UNIVERSITY OF SOUTHAMPTON

TORTS REVOLVING IN STATUTORY ORBITS

The Theory, History and Implications in Practice of the Intersection of Tort and Regulatory Law in a Rivers Pollution Context

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ABSTRACT

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TORTS REVOLVING IN STATUTORY ORBITS: THE THEORY, HISTORY AND IMPLICATIONS IN PRACTICE OF THE INTERSECTION OF TORT AND REGULATORY LAW IN A RIVERS POLLUTION CONTEXT

by Ben Pontin

The thesis explores an important general feature of law in a common law jurisdiction, concerning the overlaying upon common law principles of freestanding provisions of a regulatory law character. This subject is analysed from the standpoints of legal theory, case law, legislative history, and the implementation of regulation in the field. Particular attention is given to the intersection of nuisance and rivers pollution regulation, giving meaning to the tensions and opportunities which arise. Comparisons are made with adjacent tort and regulatory settings, notably chemical pollution and factory safety regulation, reinforcing the message that notwithstanding that the two 'systems' of law are in large part complementary, they are not without significant points of friction too. The broad aim is to identify and offer a critique of contrasting 'Blackstonian' and 'Benthamite' images of law which, it will be argued, dominate the relevant academic discussion in such a way as to obscure the need for critical reflection on the intersection at hand.

Contents

Acknowledgements i
Glossary ii

PART ONE INTRODUCTION

Chapter One - Introducing the Intersection of Tort and Regulatory Law 1

PART TWO LEGAL THEORY & CASE LAW

Chapter Two - Images of Tort Intersecting Regulatory Law within Legal Scholarship 10

I Contrasting Images of Law: Blackstonian and Benthamite 12
II A Public Law Perspective 22
III A Tort Law Perspective 32
IV Intersecting Modes of Social Rationality 41
V Issues to Explore at the Intersection of Tort and Regulatory Law 43

Chapter Three - Torts Revolving in Statutory Orbits 46

I Divergence in Method at the Intersection of Tort and Statute 49
II Town Planning and the Defence of Statutory Authority 63
III A Comparison of Nuisance and Negligence in the Context of Statutory Powers 72
IV Conclusion: Problems of the Courts' Making 75

Postscript - Case Law Concerning Nuisance and Discharge Consent 77

PART THREE LEGISLATIVE HISTORY

Chapter Four - Tort, Factory Safety and Chemical Pollution Regulation During the Industrial Revolution 80

I Alkali Regulation 1863-81 & Private Nuisance 81
II Civil Liability for Workplace Injuries and Chemical Pollution 95
III Tort Law and Theories of Government Growth 101

Chapter Five - Riparian Rights and Rivers Pollution Regulation 105

I Debate at the Intersection of Standards in Tort and Regulatory Law 106
II The Silent Evolution of Remedies and Remediation 131
III Conclusion: The Implications of Tort for the Study of Legislative History 145

PART FOUR - FIELDWORK

Methodological Note 151

Chapter Six - The Intersection of Tort and Regulatory Law in the Field 155

I The Significance of Remedies in Private Law 157
II Beyond Criminal-Administrative Law in Socio-Legal Study 163

PART FIVE - CONCLUSIONS

Chapter Seven - Conclusion 166

Bibliography 169

APPENDIX 1 - Interview Structure 181

APPENDIX 2 - Remediation in the Field 186

Tables

Table 1 189
Costs incurred in responding to water pollution incidents (pounds, 000s): 1993/94-1995/96

Table 2 190
Costs incurred in responding to water pollution incidents as a proportion of expenditure on water quality in the aggregate (per cent): 1993/94-1995/96

Table 3 191
Number of substantiated pollution incidents: 1993/94-1995/96

Table 4 191
Number of category 1 incidents: 1993/94-1995/96

Table 5 193
Costs recovered as a percentage of costs incurred (per cent): 1993/94-1995/96

Figures

Figure 1 192
Expenditure upon remediation relative to total number of pollution incidents

Figure 2 192
Expenditure upon remediation relative to 'category 1' pollution incidents

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Ben Pontin, May 1998.

Glossary
List of Acronyms and Abbreviations

ACA	Anglers' Co-operative Association
COPA 1974	Control of Pollution Act 1974
EA 1995	Environment Act 1995
EA	Environment Agency
EPA 1990	Environmental Protection Act 1990
HLG	Ministry of Housing and Local Government
l	English pound sterling (nineteenth century notation)
MAFF	Ministry of Agriculture, Fisheries and Food
MH	Ministry of Health
NFA	National Federation of Anglers
NRA	National Rivers Authority
OPC	Officer of Parliamentary Counsel
PRO	Public Records Office
RPPA 1951	Rivers (Prevention of Pollution) Act 1951
RPPA 1961	Rivers (Prevention of Pollution) Act 1961
R1 (2, 3 etc)	Region 1 (2, 3 etc) of the fieldwork sample
RQO	River Quality Objective
WA 1989	Water Act 1989
WRA 1963	Water Resources Act 1963
WRA 1991	Water Resources Act 1991

Part One
Introduction

Chapter One
Introducing the Intersection of Tort and Regulatory Law

In one of the earliest wide ranging reflections on environmental law, James McLoughlin criticised the legal structure of regulation by which freestanding systems of law, each operating according to different criteria, coexist in an arrangement with presents a considerable challenge to the law's overall coherence.[1] This is a reference to common law and statutory *sources* of law; 'regulatory' and 'non-regulatory' *forms* of law; and private and public *interests* or *values* typically associated with these legal sources and forms converging in the field of pollution prevention, control, remedies and remediation. The concern in this thesis is, first, to discuss the implications of this heterogeneous arrangement in terms of legal theory and case law; secondly, to explore how this arrangement has unfolded historically; and, thirdly, to assess its impact with respect to regulation 'on the ground'. Particular attention is given to the specific common law and regulatory settings of nuisance and rivers pollution. However, more general observations relating to adjacent tort and regulatory fields, and common law and statute broadly, will be brought to bear throughout.

Recent developments have added considerable topicality to McLoughlin's identification of the relationship between tort and regulatory law as among the most pressing issues to be confronted in the maturing of environmental law. At their broadest, these developments are characterised by a growth in civil litigation in the shadows of regulatory law, which is giving rise to an increasingly substantial body of research upon which this thesis sets out to build.[2] Of particular interest in this respect is the commentary which has been stimulated by some of the developments at the intersection of tort and regulatory law. Four developments are especially pertinent. First, developments in the case law concerning the relevance of regulatory law to definitions of actionable damage;[3] and, secondly, liability.[4]

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1 McLoughlin, *The Law Relating to Pollution* (1972).

2 Albeit that it is easy to exaggerate the extent of growth in civil litigation in an environmental context. Certainly, understanding of any such trend remains at an impressionistic level, lacking any systematic supporting evidence: see generally Armstrong, 'The Litigation Myth' [1997] *New Law Journal* 1058. Perhaps it is more accurate to identify a growing *appreciation* of civil litigation in the shadows of regulatory law.

3 *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 and, more recently, *Blue Circle Industries Plc v Ministry of Defence* (ChD, 26 November 1996, unreported), applying *The Orjula* [1995] 2 Lloyd's Report 395.

Thirdly, evidence of the practical uses of tort by regulatory authorities, which contributes an added dimension to the more familiar use of tort against them.[5] Fourthly, the emergence of the tactical deployment, by individuals, of the threat of private proceedings in order to negotiate settlements with the 'polluter' of the kind that have become associated with the *requirements* of regulatory law.[6] It is in these ways that developments in an environmental context provide a variation on long-standing themes being discussed in the context of, notably, 'mixed systems' of 'accident compensation';[7] or mixed procedures for pursuing private and public law proceedings.[8]

It is significant that in the early years following McLoughlin's study, when environmental law was beginning to gather some of its modern momentum, tort and regulatory law were predominantly discussed in ideal terms, in isolation from one another. Typical questions centred upon the relative merits of the two systems of law given an assumed set of policy goals.[9] Yet notwithstanding that the answer to this line of questioning has on the whole been the efficacy of 'a mixture of the two', it is left largely to more recent

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4 Notably, the litigation in the context of nuisance and planning beginning with the notorious judgement of Buckley J in *Gillingham Borough Council v Medway (Chatham) Dock Ltd* [1993] QB 343, discussed more fully in Chapter Three, below. *Margereson v J W Roberts Ltd, Hancock v J W Roberts Ltd* (Court of Appeal, 2 April 1996, unreported) is a useful example of a distinctive kind, concerning the relevance of regulatory standards governing an employer's relationship with employees to an employer's liability to parties beyond the ambit of the regulation, namely, residential neighbours of the workplace. See further Steele and Wikeley, 'Dust on the Streets and Liability for Environmental Cancers' (1997) 60 MLR 265.

5 An example of the uses of tort by statutory regulators is the NRA contemplating suing as a riparian owner, Jones, 'Civil Liability and Compensation for Environmental Harm', in Freshfields (ed), *Tolley's Environmental Handbook* (1994), 38. In a similar vein, is the emerging practice (albeit only gradual) on the part of the NHS of suing negligent drivers for the costs of treating those suffering injuries in road traffic accidents: see Atiyah, 'Personal Injuries in the Twenty First Century', in Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996).

6 'Anglers threaten liability suit over sheep dip pollution' (1997) 268 ENDS Report, 13.

7 Atiyah, *Accidents, Compensation and the Law* (1970) being of particular influence in this respect.

8 For a general discussion on this point see Beatson, '"Public" and "Private" in English Administrative Law' (1987) 103 LQR 34.

9 For example from an economic standpoint, Ogus and Richardson, 'Economics and the Environment: A Study of Private Nuisance' (1977) 36 *Cambridge Law Journal* 284.

commentary to explore precisely how the two systems of law *coexist*. It is against this backdrop that this thesis is to be appreciated. The purpose is to reflect on the tensions and opportunities strictly at the *intersection* of tort and regulatory law from a range of vantage points which, whilst lacking 'methodological elegance',[10] is nevertheless valuable in enabling insights of a theoretical nature to be informed by empirical ones; and empirical insights to be informed by theory.

Preliminary Issues of Focus and Terminology

The focus upon the 'intersection' of tort and regulatory law merits clarification at the outset, as indeed does the term 'regulatory law'. To 'intersect' means to 'divide, cut or mark-off by passing through or across'.[11] It is perhaps most commonly used in the context of 'paths'. This usage is significant in that, whilst the metaphor of individual 'paths of law' is rooted deep within Anglo-American legal scholarship,[12] the notion of their intersection is less so. This is particularly true of the intersection of 'paths' of common law and regulatory law which have tended to be discussed in isolation from each other. The purpose of this thesis is to examine the issues which arise when the intersection of paths of law in an environmental context is made the focus of attention.

A source of considerable difficulty has been to arrive at manageable terminology capturing the full breadth and diversity of source, form and value constitutive of environmental law. McLoughlin's own fundamental distinction in this regard, namely, that of common law and statute, is not entirely apt in so far as it relates only to the sources of law at issue, revealing nothing of the specific legal form or interests also at stake.[13] Of

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10 At least 'elegance' in the sense that it is understood by economists, referring to a homogeneous framework of analysis which is applicable to a diverse subject matter, Veljanowski, 'Legal Theory, Economic Analysis and the Law of Torts', in Twining (ed), *Legal Theory and the Common Law* (1986). The approach in what follows is, conversely, to bring to bear a number of distinctive frameworks of analysis, applicable, loosely, to one broad subject-matter. In the language once again of economists, the methodology adopted here is 'heterodoxical': Posner, R. 'New Institutional Economics Meets Law and Economics' (1993) 149 *Journal of Institutional and Theoretical Economics* 73.

11 Oxford English Dictionary (1933), Vol V, 419.

12 Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457.

13 It is trite, but important, to stress that common law is the source of different forms of law, notably private and public forms; as indeed is statute.

greater promise is Anthony Ogus' concept of 'the law of regulation' or 'regulatory law', in place of 'statute' simpliciter.[14] The term 'regulatory law' is particularly valuable in conveying a composite of statutory source, public law form and value, which is distinct from private or public common law. It will be adopted in this thesis.

However, caution in using Ogus' terminology is called for on two grounds. First, Ogus' definition gives rise to the somewhat counter-intuitive implication that all which falls outside of the boundaries of 'regulatory law' is necessarily non-regulatory in character. Indeed, Ogus goes some way to encouraging this implication in contrasting 'regulated' and 'unregulated activities'.[15] In adopting the term 'regulatory law', this implication will in the course of the thesis, notably in the context of the legislative history part of it, be challenged. Secondly, there is a danger that Ogus's definition conceals the scope for regulatory law being of a private as well as public law form and, in so doing, risks simplifying what this thesis will argue to be the highly complex relationship between regulatory law and areas of private common law. The potential for a private law dimension to regulatory law is explicitly acknowledged by Ogus in later work[16] - a point which this thesis elaborates on.

The Structure and Content of the Thesis

It is a reflection of the 'heterodoxical' nature of the approach to the intersection of tort and regulatory law being pursued here, that the main body of the thesis comprises three distinct parts: legal theory and case law; legislative history; and fieldwork. These are framed by the introductory part at hand, and a final part drawing together the thesis' conclusions. The basic aim is to provide a coherent, multi-layered account of an important but neglected feature of the legal system in a common law jurisdiction, exploring the interrelationship of the general and the specific; the formal and the empirical; and, all the while, identifying issues onto which the analysis opens out that are the appropriate object of further research. The most important substantive points are summarised in the remainder of this introductory chapter.

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14 Ogus, 'Economics, Liberty and the Common Law' (1980) 15 *Journal of the Society of Public Teachers of Law*, 44. Ogus' characterisation of the profile of regulatory law provides the backdrop for Chapter Two, below.

15 Id, at 57.

16 Ogus, *Regulation: Legal Form and Economic Theory* (1994).

Legal Theory and Case Law

Part Two addresses two questions which are recognisably traditional in terms of the concerns of legal research. First, what light does legal scholarship throw on the present subject matter? Secondly, what issues have the courts been called upon to resolve, and how satisfactory is their resolution of them? This is a characteristically formal, theoretical mode of analysis. It is of intrinsic value, as part of a traditional legal discourse, as well as laying the foundations for an appreciation of the issues arising from somewhat less traditional empirical standpoints.

In answer to the question of the contribution of scholarship, it will be argued that both general legal theory and theory in the substantive fields of public law and tort leave many important aspects of the intersection of tort and regulatory law obscure. The concern in Chapter Two is to offer an explanation for the deep-rooted and widespread academic disinterest in the subject matter, and identify those of the outstanding issues which call for closer attention. Adopting the increasingly familiar language of 'images of law', it will be argued that this state of affairs is to be accounted for in terms of the allure of two contrasting images of common law and statute generally, and tort and regulatory law in particular.[17] On the one hand, an image of law in which their coexistence is real but simply not a problem, each representing part of a functionally differentiated, fundamentally complementary whole. This will be referred to as a Blackstonian image of law, after one of its earliest and most influential 'proponents'. On the other, an image of law in which their coexistence simply does not happen, the former being subordinated to the latter, diversity in the legal framework being consequentially reduced to the homogeneous provision of statute. This will be known here as a Benthamite image of law. Notable exceptions are apparent, which are helpful in giving expression to a more critical appreciation of the issues at the

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17 The notion of an image of law is put to good use in the context of legal theory and case law by Roger Cotterrell: for example, 'Law's Images of Community and Imperium', in Silbey and Sarat (eds), *Studies in Law, Politics and Society: A Research Annual* (1990) 10; and 'Judicial Review and Legal Theory', in Richardson and Genn (eds), *Administrative Law and Government Action* (1994) 13. In a separate development - one which is particularly germane in respect of the thesis at hand - it finds expression in Galligan, (1995) 22 *Journal of Law and Society*, 1. The meaning of 'image of law' in these contexts is not always explicit, and is more typically to be implied from its usage, which suggests a concept located somewhere between a 'theory' and 'ideology' of law: in essence, a largely uncritical and highly impressionistic conception of a fundamental character bearing upon the nature of the legal system.

intersection of tort and regulatory law. Nevertheless, these exceptions do not yet add up to the sustained reflection which the theoretical complexity and pervasiveness in practice of common law and regulatory law intersecting warrants.

Case law is addressed in Chapter Three. It is argued there that the courts' resolution of the principal issues lacks consistency, at least as it bears upon the common law field of tort and regulatory law on which the analysis focuses. Much of the difficulty stems from the isolated development of the numerous individual lines of authority at the intersection of tort and regulatory law. This is both a reflection, and a cause, of variation in the methods adopted by the courts in approaching adjudication in this context - differing approaches to statutory construction taking their place alongside differing approaches to the application of the principles of the common law. It is a reflection too of a general lack of a commitment to consistency in this context, at least relative to disputes belonging to common law in the purest of senses. This in turn is difficult to disassociate from the academic disinterest in the subject matter. The most important substantive questions relate to the tort law significance of the defendant's activities which are otherwise lawful in terms of regulatory law. Contrasts of a particularly striking nature are apparent in the specific settings of negligence and nuisance in the context of statutory powers. When taken together with scholarship's disinterest in the tensions and opportunities at stake, it is clear that the challenge of making sense of the critical issues from the standpoint of legal theory and formal legal principles is daunting.

Legislative History

Legislative history affords a standpoint from which to give meaning to both the tensions and opportunities at the intersection of common law and regulatory law, with particular reference to legislative histories in fields in which tort is disclosed as being among the most controversial issues. This is the subject of Part Three.

Chapter Four explores the role of tort in the context of the evolution of nineteenth century alkali regulation. There is an important debate in this context, which the chapter compares and contrasts with the one area of tort intersecting regulatory law that is already familiar, namely, the intersection of the two in the context of occupational health and safety.[18] Issues of particular interest arise from the contribution to the debate of the Alkali

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[18] The familiarity of the intersection of tort and regulatory law in this context is owing largely to the study of Bartrip and Burman, *The Wounded Soldiers of Industry* (1983).

Inspectorate - the pollution regulator in this context - and how it compares with that of the Factory Inspectorate in the context of factory safety. It is intriguing to find that in each case, albeit for differing reasons, the inspectorate is in support of liberal tort provision in the shadow of regulatory law, tort being appreciated as fundamentally complementary in relation to the inspectorates' regulatory functions.

Chapter Five builds on this comparison by addressing the adjacent regulatory setting of rivers pollution, and looking beyond the nineteenth century focus of the previous chapter to encompass parliamentary discussion at the intersection of tort and regulatory law in the period since the Second World War. Rivers pollution is of particular interest for the forceful expression given there by critics of tort's continued provision in the shadow of statute to the numerous tensions arising from such an arrangement. Each chapter offers an opportunity to examine in closer detail the shortcomings of both an image of law in which regulatory law replaces common law; and one in which the two coexist in an essentially unproblematic, mutually reinforcing pluralism. In so doing, they raise profound questions of the historiography of government growth in which tort is, as is generally the case, written out of the historical terms of reference altogether.

Fieldwork

An image of law in which heterogeneity in the legal framework is reduced to the homogeneous provision of statute is subject to further questioning and ultimately challenge in Part Four of the thesis. Chapter Six addresses rivers pollution as one among a number of areas of social regulation in which the implementation of regulation in the field is traditionally studied exclusively at the level of criminal-administrative provision. This chapter offers a critical appreciation of the influential study of Hawkins,[19] arguing that the preoccupation there with the criminal law in the analysis of rivers pollution regulation represents a distortion in the breadth and diversity of the relevant legal framework. Furthermore, and more significantly, it gives rise to a fundamental inconsistency in the sense that the reduction of the regulatory framework to criminal-administrative provision reinforces the very image of law that the fieldwork sets out to critique.[20] Given the aim of

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19 *Environment and Enforcement* (1984).

20 The aim of empirical study in this context has been described as seeking to expose the ideal image of law of Bentham to the negotiated character of law enforcement: Galligan, above n 17.

challenging a Benthamite image of law, it is difficult to conceive of a better basis upon which to do so than to explore the neglected interrelationship alongside criminal law of civil provision under common law.

Conclusion

The title of the thesis is an allusion to a short essay by Roger Traynor,[21] who wrote of the importance of lawyers adapting their conceptual tools in anticipation of the inevitability that:

> '[o]ne way or another, the rising lines of statutes and of judicial precedents are likely at times to converge. It is not realistic, if it ever was, to view them as parallel lines'.[22]

However, Traynor's concern is with the meeting of 'seemingly immovable precedents and seemingly irresistible statutes' in the 'courtroom'[23] and, as such, shares the standpoint of much of what has been written at the intersection of tort and statute both before and subsequently.[24] In contrast, the principal contribution of this thesis is that, whilst offering an analysis of modern case law on the point, it takes on board too the possibility of the convergence of these systems of law from a variety of other standpoints. Notably, those of parliamentary draftsmen, government and Parliament, and regulatory officials in the field.

It is also significant that Traynor directed his remarks to the scope for statute revolving in 'the long-travelled orbits' of the common law.[25] Given the extent to which the areas of regulatory law which are considered in this thesis are each in many respects as deep rooted historically as the common law, which has in a strong sense evolved in the shadow of social regulation here; given too the more general growth in regulatory law in the three

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21 Traynor, 'Statutes Revolving in Common-Law Orbits' (1968) 17 *Catholic University of America Law Review*, 401.

22 Id, 406.

23 Id, 417.

24 For example, Pound, 'Common Law and Legislation' (1908) 21 *Harvard Law Review* 383; Landis, 'Statutes and the Sources of Law' in Pound, (ed.), *Harvard Legal Essays* (1934); Atiyah, P. 'Common Law and Statute' (1985) 48 *Modern Law Review* 1.

25 Above n 21, 417.

decades since Traynor was writing on this subject, it is surely more apt to approach common law as 'revolving' in the well-charted orbits of statute. Traynor's astronomical metaphor continues to have vitality however, with the 'Earth Summit' representing as it does an overarching framework within which law unfolds today. Fundamentally, torts and statute converge as profoundly as ever, the challenge which McLoughlin laid down in the specific context of environmental law only having increased in importance in the intervening period.

Part Two
Legal Theory & Case Law

Chapter Two
Images of Tort Intersecting Regulatory Law within Legal Scholarship

Of the many broad reflections on the content of modern legal research, those of Anthony Ogus stand out for their particularly uncompromisingly criticisms of an 'unhealthy bias' in legal education elevating common law at the expense of the 'law of regulation'.[1] Ogus' analysis is also of interest in that since the time of his writing, all four of the substantive areas which were singled out there as exemplary of the academic lawyer's tendency to reduce diversity in the legal framework to the provisions of the common law - pollution, town planning, consumer protection and personal security - are now better understood at the level of their regulatory law provisions.[2] These developments suggest that it is timely to reappraise the representation of common law and regulatory law within legal scholarship. It is particularly pertinent to examine the extent to which, at least in the contexts with which Ogus was concerned, research is no longer characterised by the exclusivity of its preoccupation with the common law.

This chapter proposes an alternative characterisation of the tendencies which are dominant today, the roots of which will be argued to lie at the foundations of modern legal scholarship. Casting a broad net over a wide range of scholarship since Blackstone and Bentham, two tendencies will be elaborated as of particular significance. Ogus' account is valuable in offering a starting-point towards a fuller understanding of one of these tendencies - the more familiar of the two - which concerns the privileged position that is occupied by common law within the history of the Anglo-Amercian law school. However it is as an illustration of the other, less familiar of the two tendencies that Ogus' analysis is of greatest interest. This is the tendency to elevate regulatory law as a focal point in research in such a way as to disengage this form of law from any context it may have in the common law. Ogus presents a challenge to the educational primacy of the common law which is oriented around

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1 Ogus, 'Economics, Liberty and the Common Law' (1980) 15 *Journal of the Society of Public Teachers of Law* 44, 57. The 'law of regulation' and 'regulatory law' are used interchangeably. For their definition see Chapter One, p 4.

2 The research in the field is led largely by the work of the Oxford Centre for Socio-Legal Studies: Richardson, et al, *Policing Pollution* (1983), Hawkins, *Environment and Enforcement* (1984) - both rivers pollution examples; Harris et al, *Compensation and Support for Illness and Injury* (1984); and Cranston, *Regulating Business: Law and Consumer Agencies* (1979) consumer protection. The regulatory law of town planning is the subject of the empirical study of Miller and Wood, *Planning and Pollution* (1983).

a critique of the intellectual rigour, normative force and practical relevance which researchers into the common law have attributed to this form over regulatory law.[3] Yet as issues which are surely independent of (even if they have a bearing on) the terms on which common law and regulatory law intersect, the reader is presented with what this chapter suggests to be an artificial choice between the two fields of study, affording little in the way of a standpoint from which to reflect critically upon the implications of common law and regulatory law's intersection.[4]

The aim in this chapter is to elaborate on the scholarly tendencies introduced above, with reference to two contrasting images of law.[5] These are appropriately summarised at the outset in terms of, on the one hand, an image of law in which common law and regulatory law coexist coherently in a functionally differentiated and constitutionally ordered arrangement. This is an image which has its earliest and most influential articulation in the writing of Blackstone concerning the relationship between common law and statute, but which underpins more recent accounts of the relationship between common law and the law of regulation. This image of law is 'pluralist' in the sense that it embraces diversity in the sources of law in a common law jurisdiction. One the other hand is an image of law of Bentham. In contrast to the 'Blackstonian' image of law, that of Bentham envisages the heterogeneous arrangement in which common law and statute coexist as reducible to the homogeneous provision of latter. This 'reductivist' image of law also has its reflection in recent work in the field of regulatory law.

Blackstonian and Benthamite images of law provide the background to a discussion of substantive theory concerning public law and tort. It will be argued that the dominance of these images of law can be clearly discerned in the scholarship relating to

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3 Ogus, id, 43ff.

4 It is significant that in his conclusion, id 57, Ogus stops short of inviting a more sustained examination of the interrelation of common law and regulatory law. The discussion is conducted to the very end in terms of a *choice* between the two areas of study - '*either* the decentralised, common law, approach, *or* the centralised, regulatory, approach...' (emphasis added). Ogus does however suggest that the tension which is most 'central to society' arises from the coexistence of 'regulated and unregulated activity'. It is possible that 'unregulated' and 'common law' are being treated as synonymous, and that the intersection of the two is indeed considered by him to warrant research. Yet this is not clear, for in other contexts Ogus implies that common law or, at least, private law, is a form of regulation: *Regulation: Legal Form and Economic Theory* (1994).

5 The notion of an 'image of law' as an analytical device is introduced in Chapter One, n 17.

these substantive contexts, in such a way as to obscure the possibility of, and the need to reflect critically upon, tensions of a familiar and fundamental nature. Tensions, that is, which arise from the differing association in terms of constitutional sovereignty and functional competence of common law fields such as tort and statutory fields of regulation; the differing values typically associated with these sources and forms of law, with particular reference to the 'private' and the 'public'; and the differing modes of reasoning which are widely argued to underlie their respective provisions. Such is the dominance of Blackstonian and Benthamite images of law that there is lacking any satisfactory standpoint from which to reflect upon the intersection of common law and regulatory law in a manner which is critical of the assumption of harmonious, coherently differentiated coexistence characterising the image of law of Blackstone; and yet which acknowledges, contra Bentham, that common law is not, nor is it likely to be, comprehensively replaced by statute generally, and regulatory law in particular.

I Contrasting Images of Law: Blackstonian and Benthamite

The historical context of Blackstone and Bentham's writings on the subject of common law and statute is thoroughly covered elsewhere.[6] It is however important to note at the outset those features of the contemporary legal system most pertinent to their thought on the subject. Most broadly speaking, the major periods of statutory intervention had been or were to come. The eighteenth century legislature was weak and with few exceptions, handed down little of major importance. Equally, however, common law was by no means the only source of law of practical relevance. Statute law pervaded the legal system. Both private and local legislation proliferated: 'statutes had many different parents'.[7] Moreover statutes were poorly drafted, with little or no regard for their consistency in relation to one another, or in relation to the common law. Crucially, common law and statute coexisted alongside one another in a manner which has been described as presenting a confusing and haphazard array of laws.[8]

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6 Historical background is taken from the influential discussion of eighteenth century law and, in particular, 'enacted law' in Holdsworth, *A History of English Law, Vol 11* (1938).

7 Holdsworth, id, 371.

8 Twining, *Blackstone's Tower: The English Law School* (1994).

Against this shared legal backdrop, Blackstone sought a solution to this confusion in the strengthening of the common law. This entailed ridding it of the distortions caused by *ad hoc* and unintegrated statutory intervention. Bentham called for the opposite. His proposal reflected a science of legislation: a science oriented around the institution of a reformed Parliament promulgating public, comprehensive, complete and prospective laws, guided by the principle of utility. Blackstone sought to strengthen the common law; Bentham sought to do away with it altogether. The purpose in the remainder of this section is to elaborate on this contrast, and to capture the extent of its legacy in modern images of law. The upshot is two competing images of law, neither of which reflect critically upon possible tensions at the intersection of private, common law and regulatory law.

'Pluralism' and 'Reductivism'

It is significant that Blackstone's writing is underpinned by an image of law which does not involve the *elimination* of the co-existence of common law and statute.[9] Rather the two are conceived in terms of a complementary interrelationship, each co-existing consistently and coherently alongside one another. The fundamental sense of order that Blackstone envisaged here had its roots in two assumptions. First, an assumption concerning relative authority by which one of common law and statute is given clear precedence over the other in the event of conflict. Secondly, an assumption concerning relative function, indicating a functional hierarchy between common law and statute.[10]

Regarding authority, Blackstone assumed common law to be unequivocally subordinate to statute. In the event that the two were to 'differ', the common law would necessarily 'give place' to statute.[11] As regards function, this priority was reversed.

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9 Reference to Blackstone's work is to the first volume of his *Commentaries*: *Commentaries on the Laws of England, Volume 1* (9th ed, Burns, 1783).

10 The reference to 'assumption' in this context is apt. Blackstone's *Commentaries* is not, nor did it set out to be, a rigorous theoretical reflection upon the fundamentals of the English legal system: Twining, above, n 8.

11 Id, 89. Recourse to the doctrine of the supremacy of Parliament in Blackstone's *Commentaries* represents more the product of assertion than analysis. Certainly, it is not underpinned by any discussion of the relevant, *prima facie* ambivalent, case law: Loveland, *Constitutional Law: A Critical Introduction* (1996), 39-40. It is not until later writing, notably that of Dicey, that the supremacy doctrine begins to be fully developed.

Common law provided the dominant source of 'rights', 'wrongs', 'punishments' and 'redress'.[12] Statute was ancillary to the common law in this respect; statute was nothing more independent of the common law than 'declaratory' of its provisions, or 'remedial' of its defects as and when they appeared.[13]

In contrast Bentham, in a flourishing response to Blackstone's functional priority, presented his own outline of 'the laws of England' in terms of statute first.[14] Not content with merely reversing Blackstone's functional priority, Bentham emphasised the independence of statute in relation to the common law. 'The employment of the legislator is not so sad a one' he wrote,[15] as to confine the role of statute to that of mere guardian of the integrity of the common law. The legislator is 'indeed much employed about suppressing mischief', but it is also 'employed in the procuring of benefits'.[16] In the notion of a proactive legislature procuring positive benefits for its citizens, Bentham signals the beginning of a more far reaching disengagement of common law from his ideal of law as legislation.

Having reversed Blackstone's functional subordination of statute to common law, Bentham set about a thorough critique of the latter's legitimacy, taking on board its very meaning as a source of law.[17] So far as common law is reliant upon an appeal to rights, common law has no content. Rights do not exist. Rights are fictions - fictions which are

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12 *Commentaries*, 27.

13 Id, 85. Blackstone's assumptions concerning functional pre-eminence are understood to be a reflection of the common law basis of the substantive fields which the *Commentaries* explore: see Milsom, 'The Nature of Blackstone's Achievement' (1981) 1 *Oxford Journal of Legal Studies* 1, 4. This is particularly true of criminal law, contract and tort. In those rare instances where statute had significantly interposed itself at the time Blackstone was writing, notably in the field of real property, Blackstone considered that it had done so to the detriment of the coherence of the law.

14 References in the text are to *Comment on the Commentaries* (1977).

15 Id, 138.

16 Id.

17 The substance of Bentham's critique is well documented, albeit that it is to be found in various guises throughout his work: Postema, *Bentham and the Common Law Tradition* (1986) 268. The following outline has been largely guided by the references supplied by Postema. Harrison, *Bentham* (1983), Chapters 2 and 3, has also been of particular assistance.

made pernicious by the raft of other weaknesses Bentham associates with the common law.[18] Common law is of a *form* of 'law' that goes against the grain of any possible claim to its legitimacy. Common law is law made in the course of adjudication.[19] It is not posited in public, and cannot be known in advance.[20] Further, common law appeals to tradition or 'common reason' for its authority. Yet these notions of tradition and 'common reason' constitute ideological devices serving to obscure the reality of arbitrary judicial law-making.[21] These weaknesses are compounded by the doctrine of precedent, guaranteeing the inability of common law to adapt in a principled fashion in the face of social change.[22] Fundamentally, common law and its institutions are unable to provide citizens with a legal framework conferring upon them the necessary security for productive living.[23] Bentham's ideal of law goes beyond the 'mere' reversal of a priority as between common law and statute, so far as to elimination of one of its terms. Bentham's ideal of law, in contrast to that of Blackstone, is constructed exclusively in the image of statute.[24]

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18 The common law is poisoned by the 'pestilential breath of Fiction', *Fragment on Government*, 411n. Bentham's distinction between 'pernicious' and 'innocuous' fictions, and his theory of fictions generally, is discussed by Postema, id, at 295ff.

19 *University College* collection, Box clix, 263ff.

20 The retrospective character of the common law is addressed most fully at *University College* collection, Box lxix, 6ff.

21 '[L]ies, devised by judges to serve as instruments of, and cloaks to, injustice', *The Works of Jeremy Bentham. Published under the Superintendence of...John Bowring*, Vol 4, 498. (11 vols, 1838-1843).

22 *Constitutional Code* in *Bowring* above n Vol 9 332ff.

23 Postema, above n 17, 274, argues that 'security for every citizen in the relations each bears to other citizens and government authorities' is the fundamental social function that any legal arrangement aspires to in Bentham's ideal.

24 Bentham set out to conceive a 'perfect plan of legislation' as complete and integrated in its substantive provisions. This he referred to as his *Pannomion*, as defined in *Introduction to the Principles of Morals and Legislation* and returned to in *Of Laws in General*. Lieberman has compared Bentham with contemporaries of his who were also proponents of law reform through statute: Lieberman, *The Province of Legislation Determined* (1989) 282-85. He concludes that it is Bentham's aspiration towards completeness in law which distinguishes him in this respect: that it was not so much the idea of different sources of law *per se* that concerned Bentham. Rather, what concerned Bentham was the 'contrast...between the complete body of law [of pure statute] and the incomplete system of statute with its unavoidable appendage, common law' (282). Viewed against the image of law as *Pannomion*, 'the most damning feature of judge-made law was that it could never be complete' (285). Fittingly, Bentham's *Pannomion* was itself never fully articulated by him (290).

The Legacy of Blackstone

Neither the fact nor the substance of Blackstone's legacy is contentious.[25] In terms of practitioners of law, it is understood to manifest itself in a scorn for statute, and a tendency to construe statutes strictly in accordance with the provisions of the common law.[26] At its broadest, it presents an unsympathetic attitude towards maintaining the coherence of a given statute at any points at which it might appear in the course of litigation to be obscure. As regards legal education, it is understood to be manifested in the materials and institutions that are privileged academically over others - common law over statute; courts over legislatures and executive - and, at a substantive level, in the resistance that public law has met with in the course of its having been received into the syllabus.[27]

Owing to the relatively recent development of the English law faculty,[28] Blackstone's legacy in terms of legal education has been sought elsewhere. In particular the US, where it is understood that Blackstone's work has had much of its influence.[29] Langdell's case method owes much to Blackstone's image of law.[30] This method in turn set the agenda for US research well into the twentieth century. Striking testimony of the hold of Blackstone's image of law is to be found in the preoccupation of realist critics of Langdell

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25 Twining, *Blackstone's Tower*, above n 8. The nature of Blackstone's legacy suggested in what follows does however emphasise the pluralist dimension to *Commentaries*, thus differing from the more prevalent identification of the crux of Blackstone's legacy in his predilection towards private, common law.

26 Zander, in his discussion of statutory interpretation, writes of 'an ancient tradition amongst the judges that the common law is a superior form of creation to statute' - Zander, *The Law-Making Process* (4th ed, 1992), 126.

27 The Blackstonian legal framework is one of private law in its purest form, addressing 'horizontal' arrangements among individuals, but not 'vertical' arrangements between individuals and the state. In this respect, Blackstone reflected the law of his time: Milsom, above n 13.

28 See generally Twining, W., above n 8, p 24ff.

29 Twining, W. *Karl Llewelyn and the Realist Movement* (1973).

30 Twining, W., id; Duxbury, N., *Patterns of American Jurisprudence* (1995), 19ff, where it is argued that Langdell' method of encouraging students to focus upon the principles arising from appellate decisions 'continued, more or less, the same tradition as....Blackstone', whose *Commentaries* were first published in America in 1771-72.

and Ames' method with the realities behind *case* law and the *judicial* process. Profound changes represented by the contemporary growth in public administration were not engaged with. Realism provided little in the way of a jurisprudence of legislative and administrative regulation.[31] Reflecting on this oversight, Chase laments that the 'revolt against formalism' simply substituted a newer conception of judge-made law for an older one.[32] Paraphrasing Duxbury, realism represented a critique of formalism which was unable to escape from the constraint that it imposed upon itself by continuing to rely upon a private law jurisprudence in an increasingly public law world.[33]

It would however be a mistake to confine the legacy of Blackstone to a preoccupation with the provisions and institutions of private law. More fundamental to his image is a conception of the coherence of an arrangement in which common law and statute coexist: common law being functionally predominant without being superior in terms of positive authority. When conceived in these broad terms, as involving a complementary intersection of common law and statute, it is possible for modern administrative techniques to be incorporated into Blackstone's image of law without too great a strain. This point is well illustrated by the approach to the US legal system of Hart and Sacks.[34]

Unlike Blackstone, Hart and Sacks *do* engage with statute at the level of a freestanding managerial system of law, defining the powers by which officials might actively take part in the management of individuals' lives - procuring benefits for citizens in the sense envisaged by Bentham. Their's is a concern with the courts in the context of social legislation. Further, they acknowledge, following Fuller, that certain social tasks are indeed better performed by institutions other than the courts:[35] tasks, that is, involving solutions to complex, 'polycentric' social problems in relation to which the language of rights and the procedure of adjudication characteristic of private law runs the risk of distorting the nature of the problem; and undermining too the integrity of the language of rights and the court's institutional competence in the field of bi-party disputes. This departure notwithstanding, it

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31 Duxbury, id, 156.

32 Chase, *The American Law School and the Rise of Administrative Government* (1982) 116.

33 Duxbury, above, n 30, 157-58.

34 Hart and Sacks, *The Legal Process* (1958)

35 Fuller, L. 'Form and Limits of Adjudication' (1978) 92 *Harvard Law Review* 349.

is stressed in what follows that Hart and Sacks' account of the legal system in an age of regulatory law shares many of the fundamental features of Blackstone's account of the legal system of an earlier, 'pre-regulatory' period.

Hart and Sacks' aim is to make sense of the interrelation of the courts and the various other institutions bound up with the modern administrative state. Like Blackstone, the motifs in *The Legal Process* are of order, consistency and coherence. They share with Blackstone an educational aspiration in respect of the legal system as a whole. Like Blackstone, moreover, Hart and Sacks seek to have the student thinking about the integrity of the various institutions comprising the legal system. Readers are urged not to look upon administrative growth with disdain, as contributing to a 'confusing and debilitating fractionalization of authority',[36] rather, to 'rejoice in it and capitalise upon it, as a multiplication of opportunities and resources for fruitful action'.[37] Law remains a system in the face of its diversity - 'a co-ordinated functioning whole made up of interrelating parts'.[38] A plurality of interests and institutions which coexist in a consensual, complementary manner.

It is of further significance that like Blackstone, Hart and Sacks make a swift passage from considerations of relative authority to relative competence conceived functionally. Notwithstanding the limits of adjudication in the context of 'social problems', the courts and common law in *The Legal Process* do nevertheless assume a functional pre-eminence. Courts are the first stop in the management of 'emerging problems of social maladjustment'.[39] Legislators 'and administrative agencies tend always to make law by way not of original solutions to social problems but by alterations to the solutions first laid down by the courts'.[40] Even where the legislature does indeed become involved with law-making in a way that is functionally independent of the common law, the relationship between the two is mutually supportive. Innovation in 'techniques of control' - innovation engaging the legislature in the 'wholly distinctive function [of] devising and instituting solutions beyond

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36 Hart and Sacks, above n 34, 181.

37 Id.

38 Id, iii.

39 Id, 186.

40 Id.

the capacity of the court to develop' - is not a source of conflict between courts and legislature, but is the basis of their 'co-operation'.[41] Statute and the common law are only in 'competition' to the extent that the provisions of the latter are capable of being overruled by the former. Strikingly, as with Blackstone, there is never in *The Legal Process* any sense of converging, overlapping provisions, incidentally and in unplanned fashion holding out the possibility of tension in relation to one another. Rather, it is assumed that a plurality of interests is harnessed to a diverse, yet consistent, mutually reinforcing range of institutions and instruments of law, thus forestalling any question of common law and regulatory law cutting across one another's provisions as to, for example, what is lawful.

The Legacy of Bentham

Whereas Blackstone's legacy is the subject of widespread agreement, Bentham's legacy is altogether more controversial. There is disagreement concerning the impact of Bentham's work upon law reform.[42] Moreover, there is no consensus as to the direction his work would have tended towards, regardless of its *actual* influence.[43] And although it is clear that Bentham's academic legacy is profound at the level of his positivism and theory of utility,[44] the impact of his work upon the study of legislation has received little attention.

One well documented jurisprudential aspect of Bentham's legacy worth emphasis concerns H.L.A. Hart's attempt to introduce pluralism into positivism. Hart is a good and relatively recent illustration of the allure of the statutory model. *The Concept of Law* is an attempt to resist the jurist's 'itch for uniformity'.[45] It is an attempt to correct the distortions

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41 Id, 186-187.

42 Most publicised is the difference between MacDonagh, O. 'The Nineteenth Century Revolution in Government: A Reappraisal' (1958) 1 *Historical Journal* 52, and Hart, 'Nineteenth Century Social Reform: A Tory Interpretation of History' (1965) 31 *Past and Present* 39.

43 The ambivalence of Dicey is revealing in this respect. Bentham is understood to represent 'individualism', albeit that there are aspects of his thought to which 'collectivism' is indebted: *Law and Opinion in England* (1905).

44 Hart, H.L.A. *Essays on Bentham: Jurisprudence and Political Theory*(1982); James, ed, *Bentham and Legal Theory* (1974).

45 Hart, H.L.A. *The Concept of Law* (2nd ed 1994) 32.

of a reductive approach to law. The result is an elegant clarification of the different types of 'rules' that make up a legal system. It is important to have it said that 'a distinguishing, if not the distinguishing, characteristic of law lies in its fusion of different types of rule'.[46] What is less clear, however, is the systematic role played by different *sources* of rules. It emerges that the reduction in legal theory that Hart is railing against is the reduction of civil rules to criminal rules. Austin is the explicit object of opposition.[47] What is not questioned in Hart's critique of reductive tendencies in legal theory, is the tendency to reduce common law to statute. Hart remains within the positivist tradition of Bentham: a tradition which is less comfortable with an image of law as common law, than an image of law as statute.[48]

In a seemingly improvised but nonetheless important contribution to our understanding of the impact of Bentham on the study of legislation, Galligan suggests that Bentham's legacy on this subject is as profound as his legacy on the subject of positivism.[49] Indeed, Galligan considers that lawyers typically follow Bentham's ideal of law as legislation uncritically. Lawyers too often view legislation as if this ideal is achieved in reality: as if a given instance of legislation can reasonably be assumed to be complete in its provisions and comprehensive in its enforcement; as if it is an empirically unproblematic application of means to ends.

There is cause to question the generality of lawyers' naiveté that Galligan is suggesting here. Certainly, Galligan's account is difficult to reconcile with the cynical attitude towards legislation others have observed among academic lawyers in a common law jurisdiction.[50] What is more salient, however, is the possibility that Galligan does not go far enough. Surely, if there is one characteristic which best defines Bentham's ideal image of law it is the blanket provision of statute to the exclusion of the common law.

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46 Id, 49.

47 Not that Hart's critique is any less applicable to Bentham: Raz, J. 'On the Functions of Law' in Simpson (ed), *Oxford Essays in Jurisprudence, 2nd Series* (1973) 278, 303.

48 A conclusion which Simpson draws in 'The Common Law and Legal Theory' in Simpson (ed), id.

49 Galligan, (1995) 22 *Journal of Law and Society* 1.

50 Others, in this respect, including Ogus, above, n 1.

Intriguingly, there is considerable evidence of an approach to the study of legislation which assumes that common law ceases to have relevance once the legislature has intervened by way of statute. One example in this respect is the discussion of the social function of common law, where administrative intervention is presented as superseding (rather than coexisting alongside) the provisions of the common law.[51] In a similar vein is historiography of government growth, which abstracts administrative powers from any context they may have in obligations under the common law.[52] This tendency is evident too in the context of specific legislative histories, notably those concerning pollution legislation, where statutory reform is discussed without any reference to the implications of continuity and change within the common law.[53] It is also evident, moreover, in empirical accounts of regulatory implementation and enforcement, which proceed on the basis that the legal framework of relevance is exclusively statutory.[54] So often, it is as if in each instance of statutory intervention studied there is the realisation of the Benthamite ideal of law.

It is now appropriate to summarise the basic character of the two distinct traditions to which Blackstone and Bentham contribute. On the one hand, a tradition which accepts the legislative supremacy of Parliament, but which conceives the predominant legal provisions as being those of the common law. This is the image of law of Blackstone. It is reductive up to the point that the courts and the common law continue to have pre-eminence notwithstanding the practical importance of 'the law of regulation'. Yet it is inclusive in the sense that common law and statute do nevertheless coexist in a coherent, functionally differentiated arrangement. It is best characterised in terms of the *assumption* of a complementary interrelationship underpinning the areas of law in question. Where statute strikes out on its own, as Hart and Sacks would suggest, it does so in a manner secondary to the common law, supplementing the institutional competence of the courts by bringing to

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51 McLaren, 'Nuisance Law and the Industrial Revolution - Some Lessons from Social History' (1983) 3 *Oxford Journal of Legal Studies* 155, 219.

52 For example the debate referred to above, n 42.

53 Exemplified in the history of alkali and clean air legislation of Ashby and Anderson, *The Politics of Clean Air* (1981).

54 Reductionism in the rivers pollution context being of particular relevance to my own focus: Hawkins, *Environment and Enforcement* above n 2. This point is returned to in the context of other regulatory spheres below, n 87 and associated text.

bear an institutional competence of its own. The image is characterised by, and has been criticised for, its assumptions of underlying social consensus. What also needs to be examined more closely is its conception of diversity in legal provision as reinforcing, rather than undermining, the integrity of the legal system as a whole. On the other hand, a tradition backed by an image of law of Bentham: a tradition which shares the notion of the sovereignty of parliament, but which subordinates the common law in terms both of function and intellectual rigour. This is an image which accommodates only one source of law, statute.

II A Public Law Perspective

It has become customary to distinguish within public law theory between 'institutional' and 'instrumental' standpoints.[55] The institutional standpoint is perhaps the most established within scholarship in this field, concerning as it does the fundamental question of accountability in the exercise of governmental power. More recent is the concern with questions of a predominantly instrumental character, focusing on the content of government powers, which are then assessed in terms of the regulatory form which they embody and the effectiveness with which a given form promotes the public interest. The coexistence of common law and statute, and, in particular, tort and public law, cuts across these standpoints in ways which will be discussed by taking each standpoint in turn.

Institutional Considerations

Dicey's theory is an appropriate point at which to begin a discussion of the coexistence of tort and public law of an institutional character. His theory is the starting-point for much of what has been written in the field subsequently. At the same time, the centrality that is assumed by individual, common law rights in Dicey's scheme is generally acknowledged to

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55 The distinction between 'institutional' and 'instrumental' standpoints within public law, and the sense in which the latter has evolved out of the former is captured well by Ogus. Ogus writes of a scholarly obsession with the 'institutional dimension to public law', and calls for a more widespread recognition that 'public law is not only about preventing the abuse of power; it is also about selecting legal forms that can best achieve the instrumental goals of collective choice': *Regulation: Legal Form and Economic Theory* (1994), Preface, v. It is possible to situate Ogus' remarks in this context in terms of a 'dissenting tradition' within public law scholarship, which Loughlin has labelled 'functionalist' in contrast to the dominant 'normativist' tradition: *Public Law and Political Theory* (1992).

be its weakest link.[56] If Dicey's conception of the public law significance of private, common law lacks sophistication, it is important to be clear about the precise nature of its shortcomings, and ask whether scholars since Dicey have articulated a more plausible conception. It will be suggested that there is a consensus as to where Dicey went wrong, but little attention to (let alone agreement as to) any more satisfactory delineation of a private law role.

Of the three fundamental principles upon which Dicey's constitutional theory rests[57] - the 'legislative sovereignty of Parliament'; the 'universal rule or supremacy throughout the constitution of ordinary law'; 'the dependence in the last resort of the conventions upon the law of the constitution' - it is the principle of the rule of law which has proved most controversial. It is also that aspect of Dicey's theory which is of the most immediate relevance to the problem at hand. Dicey's conception of the rule of law is ambiguous. Three different meanings are put forward by him.[58] Two of them - 'absence of arbitrary power on the part of the Government' on the one hand, and a belonging of '[g]eneral rules of constitutional law' to 'the ordinary law of the land' on the other - have presented fewer difficulties in this respect than his more far reaching equation of rule of law with private law procedures and doctrine: 'Every man subject to the ordinary law administered by the ordinary tribunals'. The view that relationships between citizens and public officials are not radically different from relationships among citizens is one that has proved extremely difficult to sustain.[59] It is difficult to accept 'rule of law' as meaning that no one can lawfully be made to suffer in body or in goods through the exercise by persons in authority of discretionary powers of constraint.[60] Dicey's theory on this point jars in relation to constitutional reality. Equally, it is found to lack sensitivity to the nature and purpose of *discretionary* power, necessary for it to gain acceptance as a constitutional norm or ideal.

However, it is pertinent to ask whether the real difficulty with Dicey's theory is less the centrality it affords private law than the all-or-nothing approach which it adopts towards the relationship between common law and statute. Private, common law provision is indeed

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56 Jennings' retrospective being widely concurred with in this respect: 'In Praise of Dicey: 1885-1935' (1935) 13 *Public Administration* 123, 134.

57 References here are to Dicey, *The Law of the Constitution* (10th ed 1959) 35.

58 Id, 188-89.

59 Harlow and Rawlings, *Law and Administration* (1984) 14.

60 Wade's 'Introduction' to *Law of the Constitution* above n 57, cxxv.

pervasive in Dicey's scheme, but it is subordinate to statute in line with the doctrine of the legislative supremacy of Parliament.[61] From this doctrine it follows that in the event that common law and statute conflict, statute must necessarily prevail. This all-or-nothing quality to Dicey's theory is highly problematic. It is particularly problematic for its allowing no room for subtlety in the precise nature or form of the decision-making pursuant to statute: for example, differences in the analytical character of the official decision; or the political context within which the decision is made. Unless contradicted at the level of statute, private, common law provision will prevail. If contradicted, it will be extinguished. Within these two poles of statutory intervention and laissez-faire, any relationship between common law and the exercise of discretion is obscure.

This all-or-nothing character to Dicey's theory has had a major influence on the course of debate in public law. Even those most sympathetic to the spirit of Dicey have little difficulty in acknowledging his blind spot as regards accountability in the exercise of discretion. Wade, for example, who in his attempt to give the 'rule of law' modern currency, considers that Dicey's oversight elevates 'discretions' to the point of being 'the most important of all topics for the modern constitutional lawyer'.[62] Discretion, in turn, has become a source of considerable academic controversy. Wade's classic and fundamental institutional question of 'how far power is to be controlled by law',[63] has given rise to equally fundamental questions concerning how far discretion is to be controlled at all; how far ordinary courts are to be the agents to this end; and what principles should underlie judicial intervention.[64]

Yet surprisingly little attention has been focused upon the role of private, common law in answering these questions. Institutional public law literature broadly accepts that the courts have a legitimate role in the realm of private law, and accepts too the sovereignty of Parliament. The debate, rather, has focused upon the various ways in which common law may be *adapted* to take account of the reality of discretionary power. Some see the necessary adaptation as procedural: it is about the development of procedures such as the

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61 Dicey, above n 57, 48. Also 88.

62 Wade, above n 60.

63 Wade, 'Law, Opinion and Administration' (1962) 78 *Law Quarterly Review* 188, 189.

64 See generally Loughlin, *Public Law and Political Theory*, above n 55.

requirement of leave to commence judicial review proceedings which aim to balance the need for justice and the need, on the part of public bodies, to have safeguards against constant interference by the courts.[65] For others, it lies in the jurisprudence of the courts: it is about finding a public-oriented alternative to the essentially private law jurisprudence of the High Court.[66] For others still, it lies in the culture of the legal profession, which needs to develop beyond its preoccupation with the protection of, for example, individual property rights.[67] Yet regardless of the particular form which the call for adaptation takes (and it is not suggested that these areas of adaptation are exclusive of each other), the implications of the continued availability of private law provision freestanding of any adaptations that are affected is never clearly elaborated. It is as if whatever 'special' accommodation of 'public' law concerns is being advocated, the boundary separating these and traditional private law concerns will always be self-evident: as if once common law has adapted to the reality of discretion, it will be obvious where its role as upholder of private rights ends, and role as overseer of discretionary power begins.

The private law field of tort illustrates this point well. So much is typically conceded to the scope for continued tort provision in a public law setting. This is particularly apparent where the focal point is crown immunity. Immunity is generally treated with suspicion: it is something to be rolled back, something to be eroded, so that liability for its wrongs may be placed firmly at the feet of the executive.[68] Just how far or with what justification tort obligations could apply in the absence of immunity is generally left to implication. The implication is that immunity is the problem, and its removal the solution. Statutory intervention approaching this end is widely applauded.[69] Well-documented difficulties with respect to judicial remedies of a public law character in the context of, for example, discretionary powers are often barely apparent when the discussion turns to tort. It is as if

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65 Wade, above n 60.

66 Mitchell, 'The State of Public Law in the UK' (1966) 15 *International Comparative Law Quarterly* 133.

67 McAuslan, 'The Plan, the Planner and the Lawyers' [1971] *Public Law* 247.

68 Harold Laski being an interesting exponent of this view: 'The Responsibility of the State in England' (1919) 32 *Harvard Law Review* 447.

69 Crown Proceedings Act 1947: see Street, *Governmental Liability* (1953); Hogg, *Liability of the Crown* (1971). Cf Arrowsmith, *Civil Liability of Public Authorities* (1992).

the controversies attending the grounds on which the remedies of certiorari, mandamus and prohibition are granted have no relevance whatever to the application - in a public law setting - of private law. As if it is quite legitimate for the courts to continue applying private law remedies of damages and the injunction without regard to the otherwise public law context, so long as they always remember to purge themselves of inappropriate private law characteristics (procedures, substance and ideologies) in their application of 'orthodox' public law.

However there are exceptions, from which it is learnt how delicate is the task which faces the court when asked to apply torts of, for example, negligence, nuisance or breach of statutory duty in contexts in which public law might also operate. Nonetheless, the delicacy of the task is frequently treated cursorily, as the concern switches rapidly from the limits of private law to the scope for its continued application. A good illustration of this point is provided by the influential analysis of the defence of statutory authority of Craig which, whilst acknowledging the problematic sovereignty implications of statutorily authorised projects being prohibited on account of their interference with individual rights, suggests no difficulty in the application of private law where damages are awarded *in lieu* of an injunction.[70] Craig is surely right to draw a distinction between private law which operates to enjoin otherwise authorised activities incompatible with individual rights, and that which 'merely' requires compensation. But as Craig himself is also aware, compensation has resource implications which, in turn, are capable of rendering the distinction he is drawing between damages and injunction more one of form than substance.

Craig's remarks in connection with negligence are, intriguingly, altogether more emphatic of the difficulties arising from tort in an otherwise public law context. In discussing the delicacy of the task facing the courts when asked to impose a duty of care in the exercise of statutory powers, Craig is highly sympathetic to the (at that time emerging) distinction between adjudicating reasonableness in the context of 'operational' and 'policy' decisions.[71] This distinction is valuable, he argues, in reflecting the sense in which decisions of a 'policy' character embody judgment arrived at on the basis of a breadth of 'social facts' and political considerations. In such circumstances the court is less equipped to determine reasonableness as is an institution designed for the purpose. Indeed, even damages are not

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70 Craig, P., *Administrative Law* (2nd ed 1988), 445 and 447.

71 Craig, P., 'Negligence in the Exercise of a Statutory Power' (1978) 94 LQR 428. Compare Weir's emphasis on the resource implications of civil liability: Weir, P., 'Governmental Liability' [1989] *Public Law* 40.

appropriate in this context. Where this leaves Craig's less cautionary remarks on the subject of statutory authority becomes an important question. Why considerations of institutional competence of the kind raised by Fuller and taken up by Hart and Sacks should apply to one tort but not the other calls for explanation.[72]

The possibility that Craig's contrasting treatment of negligence and nuisance in this respect is indeed *consistent* raises issues of the most profound relevance to the intersection of tort and public law. One issue of particular significance concerns the extent to which it is helpful to continue speaking generally of tort in this connection, as opposed to differentiating according to the tort in question. The idea that different torts have differing public law implications has been addressed by Jenny Steele in terms more explicit than the analysis of Craig.[73] Steele suggests that the key to understanding the crucial difference as it concerns nuisance and negligence lies less in any differences in remedies, although differences here are important, than differences in the 'subject' of the torts. Nuisance fixes its attention on 'outcomes' in a way that contrasts with the attention which negligence fixes upon 'conduct'. From this distinction it follows that nuisance is of a more 'coercive' character than negligence with implications, in turn, for the intersection with public law.[74]

What Craig's work illustrates best, however, is the extent to which public law scholarship leaves so much of the answer to the question of the institutional significance of the coexistence of tort and public law to implication. Things might have been very different had Friedmann's early vision of the nature of the public law enterprise had more influence upon the development of this field. In his discussion of the courts' early attempts at applying duty of care principles in a local government setting, Friedmann defined issues of civil liability as central to those that a burgeoning public law discipline would have to confront as part of its maturation.[75] Yet the powerful introductory analysis of the issues of sovereignty and competence as they bear upon the intersection of tort and public law which Friedmann offered has yet to be seriously developed in public law writing, which has evidently not

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72 See above, n 35 and associated text.

73 Jenny Steele, 'Private Law and the Environment: Nuisance in Context' (1995) 15 *Legal Studies* 236, 254ff.

74 These issues will be returned to in the more concrete setting of case law in Chapter Three.

75 Friedmann, 'Statutory Powers and Legal Duties of Local Authorities' (1944) 8 MLR 31.

shared his conception of the fundamental challenges facing public law. What appears to have happened in the intervening period is that liability concerns have faded into the background - as part of private law - to be replaced by concerns of a specifically 'public' law nature with, for example, *legality*. This is not to suggest that the competence of the courts in adjudicating matters involving, for example, public resource allocation has ceased to become an issue for public law scholarship; or that the accountability of public bodies in terms of common law rather than, for example, statutory or administrative channels no longer carries with it any controversy. Rather, it is to suggest that these concerns and controversies have become compartmentalised as of a peculiarly public law character. The relevance of private law to this discussion has received little serious attention.[76]

The marginalisation of private law within public law scholarship is all the more important for the fact that the distinction which is operative here - that is to say, the fundamental distinction between public and private law - may once again be objected to for its formal and, more to the point arbitrary, character.[77] Surely it is meaningless for accountability in the exercise of public power under the common law to be reduced to questions of public law, when private law may be evoked to significant practical effect. Much is made of the procedural orientation of public law: the unwillingness (whether *ex post* or *ex ante*) for the common law to involve itself in the *substantive* merits of a public decision subject to judicial review. Yet less is made of the scope that exists for the substantive rights protected by private law to constrain the decisions a public official is able to make stick in any given context,[78] or to carry implications more broadly in terms of standards to which public decision making is subject.

In the upshot, public law scholarship does have much to offer in the way of understanding the tensions relating to sovereignty and competence arising from the coexistence of (private and public) common law and statutory regulation. However, it is disappointing that so much of this insight is left to be drawn as an inference from judicial

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76 It is indicative of the lapse of interest in the public law significance of private law that Harlow has felt the need to point out the fact that standards relevant to public functions are not the sole preserve of public law, but arise to under fields such as tort and contract: Harlow, 'Back to Basics: Reinventing Administrative Law' [1997] *Public Law* 245, 257.

77 Harlow, '"Public" and "Private" Law: Definition Without Distinction', (1980) 43 *Modern Law Review* 241.

78 This is one of the implications of the 'coercive' nature of nuisance explored by Steele, above n 73, and returned to in Chapter Three.

review of the legality of public decisions which, given its procedural orientation, is not always a reliable source of analogy for purposes of illuminating issues relating to private law. Whether private law is ultimately an opportunity to enrich or problematise public law discussion must, for the time being at least, remain open. What is clear is that the post-Diceyan task of adapting common law to a public law setting is incomplete, so long as the particular ambit of the private law remains a largely peripheral concern.

The Content of Regulatory Law

If scholarship in respect of the institutional dimension to public law is overly cursory in its discussion of the relevance of private common law, scholarship of a more instrumental dimension is little if any more critical. Discussion of the content of regulatory powers is characterised by its willingness to abstract regulatory form from any context it may have in private law fields of the common law.

The disinterest in issues at the intersection of common law and regulatory law as it concerns the content of regulatory powers is usefully illustrated, first, with reference writing directed to historical concerns. Wade, for example, is right to draw attention to the sense in which 'Parliament indirectly has reduced the sphere of influence of judicial independence by the character of modern legislation'.[79] That is to say, Wade is correct in his generalisation to the effect that 'common law rests upon an individualistic conception of society' in relation to which the 'socialisation of the activities of the people has meant restriction of individual rights by conferment of powers of a novel character upon governmental organs'.[80] However, it should not be taken to follow that regulatory powers have in all circumstances subjugated the relevant common law provision. Rather, it may be more accurate to understand freestanding common law and administrative provision as *coexisting*. Such is said to be the case in the field of pollution, in which context Ogus and Richardson - in a rare acknowledgement of the coexistence of common law and regulatory law - observe that: 'The legislature decided that such activities as sewage disposal, discharges of industrial waste, and chemical industrial processes created serious health hazards, and minimum standards of hygiene had to be imposed'.[81] Protection of private rights under nuisance remained

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79 Wade, above n 60, ciii.

80 Id.

81 Ogus and Richardson, 'Economics and the Environment: A Study of Private Nuisance' (1977) 36 *Cambridge Law Journal* 284, 289.

unqualified. There 'emerged, in effect, a two-tiered system: the general goal was determined by the legislature while the achievement of any superior environmental quality was left to the individual through the assertion of private rights'.[82] Given this invitation to reflect more closely on the intersection of, for example, tort and regulatory law, it is unfortunate that so little attention has been given to the co-evolution of common law and statute alongside one another. Far more is understood of the evolution of fields of common law and statute independent of one another. Indeed, with the notable exception of the study by Bartrip and Burman,[83] the overriding message of legal history is one of the superfluousness of private, common law fields such as tort, in the face of statutory intervention of a regulatory nature.[84]

A similar message arises from theoretical accounts of contemporary regulation, for example Ogus, in his (largely economic) analysis of regulatory instruments.[85] It is not so much that instruments of private law are marginalised that is relevant in this respect;[86] more that they are presented as wholesale alternatives to collective forms. The interrelationship of 'private' and 'collective' regulation is a possibility which is barely acknowledged, and is never the subject of serious attention. Ogus' work assesses instrumental efficacy in terms of the single plane or dimension of collective regulation. It is difficult to avoid the conclusion that private law, rather like the chapter given over to it, remains unintegrated - out on a limb. Certainly, what is not entertained is the possibility that the continued provision of private law is integral to the regulatory design in any given instance; or that the continued availability of common law may have greater symbolic than instrumental significance.

Nor do we have any fuller understanding of the impact of individual rights and remedies in terms of the implementation of regulation 'on the ground'. Here, as with historical and theoretical accounts, the temptation to bracket-off any implications that may follow from continued freestanding common law provision proves difficult to resist. In a

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82 Id. It may be doubted whether the distinction referred to in this connection between higher and lower standards corresponding to common law and statute is convincing.

83 Bartrip and Burman, *Wounded Soldiers of Industry* (1983).

84 See above n 51-53 and associated text.

85 Ogus, above n 55.

86 '"Private" regulation is peripheral to the subject-matter of this book', id 260.

study of trading standards regulation, for example, the focus is upon matters of crime;[87] civil law and procedure is evoked only so far as it is the object of consumers' and officials' ignorance.[88] In an occupational health and safety context, the Robens Commission's findings concerning the possible effects of litigation on enforcement of *ex ante* control remain noted, but unexplored.[89] In the rivers pollution context, research unfolds within an exclusively criminal administrative framework devoid of any private common law or otherwise civil law provision.[90] The reader is left unsure whether it is in fact the *regulator's* ignorance of the wider legal framework that explains the silence on this point.

This neglect of the common law in the context of empirical research is all the more significant given that one of the principal findings of research in this context is the negotiability of the content and enforcement of public standards: that public and private parties bargain over the standards that will bite.[91] This research conveys the sense in which regulation is far from a straightforward application of means to ends. Yet many of these characteristics are inherent in private law, and whilst there may well prove to be no causal connection between 'background' private law and the negotiated quality of public regulation, there is sufficient *prima facie* potential for a connection, here, to demand greater attention than is being given. For example, where public goods and private rights cohabit *on paper* as starkly as they do in the context of rivers pollution, it is unsatisfactory to maintain a silence as to the implications the one carries in terms of the other. It makes little sense to focus - Austinian fashion - on the criminal-administrative aspects of the regulatory framework,

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87 Cranston, *Regulating Business*, above n 2.

88 Id. Civil law is presented as the negative of criminal law: something that consumers are ignorant of, and officials considerably less familiar with than they are the relevant criminal law. There *is* a discussion of 'mediation' as a discrete function of an official and of a non-criminal administrative nature. However this discussion is very brief precisely *because* the area 'mainly concerns civil law', 21.

89 There is indeed research into the impact of accidents upon enforcement of *ex ante* control: Hutter and Lloyd-Bostock, 'Power of Accidents' (1990) 30 *British Journal of Criminology* 409. But little explicit reference is made to the relevance of civil law. Nor is there any discussion of the Robens Committee finding on the point (Cm 5034, 1972) *viz* the impossibility of ignoring the 'interplay between compensation arrangements and accident prevention arrangements' and, specifically, the 'evidence of the unfortunate effects from the former to the latter' (para 424).

90 Hawkins, *Environment and Enforcement* above n 2.

91 Hawkins, above n 2, 23ff.

ignoring the extent to which civil law is of relevance to the practice of regulation broadly; and, specifically, of relevance in the sense that it complements (or indeed frustrates) implementation of the criminal code.

III A Tort Law Perspective

Tort is less often introduced to students as one of the few common law fields which has substantially withstood the proliferation of statute.[92] Areas of life once predominantly regulated or 'facilitated' by tort are today regulated under statute too. Indeed, this is the point that Ogus is making when he criticises the attention academic law bestows upon, for example, nuisance to the exclusion of pollution legislation.[93] True, tort is not itself codified to the same extent as other traditionally common law fields such as contract. Nevertheless, its practical significance is increasingly relative to the numerous and various statutory codes that have been (and continue to be) enacted in the sphere of personal security and private property.[94] The adjective Weir uses in this connection captures the complexity of this arrangement well: statute does not simply reform or tidy up tort; statute is 'overlaid' upon tort's freestanding provision.[95] Against this backdrop, the future of tort is a matter of some interest.

Crucial to the problem at hand is that tort scholarship has been considerably informed by the challenge public regulation represents for the future of this traditional, common law form. Significantly, the tenor of the discussion is by no means bleak. It is not only the obstacles in the way of a future for tort that are receiving attention. On the contrary, attention is also being focused on tort in the *alternative* to public regulation and, more to the point, tort as operating *within* a regulatory context. In contrast then to the literature considered above, tort writing may be understood to be deeply engaged with the relevance to public law of private law.

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92 For example Weir, *Casebook on Tort* (7th ed 1992) 1.

93 Ogus, above n 1.

94 This in addition to the more obvious senses in which statute impinges upon tort, namely, direct intervention in order 'to reverse specific rules laid down by the judges'; and intervention to 'tidy up an area of the law' which is ragged: Weir, above n 92, 2.

95 Id, p 3.

However, it is possible to overstate the interest shown by tort scholarship in the wider public law context. On the one hand, there is a now well established debate concerning the deontic, moral significance of tort, within which the regulatory context is extremely remote.[96] Jules Coleman is a dissenting voice in this respect, when he argues that the morality of tort law cannot be conceived outside of wider justice-affecting common law and statutory provision.[97] For the most part, little attempt is made to accommodate what is known of the practical workings of tort litigation in the analysis of tort's moral foundations.[98] On the other hand - and within the literature that had indeed engaged with tort's regulatory context - an issue of particular importance remains largely obscure. This is a reference to the regulatory implications of differing torts touched on in the previous section, notably negligence and nuisance.[99] True, differences between negligence and nuisance have been suggested. But discussion here is in its early stages, and remains tentative, and formal. Certainly, what empirical research there is at the intersection of tort and public law is dominated by negligence and personal injury.[100]

With tort no less than public law scholarship, there are different standpoints across which the intersection in question cuts. Beginning with scholarship from an economic standpoint, this section will then address standpoints concerned, first, with tort as a forum for making assessments about individual responsibility; and, secondly, tort as a system of remedies in relation to statutory remedies aimed at promoting general welfare.

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96 Owing much to Weinrib's reflections of morality latent in tort's procedural and doctrinal structure: e.g. Weinrib, 'The Special Morality of Tort Law' (1989) 34 *McGill Law Journal* 403. See further Owen (ed), *Philosophical Foundations of Tort Law* (1995).

97 'Whether or not corrective justice in fact imposes moral duties...is conditional upon the existence of other institutions for making good victims' claim to repair', Coleman, *Risks and Wrongs* (1992), 402. In this regard, Coleman writes of the need for a 'theory of institutional competence', comparing the various private and public law forms conceivable of being harnessed 'in practice' to justice concerns (435).

98 Steele, 'Book Review: Owen (ed), *The Philosophical Foundations of Tort*' (forthcoming, *Tort Law Review*).

99 Newark, 'Boundaries of Nuisance' (1949) 65 LQR 480; Gearty 'The Place of Private Nuisance in a Modern Law of Torts' [1989] CLJ 14.

100 And, observes Englard, much of the theoretical work too: *Philosophy of Tort Law* (1993), 110ff.

Nuisance as an Economic Instrument

Michelman's economic analysis of tort merits attention as one of the first serious engagements of tort scholarship - from whatever standpoint - with nuisance in a public law context.[101] His analysis is an adaptation of that developed by Calabresi in *The Costs of Accidents*.[102] It is instrumentalist, in the sense that it is concerned with the efficiency of different forms of law in allocating resources toward a given policy end. Whereas Calabresi is concerned with accidents giving rise to personal injury, Michelman is concerned with non-accidental pollution of the environment. Yet both take as their fundamental concern the relationship between private law and public law, accepting that neither on its own - in its purest form - is worth dwelling upon. In Michelman's case, this concern is reflected in an attempt at articulating a 'proper niche for nuisance law in a total system' encompassing regulatory law.[103]

Michelman's analysis of 'the coexistence of centralised and decentralised subsystems'[104] unfolds within a familiar hypothetical scenario of a 'smoke belching factory imposing costs on nearby residents'.[105] A pure market approach is dismissed on the grounds of transaction costs. Nevertheless, any centralised scheme which eliminates market

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101 Michelman, 'Pollution as a Tort: A Non-Accidental Perspective on Calabresi's *Costs*' (1971) 80 *Yale Law Journal* 647. See Dewees et al, *Exploring the Domain of Accident Law* (1996) for a broader discussion of the basic issues raised by Michelman, and one having regard too to more recent developments in both tort and regulatory law.

102 Calabresi, *The Costs of Accidents* (1970).

103 Michelman, above n 101, 666. Michelman's focus on context is in striking contrast to other of the most influential economic-oriented nuisance analysis, which have addressed the question of what nuisance has to offer in the alternative to statutory regulation. Notable examples are Ogus and Richardson, above n 62; Dewees and Trebilcock, 'The Efficacy of the Tort System and its Alternatives: A Review of the Empirical Evidence' University of Toronto, Law and Economics Working Paper Series 1 (1991); and Calabresi and Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1093, which quickly established itself as an icon in the field, and did much to overshadow Michelman's emphasis on issues arising from the context which tort and regulatory law provide for each other.

104 Michelman, above n 101, 675.

105 Id, 669.

allocation of pollution costs is equally inconceivable. Michelman takes as his exemplary centralised scheme one in which maximum allowable concentrations of pollutant are prescribed by a public agency. His concern then turns to the role that nuisance law may conceivably have in structuring the inevitable market transactions that the collective scheme will leave open.[106] Two options are given particular attention. First, to allow for actionability only so far as the interference complained of arises out of emissions which are consented, and in compliance with the consent. Secondly, actionability only so far as interference arises out of emissions not consented, or in breach of a consent. A third option is also offered, allowing nuisance actions regardless of regulatory compliance. This option is not however discussed in any detail by Michelman. It is as if the issues which are raised by it are subsumed within the discussion of the first and second options.

As to the first option, Michelman considers that there *are* circumstances in which centralised and decentralised schemes could interrelate beneficially. Actions for loss sustained in compliance with collective regulation might usefully 'backstop' those individual costs thought insignificant at a basin-wide level.[107] Further, nuisance might serve as a 'private antennae' highlighting points at which public controls are weak.[108] These roles are not however considered anything more than interstitial by Michelman. On the other hand, the interrelation arising from this particular arrangement might rather be one of tension, a possibility to which Michelman attributes great significance. Tension would be most apparent in cases where the regulatory standards at issue had been 'deliberately calibrated to allow some polluters to inflict some harm on some neighbours'.[109] Allowing individual recovery would 'undercut the premises of the regulatory scheme'.[110]

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106 Id, 676.

107 Id.

108 Id. Couched later by Dewees in terms of an 'early warning system', serving to 'identify and publicize' a pollution problem, 'bringing it to the attention of the polluter and of the government': with Halewood, 'The Efficiency of the Common Law: Sulphur Dioxide Emissions in Sudbury' (1992) 42 *University of Toronto Law Journal* 1, 21.

109 Id, 677.

110 Id. Precisely what premises Michelman is referring to here is not elaborated by him, beyond, that is, general references to giving effect to the public interest by, principally, arriving at an economically optimal allocation of pollution.

Problems of a distinct nature arise from the second option. On the benign, mutually reinforcing side, actions for non-consented damage could help fill the gap left by 'laggard enforcement'.[111] Problems of coordination and coherence may however arise by virtue of the introduction of private enforcers alongside public ones.[112] Furthermore, private enforcement of *public* standards would require of nuisance law a departure from its archetypal economic role as facilitator of private transactions. Nuisance in this context would become a vehicle for enforcing standards set elsewhere, beyond the private law framework, and potentially without the participation of the individual parties. No less problematic is the scope that exists for private nuisance being deployed to offset laggard *standard-setting*.[113] This would involve the courts in collective pollution cost appraisal.[114] It would require of the courts consideration of the costs beyond those bound up with the polluter and receptor. This in turn would raise questions of the courts' competence in relation to regulatory authorities better suited to the task - questions of institutional integrity.[115]

Michelman's conclusions are of less interest than the issues which inform his analysis. Indeed, in many respects it is artificial to constrain the significance of this contribution within the rubric of economic analysis of tort law.[116] One conclusion of particular importance, however, concerns Michelman's emphasis on the gravity of the obstacles in the way of anything other than the most marginal role for private law in a public law context. Michelman goes no further than envisaging a role for injunctive relief where emissions in breach of consent are responsible for interference with an individual's property right. Certainly, he argues against any broader role for nuisance in respect of the determination of acceptable pollution standards, concluding that the scope for litigation involving individual grievances should be generally confined to the enforcement of public law obligations by means of, for example, judicial review.

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111 Id.

112 Id.

113 Id, 679.

114 Id, 680.

115 Id.

116 But see below, n 119 and associated text.

Tort and Responsibility

The scope for tort 'compensating' for shortcomings in the regulatory framework - whether shortcomings in this connection relate to standard setting or enforcement - is explored more fully by Jenny Steele.[117] Steele argues that, putting to one side the transactional standpoint characteristic of economic analysis, the significance of tort in a regulatory context lies most fundamentally in its concern with determining matters of individual responsibility for harm. Tort is particularly significant in this respect for its providing a forum within which to subject *ex ante* apportionment of risk of the kind that Michelman refers to (when speaking of the regulatory calibration of pollution), to an assessment in terms of responsibility for the outcome of risk in practice.

Michelman's comments regarding deliberately calibrated loss take on a new light when tort is viewed first and foremost as repository of principles for determining responsibility. At a mundane level, a number of practical issues would be expected to arise concerning the *ex ante* apportionment of risk and, in particular, the problem of how to ascertain whether the specific loss at issue in tort proceedings is or is not of the kind that regulatory law has sanctioned or 'calibtrated'. Where the relevant statute is clear on this point, the matter would of course be straightforward. However, it cannot be taken for granted that this would always or indeed often be the case.[118]

More profound are the issues which concern the significance for purposes of tort that is then to be attached to any regulatory sanction of the risk in question. Michelman's analysis is preoccupied with the dangers in terms of efficiency of a legal arrangement in which a regulator's decision-making concerning optimal risk carries no weight when the risk manifests itself in practice, in the context of litigation. In so doing, he downplays the attraction tort will have to two 'classes' of litigant: those frustrated by the public law process concerning the setting of standards, who feel that their concerns at a given regulatory judgment as to risk were not attributed the weight they deserved; and those

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117 As part of a more general discussion of tort's contribution to apportioning responsibility in the context of a broad range of modern risk, and changing conceptions of appropriate regulatory form: Steele, 'Assessing the Past: Tort Law and Environmental Risk' in Jewell and Steele (eds), *Law in Environmental Decision-Making* (forthcoming, Oxford University Press).

118 The difficulties of construing statutes that are silent on the question of the sanctioning of loss are explored in Chapter Three.

seeking a legal forum that is better able than regulatory law to reflect changing notions of risk tolerability, and responsibility for risk manifesting itself in injury.[119] In drawing attention to these blind spots in the economic analysis of tort, Steele's analysis does not underestimate the importance of issues of constitutional authority and institutional competence which suggest that tort should proceed cautiously in the shadow of regulatory law. However, it is important to have it said that the intersection of tort and regulatory law is of significance looked at from the standpoint of fora for judging responsibility, and not merely the standpoint of efficiency.[120]

Overlapping Remedies

Critics have argued that at root it is the very extent to which tort is concerned with individual responsibility that is the source of its precarious position. Not all injuries can be traced to an individual cause, much less to individual culpability. Even where they can, the cost of the process of doing so may be disproportionate to the benefits derived by society. This criticism is most often levelled against negligence, which is argued to be a drain on scarce resources: resources that could be better deployed giving more modest but nevertheless adequate security against misfortune, through public (and private) schemes set up to cover the broadest possible range of contingencies.[121] Ideologically and instrumentally, negligence is understood to be a bankrupt system. If it is not 'to be swept away in favour of a more rational, needs based system of comprehensive compensation',[122] it must at least be left to wither, as its appeal becomes ever more suspect in the face of growing awareness of alternatives.[123]

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119 Steele, above n 117.

120 This standpoint is of particular value in informing the empirical dimensions to this thesis (in Parts Three and Four), as well as being eminently suited to application in the context of case law (Chapter Three).

121 For example Atiyah, *Accidents, Compensation and the Law* (1970).

122 Stapleton, giving her interpretation of the 'rationalist' standpoint within tort criticism: *Product Liability* (1994) 3.

123 Calabresi, above n 102, 317.

Indeed, the metaphor of withering sits comfortably with historical accounts concerning the co-evolution of negligence and measures of the welfare state. Scholarship draws liberally from Pearson on this point, regarding social security.[124] The 'two systems have for too long been permitted to develop in isolation from one another'.[125] The result is, in the words of Harris, a 'patchwork quilt' of 'assorted compensation schemes':[126] a product of 'unplanned, incremental change as politicians react to particular crises'.[127] However, the 'rationalist's' case against negligence is not heavily dependent upon historical analysis. It is not that tort and 'welfare state' provisions are inadequately dovetailed that is always the crux of the criticism. Rather, that they are permitted to coexist alongside each other at all.[128] Because of the profound differences between the two systems - differences, that is, which emanate from the underlying contrast between individualism and collectivism - no amount of careful design will make up for what is understood to be an inherent irreconcilability. For critics, here, tort and welfare provisions *are* necessarily at the expense of one another.

Many of these considerations would appear to extend by way of analogy to the nuisance context. However, the call for rationalisation in this context is not heard to anything like the same extent that it has been in the context of negligence, if it has been heard at all. Well before the controversy either side of Pearson, Glanville Williams predicted an increasing reliance upon administrative schemes where previously tort law had reigned.[129]

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124 *Royal Commission on Civil Liability and Compensation for Personal Injury* (1978, Cm 7054).

125 Id, para 271.

126 Harris, 'Tort Law Reform in the United States' (1991) 11 *Oxford Journal of Legal Studies* 407, 412.

127 Id. Nevertheless, other writing suggests that it is possible to exaggerate the extent to which tort and welfare legislation have in fact evolved in isolation. For Conaghan and Mansell, 'the question how far the social security system should extend and assume responsibility for what has traditionally been the province of the tort system has never been far from the surface of debate about the nature and scope of the welfare state': Conaghan and Mansell, *The Wrongs of Tort* (1993) 96. For Bartrip and Burman, turn-of-the-century common law continued to hold considerable attraction to employees notwithstanding the enactment of statutory measures of workers' compensation, above n 83.

128 Abel, 'A Socialist Approach to Risk' (1982) 41 *Maryland Law Review* 699.

129 Williams, 'Aims of the Law of Torts' (1951) 4 *Current Legal Problems* 137, 174.

Intriguingly, Williams singled out river pollution as an area in which the shoots of this transition were already evident.[130] That is to say, the practical ambit of nuisance was being superseded by that of public regulation. With the passage of time, it is clear that any prophesied or willed transition from a private to a public law system of remedies has not materialised, at least not in the sense that it is complete. Rather, like negligence, the discussion of public law remedies in an environmental context must proceed on the basis of their coexistence alongside remedies of a tort, notably nuisance, character.

If an explanation is needed for the lack of a rationalist voice speaking out against overlapping remedies in this context it might lie in the sense in which public law remedies are privatised rather than collective:[131] that there is not the ideological clash that might have appeared at the level of tort and social security. However, social security is now itself showing signs of increasing privatisation, without thereby detracting from the interest of its intersection with tort.[132] Alternatively, the explanation for the lack of a rationalist voice in an environmental context may be more mundane. Statutory powers of an *ex post* character to do, for example, with remediation have only recently begun to attract academic attention. Meanwhile, rationalism has lost much of the momentum that it had at its height in the 1960s and 1970s.[133] Given too the parochial nature of the rationalists case when at its most influential, it is easy to appreciate how emerging developments in respect of tort and environmental remediation have received less discussion in terms of this standpoint than they might otherwise merit.

To capture then the contribution of tort theory to an understanding of the intersection of tort and regulatory law, it can be concluded that theory here is, broadly, more alive to the breadth of issues at the intersection in question than its 'counterpart' in the context of public law. Yet it would be wrong to exaggerate the extent of the engagement of tort commentators

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130 Id.

131 Jewell and Steele, 'UK Regulatory Reform and the Pursuit of 'Sustainable Development': The Environment Act 1995 (1996) 8 JEL 283.

132 The uncertain future of tort in the context of first party insurance is discussed by Atiyah, 'Personal Injuries in the Twenty First Century: Thinking the Unthinkable' in Birks, (ed), *Wrongs and Remedies in the Twenty-First Century* (1996).

133 Symbolised, for example, by the decline of the New Zealand no-fault compensation scheme: Markesinis and Deakin, *Tort Law* (3rd ed, 1994), 5-6.

with the context of tort in this respect. For on the whole, commentary is content to make only cursory reference to issues arising from tort in the shadow of regulatory law. Certainly, there is little if anything in the literature resembling a systematic and comprehensive reflection on law at the intersection of tort and statute. This is well illustrated by the discussion of case law, in which context much is indeed understood of individual lines of authority such as negligence in the exercise of statutory powers and the tort of breach of statutory duty.[134] Nevertheless, other areas are generally treated with disdain, the difficulties associated with case law concerning, for example, the defence of statutory authority typically being dismissed as 'difficulties of application' - not involving fundamental issues of principle and, as such, not deserving serious academic attention.[135]

IV Intersecting Modes of Rationality

Common law and regulatory law have long been associated with distinctive modes of rationality. These are perhaps most familiar in the context of Blackstone and Bentham, in whose writings the modes at issue concern the 'artificial' or 'common' reason of the common law, and the utilitarian, fundamentally instrumental mode of rationality reflected in Bentham's ideal of codified law. Neither writer however turned their attention to the coexistence of these modes of rationality and, in particular, the extent to which they are ultimately compatible. This is important, for whilst it is implicit in Blackstone's work that the coexistence of distinctive modes of rationality poses no significant problems, however they are conceived, the position is rather more problematic from the standpoint of Bentham,

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134 See for example the analysis of Craig, above n 71 and, as regards breach of statutory duty, Stanton, *Breach of Statutory Duty in Tort* (1986).

135 Most overt is *Street on Torts* (7th ed 1983): 'The cases on this defence are very numerous but since they turn on the interpretation of ...particular statutes and merely illustrate the general principle set out in the text [it is] unprofitable to discuss them' (p 85, n 7). It is also significant that the nuisance and planning litigation discussed in Chapter Three is typically confined to a passing mention in the context of the already forestalled discussion of the defence of statutory authority or, alternatively, discretely compartmentalised among a list of defences: *Salmond and Heuston on Torts*, (21 ed, 1996) 71-72. This notwithstanding that there is in *Gillingham Borough Council v Medway (Chatham) Dock Ltd* [1993] QB 343 *et post* arguably the emergence of an analogue to the highly prominent authorities concerning negligence in the exercise of statutory powers.

from which it appears essential that the law be purged of 'common' reason and rationalised along instrumental lines.

The interrelationship of differing modes of rationality only begins to be explored in a little more detail in writing of the early twentieth century, most notably that of Weber and Hayek. In Weber's work the fundamental distinction is couched not in terms of artificial and instrumental rationality but, rather, in terms of 'formal rationality' and 'substantive rationality';[136] in Hayek's work the fundamental distinction is between 'evolutionary rationality' and 'constructive rationality'.[137] Both Weber and Hayek's writing on this subject is discussed elsewhere,[138] the point to stress here being that for each theorist the distinctive modes of rationality to which they give meaning are clearly conceived as capable of coexisting and, as such, are not mutually exclusive. For example, Weber writes of the gradual emergence of forms of law reflecting rationality of a substantive character, interposed alongside those reflecting rationality of a formal character.[139] For Hayek, forms of law reflecting constructive rationality arise from the need which manifests itself from time to time for radical reform in substantive fields which reflect rationality of an evolutionary character.[140]

However, one important issue upon which Weber and Hayek are unclear concerns the exact nature of the relationship between common law and statute and the modes of rationality at issue. Of particular importance in this respect is the fact that it is unclear whether it is being suggested that there is a straightforward correspondence between the principal sources of law and the distinctive modes of rationality, or, rather, whether the 'fit' in this respect depends on the common law or statutory form at hand. The latter interpretation is perhaps the one which presents each theorist in the best light, for it is

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136 Weber, *Economy and Society: Volume Two* (1978), especially 641ff and 880ff.

137 Hayek, *Law, Legislation and Liberty: Volume 1, Rules and Order* (1973), esp Ch 1-2.

138 Although of neither theorist could it be said that there is a substantial body of legal commentary. A useful critical introduction to Weber's thought is provided in Murphy, *Weber and the Rationalisation of the Law* (1992); and, of Hayek's thought, Ogus, 'Law and Spontaneous Order: Hayek's Contribution to Legal Theory' (1989) 16 *Journal of Law and Society* 393.

139 Weber, above n 136, 882-889.

140 Hayek, above n 137, 46-51.

increasingly common to find commentators today referring to substantive rationality in, for example, the context of tort actions or, conversely, formal rationality in the context of statute.[141] What writing there is linking modes of rationality with sources of law is nonetheless of a broad nature, leaving issues of the relationship between modes of rationality and tort largely unexplained.[142] Certainly, scholarship in this field has yet to supply the thorough analysis of rationality in terms of legal forms which is merited.[143]

V Issues to Explore at the Intersection of Common Law and Statute

What, then, is learnt from scratching the surface of general legal systems thinking and theory in the substantive fields of public law and tort? Fundamentally, that the coexistence of common law and statute is a matter of considerable breadth and complexity. It spans different torts, and different ways of analysing them. It carries implications relevant to economic analysis; analysis in terms of justice and, broadly, the continued viability of tort in a society in so many important respects different from the one in which tort has its origins.[144] It encompasses different procedures of the common law, and different common law interests and values too: this is evident from public law discussion, in which context it is not always the coexistence of common law and statutory regulation that is the problem, as much as the coexistence *within* common law of provisions of a public and private character.[145]

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141 Led largely by the increasingly influential systems theorists, see for example Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) *17 Law and Society Review* 239.

142 The possible ambivalence of tort with respect to modes of rationality is noted in Steele, above n 117.

143 This point will be developed in Chapter Four, in which context it will be seen to be crucial to an evaluation of historiography of government growth.

144 For the future, it may be that emerging forms of regulation will transform the nature of the interaction of private and public law: see Steele, 'Assessing the Past: Tort Law and Environmental Risk' in Jewell and Steele (eds), above n 117. However, command-and-control has not yet lost its hold as a dominant form of regulation. On the contrary, it continues to be promulgated, and it looks like assuming an important role for some time to come. Besides, it is surely of assistance to the study of new forms of regulation, if the common law implications of traditional forms are well understood. Occupational health and safety alone cannot be expected to bear the full burden of generalisation. Other command-and-control forms merit exploration.

Coexistence operates at the level of case law. It is of interest as a product of legislative history, and it raises questions of the implementation of regulation on the ground.

Moreover, coexistence appears a problem of significant depth. The intersection of common law and statutory regulation goes to the very identity of the legal system. The scope for common law standards 'to *cut across* standards set elsewhere, allowing litigants to claim compensation for activities which in the language of other parts of the legal framework would be described as legitimate' may not be a local problem,[146] but a reflection of heterogeneity at the heart of any modern common law jurisdiction. That is to say any jurisdiction in which different sources, instruments and interests protected by law coexist alongside one another in an arrangement that McLoughlin was among the first to recognise in an environmental context;[147] in which law facilitating individual action operates alongside of that providing for its control in the public interest; and where the rationality associated with the common law cohabits alongside the distinctive rationality associated with statute.

Indeed, it may be doubted that coexistence of differing 'systems' of law is a peculiarly common law problem. Merryman's account of the civilian tradition suggests otherwise.[148] This is not a matter which it is realistic to explore within this chapter or, indeed, within this project as a whole. But it does add interest to the issues being discussed here, to read of similar issues being discussed in the context of jurisdictions beyond those of the common law. Thus, civil law systems are undergoing a process of 'decodification'.[149] This arises from increasing recourse to statute law. In some cases, statutes simply elucidate, clarify or complete the original code design. That is to say, perform an ancillary and complementary function of the kind that Blackstone envisaged of statutes in a common law jurisdiction. In others, intervention by way of statute is more profound. The great bulk of modern legislation 'does something quite different: it sets up special legal regimes, "micro-

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145 This is not a matter which will be returned to in any detail: for a useful discussion of the convergence of private and public common law in the context of tort see Beatson, '"Public" and "Private" in English Administrative Law' (1987) 103 LQR 34.

146 Steele, above n 73, 237.

147 *The Law Relating to Pollution*, above Chapter One, n 1.

148 Merryman, *The Civil Law Tradition* (1985).

149 Id, 151.

systems of law", that differ ideologically from the code and are in this sense incompatible with it'.[150] 'Such laws are not mere supplements to the code, they are competitors to it'.[151]

Whether or not common law-civil law continuity proves to withstand closer scrutiny, the notion of 'micro-systems of law' imposed without regard to integration upon a background of law of different origins and distinct values is fitting imagery with which to explore the intersection of different sources, instruments and interests protected by law in a *common law* jurisdiction. It captures well the possible shortcomings of Blackstonian and Benthamite images of order as applicable to a modern, heterogeneous, regulatory setting. It invites examination of the intersection in question from the perspective of case law, legislative history and implementation in the field.

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150 Id.

151 Id, 152.

Chapter Three
Tort Revolving in Statutory Orbits

Francis Bennion has recently suggested that the law at the intersection of tort and statute is sufficiently refined and settled as to justify its codification.[1] He argues that the distinction between remedies in private and public law has been crystallised; the relationship between breach of statutory duty and negligence in the exercise of statutory powers is now clear; duties of a 'welfare nature' are cleanly delineated for purposes of their special tort law significance; meanwhile, the defence of statutory authority is as stable as ever. This stability in the law is considered by Bennion to justify a sixteen clause code which, whilst centring around the specific tort of breach of statutory duty, is nevertheless expansive in its coverage, tying in adjacent tort and statute settings.

Bennion's remarks are of particular significance in light of the tendency within academic commentary to address the numerous lines of authority at the intersection of tort and statute discretely.[2] His remarks lay down an important challenge in this connection, which is to reflect on the subject broadly, having regard to the contribution of each line of authority to the integrity of the whole. In taking up this challenge in what follows, it will be asked whether the law is indeed as settled as the timing of Bennion's proposal presupposes. To this end, the three areas of case law which he addresses - breach of statutory duty, the defence of statutory authority, and negligence in the exercise of statutory powers - are examined together with a fourth to which no reference is made by Bennion, but which is highly relevant to an appreciation of the broader picture: nuisance in the context of statutory powers. In so doing, particular attention is given to the consistency in the courts' resolution of an issue which cuts-across these lines of authority, namely, the tort law significance of acts or decisions valid in terms of public law. It will be argued that profound difficulties continue to affect this area of the law and that, as a consequence, Bennion's remarks on the subject of codification are premature.

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1 Bennion, 'Codifying the Tort of Breach of Statutory Duty' (1996) 17 *Statute Law Review* 192.

2 See further Chapter Two, n 135 and associated text.

Backdrop in Canadian Authorities

It is useful to set the assessment of English case law against the backdrop of two Canadian Supreme Court authorities, judgments in which provide a striking counter-point to Bennion's perception of the settled nature of tort at the intersection of statute. First, the judgment of Dickson J in *Saskatchewan Wheat Pool*. Dickson J argues that, far from being settled, English law concerning the actionability of breach of statutory duty is fundamentally lacking rationality: 'It is doubtful that any general principle or rationale can be found in the authorities to resolve all of the issues or even those which are transcendent'.[3] He approvingly recalls Glanville Williams' scepticism on the point: 'In effect the judge can do what he likes, and then select one of the conflicting principles stated by his predecessor in order to justify his decision'.[4] The mistake the courts make, maintains Dickson J, is to determine the tort law significance of statute by means of the method of statutory construction, broadly speaking, in circumstances where, for any number of reasons, the statute is silent. In these circumstances it would be better for the courts to abandon statutory construction and proceed in accordance with principles of the common law which, in the case of breach of statutory duty, are suitably located in terms of those governing the imposition of a duty of care.

These remarks of Dickson J are reinforced by similar criticisms, culminating in the proposal of a similar solution, in the context of the defence of statutory authority. Of particular note in this respect is the judgment of La Forest J in *Tock v St John's Metropolitan Area Board*,[5] in which it is argued that:

> '[T]here is no point in donning the cloak of soothsayer to plumb the intent of the legislature...I think the best way to resolve the problem is to proceed rather as one does when facing a claim in nuisance between two private individuals, and ask whether, given all the circumstances, it is reasonable to refuse to compensate the aggrieved party for the damage he has suffered'.[6]

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3 *The Queen v Saskatchewan Wheat Pool* (1983) 143 DLR (3d) 9, 13.

4 Id, 17, quoting Williams, 'The Effect of Penal Legislation in the Law of Tort' (1960) 23 MLR 233, 246.

5 *Tock v St John's Metropolitan Area Board* (1990) 64 DLR (4th) 620, 647.

6 Id.

On this view, as with that of Dickson J in *Saskatchewan Wheat Pool*, it is better for the common law to take full responsibility.[7]

Substance and Methodology

The importance of these observations lies in their highlighting the methodological dimension to any substantive assessment of law at the intersection of tort and statute, which is neglected in Bennion's analysis. In addressing method at the outset, it will be argued that the courts' treatment of this area of law resembles its treatment for the most part in the academic commentary. The numerous strands which comprise the relevant law have evolved in a debilitatingly fragmented manner, not only independently but in isolation from one another. At the most fundamental level, this fragmented evolution is reflected in the very difference in approach to the intersection of tort and statute played out immediately above: on the one hand, an approach which is dependent in the final analysis upon the intention of the legislature; and, on the other, one that answers to the strictures of the common law.[8] More specific examples of diversity in method also deserve attention, particularly as they bear upon the precise method of statutory construction; and the precise approach to the application of common law principles in the context of statute.

It will be concluded that problems of methodological consistency are reinforced by problems of a more substantive nature, mitigating against sharing, with Bennion, the view of English law at the intersection of tort and statute as settled. Crucially, case law lacks consistency in its determination of the significance - for tort - of acts or decisions valid in terms of public law. The most striking anomalies lie in the contrasting treatment of nuisance and negligence in the context of statutory powers. Both are areas which have been subject to recent appellate litigation. Yet each yield authorities which appear to pull in opposing directions. Whilst it is necessary to have regard to any differences inherent in the tort and

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7 La Forest J approves Linden's academic criticism of statutory authority in his influential article 'Strict Liability, Nuisance and Legislative Authorization' (1966) 4 *Osgoode Hall Law Journal* 197. Linden too perceived the court's difficulties as being bound up with considerations of methodology, arguing, at p 202, that any indeterminacy in this context has its roots in the courts' willingness 'to speculate about the mythical and non-existent legislative intention'. The courts should concentrate instead on formulating appropriate common law principles.

8 Even if the distinction is not always clear cut, see n 53 and associated text.

statutory settings which have been litigated, it is far from clear that these differences help explain the evident divergence in precedent. The overriding impression is that the courts are failing to treat like cases alike, and that this is because they have yet to arrive at a satisfactory resolution of the most general issues.

I Divergence in Method at the Intersection of Tort and Statute

It is trite law that where a statute makes explicit provision, the courts are constrained by the sovereignty of the legislature to interpret the meaning of the words in accordance with the intention of Parliament.[9] Less obvious is the relevance of sovereignty in circumstances where the question at issue is - taking the example of breach of statutory duty - one of 'ought a right to be implied which *ex hypothesi* is not express'?[10] Because the intention of Parliament is at best implicit in these circumstances, there is considerable potential for doubt as to what, precisely, the intention is or, indeed, whether the common law significance of the statute is the subject of parliamentary intention at all. It is not therefore surprising to discover that there are a variety of approaches to the intersection of common law and statute in this, and other, tort settings, amongst which are those which rely upon rules, indicators, principles or presumptions which are of judicial origin, even if they are not always strictly speaking 'of' the common law. Nor is it surprising that the courts often fall back upon common law principles in the purest sense, independent of the intention of the legislature.

In assessing consistency in method at the intersection of tort and statute it is important not to lose sight of the contrasting opinions which exist as to the degree of consistency it is reasonable to expect. This is particularly true of consistency relating to case law which is reliant upon methods of statutory construction. Willis' early expression of scepticism towards the canons of construction has gained much academic support over the years.[11] Just as Williams was to argue later in the context of breach of statutory duty,[12] Willis argued that individual judges pick and choose the technique that best fits the substantive outcome they prefer. Perhaps because there is evidence of convergence among the approaches to statutory construction in more recent times - it has been submitted that the

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9 *Duport Steel v Sirs* [1980] 1 WLR 142, 168 per Lord Scarman.

10 *Cutler v Wandsworth Stadiums Ltd* [1948] 2 KB 291, 298 per Lord Greene MR (Court of Appeal).

11 Willis, 'Statutory Interpretation in a Nutshell' (1938) 16 *Canadian Bar Review* 1.

12 Williams, above n 4.

predominant approach today is purposive[13] - increasing support can be found for the view that judicial method here is, contrary to Willis, characterised by a single, coherent, sequential scheme. This is the argument of Sir Rupert Cross.[14] Be that as it may, none would claim that statutory construction in particular, or method on the whole, lend themselves to consistency to the degree that is *demanded* of substantive rules.[15] It is telling that Cross himself concedes that, in the final analysis, there are 'no binding judicial decision on the subject of statutory interpretation generally...all there is is a welter of judicial dicta which vary considerably in weight, age and uniformity'.[16]

However, if it is important to guard against naive conceptions of what counts as reasonable order when addressing method, it does not follow that there is no limit to the variation that can be tolerated without undermining the rationality of the law. It will be argued that the differences in method at the intersection of tort and statute are far reaching. The source of the concern is not only the variation in method that is evident *within* the major heads of liability - breach of statutory duty, statutory authority, negligence and nuisance in the context of statutory powers - but also the lack of uniformity *across* these tort and statute headings, each manifesting what will be argued to be its own distinctive and contrasting dominant method. This alone is not anything like proof of an overall lack of methodological rationality, for it could equally well reflect fundamental differences in the nature of the methodological challenge posed by, for example, breach of statutory duty and negligence in the exercise of statutory powers. Nevertheless, a more plausible explanation will be argued to centre upon the evolution of each method in isolation from one another. From this perspective, methodological differences are to be accounted for less in terms of a product of well-grounded and meticulously reasoned distinctions, and more in terms of a fragmented development of authorities which have more in common with one another than their development would otherwise suggest. This argument will be returned to after the salient methodological diversity has been outlined. With notable exceptions, which will be

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13 Bennion, *Statutory Interpretation* (2nd ed, 1992), vii.

14 Cross, *Statutory Interpretation* (1976).

15 Precedent lacks force in this context: each statute requires consideration on its own merits; no earlier construction of one is permitted to bind a later construction of the same: Cross, *Precedent in English Law* (3rd ed, 1977).

16 Cross, above n 14, p 46.

considered below, commentary has generally shown little interest in methodology at the intersection of tort and statute.

Divergence in the Construction of Statute

To reiterate the point made in connection with the Canadian authorities, above, the most fundamental distinction in method demonstrated by the case law at the intersection of tort and statute is between, on the one hand, methods relying upon statutory construction; and, on the other, those reliant upon application of the principles of the common law. This is a distinction which separates breach of statutory duty and the defence of statutory authority - each of which are underpinned by methods of statutory construction - from negligence and nuisance in the context of statutory powers, which are underpinned by the application of principles of the common law. However, in considering each in turn, it will become apparent that the distinction is one of degree. Certainly, recourse to common law has its judicial proponents in the context of those authorities characteristically underpinned by methods of statutory construction; and vice versa, in areas traditionally underpinned by principles of the common law. Nevertheless, dominant methods are discernible. The point to enlarge upon here is that there is little consistency in the methods which are dominant, at any one time, in a given tort and statutory context.

Breach of Statutory Duty

The methods of statutory construction which have vied for dominance in the context of breach of statutory duty are usefully introduced with reference to *Cutler v Wandsworth Stadium Ltd*,[17] a case concerning breach of statutory duty which represents one of the most self-conscious reflections on method at the intersection of tort and statute generally. Appreciation of the fluctuating dominance in method in the context of breach of statutory duty paves the way for comparisons involving the other major tort and statute contexts.

Cutler concerned the significance, in terms of tort, of The Betting and Lotteries Act 1934. This Act permitted the use of a totalisor at licensed dog racing tracks, subject to the proviso (under section II) that the occupier of the track shall not exclude a person from the track 'by reason only that he proposes to carry out bookmaking'; and, subject also to the

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17 [1949] AC 398.

occupier taking such steps as are necessary to secure that, so long as the totalisor is being operated on the track, 'there is available for the bookmakers space on the track where they can conveniently carry on bookmaking'. The plaintiff was a bookmaker excluded from the track in contravention of section II, who sought damages for breach of statutory duty from the defendant operators. Crucially, the statute on this point was not explicit. Two methods of statutory construction vied for acceptance in determining the point in favour of the defendants. First, a method appealing fundamentally to judicial presumption, advocated by Lord du Parcq. Secondly, one demanding rounded statutory construction unmediated by judicial constraints, advocated by Lords Simonds and Reid.

Lord du Parcq's method has been commented upon elsewhere.[18] It is particularly interesting for its attempt at reconciling judicially formulated presumptions in the construction of statute and the doctrine of the legislative supremacy of Parliament. Lord du Parcq took as his starting-point the absence of any specific provision within the 1934 Act on the point. It was not that the Act was vague or, indeed, ambiguous, but simply silent. Silence notwithstanding, Lord du Parcq approached the tort law significance of the Act as a matter of interpreting the intention of the legislature. Presumptions enabled this task to be discharged, he reasoned, so far as it was meaningful to attribute familiarity on the part of Parliament with the tools which the judiciary evolve for their own guidance. Silence represented tacit approval of these tools. Capturing the fine line between statutory constraint and judicial creativity, Stanton observes that by Lord du Parcq's chosen method of construction 'in effect, judicial intent is attributed to the legislature'.[19]

The contrasting method of Lord Simonds and Lord Reid echoes the dismissive approach to presumptions of Lord Greene MR in the Court of Appeal in the same case. Not only were the 'so called rules of construction' which Lord du Parcq had sympathy with in the House of Lords unable to 'prevail against the true construction of the statute',[20] but these 'so called rules' had 'fallen into some disfavour'. They had been replaced, Lord Greene reasoned, by an approach involving 'consideration of the whole statute and such other matters as may legitimately be considered in relation to its interpretation'.[21] Lord Green's methodological concerns are encapsulated in the now famous dictum of Lord Simonds:[22]

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18 See generally Stanton, *Breach of Statutory Duty in Tort* (1986).

19 Stanton, id, 33. Indeed, Lord du Parcq himself appealed to 'an inevitable interaction between the methods of parliamentary drafting and the principles of judicial interpretation', *Cutler*, id, 411.

20 *Cutler*, above n 10, per Lord Greene MR.

> 'I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only true rule which in all circumstances is valid is that the answer must depend on consideration of the whole Act and the circumstances, including pre-existing law, in which it was enacted'.[23]

Both minority and majority methods in *Cutler* contrast fundamentally with a third method proposed in the context of breach of statutory duty: the method adopted by Lord Denning MR in his judgment in the Court of Appeal in *Ex parte Island Records*.[24] Unlike those adopted in *Cutler*, Lord Denning's method abandons all appeal to parliamentary intention. Parliament in these circumstances simply has no intent. Parliament:

> 'has left the courts with a guesswork puzzle. The dividing line between the pro-cases and the contra-cases is so blurred and ill-defined that you might as well toss a coin to decide it'.[25]

Declining to 'indulge in such a game of chance',[26] and considering Lord du Parcq's solution to the silent statute problem to be artificial, Lord Denning decided the case instead by reference to general principles of the common law.[27]

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21 Id.

22 *Cutler*, above n 17, at 407.

23 Lord Simonds and Lord Reid disagreed as to the precise relevance of judicial aids to construction. Whereas Lord Reid was dismissive of any value whatsoever in the appeal to presumptions whatever little weight was to be attached to them, Lord Simonds saw them as having a role, albeit of a more limited nature than that envisaged by Lord du Parcq. Presumptions in Lord Simonds speech become 'indicators' - creations of the court which assist in the act of interpretation, but which would always be answerable to a rounded interpretation of the statute as a whole.

24 [1978] 1 Ch 122.

25 Id, 134-135.

26 Id.

27 Lord Denning MR was in a minority of one. Missing the point somewhat in dismissing Lord Denning's method as involving 'an illicit process of interpretation', Shaw LJ argued that any justice in the outcome had ultimately to yield to the

Lord Denning's method has enjoyed considerable academic support for its refusal to search out a statutory intention which, if not non-existent, is certainly unexpressed.[28] It also accords well with the refusal elsewhere in the common law world to rely upon statutory construction when addressing the actionability of a statutory duty.[29] However, it represents very much a dissenting voice within judicial discussion of legal method in this context. It is peripheral to the principal dispute which is between adherents to an approach emphasising presumptions or other judicial constructs *pace* Lord du Parcq, and unfettered recourse to statute *pace* Lords Simonds and Reid.

The fluctuating dominance of various approaches to statutory construction is illustrated in recent developments. In his judgment for the House in *Lonrho v Shell Petroleum Co Ltd*,[30] Lord Diplock suggested that judicial presumptions were back in favour. Certainly, in rehearsing a 'general rule' emanating from case law, and rehearsing too its exceptions,[31] Lord Diplock determined the matter without any regard whatsoever to Parliament's intentions. However, subsequent case law suggest that the presumption approach is once again out of fashion. After *R v Deputy Governor of Parkhurst Prison, Ex parte Hague*[32] and *X v Bedfordshire County Council*,[33] it is now clear that Lords du Parcq and Diplock are not being followed on this point. Now dominant is the rounded method of statutory construction of the majority in *Cutler*. In particular, the variant propounded by Lord Simonds.

The Defence of Statutory Authority

Glimmers of support for a method grounded fundamentally in the provisions of the common law of the kind adopted by Lord Denning MR in *Ex parte Island Records* can be discerned

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intention of Parliament - 'that the product might be potable cannot justify the method' - id, at 139.

28 Linden, above n 7; Stanton, above n 18.

29 *Q v Saskatchewan Wheat Pool*, above n 3.

30 [1982] AC 173.

31 Evoking the speech of Lord Tenterton in *Doe Murray v Bridges* (1831) B & Ad 847.

32 [1992] AC 58.

33 [1995] 2 AC 633.

in the context of statutory authority. Baron Bramwell provides an early and well remarked upon example in *Hammersmith Railway v Brand*,[34] his dissenting judgment in that case effecting a form of enterprise liability in circumstances where nuisance arises in the shadow of statutory authorisation.[35] This regardless of the intention of the legislature. Echoes of Baron Bramwell are heard in Lord Denning's call for a new and general common law principle governing the liability of private undertakers acting under the authority of statute in the Court of Appeal in *Allen v Gulf Oil Refining Ltd*[36]. The judgment of La Forest J in the Supreme Court of Canada in *Tock v St John's Metropolitan Area Board* is also relevant in this context.[37] These dicta notwithstanding, judicial scepticism towards the value of statutory construction is very much the exception rather than the rule, no less than it is in the context of breach of statutory duty.

Where the courts' approach to statutory construction in the context of statutory authority is distinctive is in the dominance today of a method reliant upon judicial presumptions. Whereas in the context of breach of statutory duty the courts are presently at pains to emphasise the dangers of fettering the intention of Parliament by reference to judge-made constraints, there is evidently less of a reluctance to impose a judicial framework mediating the activity of construction in the context of the defence of statutory authority. A vivid illustration of the role of judicial presumptions in this context is Lord Fraser's statement of 'the general law on this subject' in which the law is broken down into a series of four propositions.[38] Lord Wilberforce's very different delineation of four propositions in *Allen* is another example in this vein,[39] and one which is all the more important for the influence it has assumed in subsequent case law.[40] This will be returned to below in the

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34 (1869) LR 4 HL 171.

35 Id, 191-192. The economic rationale underpinning Bramwell B's remarks is explored in Atiyah, 'Liability for Railway Nuisance in the English Common Law: A Historical Footnote' (1980) 23 *Journal of Law and Economics*, 191.

36 [1979] 3 All ER 1008 at 1016.

37 Above n 5.

38 *Department of Transport v North West Water* [1984] 1 AC 337 at 359. The propositions themselves are of less importance for present purposes than the fact that the courts are attempting to construe individual statutes by means of a predetermined, common law framework.

39 *Allen v Gulf Oil Refining Ltd* [1981] AC 1001.

context of substantive considerations. At this stage, it is useful only to note the fourth proposition of Lord Wilberforce: 'where the terms of the statute are permissive only...the powers conferred must be exercised in strict conformity with private rights'.[41] Not only does it appear to prejudge the construction of any given statute on the point, thus contrasting with the care the courts now take not to fetter the activity of construction in the context of breach of statutory duty, but it also appears to distort good authority to the effect that the label 'permissive legislation' is not dispositive of anything.[42] The modern approach to statutory construction in this context simply disregards earlier authority suggesting that 'permissive legislation' needs to be scrutinised for its finer details, ultimately depending on the precise nature of the statutory powers it confers.

Pragmatism and Formalism in Applying Common Law

Heterogeneity in method is further reinforced by the contrasting approaches to the application of principles of common law as regards negligence and nuisance in the context of statutory powers. Two contrasting approaches, once again, vie for dominance. On the one hand, is an approach which emphasises the importance of considering the broadest possible range of factors relevant to actionability in the shadow of statute: factors including the statutory provisions themselves, with particular reference to the nature of any discretion which the statute confers. On the other hand is an approach in which common law principles are applied largely without regard to any challenges posed by the possible relevance of statute or public law. These contrasting approaches will be referred to as, respectively, 'pragmatic' and 'formal',[43] and correspond broadly to the courts' treatment of negligence and nuisance.

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40 Lord Wilberforce's summary provides the statement of law in accordance with which the House of Lords proceeded in *Tate & Lyle Food and Distribution Ltd v GLC* [1983] 2 AC 509. It is also followed in the nuisance and planning authorities, considered below, n 57 & n 59.

41 Id, 1011.

42 *Marriage v East Norfolk River Catchment Board* [1950] 1 KB 284, discussed further below, n 97 and associated text.

43 This choice of terminology follows that of Beatson who, in the context of private and public law procedure, distinguishes between approaches which are 'pragmatic', and those which are 'formalist' or 'conceptualist': '"Public" and "Private" in English Administrative Law' (1987) 103 LQR 34.

Negligence in the Exercise of Statutory Powers

The courts' approach to imposing a common law duty of care in the exercise of statutory powers is broadly of a pragmatic character. This approach has a number of defining characteristics, of which the first to note is a general - but not unqualified - willingness to impose a duty of care, notwithstanding fears expressed at the prospect of intervention on the part of the court being inappropriate in institutional terms.[44] Secondly, a resistance to importing narrow but arbitrary rules for limiting a statutory body's exposure to liability, of which 'the new damage' test in *East Suffolk Rivers Catchment Board v Kent* was considered to be a particularly pernicious example,[45] with the 'policy/operational' test applied in *Anns v Merton Borough Council*[46] coming in for similar criticism.[47] Thirdly, an emphasis on considerations of justiciability, as providing the most appropriate check on a statutory body's exposure.[48] In defining issues of justiciability in this regard, particular significance is assumed by the nature of the powers at issue and, more particularly still, whether the exercise of these powers involves policy or technical expertise which the courts are ill-suited to supervise.

However, this pragmatism has come under 'threat' from the emergence of what appear to be more formalistic tendencies within the case law, illustrated by the recent cases of *X v Bedfordshire County Council*[49] and *Stovin v Wise*.[50] One development to note arising from these authorities is the willingness on the part of members of the court there to be guided less by common law principles and a broad range of policy considerations, than by the intention of the legislature. This development has antecedents in Commonwealth

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44 See below, n 47.

45 [1941] AC 74.

46 [1978] AC 728.

47 As articulated most influentially by Lord Keith in *Yuen Kun Yeu v A-G Hong Kong* [1987] 2 All ER 705; and *Rowling v Takaro Properties Ltd* [1988] 1 All ER 163.

48 Id.

49 [1995] 2 AC 58.

50 [1996] 3 All ER 801.

authorities, for example, the Canadian case of *City of Kamloops v Nielsen*.[51] In that case, Wilson J required of the plaintiff evidence that an action for negligence in the exercise of statutory powers had been 'impliedly sanctioned by the legislature'.[52] In a similar vein is the judgment of the Privy Council in *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co* [1985] AC 210, where significance was attributed to the statute impliedly not intending to confer a right of action on the plaintiff in respect of the economic loss they sustained - a test more closely associated with breach of statutory duty. Lord Nichols' judgment in *Stovin* is the most recent illustration of importance being attributed to the intention of Parliament. Lord Nichols defined the critical difficulty facing the courts there as determining 'how much weight should be accorded to the fact that, when creating a statutory function, the legislature held back from attaching a private law cause of action'.[53]

However, in many respects the concern with the intention of Parliament in these most recent English authorities reinforces, rather than challenges, the pragmatic tradition of the courts. It is particularly significant that Lord Nichols in *Stovin v Wise* is questioning the weight to be attributed to the provisions of the statute, rather than requiring, as in Wilson J's judgment in *City of Kamloop*, the answers to the key questions to be supplied by the statute alone. A more clear-cut and far-reaching 'threat' to the traditionally pragmatic approach in this context arises from the subordination, in *Stovin v Wise*, of issues of private to issues of public law.

Stovin v Wise arose from a road traffic accident at a notorious accident black spot. The defendant motorist's insurers sought to apportion part of the responsibility to the local highway authority, on the basis that the authority owed a duty of care in exercising its statutory powers of traffic and road infrastructure management to avoid reasonably foreseeable loss to road users. Failure to take reasonable steps to remedy the causes of the black spot amounted, the defendants argued, to a breach of a common law duty of care. The House there was unanimous in holding existence of a duty of care to be conditional upon

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51 [1984] 2 SCR 2.

52 Id, 35.

53 Id, 801. For Lord Hoffman it was decisive that there could be found no evidence in the policy of the Act that Parliament intended to have converted a statutory 'may' into a common law 'ought', id 828. Similarly, in *X v Bedfordshire CC* [1995] 2 AC 632, 739 Lord Browne-Wilkinson stated that the question whether to impose a duty of care 'must be profoundly influenced by the statutory framework within which the acts complained of were done'.

existence of a common law *public* law duty to act rationally.[54] The ratio of the case on this point is best located in the passage of Lord Hoffman, maintaining 'that the minimum pre-conditions for basing a duty of care upon the exercise of a statutory power' include:

> 'that it would in the circumstances have been irrational not to have exercised the power [to make infrastructure improvements], so that there was in effect a public law duty to act'.[55]

Putting to one side the substantive implications of this subordination of private to public law, the point to stress at this stage is the methodological one, namely, of constraining the range of issues that will be considered for their relevance to the question of actionability by laying down strict conditions which have to be met if a duty of care is to be imposed in a statutory context. However, there is cause to doubt the generality of this condition,[56] such that the extent to which courts have signalled a departure from a traditionally pragmatic approach is, at present, unclear.

Nuisance in the Context of Statutory Powers

The approach to applying nuisance at the intersection of statutory powers has traditionally involved no concessions whatsoever to the statutory context. Providing always that the statute does not confer *immunity* in respect of a nuisance action in accordance with the defence of statutory authority, traditional doctrine suggests that ordinary common law principles are upheld without any significance being attached to defendant being a person or body exercising powers pursuant to statute.

When *Gillingham Borough Council v Medway (Chatham) Docks Ltd*[57] was decided there appeared promise of a novel sensitivity to statute on the part of the courts in a nuisance

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54 *Stovin v Wise*, above n 50. The House were divided over whether the public law duty to act rationally had in fact been breached. Lord Nichols, with whom Lord Slynn of Hadley concurred, considered that it had; the majority considered that it had not. However, on the crucial legal issue of the relevance of public law to the existence of a private law duty of care the House was unanimous.

55 Id, 828.

56 The uncertain status of the condition of invalidity in terms of public law is returned to below, n 116 and associated text.

57 [1993] QB 343.

context, of the kind emanating from authorities in the context of negligence. Particularly suggestive in this respect are the passages in this first instance judgment of Buckley J referring to the competence of the courts relative to specialist regulatory bodies, in this case a local planning authority, and the need for caution in rendering unlawful in terms of private law what is otherwise lawful in terms of public law.[58] However, the Court of Appeal in subsequent cases on the point has not been invited (nor has it taken it upon itself) to extend these 'pragmatic' observations to a full blown analogy with 'pragmatism' in the context of negligence.[59]

Indeed, the upshot of the recent appellate authorities in the context of nuisance and planning is to heighten the sense of 'formalism' in the approach to the intersection of this area of common law and statute. These cases offer a powerful endorsement, albeit obiter, of the 'locality principle' as applied in *Gillingham*. This is a device by means of which Buckley J sought to develop beyond the strictly all-or-nothing significance of the statutory framework under the defence of statutory authority:

> 'It has been said, no doubt correctly, that planning permission is not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, a planning authority can, through its development plans and decisions, alter the character of a neighbourhood.'[60]

> 'In short, where a planning consent is given for a development or change of use, the question of nuisance will thereafter fall to be decided by reference to a neighbourhood with that development or use and not as it was previously'.[61]

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58 *Gillingham*, id, 359: 'Parliament has set up a statutory framework and delegated the task of balancing the interest of the community against those of individuals and of holding the scales of justice between individuals to the local planning authorities...If a planning authority grants permission for a particular construction or use in its area it is almost certain that some local inhabitants will be prejudiced in the quiet enjoyment of their properties. Can they defeat the scheme by simply bringing an action in nuisance?' See too Buckley J's concern to avoid re-opening of the local planning authority's determination of the balance of interests - 'a task for which the court would be ill-equipped' (360-61).

59 *Wheeler v J J Saunders* [1995] 3 WLR 466; *Hunter v Canary Wharf Ltd* [1996] 2 WLR 348.

60 *Gillingham*, above n 57, 359. Approved by Staughton and Gibson LJJ in *Wheeler*, id, at 473 and 478.

Whilst this device is of importance in indicating a willingness on the part of the court to adapt nuisance to the statutory context, it must be asked whether it is not too narrow and artificial an adaptation for it to be considered a development of a progressive character. In particular, it must be asked whether the neighbourhood device represents the kind of arbitrary limit on a defendant's exposure that the courts have struggled to progress beyond in the context of negligence, in rejecting the 'new damage' and 'policy/operational' tests.[62] As it stands, nuisance appears not so much to have accommodated the context at issue, as it has grafted it onto ordinary tort principles which, in turn, reflect private law concerns. What is lacking is any serious attempt at defining the challenges arising from the intersection of nuisance and statute, and a willingness to tailor orthodox nuisance doctrine accordingly.

Overall Rationality of Method

It is clear then that method at the intersection of tort and statute is diverse. Fundamentally, no two lines of authority share the same approach to statutory construction, or, where appropriate, application of the principles of the common law. Yet different challenges call for different methods of resolving them. The key question is therefore one of the extent to which this diversity in method is inextricably bound up with features which distinguish breach of statutory duty from the defence of statutory authority; and negligence from nuisance in the exercise of statutory powers.

Writing of the relationship between breach of statutory duty and negligence in the exercise of statutory powers, Todd makes a good case for the distinctive legal methods that are predominant being linked to fundamental differences in the nature of the task at hand.[63] In the context of breach of statutory duty, the preferred method is fundamentally one of statutory construction precisely because the obligation at issue has its origins in statute.[64]

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61 Id, 361. Approved by Pill LJ in *Hunter*, above n 59.

62 Above, n 46. Particularly noteworthy in this respect is the apparent limitation of the 'locality test' to interference with 'personal inconvenience and interference with one's enjoyment of property', falling short of 'material injury': *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 at 650-51. This point is made by Steele, 'Private Rights and Planning Consent' [1995] *Web Journal of Current Legal Issues*.

63 Todd, 'The Negligence Liability of Public Authorities: Divergence in the Common Law' (1986) 102 LQR 370.

Negligence in the exercise of statutory power on the other hand is different in that 'statute provides the authority or reason for [the defendant] acting but no more than that. The source of the duty is in familiar common law principles of foreseeability, proximity, reliance and the like'.[65] A similar rationale can be suggested for the fundamental distinction in methods in the context of the defence of statutory authority and nuisance in the shadow of statutory powers.

However, this line of reasoning begins to lose force as an explanation for differences of a more specific nature, relating to the particular method of statutory construction adopted, or the particular approach to applying the principles of the common law. Thus, whilst there is indeed a profound difference between statute being the basis of a tort action which would not otherwise lie (breach of statutory duty), and statute being a defence to an otherwise sound cause of action (statutory authority), the difficulty is in discerning in this distinction anything which demands of the court a rounded construction of statute in the context of the one, at the same time as a construction which is heavily mediated by the presumed meaning of certain 'trigger' provisions in the context of the other. A more plausible explanation looks to the historical variation in the approaches which have been dominant (presumptions in favour at some times but not others); and looks, too, to the lack of evident dissemination in method across the individual lines of authority. The powerful inference is that such variation exists not because it is rational for it to do so, but because it has passed unnoticed.

The same conclusion must be reached of the diversity in approaches to applying the principles of the common law. Here, no less than elsewhere, there are profound differences in the torts at issue: negligence and nuisance. In particular, there is the important difference which centres on the extent to which negligence fixes its attention upon conduct in a way that contrasts with the orientation of nuisance around outcomes.[66] Moreover, these are

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64 An alternative but increasingly less popular explanation for breach of statutory duty maintains that breach of a statutory duty is simply evidence of negligence as defined at common law: see generally Buckley, 'Liability in Tort for Breach of Statutory Duty' (1984) 100 LQR 204; and Stanton, above n 18. This is a different point from the one Denning is making, above n 27 and associated text, where recourse to common law is justified in terms of the absence of a legislative intention; in a similar vein is Bramwell B, above n 34.

65 Todd, above n 63, 396. Recent developments somewhat qualify the extent to which the common law principles are 'familiar' in the sense of unadapted to the statutory, public law context, see above, n 53 and associated text.

66 This contrast is drawn by Steele, 'Private Law and the Environment: Nuisance in Context' (1995) 15 *Legal Studies* 236, 254. See further Chapter Two, n 73 and associated text.

differences which can be understood to carry serious implications for the intersection of tort and statute, suggesting, for example, that nuisance may have a greater coercive effect than negligence.[67] However, it is difficult to discern anything inherent in the respective tort settings which demands a pragmatic openness to a range of considerations relating to the statutory context in the one setting, in contrast to a more rigid upholding of unqualified common provision in the context of the other. As with the other differences in method described in this section, the more plausible explanation lies in the fragmented, isolated evolution of the various authorities, lacking any discernible dissemination of methodological thinking.

II Town Planning and the Defence of Statutory Authority

Such is the methodological diversity at the intersection of tort and statute that there is a danger of issues concerning substantive inconsistency seeming tame in comparison. Nevertheless, it is substantive consistency that is *demanded* by the doctrine of precedent, such that any question marks which hang over the substance of the law assume greater significance than any inconsistency in method. In assessing consistency in substance, the topical focus is on the intersection of nuisance and planning, and the adjacent areas of case law onto which authorities here open out.[68] This section considers town planning in relation to the defence of statutory authority. The section after compares nuisance and negligence for their accommodation the statutory context otherwise than as (per statutory authority) an absolute defence.

The trilogy of cases of *Gillingham Borough Council v Medway (Chatham) Dock Ltd*,[69] *Wheeler v JJ Saunders*[70] and *Hunter v Canary Wharf*[71] has attracted an insightful body of commentary, by far the most part of which is in agreement with the courts' rejection of the defendant's requests, in each instance, to confer upon planning consent the status of

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67 This point is explored further below, n 113 and associated text.

68 Principally, the defence of statutory authority and negligence in the exercise of statutory powers. Breach of statutory duty - a valuable backdrop in the context of method - is hereafter put to one side.

69 Above n 57.

70 Above n 59.

71 Id.

statutory authority.[72] That this is the correct outcome in terms of both law and policy is surely no longer in doubt, and there is little to be gained by expanding on the three contrasting factual scenarios in which this outcome has been arrived at. Clearly, the courts' rejection of the defence of statutory authority in this context is now based a broad spectrum of relevant planning decisions, ranging from a decision relating to a development proposal small in scale and of a local character, as in *Wheeler*,[73] to decisions relating to proposals on a grander scale, of wider community interest, decided through procedures, for example, involving a public inquiry, as in *Gillingham*,[74] or against the background of statutory duties of regeneration, as in *Hunter*.[75] What does merit closer attention, however, is the reasoning underpinning these authorities.[76] It will be argued that they misrepresent the law relating to the defence of statutory authority and, in so doing, lay down precedents which risk undermining the wider integrity of the law. In particular, they ignore a profound ambivalence within the law in circumstances where the statute in question confers not duties but powers. Fundamentally, they give the impression that law on this point is more straightforward and settled than it in fact is.

Competing Goals: Protecting Private Rights and Statutory Powers

At the root of the courts ambivalence is the need to adjudicate between competing goals of, on the one hand, protecting private rights and, on the other, refraining from allowing private

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72 See for example Steele and Jewell, 'Nuisance and Planning' (1993) 56 MLR 568; Steele, 'Private Rights and Planning Consent', above n 62; Ball, 'Nuisance and Planning Permission' (1995) 7 JEL 290; English, 'A Spot of Nuisance in the Docklands' (1996) 59 MLR 726; Steele, 'Being There is not Enough - The House of Lords Puts the Brakes on Nuisance in the Home' (1997) 9 JEL 345.

73 Which involved planning consent for the extension of the defendant's piggery.

74 Which involved the redevelopment of a disused naval dockyard for purposes of a commercial dock.

75 Consent in that case concerned the redevelopment of the London Docklands, and took place against the backdrop of statutory duties on the part of the London Docklands Development Corporation - the local planning authority - to regenerate the area.

76 In particular, the reasoning underpinning *Gillingham* and *Wheeler*, for the judgment of the Court of Appeal in *Hunter* adds little or nothing to the jurisprudence of these earlier cases.

rights to be evoked so as to fetter a public authority's statutory powers. The difference in emphasis of Rosalind English,[77] and John Fleming,[78] provides a useful academic backdrop to the tension which the courts are faced with here. The remarks of English arise in connection with her comment on the Court of Appeal's decision in *Hunter v Canary Wharf Ltd*, which is applauded by her so far as it concerns the refusal to bring planning consent within the ambit of the defence of statutory authority. What is most intriguing is that English goes as far as to justify *Hunter* in terms of nineteenth century authorities in which the protection of private property rights in the face of industrialisation and early welfare legislation is paramount.[79] Tensions arising from distinctive private and public law definitions of lawfulness are more apparent than real, she asserts.[80] Any signs that tort is regaining the status it enjoyed during the early years of mass industrialisation are, it seems, to be welcomed.

A considerably more circumspect line is taken by Fleming who, in an early edition of *Law of Torts*,[81] emphasised the circumstances in which tort should indeed defer to activities which take their authority from a statutory framework. Flemming drew attention to the critical importance of the precise nature of the powers conferred by the statute in question. Certain powers are appropriately 'qualified by the need to respect private rights except insofar as infringement is a demonstrably necessary consequence of doing what is authorised'. In other instances, for a power to be constrained in this way would be 'calculated to frustrate the legislative purpose'. In a passage of particular significance to the present concerns, Flemming argues that it 'would be highly impolitic to permit any person aggrieved by the execution of a planning decision within the powers of a statutory authority to challenge it in court for error of judgement or lack of foresight, for instance, let alone simply inflicting on him a nuisance'.[82]

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77 English, 'A Spot of Nuisance in the Docklands', above n 72.

78 Fleming, *The Law of Torts* (1983, 6th ed).

79 English, above n 77, 732.

80 Id. Risk theory is understood by her to provide the critical rationale for overlapping private and public law provision, giving expression to the sense of justice in an arrangement in which those who profit from an activity undertaken in the public interest compensate those who suffer 'special hardship'.

81 Above, n 78, 407-408.

82 Id, 408.

Ambivalence within the Defence of Statutory Authority

The difference in emphasis of English and Flemming mirrors an ambivalence within the case law concerning defence of statutory authority and, in particular, the defence as it concerns statutory powers. The contrasting authorities of *Metropolitan Asylum District v Hill*[83] and *Marriage v East Norfolk River Catchment Board*[84] illustrate this ambivalence. In so doing, they pave the way for a critical appreciation of the courts' treatment of the defence of statutory authority in the context of town planning.[85]

Strict Protection of Individual Rights: The Case of Hill

In *Hill* the plaintiff and a number of other residents of Hampstead sought an injunction against the use of a building owned by the defendants as hospital for the treatment of 'classes of poor' suffering from smallpox and other contagious diseases. At trial, it was found that the operation of the hospital did indeed amount to an actionable nuisance, notwithstanding the best efforts of the management, and notwithstanding too that it was agreed that the public benefits arising from the hospital, providing it was well managed, were greater than leaving the sick at large. The defendants sought, successfully, a retrial, against which the plaintiffs appealed. The defendants cross-appealed on the grounds that even if the hospital amounted to a nuisance in fact, the statutory framework in accordance with which the defendants built and operated the hospital raised the defence of statutory authority. The report of *Hill* refers to the House of Lords' hearing of this defence alone.

In refusing to apply the defence of statutory authority, all three judges proceeded on the basis that unless there was anything 'mandatory' or 'imperative' in the statutory framework which 'specified' ('ordered' or 'compelled') the building *and* operation of the

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83 (1881) 6 App Cas 193.

84 [1950] 1 QB 284.

85 This chapter does not offer a general account of the defence of statutory authority. Such an account would examine modern authorities against the backdrop of the many nineteenth century authorities concerning 'what kind or degree of statutory sanction is sufficient to justify the creation of a legal nuisance' (this is the definition of the problem which Lord Watson gives, in *Hill* above, n 83, 211). See further Linden, above n 7; and, for more recent case law, Kodilinye, 'The Statutory Authority Defence in Nuisance Actions' 19 *Anglo-American Law Review*, 72.

hospital in question, then it was to be inferred that Parliament had intended the powers to be exercised in strict conformity with private rights. Thus, whilst indeed the Metropolitan Poor Law Act 1867 empowered the Poor Law Board (later the Local Government Board) to designate the metropolis an asylum district and, under section 7, provided that 'there shall be an asylum or asylums as the Poor Law Board directs', a number of features of the statute were held to mitigate against this section or any other section of the Act conferring the necessary authority to commit a nuisance. The reasoning is revealing of the once often-levelled predilection on the part of the judiciary towards the common law.

Lord Selborne drew attention to the fact that although the language of section 7 is clearly mandatory, the precise nature of the asylum, or the class of poor to be admitted, is not specified.[86] Lord Selborne attributed further weight to the absence of powers to compulsorily purchase land for development as a hospital,[87] a point on which Lord Blackburn concurred:

> 'I am sensible of the great difficulty that there may be in finding sites for asylums under this Act...unless farther powers be given, but that must be for consideration of the Legislature'. [88]

In the face of doubts about whether it was indeed possible to operate a hospital for the treatment of contagious diseases in a densely populated area without creating a nuisance, Lord Watson was disposed to apply the defence 'provided it was either apparent or proved to the satisfaction of the Court that the directions of the Act could not be complied with *at all*, without creating a nuisance'.[89] However, in the absence of such demanding evidence, the defence would fail. Certainly, and crucially in light of the comparison with *Marriage*, below,

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86 An earlier section - section 5 - stated asylums 'may be provided under this Act for reception or relief of the sick, insane, or infirm, or other class or classes of the poor'. Lord Selborne's argument was that section 7 did not specifically mandate a hospital for purposes of treating contagious diseases: *Hill*, above n 83.

87 'The only sense in which the Legislature can be properly said to have authorized these things to be done is, that it has enabled the Poor Law Board to order, and the managers to do them, if, and when, and where, they can obtain by free bargain and contract the means of doing so': *Hill*, id, 201.

88 *Hill*, 209. In a similar vein in a sewage disposal context is *A-G v Birmingham Borough Council* (1858) 70 ER 220.

89 *Hill*, 212 (emphasis added).

it was not enough that to uphold private rights would substantially fetter the discretion of the Poor Law Board. Two final features of the statutory framework were attributed significance in all three of the Lords' speeches. First, the breadth of the statutory powers, both in terms of functions and geographical region to which they related.[90] Second, the absence of a clause compensating victims of injury in the exercise of the statutory powers.[91]

Criticisms of Hill

Setting his objections to *Hill* against the backdrop of 'the vast increase of public services',[92] William Friedmann, a legal academic, argued that the continued force of this authority represented a profound weakness in the law. For Friedmann, this authority exemplified better than any other the lamentable absence of any adaptation of private law in the face of parties exercising a social function pursuant to statutory powers. Friedmann argued that it should not matter whether that the defendant is exercising 'mere' powers rather than a duty. Rather, what should matter is the social function of the powers in question:

> 'Whether the statutory authority is imperative...or, on the other hand, is merely permissive...can no longer be regarded as the decisive test. The decisive test is whether the authorised act is of such public importance that it must be deemed to override private interests'.[93]

Few have echoed Friedmann on this point, and the overwhelming tendency has been to support the strict protection of private rights provided in *Hill*.[94] However, what is particularly intriguing about Friedmann's account is the extent to which he is alive to the

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90 Case law in which the defence had hitherto been successfully applied tended to relate to powers narrower on each count: notably *Brand*, above n 34.

91 *Brand* again, above n 34.

92 Friedmann, 'Statutory Powers and Duties of Local Authorities' (1945) 8 MLR 31, ('augmented by the war-time responsibilities imposed upon local authorities').

93 Id, 32.

94 The Law Commission, for example, has argued that the distinction between imperative and permissive legislation in this context should be abandoned in favour of a general (although rebuttable) presumption against statute conferring immunity from acts unlawful in terms of nuisance: Appendix A, *Law Commission Report No 32* (1970), 20-21.

implications which 'social change', broadly, carries in terms of the ambit of the defence of statutory authority. His criticisms of *Hill* reflect the sense in which a conception of the state and of the proper sphere of social services is in a constant state of evolution. That the 'permissive form in which even the most important powers are now usually conferred, has nothing to do with the public interests at stake and should not, therefore, serve as a test for the extent of civil liabilities.'[95] Friedmann's view that change here 'considerably affects the validity' of *Hill* provides an interesting contrast to that of English, for whom continuity with the nineteenth century authority is a sign of law's strength rather than a weakness.[96] Friedmann's comments are also of significance as a precursor to the case of *Marriage*, decided shortly after, in which the ambit of *Hill* was defined narrowly.

Protecting a Public Body's Discretion: The Case of Marriage

If *Hill* continues to be good authority, nevertheless its application has not remained entirely unqualified. On the contrary, the Court of Appeal in *Marriage v East Norfolk River Catchment Board*,[97] which Flemming refers to in his remarks concerning nuisance and 'planning powers' above, goes some way towards limiting the ambit of *Hill* in this respect. The plaintiff in *Marriage* was a miller, who owned a mill which received water via a by-pass channel leading from a river within the catchment of the defendant board. In the course of dredging operations the defendants deposited spoil on one side of the river bank, blocking the normal flood course of the river, and diverting flood water into the channel servicing the plaintiff's mill. During a storm, flooding caused a bridge belonging to the plaintiff to collapse. At trial the defendants pleaded the defence of statutory authority. It was argued that the Land Drainage Act 1930 in accordance with which the dredging was undertaken did not give rise to the presumption in favour of private rights which the statute did in *Hill*. True, the defendant possessed only powers to do the work leading to damage - the statute was in this sense 'permissive' and not 'mandatory'. However, it was necessary for the law to differentiate the precise powers at issue, having regard all the while to the importance, in

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95 Above n 92, 40.

96 Id, 37. Friedmann considered that the outcome in Hill would have been different had it have been decided in the 1940s. The possibility that *Hill* was a controversial decision 'in its own time' should not however be overlooked: cf *London, Brighton and South Coast Railway v Truman* (1885) 11 App Cas 45.

97 [1950] 1 KB 284.

policy terms, of not fettering the discretion of the board. In particular, the importance of not transferring to the courts day-to-day decisions as to how the board's powers are exercised in the event of 'private' objections. The Court of Appeal upheld Mr Justice Byrne's ruling in favour of the defendants.

The precise grounds on which *Marriage* was distinguished from *Hill* are of less interest, here, than the wider policy concerns which the judgment gives expression to. It would have been easy for the court to have distinguished *Hill* simply on the basis that the relevant statute there did not provide (as did the statute in *Marriage*) a mechanism for persons injured by the exercise of powers to be compensated. In the end, the elaborate reasoning by which the court explained the distinctive nature of the respective statutory powers appears a little artificial.[98] However, what *is* clear is that the following policy considerations were all weighed in by the Court of Appeal in support of the defendants' submissions: the social function being provided by the defendants;[99] the competence of the defendants as an expert body acting in the public interest;[100] and the danger of rendering nugatory statutory powers by an excessive private law fettering of the defendants' discretion.[101] Similar policy arguments on behalf of the defendants in *Hill*, impassioned by the altogether more direct prospect of the objectives of the Act being frustrated there, met with a far cooler response. *Hill* held that if the statute did not explicitly license the nuisance complained of, the defendants must appeal to Parliament for the authority to be made explicit.[102]

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98 It is not clear whether it is the breadth of the powers of the catchment board; the detail in terms of which the powers are expressed; the inevitability of occasional interference with private rights if the powers are to be exercised to the full; or the fact that the board also has general duties in respect of drainage that are most important. The best interpretation is that it is all of these features taken together. Yet whilst this may well serve to distinguish *Hill* on the basis that the statute in that case is concerned only with the execution of some particular work or undertaking (which is itself doubtful given that the House of Lords understood the powers in *Hill* to be of immense breadth, in combination with elements of duty regarding the relationship between the executive and the defendants), it is not clear why this distinction should have significance for actionability in private law.

99 *Marriage*, id, 298 (per Singleton LJ).

100 Id, 292 (per Tucker LJ).

101 Id, 308 (per Jenkins LJ).

102 Above, n 83 and associated text.

Application of *Hill* and *Marriage* to Town Planning

There is little ground for suggesting that the outcome of the nuisance and planning authorities turns on the failure of the court to be invited to consider the relevance of *Marriage*. True, Buckley J in *Gillingham* did indeed express many of the policy concerns that are evident in *Marriage*.[103] Moreover, the statutory framework at issue in *Hunter* is one in which the powers of the urban regeneration agency are acknowledged to be unusually extensive in town planning terms, especially as they include a positive obligation to secure regeneration in the neighbourhood.[104] However, there are strong grounds for maintaining that the nature of the statutory powers in the context of planning resemble more those of *Hill* than *Marriage*.[105]

It is in their reasoning that *Gillingham*, *Wheeler* and *Hunter* merit being taken issue with. The fundamental message of *Marriage* is that whether or not a statute confers immunity in respect of a nuisance action is dependent upon the precise nature of the powers in question. Yet authorities in the context of planning and nuisance proceed on the basis that the 'permissive' nature of the statutory framework tends necessarily towards the defence not applying.[106] If the roots of this 'oversight' lie elsewhere,[107] nevertheless, it is disappointing to discover that what is openly acknowledged as an issue of far reaching significance is being assessed in terms of an overly narrow rendering of the case law on the subject.

Even if the tensions arising at the intersection of nuisance and statute are indeed more apparent than real in the context of town planning, it does not follow that *Marriage* is to be confined to the rubbish heap of inflated early post war anxieties about the prospect of welfare being impeded by the over-zealous protection of individual rights. *Marriage* need not be understood as an isolated case, or indeed a case of its time. On the contrary, it is better appreciated as a reflection of concerns which have their roots in the same period as

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103 See above n 58.

104 *Hunter*, above n 59, 359.

105 Not least of which is the absence of statutory avenues of compensation.

106 Particularly significant in this regard is Peter Gibson LJ's reference to the 'permissive grant of planning permission', *Wheeler*, above n 59, at 480.

107 *Allen*, above n 39.

Hill, and continue to have currency today.[108] The courts have had profound difficulty in arriving at a consistent stance at the intersection of nuisance and statutory powers. It is a shortcoming of recent appellate authorities in the context of nuisance and planning that they downplay this difficulty, articulating a presumption in favour of individual rights in rather stronger language than the case law dictates or, indeed, *allows*.

III Comparison of Nuisance and Negligence in the Context of Statutory Powers

The ambivalence within the law relating to statutory authority reflects wider ambivalence in the law at the intersection of tort and statute. This section will illustrate this wider ambivalence with reference to a comparison between nuisance and negligence in the context of statutory powers. It will be argued that case law in the particular context of nuisance and planning is at odds with that in the context of negligence in the exercise of statutory powers. What is fundamentally lacking is a framework of general principle within which to adjudicate tort actions in the shadow of statute.

To reiterate the point made above,[109] nuisance makes little or no concession to statutory context other than by means of the defence of statutory authority: either the courts uphold the orthodox protection of individual rights or, where statute is understood to authorise the interference complained of, withdraw common law protection altogether. There is an all-or-nothing character to nuisance doctrine which contrasts with the great lengths to which the courts have gone in the field of negligence to *accommodate* issues arising from the relevance of the defendant acting in accordance with statutory powers.[110] The question here is, at its broadest, whether the diversity of 'principles' at the intersection of tort and statute amounts to inconsistency. In particular, whether it is consistent that differing significance is attached in adjacent tort settings to considerations of justiciability; and differing implications attached to *prima facie* validity in terms of public law.

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108 Compare *Hill* and *Truman*, above n 96, consistency here being doubted by Lord Denning MR in *Allen v Gulf Oil Refining* [1979] 3 All ER 1008.

109 See the subsection 'Nuisance in the Context of Statutory Powers'.

110 This is not to detract from the relevance of statute to the definition of actionable damage, as in *Cambridge Water v Eastern Counties Leather plc* [1994] 2 AC 264, noted in Chapter One, n 3.

It is easy to anticipate that where tort fixes its attention upon outcomes rather than conduct, this will affect the issues arising at its intersection with statute.[111] This is particularly true of issues of competence or expertise on the part of the court relative to specialist public authorities, which appear more pronounced when the action is one centring around the reasonableness of acts or decisions giving rise to damage (negligence), than when the action is fundamentally one of the reasonableness of the damage - or the tolerance to be expected of the damage - arising (nuisance).[112] But there is another aspect to justiciability, which concerns notions of sovereignty constitutionally speaking. The characterisation of nuisance in terms of its being 'coercive' is particularly valuable in this respect,[113] capturing as it does the problematic implications of a constitutional nature bound up with an arrangement in which individual rights protected by the common law override outcomes authorised by the executive, in keeping with the authority of Parliament. In this sense, at least, nuisance carries implications relating to justiciability which are equally striking as those carried by negligence in the context of competence, defined in terms of expertise.

Meanwhile, to find that liability in negligence is conditional on illegality in public law but liability in nuisance is not gives rise to issues of inconsistency of its own.[114] It may be contemplated that the contrast here once again has its foundation in the differing significance assumed by considerations of reasonableness across the two torts. However, the thinking underlying negligence case law on this point appears to have little to do with reasonableness, at least not in the sense referred to in the context of justiciability, above. Rather, the thinking underlying the subordination of private to public law in this context is based upon the assumption that it is wrong for obligations to be imposed in the exercise of statutory power that are more stringent than those imposed by public law.[115] It is acutely difficult to appreciate how this assumption is founded upon considerations which are

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111 A contrast which is articulated by Steele, above n 66.

112 The difficulty in the duty of care context is with the technical expertise and/or political judgement that will typically be demanded in any assessment of the reasonableness of a 'regulatory' decision: *Yuen Kun Yeu* and *Rowling v Takaro*, above n 47.

113 Steele, above n 66.

114 *Wheeler*, above n 59, 483, this being a reference to the dictum of Sir John May.

115 *Stovin v Wise*, above n 50, Lord Nichols, 810-812. Lord Nichols was happy to uphold a duty of care here precisely because he understood that 'a concurrent common law duty would not impose on the council any greater obligation to act than the obligation already imposed by its public law duties' (812).

peculiar to negligence. On the contrary, it is surely equally applicable to all settings in which private and public law intersect.

The comparison on this point is complicated by the uncertainty that surrounds invalidity in terms of public law as a precondition for liability in negligence of a general character. In *X v Bedfordshire CC* it was considered neither helpful or necessary 'to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence'.[116] The authority for the contrasting stance in *Stovin v Wise* is thus unclear. Remarks of Lord Diplock in *Anns* may be taken to have been particularly influential in that case.[117] Even so, Lord Browne-Wilkinson's emphasis upon the autonomy of private and public law accords better with other dicta in *Anns*. Furthermore, the force of *Stovin v Wise* is not enhanced by the Lords' failure, there, to address Lord Browne-Wilkinson's contrasting dictum.

However, this grey area does not alter the sense in which nuisance and negligence are pointing in opposing directions. In according little relevance to statutory context, nuisance contrasts with negligence no matter whether traditional pragmatism or a novel formalism is held to prevail. Nuisance quite simply fails to tailor its doctrine to the specific challenges arising in a statutory context, unless, and rather implausibly, the neighbourhood device is viewed as an adaptation, rather than a straightforward application, of principles which reflect private law concerns.[118] The US approach to accommodating nuisance and statutory powers may have more to offer than is presently being contemplated.[119] The courts there are open to evidence of 'municipal thought and opinion' which can be gleaned from decisions of public authorities, and are willing to factor this evidence into questions of actionability.[120] Whereas the locality test as brought to bear in the domestic context goes some way towards a similar accommodation, the fact that it is not a test which is devised for

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116 *X v Bedfordshire CC*, per Lord Browne-Wilkinson, above n 49 at 736.

117 Quoted in *X v Bedfordshire CC* at 737.

118 The implausibility of this position is touched on above, n 62 and associated text.

119 The US approach is criticised by Penner, 'Nuisance and the Character of the Neighbourhood' (1993) 5 JEL 1.

120 *Appeal of Perrin* (1931) 305 Pa 42, 156 A 305. Similarly *Weltshe v Graf* (1948), 323 Mass 498, 500, 82 NE 2d 795; and *Commerce Oil Refining Corp v Miner* (1960) 281 F 2d 465. These cases are noted in Linden, 'Strict Liability, Nuisance and Legislative Authorization', above n 7, 213-214.

that purpose is a shortcoming which is revealed in its application depending, arbitrarily, on the type of interference complained of.[121]

Consistency with negligence may come at too high a price, however, if the US route is to be the preferred means of rationalising the principal torts in the context of statutory powers. Whilst the coercive character of English nuisance doctrine clearly entails considerable scope for tension between private and public law, it must also be contemplated that this tension is more benign than malignant - vital to the function of law in a society in which confidence in forward planning by specialist statutory bodies is declining.[122] Be that as it may, there is no escaping the fundamental weakness of case law in this context: its failure to confront these issues head on, and its concomitant failure to offer any rationalisation of what have been argued to be *prima facie* contradictions in the law. Nuisance and negligence are converging in some respects, but not others.[123] What is lacking is any explanation as to why this should be so.

IV Conclusion: Problems of the Courts' Making

Against those who would share Francis Bennion's view that the law at the intersection of tort and statute is sufficiently refined and settled as to justify codification, it must be concluded that there are significant points at which the law remains far from settled, and correspondingly significant scope for further refinement.

In summary, an examination of method discloses a striking array of radically different practices vying for dominance in relation to one another and, more serious still, contrasting methods being applied in relative isolation. This methodological pluralism takes

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121 In addition to damage of physical character as expressed in *St Helens Smelting*, above n 62, the character of the neighbourhood is thought to have no relevance too to interferences with a riparian entitlement to purity: see Ball, 'Nuisance and Planning Permission', above n 72.

122 Steele, 'Assessing the Past: Tort Law and Environmental Risk', in Jewell and Steele (eds), *Law in Environmental Decision-Making* (forthcoming).

123 See, for example, the convergence of negligence and nuisance signalled in respect of reasonable foreseeability: *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264. However, it should also be noted that there is a converse drift in the case law towards emphasising the distinctive identity of nuisance in relation to negligence in, for example, the context of standing to sue: *Hunter v Canary Wharf* (unreported, 24 April 1997, House of Lords). See further Steele, 'Being There is Not Enough - The House of Lords Puts the Brakes on Nuisance in the Home', above n 72.

its toll upon the substance of the law. Authorities concerning negligence in the exercise of statutory powers reveal deep rooted difficulty in arriving at a satisfactory framework of principle. The latest alignment of public and private law appears particularly unsatisfactory, at least as a general principle. The position is problematic too with respect to nuisance. The defence of statutory authority continues to be subject to a fundamental ambivalence concerning statutory powers, and its application is made no more predictable by the recent tendency to overlook ambivalence here altogether. Meanwhile, the ambit of the tort of breach of statutory duty is both contracting in the refusal of the courts to hold statutory duties actionable,[124] at the same time as it is expanding in the evidence of willingness on the part of the courts to determine negligence in the exercise of statutory powers in accordance with principles traditionally associated with statutory duties.[125]

This chapter has touched only upon issues of *liability* at the intersection of tort and statute. Issues of procedure and remedy have been bracketed-off which, though crucial to a comprehensive picture, are appropriately sacrificed for purposes of a manageable focus. Even so, it is apparent that the subject is of considerable breadth and complexity, reinforcing a conclusion of the previous chapter. Whether the tensions at the intersection of various tort and statutory settings are more apparent than real is ultimately an empirical question. Whilst there is indeed scope for conceiving a standpoint from which private law 'outcomes' overriding those sanctioned by public law can be reconciled, equally there are standpoints from which such an arrangement is highly problematic. However, the most striking shortcoming of case law discussed here is the casualness with which these problem areas are skirted around in certain settings, in contrast to the profound sensitivity towards them in others. The upshot is a broad body of law of which it is difficult to discern underlying consistency in its constitutive strands.

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124 For example *X v Bedfordshire CC*, above 49.

125 Above, n 51 and 52.

Postscript
Case Law Concerning Nuisance and Discharge Consent

There is no direct authority concerning the impact upon a nuisance action of the defendant exercising powers pursuant to discharge content. A number of issues are therefore open, the most basic of which include that of whether consent in this context constitutes an application of the defence of statutory authority; whether, in the alternative, it has significance in terms of actionability analogous to the significance of consent in the context of town planning; or whether it is altogether irrelevant. This postscript examines these issues, having particular regard to two county court judgments on the point: *Cook v South West Water plc*[1] and *Hughes v Welsh Water plc*.[2] Whilst not the appropriate subject of an analysis of precedent, the county court judgments concerning the relationship between nuisance and discharge consent are nevertheless a useful bridge between case law at the intersection of tort and regulatory law, and legislative history in and around the sphere.

Before considering the judgments in question, some general remarks are in order concerning the way in which the issues raised immediately above might reasonably be approached by the courts. Thus, it is significant that there are clear difficulties in the way of interpreting discharge consent as constitutive of statutory authority, the more obvious of which are apparent by way of analogy with authorities in the context of private rights and planning permission: notably, the sense in which any authority here is indirect, mediated, as it is in the case of planning, by a regulatory authority. Yet if the courts are to follow *Allen*, *Gillingham*, *Wheeler* and *Hunter* (above) in refusing to accept a defendant's arguments that compliance with 'administrative consent' which is lawful in the language of public law amounts to statutory authorisation, there are also difficulties in the way of any straightforward application of the locality test, as a device for accommodating the *relevance* of a consent to the assessment of actionability.[3] In particular, it is difficult to see how a pollution permit can change 'the character of the neighbourhood' in the way that is understood of planning consent; the locality test has little relevance to cases involving interference with riparian rights where the harm is characterised as 'physical'; and, with particular reference to Buckley J's policy justification for the neighbourhood device, namely,

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1 Unreported, Exeter County Court, 15 April 1992.

2 Unreported, Llangefni County Court, 21 June 1995.

3 Difficulties which are usefully noted elsewhere: Simon Ball, 'Nuisance and Planning Permission' (1995) 7 JEL 290, 291.

the importance of giving effect to the balancing of conflicting private and public interests undertaken by a specialist and accountable authority, 'if anything private interests are accorded less weight in pollution decisions than in planning decisions'.[4] Thus, there is a strong sense in which either the grant of a discharge consent is to be entirely irrelevant to the actionability of a discharge in compliance; or a modification of the current test for relevance is required. Provided always, that is, that discharge consent - like planning consent - will be treated as not constituting an application of the defence of statutory authority.

The proviso that discharge consent is not treated as an application of the defence of statutory authority is not without problems, at least as far as the judgment in *Hughes* is concerned. The court there held that compliance with a discharge consent did indeed give rise to the application of this defence and, in so doing, reinforces a number of the features of the case law addressed in the foregoing chapter. In particular, the sense of ambivalence among the courts as to the nuisance law significance of statutory powers and, more importantly still, the unfortunate willingness of the courts to determine issues at the intersection of tort and statute without regard to a full range of authorities of relevance. Certainly, it is striking that the dictum of Cumming-Bruce LJ relating to planning consent in the court of appeal in *Allen* is ignored in *Hughes*, and even more so the neglect of *Gillingham*. It is as if the application of the defence of statutory authority is not influenced by legal principle emanating from adjacent authorities.

The judgment in *Hughes* is all the more surprising for its extension of immunity conferred by the defence of statutory authority so as to encompass a component of the defendant's discharge not explicitly provided for on the face of the consent, namely, phosphate. Given that the judge in this case appears to have taken very seriously the costs to the defendant of introducing phosphate stripping equipment, and indeed the wider costs to the sewage disposal industry of consent *not* providing immunity to sewage undertakers from liability in respect of the consequence of phosphate-rich discharges, there is a strong sense in which the defence of statutory authority is being applied in *Hughes* in order to give effect to policy concerns. Whatever other merits or demerits of the judgment, the upshot is a highly significant blurring of the reasoning underpinning the defence of statutory authority, traditionally associated as it is with giving effect to the will of Parliament, and not to the courts view as to the appropriate balance of competing interests.

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[4] Id. The relationship between issues of accountability public law style and the continued private law protection of riparian rights is addressed in Chapter Five, from the standpoint of legislative history.

The case of *Cook* had earlier left open the nuisance law implications of elements of a discharge *explicitly* consented, the case being decided on the basis that the injurious component of the discharge in that instance was not explicitly provided for and, as such could not be brought within the defence of statutory authority. In addition to playing its part in reflecting a wider judicial ambivalence on the subject of statutory authority, *Cook* is also significant as an illustration of the range of opportunities for raising the defence of statutory authority which the regulatory framework in this context offers. In particular, the possible relevance to actionability of the watercourse in question being at all material times in compliance with river quality objectives (RQOs) set by the National Water Council, and monitored by the National Rivers Authority (NRA).[5] It is interesting that the judge avoided addressing this issue, arguing that although the NRA had found the watercourse to be in compliance with the RQO 1B, the fact that the plaintiff proved that surfactants from the defendants sewage treatment works had caused a 'defacing [of] the beauty of the river' was sufficient to contradict the NRA record of compliance.[6]

Indeed, it is for their facts as much as the court's reasoning that *Cook* and *Hughes* deserve attention. At a most basic level they illustrate the sense in which the case law considered in the previous chapter involving nuisance and planning opens out onto a broader terrain. They illustrate too the far reaching implications of the answer to the question of statutory authority, at least in the absence of any more 'pragmatic' test for taking each case in which tort and statute intersect on its own merits. In *Cook* there is also an especially good illustration of the attraction of tort in the eyes of an individual frustrated by public law avenues of accountability of an *ex ante* nature. On the eve of privatisation, the then public sewage undertaker applied to the 'regulatory' wing of the public authority to increase the maximum consented daily discharge of sewage from 1,811 to 4,155 cubic metres. Mr Cook had objected, citing the impact upon the watercourse of such a substantial relaxation in terms of control. Although unsuccessful, Cook was later able to bring private proceedings claiming damages for the injurious effect of the discharge which he had anticipated. Had he have successfully applied to the court for an injunction, he would have arrived by means of private law at the position he had earlier sought by means of procedures of a public law character.

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5 The NRA was - pursuant to the Water Act 1989 - the competent authority in respect of rivers pollution regulation. Its functions have now been subsumed within the Environment Agency, under the Environment Act 1995.

6 The judge noted that RQO 1B required that physical evidence of pollution is absent.

Part Three
Legislative History

Chapter Four
Tort, Factory Safety and Chemical Pollution Regulation During the Industrial Revolution

Historical discussion of the origins of modern social regulation has tended to focus upon regulatory law to the exclusion of private, common law forms. Evolutionary or 'organic' accounts of nineteenth century government growth depict a piecemeal accumulation of expertise on the part of infant executive inspectorates, together with a gradual earning of the trust of the public in the emerging statutory forms in which inspectorates had their legislative foundation.[1] Critics of this explanatory framework argue that it denigrates the significant extent to which growth in government has been and continues to be guided by contemporary ideas of political theory:[2] less a process of incremental and *ad hoc* evolution, and rather more an outcome of an increasingly ascendant ideological bias towards welfare planning. Yet if historiography here differs in its emphasis upon evolution or design, it is largely singular in its disinterest in the opportunity which the emergence of social regulation offered contemporary 'law reformers' in debating the continuing relevance of private law fields of common law such as tort, upon which novel forms of regulation were being overlaid. In consequence, neither the implications of tort for the ideological character of regulation, nor the consolidation of nascent bureaucracies, is illuminated. Analysis unfolds in abstraction from any context which government growth may have in the common law.

There is one important exception to this otherwise blanket historiographical disengagement of social regulation from its context in tort, which this chapter aims to build upon. In Peter Bartrip and Sandra Burman's study of the background to the Workmen's Compensation Act 1897,[3] tort is depicted as occupying a pivotal role in the debate about emerging public law provision aiming both at the prevention of workplace accidents and the compensation of accident victims. Tort is not only perceived in narrowly instrumental terms as a means to both preventative and compensatory ends, complementing the objectives of contemporary regulatory law; tort also becomes politicised in the sense that the possession of rights is understood to be deeply implicated with configurations of socio-economic power.

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1 O MacDonagh, 'The Nineteenth-Century Revolution in Government: A Reappraisal' (1958) 1 *The Historical Journal* 52.

2 J Hart, 'Nineteenth-Century Social Reform: A Tory Interpretation of History' (1965) 31 *Past and Present* 39.

3 P Bartrip and S Burman, *The Wounded Soldiers of Industry* (1983).

Taking as the focus alkali legislation of the period 1863-1881, it will be argued here that the prominence accorded to tort in the sphere of occupational safety is rivalled at the very least in this adjacent regulatory setting and, as such, is not entirely exceptional. Indeed, from the earliest debate about the need for and form in which regulation of chemical pollution should be cast, the relevance of private nuisance is central to the legislative history. The magnitude of the debate is easily lost sight of owing to the fact that after the enactment of the Alkali Works etc Regulation Act 1881, the profile of tort within the discussion relating to legislative reform diminishes considerably. Nevertheless, in the intervening period, spanning two major parliamentary inquiries, encompassing five legislative proposals and four Acts, the relationship between the tort and statute is among the most contentious issues. Comparisons with what is already known of factories regulation will be drawn after the contours of the alkali debate have been elaborated. The chapter will conclude by exploring the implications of tort's importance to legislative history in these two settings in terms of traditional analytical frameworks for understanding government growth, in which tort is neglected.

I Alkali Regulation 1863-1881 and Private Nuisance

The initial Alkali Act of 1863 gave rise to concerns about the continued availability of remedies in tort. Whilst common law rights were explicitly saved by the Act of 1874,[4] there are indications that legislation here was perceived by residents in neighbourhoods affected by pollution as immunising regulated works from any civil liability. This is particularly clear from the evidence to the Royal Commission on Noxious Vapours[5] of the Chief Inspector of the Alkali Inspectorate, Angus Smith, in which it is stated that 'the act of inspection causes people to suppose there is no redress' in tort.[6] Also the evidence of Keates who, as an owner

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4 Alkali Act 1874, s.10; as re-enacted in the Alkali Works etc Regulation Act 1881, s.31. For a comprehensive account of legislation of this period see Ashby and Anderson, *The Politics of Clean Air* (1981). In broad summary, the Act of 1863 prescribed standards of dilution of hydrochloric acid gas emission - on pain of criminal sanctions - enforced by a new central inspectorate, namely, the Alkali Inspectorate. Acts of 1874, 1881 1906 built upon this initial foundation, introducing an important conduct standard (best practicable means) to add to the early emission limit, bring within the ambit of these regulatory standards additional gases and further processes.

5 Report of the Royal Commission on Noxious Vapours 1878, PP 34.

6 Dr R A Smith, id, Q.155.

of copper works outside of the ambit of the legislation, complained of 'victimisation' in the hands of plaintiffs believing that the Alkali Acts 'had given manufactures a sort of license...that it was useless to attack them, because they could produce certificates of their having complied [with the legislation which would immunise them from actionability]'.[7]

The extent of this perception of immunity is of historical importance. It is therefore unfortunate that the record on this point is unclear. Smith considered it a 'mistake' as to the correct position in law.[8] In a similar vein, Keates sought unsuccessfully to disabuse complainants of their 'popular prejudice' and 'misapprehension' concerning the legislative extinguishment of private rights.[9] Moreover, it was the practice of at least one of the Alkali Inspectorate when faced with complaints about damage to property arising from regulated works to send out letters stressing that common law rights of action were unaffected by the legislation.[10]

Certainly, the evidence of civil proceedings during this period is consistent with there being a widespread belief that the Alkali Acts had conferred immunity in respect of nuisance. In particular, there is no record of any nuisance action being brought by neighbouring residents against alkali manufacturers in the decade or so after the first statutory intervention in this sphere. Indeed, in a contemporary 'study' of nuisance proceedings brought before the Lancashire County Court between 1866 and 1876, all forty-four actions were directed against copper smelting facilities, with the one exception of an action involving an alkali works which was brought by an owner of a copper works claiming a right of contribution.[11]

This evidence carries significant implications in terms of existing accounts of the origins of alkali regulation: accounts which, in their neglect of the common law, proceed on the basis that private nuisance had no relevance to the evolution of public policy and law in this field. Indeed, support for this assumption is provided not only by the evidence above. It

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7 William Keates, id, Q.3214.

8 Smith, above n 6.

9 Keates, above n 7.

10 A letter of Inspector Fletcher to this effect is presented in the evidence of J Hallows, Royal Commission, above n 5, Q.2112.

11 Discussed in the evidence of D Gamble (the chairman of the legislative committee of the Alkali Manufacturers Association), Royal Commission, above n 5, Q.4919-4933; 5220-5221.

is further reinforced by an early memorandum of the Office of Parliamentary Council in which it was anticipated that the principal objection to the initial legislative proposal would lie in its effect upon private rights: 'In effect this Bill is a Legalisation of a Nuisance, for it is impossible to contend that a manufacturer can be declared to be a Nuisance at Common Law when it is placed by Act of Parliament under the Special Control of Government Inspectors, and submits to their Regulations'.[12]

However, whilst it would be wrong to dismiss this evidence as representing a peripheral concern, nevertheless, it would be misleading to elevate its importance above what is clearly a more prominent and sustained controversy involving nuisance and alkali regulation during this period, which unfolded on the assumption that two 'systems' coexisted. Thus the main debate, which centred not upon whether tort remedies should continue to be available, but rather whether they should be strengthened in the light of the challenges to their efficacy arising from the scale of industrialisation. The purpose in what follows is to elaborate upon this debate. On the one hand is a diverse array of proposals for better facilitating tort actions. In particular, better facility in circumstances where nuisance arose from an aggregation of individually and collectively polluting works. On the other hand is the largely successful resistance to such proposals on the part of industry. It is a controversy which repays closer scrutiny, not only for its historical importance, but also for its relevance to issues of civil liability which are among those that are most pressing today, over a century later.[13] Before addressing the radical but ultimately unsuccessful proposals for reform, it appropriate to outline the rather more modest reform which was enacted.

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12 Office of Parliamentary Counsel, Alkali Act - Bills and Memoranda 1863. The Office of Parliamentary Counsel appreciated that this criticism was double-edged in that the prospect of immunity from nuisance would encourage support among manufactures for the Bill:

> 'This Scheme of Government Inspection is welcomed rather than opposed by the *great* Manufacturers. It protects them from external interference, it legalises their Manufactures, and imposes no additional expense on them, as already they have adopted the...apparatus' necessary to comply with the emission standard prescribed. (id)

That which industry most feared was not public regulation, rather, extension in civil liability which would 'take away the protection of Government Inspection, and leave them exposed to Attack from the Public'.

13 For a discussion of which see Teubner, 'The Invisible Cupola: From Causal to Collective Attribution in Ecological Liability', in Teubner, Farmer and Murphy (eds), *Environmental Law and Ecological Responsibility: The Concept and*

'Contributory Nuisance' under the 1881 Act

The statutory outcome of the debate concerning tort reform is reflected in section 28 of the Alkali Works etc Regulation Act 1881, a provision which is represented in its marginal note as 'Actions in case of contributory nuisance'.[14] The thinking underlying this reform is apparent when the official record of parliamentary statements is read alongside the relevant memoranda of the Office of Parliamentary Counsel, in particular, memoranda of 1875[15] and 1881.[16] What record there is of correspondence involving the relevant supervisory Government ministry, the Ministry of Health, is unilluminating in this respect.[17]

Practice of Ecological Self-Organisation (1994); and Steele, 'Remedies and Remediation: Foundational Issues in Environmental Liability' (1995) 58 MLR 615.

14 S 28 provided as follows:

> **Actions in case of contributory nuisance**
> 'Where a nuisance arising from any noxious or offensive gas or gases is wholly or partially caused by the acts or defaults of several persons, any person injured by such nuisance may proceed against any one or more of such persons, and may recover damages from each person made a defendant in proportion to the extent of the contribution of such defendant to the nuisance, notwithstanding that the act or default would not separately have caused a nuisance. This section shall not apply to any defendant who can produce a certificate from the chief inspector that in the works of such defendant the requirements of this Act have been complied with and were complied with when the nuisance arose'.

There is no record of this section being invoked in nuisance proceedings before the courts. However, this is to suggest nothing of its practical impact in terms of, say, out of court settlements (about which no evidence has been obtained).

15 Office of Parliamentary Counsel Miscellaneous 1875, 'Affirmation of law of nuisance to works emitting acid gases'.

16 Office of Parliamentary Counsel Miscellaneous 1906, 'Note on Clause 25 of the Alkali etc Works Regulation Bill' 30 April 1881.

17 Within the Public Record Office files MH16/1 and MH16/2, there is enough evidence for a profile of the tone of the relationship between the Chief Inspector and the Ministry. This is explored to good effect in MacLeod, 'The Alkali Administration 1863-1884: The Emergence of the Civil Scientist' (1965) 9 *Victorian Studies* 85. However, whilst there is a voluminous correspondence concerning numerous individual allegations of particularly acute chemical nuisance, the adequacy and reform of existing avenues of civil redress is barely touched on. Other documentary evidence which is considered in this chapter suggests that this is *not* for want of controversy.

It is no surprise to discover that the debate about tort reform in this context did not unfold in a vacuum. On the contrary, developments of a general nature were taking place relating to the procedures for bringing an action which offered considerable relevance to the problem of multi-party causation being identified with respect to alkali works pollution. Indeed, this is the thinking underlying the 'first part' of the 'contributory nuisance section', which is described in the Office of Parliamentary Counsel memorandum of 1881 as giving explicit force to the introduction of joint liability under the Supreme Court Judicature Act 1875.[18]

The second part of section 28 is similarly grounded in innovation further afield. In this instance, the analogous provision is section 255 of the Public Health Act 1875, which enabled local authorities to abate nuisances arising from the cumulative effect of a number of individual sources, and to recover the costs of doing so from the parties involved in such proportions as the court considered 'fair and reasonable'. Viewed from this perspective, the significance of s.28 is to extend the permissible scope of judicial apportionment of liability beyond its original context in remedies of abatement and indictments in respect of public nuisance, and into the context of remedies of damages and nuisance actions of a private nature.

The mischief behind the extension of the ambit of the Public Health Act 1875 to encompass private rights in a chemical pollution context is illuminated by the relevant Office of Parliamentary Counsel (OPC) memoranda. It is particularly intriguing to discover that the reform effected by the extension of the Act is couched in terms of rhetoric of a radical nature. In the memorandum of 1875, the OPC recommends the reversal of a 'rule of evidence' recently upheld by the courts, whereby the defendant can escape liability 'if he can prove that his trade is conducted in a neighbourhood where there is already established other alkali works or works equally noxious and that the noxious vapours are not perceptibly increased by the alleged nuisance'.

> 'This rule of evidence creates the absurd result that no nuisance can be proved to exist in a place where the greatest number of nuisances really exist and that although a person may have a remedy against one alkali work, he has no remedy where there are ten alkali works causing ten times the damage. This rule enables the

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18 SCJA 1875, together with the rules of court annexed. This was applied to alkali nuisance in a case which the memorandum (of 1881, above n 16) cites as *Chappel v Russell and Other*, 'tried before Lush J and a special jury at Newcastle in 1880.'

> law to be set at nought with impunity in these places where it ought to be enforced with the greatest stringency'. [19]

The 1881 memorandum acknowledges the continuing relevance of this criticism, in observing that the provision of joint liability under the SCJA 1875 leaves this 'rule of evidence' untouched. Whilst defendants can be joined under the new rules of court, nevertheless, the law 'still does not recognise a collective tort made up of acts of defaults none of which separately would have amounted to a tort'. On the contrary, in the absence of further reform it 'would seem that it must be proved against [the defendant]...that he has committed an act which would have done some damage if his works had stood alone'. Section 28 is intended to rectify this lacuna using 'words [which] in effect create a collective tort'.[20]

The final part of section 28 is clearly a concession to the manufacturing lobby. Manufacturers' resistance to 'contributory nuisance' had deep roots. It was the hostility of manufacturing interests to an earlier Bill of 1879 on the basis of the collective liability clause it contained which was instrumental in the Bill's failure.[21] And whilst the introduction of the 'certificate of compliance' qualification post-dates the OPC memoranda, it is nevertheless apparent that the contentiousness of tort law reform was foreseen. This is evident from the reference in the memorandum of 1881 to opposition 'certain to be encountered in Parliament'. Equally:

> 'the very great importance [which] is attached to a provision for enforcing the joint liability of manufactures by those who live in the neighbourhood of alkali works, and the absolute necessity of introducing a clause for that purpose [which] has been strongly urged on the late as well as the present President of the Local Government

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19 Above n 15. The relevant case is unspecified.

20 'Cumulative liability' is another characterisation of s.28, which is offered by Viscount Middleton during the second reading of the Bill in the House of Lords, 15 February 1881, col 870.

21 Noxious Gases Bill No 123, 7 April 1879. The Second Reading in the House of Commons was opposed by Sir H James, who singled out the contributory nuisance clause of particular concern (May 16 1879, col 644). The Bill was withdrawn shortly after 'owing to the opposition' of the manufacturing interests (Sclater-Booth, 28 July 1879, col 1406)

Board by Derby and a large and influential deputation of landowners and others from those localities'. [22]

In the event, the clause attracted considerable opposition even in its amended form. Most forthright in this respect was Commins (MP for Roscommon), who in anticipation of what is popularly known today as a 'deep pockets' approach to liability, spoke out against the prospect of it being not the 'persons who created the nuisance who suffered, but the person who was best able to pay'. [23]

Visions of Collective Liability

The references to 'collective liability' in *Hansard* and the records of the Office of Parliamentary Counsel arguably overstate the degree of innovation brought about by section 28 of the 1881 Act. Given that this section is emphatic in its requirement that liability is proportionate to a defendant's contribution to the subject matter of the nuisance, the characterisation in the marginal note of 'contributory nuisance' is surely more apt. Moreover, the 'certificate of compliance' qualification to the clause added in the Committee stage of the House of Commons appears potentially far reaching. This is particularly so in light of the Alkali Inspectorate itself openly acknowledging that compliance with the terms of the statute offered no guarantee against damage arising from an individual work, let alone an agglomeration of large works in close proximity. [24]

The modesty of the reform is given further relief by the comparatively radical proposals for adapting nuisance to industrialisation put before the House of Lords Select Committee[25] and Royal Commission[26] inquiries into chemical pollution of this period. Whilst these proposals ultimately proved unacceptable to the majority of members of the respective

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22 The submissions of Viscount Middleton (Second reading, 15 February 1881, col 870), the Marquis of Salisbury (Committee, 8 March 1881, col 538) and the Earl of Derby (id, cols 538-39) illustrate well the importance that was attributed to tort law reform in the House of Lords.

23 House of Commons, Committee, June 2 1881, cols 1973-1974.

24 See below, n 52 and 53 as associated text.

25 Report of the House of Lords Select Committee on Noxious Vapours 1862 PP 14.

26 Royal Commission on Noxious Vapours, above n 5.

parliamentary inquiries,[27] nevertheless, in their visions of innovation in the administration of tort, risk pooling and corporate liability, it will be seen that these proposals enjoyed significant support among the parties giving evidence. Furthermore, it is a reflection of their salience that they foreshadow many of the developments in the field of private remedies and public remediation which are attracting controversy today.[28]

The proposal of greatest interest emanating from the inquiry of 1862 is that of Earl Grey, who was himself a member of the Select Committee, and who sought unsuccessfully to add to the draft recommendations of the Committee on the subject of law reform generally a *specific* recommendation on the subject of tort. In the passage taken from the minutes of the Report of the Select Committee reproduced below, Grey is objecting to what is widely acknowledged in the evidence which the Committee received as the 'injustice' of the impotence of nuisance in the context of industrial pollution:

> 'The Committee cannot close their Report without expressing their opinion that, while the amendments to the law they have recommended would greatly mitigate the evils at present complained of, they would fail to provide an adequate remedy for the wrong now frequently done to individuals in carrying on certain branches on manufacture. It is not just that any individual should be allowed, for his own profit, to inflict damage upon his neighbours; and even where a town or district derives so much benefit from the extension of some of those manufacturers which have formed the subject of this inquiry, as to be willing to submit to them, it is not just that particular persons whose property is damaged should be denied, as they now practically are, the means of obtaining compensation for the injury they sustain.'[29]

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27 The subject of tort law reform is not explicitly addressed in the House of Lords Select Committee Report, which acknowledges only the limitations of existing law: namely, that nuisance 'does not afford an adequate remedy' for chemical nuisances, 'partly in consequence of the expense such actions occasion' and 'partly from the fact that where several works are in immediate juxtaposition, the difficulty of tracing damage to any one, or of apportioning it among several, is so great as to be all but insuperable' (House of Lords Select Committee, above n 25 p.5). In contrast, the Royal Commission does address nuisance law reform. Whilst affirming the earlier Select Committee's diagnosis of the problem, the Commission rejects proposals for reform on the grounds that it would be premature to recommend any legislation of a 'novel and exceptional character' (Royal Commission on Noxious Vapours, above n 5, p.35).

28 See further, above n 13.

29 House of Lords, above n 25, xvi-xvii.

The concern of Grey in this passage is with the role of nuisance in *compensating* victims of pollution. In this respect Grey is typical of his contemporaries. Landowners, land agents, farmers, lawyers and members of the Alkali Inspectorate of this period are all concerned first and foremost with better facilitating damages, rather than the opportunity for securing an injunction against the offending works.[30] Grey is also typical among contemporaries in his diagnosis of the principal tort problem: namely, the particularly acute obstacles to compensation that arise from the *concentration* of industrial works.

> 'Where a single manufactory is a source of annoyance, it is comparatively easy for any individual to recover damages for loss inflicted upon him; but where the injury is aggravated by many different manufactures being carried on in the same place, there is, practically, no redress to be obtained, because in proceeding against the one manufacturer, it is impossible to prove that he, and not some neighbouring manufacturer, is the author of the damage'.[31]

It is 'the very greatness of the evil' which is understood to undermine the practical efficacy of tort in this context.[32]

Grey proposes as a solution making the local authority vicariously liable in damages for any nuisance arising from works within its boundaries. So as to ensure that individual polluters shoulder the ultimate responsibility for compensating victims, Grey envisages that the regime would allow for the recovery by the local authority of the damages it pays out from the works within its district on the basis of apportionment by jury. It is interesting that in addition to just compensation, Grey imports a clear structure of deterrence to his scheme. Vicarious liability is understood to hold the key in this respect, supplying a motive on the

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30 In this respect the alkali debate contrasts with the debate regarding rivers pollution regulation, in which context the remedy of injunction was at the forefront of the controversy. This debate is examined at length in Chapter Five.

31 House of Lords, above n 25, xvi.

32 A point to which nuisance commentators have given due emphasis. Notably McLaren, 'Nuisance Law and the Industrial Revolution - Some Lessons from Social History' (1983) 3 *Oxford Journal of Legal Studies* 155; Dingle, '"The Monster Nuisance of All": Landowners, Alkali Manufacturers, and Air Pollution, 1828-64' (1982) 35 *Economic History Review* 529.

part of the local authority towards the exercise of its powers so as to prevent injury occurring in the first instance.[33]

Sharing Grey's diagnosis of the problem, Francis Reilly's conception of tort reform differs in its dispensing with the mediation of a local authority.[34] The crux of Reilly's scheme is the incorporation of numerous individually owned manufactories capable of pollution in a given locality for purposes of being sued by victims of industrial pollution. The boundaries of the district and the classes of works which it would encompass would be prescribed by Ministerial Order, in consultation with the Alkali Inspectorate, pursuant to enabling legislation. The plaintiff would then be entitled to proceed against a 'public officer' or any other nominal defendant within the district in an ordinary court of law, and according to otherwise regular nuisance doctrine. How the scheme of 'collective liability' would be funded would be a matter for the manufacturers to agree amongst themselves. A collective fund or a power to sue co-owners is mooted. However, Reilly refrains from detailed prescriptions, contemplating that the 'whole arrangement should be as elastic as possible'. Analogies are drawn with voluntary schemes already operating in the alkali context; the 'sue and be sued' provision in the context of insurance legislation, by which an unincorporated association of traders could be sued collectively by 'outside' contracting parties; and the medieval practice of frankpledge, by which the corporate members of a tithing would be responsible for the good behaviour of each other.

It is a reflection of the importance of the question of tort law reform that the Royal Commission had explicitly commissioned Reilly to give evidence on the scope for reforming existing arrangements concerning civil liability. In the event, just as with Earl Grey's, it is

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33 The source of the incentive and precisely what powers Grey had in mind here are unclear. Certainly, the recommendations of the Select Committee for new legal powers were directed to central, and not to local authority institutions. Whether Grey had any support within the Select Committee for his proposal is equally unclear, as is just what it was in his scheme that was considered most objectionable on the part of those who rejected it. When Grey returned to the subject of tort reform during the second reading in the House of Lords of the Alkali Bill 1863, he made no reference to his earlier vision (April 16 1863, col 176). Indeed, there is only one record of any subsequent allusion to his radical local government-mediated liability proposal. This is a reference to the speech of the Marquis of Ripon who, in a debate on possible directions for further law reform, 'entertained considerable doubts as to the advisability of carrying out the proposal made by Earl Grey to the Select Committee of 1862' (July 4 1873, col 1779).

34 Above n 5, Evidence, Q.12,992-13,113. Reilly was a barrister called upon by the Royal Commission specifically to give evidence relating to the reform in civil liability.

not clear what led the Royal Commission to reject Reilly's proposal. The reason given on the face of the Report is a general one, relating to the desirability of understanding the full effect of the joint liability provisions of the Supreme Court Judicature Act 1875 before offering support for further reform in tort 'of a novel and exceptional character'.[35] However, the questioning to which the evidence of Reilly was subject does indicate a particular scepticism towards the behavioural implications which, in a similar way to Grey, Reilly saw as a likely consequence of attaching financial consequences to polluting activity. The claim of Reilly that his regime would engender 'common pride', that 'the spirit of the body would operate so as to check malpractices on the part of individuals',[36] was scorned by members of the Commission. The Commission could see none of the necessary basis of trust within industry for mutual inspection to work in practice, necessary for those works causing the pollution being identified.[37] Moreover, even insofar as it was possible to envisage competing manufacturers co-operating with one another, it was far more conceivable that the common purpose motivating such co-operation would lie in resisting the claims of pollution victims, rather than facilitating them.[38] Certainly, the Commission was aware that the principal voluntary attempt at initiating a system for administering collective liability had foundered on want of support.[39] However, as to the crucial matter of compensation (and Reilly makes it clear that this is far and away the overriding objective underpinning his proposal), neither the examination of this witness nor the Report itself indicates any specific criticisms.

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35 Above n 5, p 34-35.

36 Q.13,034.

37 Q.13,048 (Lord Aberdare, Chairman); 13,105-13,106 (Professor Williamson).

38 Q.13,097-13,098 (Prof Williamson).

39 An appendix to the earlier Select Committee Report (above n 25) contains the draft constitution of the proposed 'Widnes Alkali Manufacturers Association' of 1862, whose functions would include funding and apportionment of pollution liabilities, and whose powers would include mutual inspection of works. The failure of this proposal to be implemented is documented before the Royal Commission in the evidence of Gamble, above n 5, Q.4886. However, the Commission would also have been aware of less ambitious and more successful ad hoc arbitration agreements involving manufacturers and residential and agricultural interests aggrieved by chemical pollution. For example, the evidence Inspector Fletcher gives as to his role in arbitrating damages claims in St Helen's between 1870 and 1872 (including a claim for 8000l), Q.6600-6601.

The Role of the Alkali Inspectorate

In the guise of Angus Smith, its Chief Inspector throughout this period, the Alkali Inspectorate was a persistent source of pressure towards reform in the provision of civil liability. As with Grey and Reilly considered immediately above, the concern of Smith was to conceive a mechanism for the apportionment of liability in damages among contributory works. Where his proposal is distinctive is in the role he envisages of the Alkali Inspectorate in determining the appropriate apportionment. Smith goes as far as to suggest the substitution of a 'nuisance liability tribunal' chaired by the Alkali Inspectorate for the ordinary (county court and High Court) jurisdiction.[40] However, a more moderate role is put forward by Russell, a county court judge from whom Smith had sought 'technical' legal nuances with which to bolster his 'common sense' vision.[41] In his evidence to the Royal Commission, Russell envisages that the role of the inspector would be twofold.[42] First, as arbitrator of small claims. Secondly, as a mandatory first stop in any nuisance action of whatever magnitude, by which the parties involved would be encouraged to reach a settlement on the basis of independent evidence as to cause, which would be assessed by the Inspectorate. In the event that the matter nevertheless proceeded to court, the Supreme Court Judicature Act 1875 provisions in respect of joinder would apply, and the court would be empowered to apportion so far as was possible damages on the basis of the respective defendants' contributions to the circumstances amounting to the nuisance.

It has been observed elsewhere that Smith interpreted the ambit of his role as Alkali Inspector liberally.[43] Most noteworthy in this respect are his Annual Reports, which are full of observations relating to processes and substances outside the Inspectorate's explicit statutory purview.[44] However, this does not explain why civil liability should have concerned

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40 This as a solution to the problem of Chief Inspector Smith having his evidence torn apart in ordinary civil proceedings (addressed further below, n 47-48 and associated text): Alkali Inspectorate, Eighth Annual Report (1871), 5.

41 Royal Commission on Noxious Vapours, above n 5, evidence of Smith, Q.159 and Q.12,034.

42 Q.11,815-11,933.

43 MacLeod, 'The Alkali Administration 1863-1884: The Emergence of the Civil Scientist', above n 17.

44 For example his study of sulphur acid in air and rain, when only hydrochloric acid gas was the subject of regulation (Alkali Inspectorate, Eighth Annual Report (1871), 7ff).

Smith, let alone concerned him to the profound extent that it did. One possible explanation for his 'digressions' into the field of liability, just as with Earl Grey and Reilly, is perhaps a desire to see compensated those suffering destruction of property in the hands of polluting works.[45]

A more intriguing explanation lies in the apparent involvement in private proceedings of Smith himself, in the capacity of expert witness. His wry claim to a lack of reverence for English civil justice (in a paper delivered to the National Association for the Promotion of the Social Sciences in 1876),[46] is redolent of more forceful criticisms contained in his Annual Reports. In particular, passages in which he recounts the humiliating experience of having expert testimony contradicted by lay witnesses and 'lay' counsel:[47] an experience compounded by what he perceived as the futility of an arrangement in which vast and competing evidence is amassed at great expense on matters of causation which could be resolved 'neutrally' by himself or other officers with little trouble.[48] Indeed, the 'hazardousness' and inefficiency of the adversarial system is a persistent theme in Smith's writing in this context.[49] He appears to relish the prospect of a role for the Inspectorate in restoring economy to the arrangements by which damages are provided. Open to injustice the law may indeed be, but it is the remoteness of common sense and science which Smith considers to be an equally important deficiency.[50]

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45 This is suggested in his remark that 'it is true, or may be true, that compensation comes to the nation; but what is that to him who loses his paternal estate or good tenants?': Ninth Annual Report (1872), p.35.

46 Smith, 'What Amendments are Required in the Legislation Necessary to Prevent the Evils arising from Noxious Vapours and Smoke?' [1876] *Annual Proceedings of the National Association for the Promotion of Social Sciences*, 495, 504.

47 Notably, the Twelfth and Thirteenth Annual Report (1875-1876), 17-18.

48 Id. Russell is particularly forceful in this respect, in his criticism of the conduct of parties to the House of Lords' judgment in *Imperial Gas Light & Coke Company v Broadbent* (1857) 7 HLC 600, above n 5, Q.11,917 ('They spent weeks [proving cause]...there being no other conceivable cause under heaven').

49 Notably the Alkali Inspectorate, Third Annual Report, 51-52; and Ninth Annual Report (1872), 35.

50 A sense which is reinforced by the efforts of Smith to define 'nuisance' chemically, as an answer to the relativity of concepts such as 'comfort' and 'enjoyment'. See Alkali Inspectorate, Third Annual Report (1866), Annex II; Alkali Inspectorate, Eighth Annual Report (1871), under the subheading 'definition of nuisance required', p.5ff.

Perhaps most intriguing is an explanation which touches even more directly on the self-interest of the Inspectorate. The Annual Reports of the Inspectorate are pervaded with lament at the lack of understanding which criticisms on the part of the public reveal of the functions of the alkali regulation. Already remarked upon in this respect is the prosecution policy of the Inspectorate, where calls for greater recourse to formal proceedings were repeatedly defended on the grounds that the role of the Inspectorate in the face of infringements of the Acts was first and foremost one of 'remonstration' and 'education'.[51] However, there existed a distinct but equally important pressure upon the Inspectorate, which concerned not so much the desire on the part of the public for greater punishment of misconduct, but the delivery of tangible results in the way of damage prevention. Hence the many references in the Annual Reports to the inevitability of damage, as a reflection of the perceived importance of instilling in the public a sense of the limitations of prospective, regulatory control.

> 'When they said, The [sic] Inspectors cannot be doing their duty, or there would be no damage, this was assuming that the Alkali Acts were fitted to protect entirely, whereas we have seen that they allow the escape of that which really is an enormous amount of gas from large works'.[52]

> 'It seems...perfectly clear that chemical works will never be carried on in such a way as to be entirely inoffensive in all cases; it is therefore requisite to provide for the results of the offence and to put in order the process of claiming in damages'.[53]

The impotence of civil remedies compounded the pressure already upon the Inspectorate to eradicate pollution. Improvements in tort could serve the dual function of signalling to the public the inherent threat of damage notwithstanding statutory regulation; at the same time as providing parties aggrieved by pollution with an outlet independent of the Inspectorate. The benefits to the Alkali Inspectorate would lie in the greater leeway an effective 'plaintiff-

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51 Alkali Inspectorate, Fourteenth and Fifteenth Annual Report (1877-78), 4-5; Eighteenth Annual Report (1881), 8. See also MacLeod, above n 17; and Ashby and Anderson, *The Politics of Clean Air*, above n 4.

52 Alkali Inspectorate, Twelfth and Thirteenth Annual Report (1875-76), 29-30.

53 Alkali Inspectorate, Intermediate Report (1875), 8.

friendly' tort system would allow it in focusing upon the task of educating manufacturers in the importance of 'realistic', cost-effective measures of pollution prevention.

II Civil Liability for Workplace Injuries and Chemical Pollution

During the period in which tort law reform was debated in connection with alkali regulation, civil liability became central to the debate in an adjacent regulatory setting. Early factories legislation of the 1840s and 1850s, like that in the context of alkali works in the decades after, had been principally concerned with the imposition of prescriptive controls upon factory owners, backed by criminal sanctions and enforced by a central inspectorate.[54] This 'command and control' form of regulation was extended in enactments throughout the century. However in a parallel development throughout the 1860s and 1870s, pressure built up for reform of a distinctive nature. This is a reference to pressure bearing upon tort reform, which culminated in the Employers' Liability Act 1880. It is useful to draw some basic comparisons between the tort debates in the factories and alkali settings. Not only is it interesting to have an appreciation of the most significant points of contrast and common ground across the differing tort and regulatory settings, it is moreover fundamental to a critique of the historiographical tendency to 'write tort out of' legislative history to have an idea of the comparative relevance of tort in these contexts.

One obvious point to make at the outset is that it is a reflection of the national profile of the two debates that reform in the context of factory safety led to an Act devoted specifically to the subject of tort. This is in contrast to reform concerning nuisance, which was effected in a discrete provision towards the end of an enactment of a more general nature.[55] Not only was the national profile of the debate ostensibly higher in the factories than in the chemical pollution context, but the factory debate was considerably more sustained. For whereas the 1860s and early 1880s mark the beginning and the end of the debate concerning the interface of tort and regulatory law in the context of chemical pollution, in contrast, this period represents the beginning of a more long-standing concern with this issue in the context of occupational health and safety.

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54 Factory Acts of 1844 and 1856. Although these Acts did provide for interesting developments in the administration of tort in a factories context, and at the interface between criminal penalties and victim compensation: Bartrip and Burman, n 3, 55ff.

55 Section 28 Alkali Works etc Regulation Act, above n 14.

Tort and Public Policy

A key 'substantive' contrast in the two tort debates lies in the policy objectives underpinning the proposals for reform. In particular, the significance assumed by the objective of damage prevention in the context of factory safety, relative to the striking absence of this objective from the instrumental arguments in support of tort reform in the chemical pollution setting. Damage prevention was critical to the case for reform in the context of factory safety from the very beginning of debate, robust 'plaintiff-friendly' negligence provision being justified not so much incidentally as first and foremost in terms of its behavioural implications:

> 'If...pecuniary responsibility for accidents which are incidental to the use of machines is imposed upon him (the factory owner), those consequences will be more likely to be taken into account, and to be guarded against at the time of the erection of the machinery.'[56]

The broadening of standing (so as to encompass dependants of deceased victims of tort) under the Fatal Accidents Act 1846 was similarly justified in terms of economic deterrence; as was the Employers' Liability Act 1880. Evidence put forward by workers' representatives gave objectives of accident prevention a prominent place alongside injury compensation. Indeed, radical proposals for a system of mandatory, contributory insurance emanating from judicial and manufacturing circles in the alternative to reform in tort were rejected by workers representatives on the very basis that they would lack the deterrent implications of a broadening tort liability.[57]

It is also significant that the notion of tort as a framework within which to generate economic incentives was crucial to the support within the Factory Inspectorate for more readily available civil redress. During the earliest years of the Inspectorate, there are indications that successful civil actions were deployed by inspectors in the course of routine inspection, as part of a strategy of prevention.[58] As the momentum for 'command and

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56 Report of the Factory Commissioners, PP 1833 XX.

57 Bartrip and Burman, above n 3, p 151 and, more generally, their Chapters Five and Six.

58 Bartrip and Burman, above n 3, p 56. The Home Office reprimanded the Inspectorate in this respect, not so much for seeking to deter accidents, as much as

control' regulation grew throughout the century, so the preventative role envisaged for civil redress within the Inspectorate became increasingly ambitious. Tort liability came to be perceived in the 1860s and 1870s as an instrument of *general* deterrence: a private law framework imposed upon the factory system capable of relieving pressures towards ever more detailed and prescriptive bureaucratisation, yet without abandoning a public policy commitment to workplace safety.[59]

The contrast with the principally compensatory objectives underlying the debate in the alkali setting is marked. Whilst the threat of both injunction and damages does appear to have been perceived as providing an early incentive towards the invention and employment of techniques for reducing pollution from the nascent chemical plants,[60] nevertheless, the remedy of an injunction soon came to be understood as too draconian in the context of an industry vital to the national economy.[61] Meanwhile, there was increasing scepticism concerning the behavioural implications of the remedy of damages, as compensation came to be generally perceived as too easily absorbed within the costs of manufacturing for it to represent a significant economic deterrent.[62] The overriding objective of proponents of tort

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for running the risk of encouraging civil litigation, with potentially catastrophic consequences for enterprise (id).

59 Bartrip and Burman, above n 3, 94-96. The Factory Inspectorate is unlike the Alkali Inspectorate in that when it came to specific proposals for legislative reform it assumed a low profile (id, 95). A likely explanation for this lies less in any difference in strength of feeling, and more in the differing stances of the inspectorates towards law reform more generally which, in turn, can be understood in terms of the relative specialism and expertise of the Alkali Inspectorate. The Alkali Inspectorate would appear to resemble other bodies possessing specialist expertise, exerting greater influence upon the reform process than Inspectorates of a more 'generalistic' nature - see Pellew, 'The Home Office and the Explosives Act 1875' (1974) 18 *Victorian Studies* 175.

60 The well publicised actions involving Edmund Muspratt, in respect of whose works repeated liability in damages forced their relocation 1851, appears to have had an initial salutary effect within the industry (Royal Commission on Noxious Vapours, Q.5105). The chairman of the Alkali Manufacturers Association, Gamble, accounted for the early attempts at condensing chemical gases on the part of manufacturers as motivated principally by the 'probability of their having to shut up on account of the great damages which they had to pay [which] was staring them in the face' (Royal Commission on Noxious Vapours, above n 5, Q.4739).

61 Russell articulates this view with particular force at the outset of his evidence to the Royal Commission, above, n 5, Q.11,816.

62 A point illustrated well by Moubert, who as land agent to Gerard had experience of awards or settlements for damages involving alkali works of 1000l (1839), 1000l, 400l, 300l, 300l (all 1846), and 450l (1852), yet perceived the ease with which this

reform here was not at all that of pollution prevention, and entirely that of victim compensation.[63]

Justice and Rights

The justice of an arrangement in which manufactures were liable to property owners injured as a consequence of pollution was broadly accepted. There was indeed debate about the vicarious criminal responsibility of manufacturers in connection with the neglect of employees,[64] but there was no serious question of employers *not* being civily liable to neighbouring landowners on the basis of their ownership of the polluting enterprise, regardless of any proof of fault on their part.[65] The debate in the context of factory safety lacked this consensus. On the contrary, there was considerable opposition to the idea of employers' liability for workplace injuries on the basis of ownership of the factory alone, the

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financial burden could be borne: House of Lords Select Committee on Noxious Vapours, above n 5, Q.60ff.

63 Albeit that, for example, Grey and Reilly did entertain the prospect of behavioural implications flowing from financial consequences being attached to polluting activities: see above, n 36 and associated text. Such consequences were however considered secondary to the objectives of compensation.

64 Section 5 of the *Alkali Act 1863* provides the owner of an offending works with a defence if they can prove (a) due diligence on their part and (b) that the offence was committed by an employee without their knowledge, consent or connivance. This clause was added in the Committee stage of the House of Commons (19 June 1863, col 1175), and was heavily argued against on consideration of the Commons amendments in the House of Lords (21 July 1863, cols 1143-1144). So controversial was this issue that the Bill almost foundered in the ensuing dispute.

65 Rather, the concern of manufacturers was to avoid being held liable for the pollution of other works, or out of proportion to their own facility's contribution. See Keates, above Q.3194, who 'writhed under a sense of injustice' in the face of liability for competitors' nuisances. Keates is a possible source of an anonymous note annexed to the Alkali Inspectorate, Fourth Annual Report (1867) 117-120, which concerns the injustice of a county court judge's imposition of several liability in the case cited as *Sefton and others v Bibby and Sons & Co and others* (20 December 1865, Liverpool County Court). The author of the note claims to have suffered heavy 'pecuniary loss' by the working of several liability, 'for when sued for damages, though it was within the knowledge of every impartial neighbour that other smokes were contributory to the damage, I had to pay for all that was proved to have been committed'. Not all judges experimented with several liability solutions to multi-party nuisances: Russell, Royal Commission on Noxious Vapours, Q.11,823.

employer not being personally at fault.[66] A profound contest is apparent in this setting, opening out onto two very different approaches to defining and solving the occupational safety problem. On the one hand an approach centring around tort liability, favoured by employees. On the other hand an approach centring around mandatory, contributory insurance, favoured by the bulk of the judiciary and manufacturers.

It is a reflection of consensus on the subject of responsibility for pollution within the alkali context that no proposals for mandatory insurance as an alternative to tort surfaced, notwithstanding that the objectives were unanimously those of compensation, and notwithstanding too the publicity which insurance proposals as a means of victim compensation were attracting in the adjacent sphere of workplace injuries.[67] Rather, debate about tort reform remained at a largely instrumental, ostensibly apolitical level, accepting the role for tort in laying down individual obligations, and disagreeing only over the practical means for making liability in synergistic pollution instances proportionate to each party's individual contribution. Landowners were clearly vocal in their lobby for civil liability reform.[68] Yet reform here did not assume the proportions of a political crusade which it was assuming in the adjacent context of employers' liability to workers.

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66 Atiyah has captured the 'laissez-faire contractualism' of much of the judiciary of this period - *Rise and Fall of Freedom of Contract* (1979). Bartrip and Burman discuss how this ideology reflected itself in case law, and in the resistance within the legal profession to any statutory reversal of common law defences to an industrial negligence action (above, n 3, especially Chapters 4 and 5). The judiciary and manufacturing interests presented, loosely, a united front in this respect, opposing the submissions relating to law reform put forward by workers.

67 Although the idea of contributory insurance as an alternative to employers liability in tort was not mooted publicly until a letter to 'The Times' in 1878, after the two parliamentary inquiries into noxious vapours had reported (Bartrip and Burman, above n 3, 141). Compulsory insurance became a prominent interest of the National Association for the Promotion of Social Science in the period leading up to the 1880 Act, and attracted significant (although not decisive) support in the passage of the 1880 Bill through Parliament. Just how familiar issues relating to employers' liability were to those interested in the alkali question is unclear. Given the proximity in time of the respective parliamentary debates of the late 1870s and early 1880s, it was inevitable that there would be some overlap in participants in the relevant committee stages of the respective Bills. What is clear, however, is that this overlap was not extensive. Certainly, the *debates* on the liability issues in each context had entirely different participants.

68 Notably, by means of the Lancashire and Cheshire Association for the Prevention of the Escape of Noxious Vapours formed in the early 1870s; and the Northumberland and Durham Association for the Prevention of Noxious Vapours from Alkali and Other Manufacturers, formed on 24 January 1874, the minutes of whose inaugural

Indeed, it is important to be clear about the striking contrasts in the degree of politicisation of tort reform as between the adjacent regulatory settings. The political significance of tort in the factories context is reflected in the deep involvement of the Trade Union Congress, for whom reversal of the defence of common employment came to be viewed as one of a number of areas in which legal recognition of workers' interests was sought in terms of *rights*. A main principled objection to negligence provision here lay in the contrasting protection tort doctrine offered employees in relation other members of the public, which was understood as symbolic of a wider, societal, subordination of workers' economic and political interests.[69] Bartrip and Burman capture the political stakes well in their encapsulation of the trades union movement's response to the 1880 Act:

> 'As is evident from speeches at the 1880 Congress, the Act was to many trade unionists not only a safety measure, but also a symbolic gesture - a move towards obtaining equal rights with the rest of British society'.[70]

To contrast tort reform in the alkali context in this respect is not to downplay the extent to which the landowners' lobby was vocal; nor the organised nature of the pressure for reform. However, it is clear that the campaigns giving effect to landowners' and workers' grievances were of a profoundly different character. The lobby in favour of employers' liability unfolded self-consciously within a wider series of labour relations issues, notably, the right to vote and the right to organise trade unions.[71] In contrast, the Lancashire and Cheshire, and Northumberland and Durham associations for the extension of the law relating to noxious vapours focused strictly upon pollution as a 'single issue', steering clear of any rhetoric more broadly antagonistic to industrial interests and industrialisation *per se*.[72] The

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meeting and membership are contained within the Ministry of Health records (Public Records Office, MH16/1 13280, 21 March 1876).

69 The TUC link between tort reform and social equality is clear in the description of the underlying purpose of proposals in this vein as 'intended to give us the same right to compensation as is now enjoyed by the general public', Howell Collection, Envelope 'Bills, Acts, etc', 26 May 1880 (Quoted from Bartrip and Burman, above n 3, 149).

70 Bartrip and Burman, above n 3, p157.

71 Id, p.2.

72 The consensual nature of statutory intervention from the outset is noted in Dingle, 'The Monster Nuisance of All', above n 32, 21.

two debates diverge markedly in the relative degrees to which tort reform was understood to embody issues of profound socio-economic significance.

III Tort Law and Theories of Government Growth

In their concluding chapter, Bartrip and Burman reflect on the adequacy of existing frameworks for analysing Victorian state intervention. They lay down an important challenge to historiographers in this respect, which is to account for the role alongside public law forms emerging in this period played by tort. This is a challenge to which the relevance of nuisance in the context of alkali works pollution adds further meaning.

Bartrip and Burman attribute particular significance to the scope for tort to disturb the straightforward application of distinctions which have tended to structure historiography of nineteenth century government growth. The distinction between laissez-faire and collectivism is singled out in this regard, in light of the extent to which interests which might otherwise be expected to align themselves with 'collectivist' solutions, namely the employees, are discovered to be seeking first and foremost an extension in the protection offered by private, common law tort. Conversely, the extent to which those who might otherwise associate themselves with 'contractualist' solutions to social problems,[73] the judiciary and manufacturers of the period, are found in this instance to be the driving force behind what Beveridge was later to describe as 'the pioneer system of social security'.[74]

Whilst the alkali context does not disclose paradoxes quite as spectacular, the prominence assumed by tort here does raise questions of its own concerning the adequacy of any historiographical framework in which tort is not accommodated. In particular, questions concerning the neglect of tort within frameworks which account for government growth in terms of an organic, bureaucratic dynamic (MacDonagh's); the necessary ideological conditions for state intervention (Hart's); and also market failure, where tort is associated with the market which has failed.[75] This chapter will conclude by considering each in turn, and suggesting the most important implications which the relevance of tort in the

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73 Albeit as the lesser of two evils, in that the *mandatory* nature of the insurance proposal was acknowledged as placing at least some strain on the economic liberalism of its proponents - Bartrip and Burman, above n 3, p 140-145.

74 Quoted in Bartrip and Burman, above, n 3, p 214.

75 See below, n 80 and associated text.

occupational safety and alkali pollution settings carry for these historiographical frameworks.

Models of Government Growth

The relevance of tort to the historiographical concept of gradual, opportunistic growth in regulatory law led by an increasingly confident and credible bureaucracy is double-edged. In one sense tort suggests an important counter-current mitigating against the possibility of bureaucratic 'closure' which is integral to the 'organic' model of government growth. This appears particularly true to the extent that tort embodies judgments concerning responsibility which are independent of the relevant inspectorate.[76] Certainly, as an authoritative source of values extraneous to the bureaucracy in question, intervention by way of tort might be understood to represent a threat to any dynamic of the kind posited by organic models of government growth, namely, towards an ever increasing ambit of bureaucratic control.

In another sense, however, tort may be understood to reinforce the authority of the relevant bureaucracy. It is clear that alkali and factory inspectorates each supported tort reform, and that the reasons for this support are more complicated than what is in itself a significant motivation, namely, a benevolent wish to see justice done. Factory inspectors saw their role in preventing accidents as hindered by the absence of economic 'sanctions' of the kind believed to be supplied by tort in the event that accidents occurred. Alkali inspectors viewed damage without civil redress as an unwanted pressure upon them towards inducing stricter preventative measures than they considered reasonable, or were indeed permitted to demand under the enabling legislation. In these respects at least it is meaningful to understand readily available civil redress as a condition for the credibility and, in turn, survival of the bureaucracies at hand.

The precise relevance of tort to the ideological conditions of government growth is even less clear cut. Indeterminacy here is profound, reflecting a more fundamental uncertainty concerning the ideological character of tort itself. Typically bracketed-off with contract, tort has become associated with ideologies and modes of reasoning antithetical to growth in regulatory law: laissez-faire rather than collectivism; formal rather than instrumental law;[77] evolutionary rather than constructivist rationality.[78] Characterisations of

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76 Steele, 'Private Law and the Environment: Nuisance in Context' (1995) 15 *Legal Studies* 236.

77 Weber, *Economy and Society (Volume 2)* (1978).

tort along these lines are highly significant, leading as they do to the conclusion that the prominence which tort has been suggested, above, to assume alongside regulatory law must be conceived in terms of a challenge to or, at the very least a tempering of, the more radical features of the thought underpinning emerging public law forms of statutory intervention. On the other hand, if tort is removed from the sphere of oppositions which have traditionally oriented historiography of government growth here, and appreciated for its inherent adaptability in the face of social change, its prominence takes on board different, altogether more complementary proportions.[79]

More obvious are the question marks surrounding the model of market failure, at least insofar as tort is associated with the market.[80] The market failure framework of historiography is seriously undermined by the extent to which tort in both factories and alkali settings is perceived as occupying a constructive role coexisting alongside regulatory law. Hence the value of Bartrip and Burman's discussion of complementary freestanding systems of law in the context of occupational health and safety which is, at least at a most general level, no less salient in the context of chemical pollution:

> 'amendments of the common law became an increasingly attractive way of reducing accident numbers. Safety would then be advanced by economic deterrence backed by effective civil liability *as well as* by protective regulation supported by inspectors and criminal sanctions'[81]

The significance of tort in both alkali and factory safety contexts calls for a fundamental reappraisal of the market-failure historiographical framework, within which tort is associated with a market which has failed.

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78 Hayek, *Law, Legislation and Liberty* (1979).

79 The adaptability of tort in this respect is suggested by Steele, 'Assessing the Past: Tort Law and Environmental Risk', in Jewell and Steele (eds), *Law in Environmental Decision Making* (forthcoming).

80 Ashby and Anderson, above n 4, and MacLeod, above n 17, do not engage with common law at all. The concept of market failure is briefly alluded to in this context in Ogus et al, *Policing Pollution* (1983), 5ff; and Dingle, above n 32.

81 Bartrip and Burman, above n 3, 96.

Preliminary Conclusions

A number of preliminary conclusions can be drawn from the foregoing account of tort and the evolution of regulatory law. Tort is significant as a major component of the history of regulatory law, neglect of which goes to the *comprehensiveness* of academic coverage in the field. Certainly, occupational health and safety is not unique in the relevance which tort assumes here, even if there are specific aspects of the relevance which negligence assumes in this context which distinguish it from the relevance that is assumed by nuisance in the context of chemical pollution regulation. Indeed, the areas of contrast at the intersection of tort and legislative history are as intriguing as the areas of common ground, opening up as they do onto further promising lines of inquiry, touching both on adjacent regulatory settings and broader historical timescales. This sense of promise is explored in the chapter which follows.

The question of whether the implications which tort carries in terms of historiographical frameworks of analysis are fundamental to the validity of the insights thus arrived at remains largely open. It is a question which is more appropriately returned to when the identity of tort for purposes of the traditional conceptual tools of historiography is a little clearer. As it stands, only the cruder variants of a market failure model are fundamentally in need of re-evaluation, 'facilitative' and coercive legal frameworks coexisting alongside one another, rather than the former being superseded by the latter. Even here, however, much depends upon the extent to which tort is indeed to be aligned with the market. Until the identity of tort in this sense is agreed, it is only meaningful to conclude by emphasising the uncovering of neglected historical material, and suggesting, loosely, its 'relevance' to a range of existing standpoints of analysis and insights arising.

Chapter Five
Riparian Rights and Rivers Pollution Regulation

River pollution regulation has undergone important changes both of an administrative and substantive character since the time of the Rivers Pollution Prevention Act 1876, the earliest national legislation in the field.[1] Historical developments in this context are, generally speaking, well remarked upon within the relevant commentary.[2] Yet little or no attention has been given to the evidence of a long-standing parliamentary debate concerning the intersection of tort and regulatory law; nor has any apparent attention been given to the significance of this evidence for the tendency within scholarship to depict tort and regulatory law as discrete forms of law which are suitably elaborated in isolation from each other.[3] The aim in this chapter is to provide an overview of this neglected parliamentary debate, having regard to the implications of the debate in terms of traditional conceptual frameworks for analysing the evolution of social regulation more broadly. It is also intended that this Chapter provides the necessary formal legal background to the empirical study of the coexistence of tort and regulatory law offered in Chapter Six.

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1 The present statutory framework is constituted by the Water Resources Act 1991 and the Environment Act 1995. For an historical account see Howarth, *Rivers Pollution Law* (1987).

2 Howarth, id, and, for more recent developments, Parpworth in Hughes, *Environmental Law* (3rd ed, 1996). Useful accounts written primarily for a non-legal audience and focusing on Victorian legislation include Wohl, *Endangered Lives* (1983) and Clapp, *An Environmental History of Britain Since the Industrial Revolution* (1994). Historical observations are also made in studies which have taken as their starting-point the notion that rivers pollution legislation is exemplary of approaches to legislation more broadly: see for example Gunningham, *Pollution Social Interest and the Law* (1974); Hawkins, *Environment and Enforcement* (1984); and Vogel, *National Styles of Regulation* (1986). However, these observations are not central to the authors' primarily contemporary focus; nor are they derived from the authors' own primary historical research.

3 Tromans alludes, exceptionally, and very briefly, to the Armer Committee Report of 1959: a report which included consideration of the future of the tort's protection of riparian rights in the shadow of emerging regulatory law, and is central to the more detailed historical account offered in this Chapter (Tromans, 'Nuisance - Prevention or Payment' (1982) 41 CLJ 87). However, it is telling that Tromans came to this report from a predominantly tort standpoint, which has been argued to be (in Chapter Two) responsible for the bulk of what has been written as regards the interrelationship of tort and regulatory law. Certainly, the parliamentary debate on this point is entirely passed over in commentaries on the subject of rivers pollution which are written from the standpoint of regulatory law. To reiterate a recurrent theme in this Thesis, research into regulatory law in this context reads as if this form of law supersedes, rather than is superimposed upon, tort.

The official debate at issue in this chapter is aptly summarised in terms of two fundamentally opposing contentions. On the one hand is the contention that the riparian entitlement to purity protected by tort[4] should be subordinated to any ambient river or effluent quality standards prescribed in accordance with regulatory law. On the other hand is the contention that tort should retain its autonomy, the riparian entitlement to purity thus remaining unqualified by developments in regulatory law. However, to focus attention on those aspects of the intersection of tort and regulatory law which have attracted the greatest parliamentary scrutiny would be to ignore an important lesson arising from the context of personal injury. When the Pearson Commission spoke out against tort and social security having 'for too long been permitted to develop in isolation from one another',[5] the point being made was that aspects of the legal framework which are neglected in the course of debate may be those very aspects which assume the greatest significance in practice. It is therefore prudent to ask whether there are any developments in regulatory law in the setting of rivers pollution which have not been debated for their bearing in terms of tort, but which carry *prima facie* relevance to the controversy surrounding tort's future. This question will be answered in the affirmative in section two, below, having particular regard to the evolution of powers of remediation.[6]

I Debate at the Intersection of Standards in Tort and Regulatory Law

As is suggested by these opening remarks, the debate in the context of rivers pollution is different from that in adjacent fields such as chemical pollution and occupational safety. In these areas, the debate has tended to centre upon ways in which tort liability may be *expanded* in the shadow of regulatory law. In contrast, debate in the context of rivers pollution fixes upon the scope for *subordinating* tort in this connection.

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4 The leading definition of this entitlement is provided in *Young (John) & Co v Bankier Distillery Co* [1893] AC 691. For a more general account of tort in this context see Howarth, above n 1.

5 Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978, Cm 7054), para 271.

6 'Remediation' is a term of art which, though of recent origin (see the Environment Act 1995 s 78), applies to a more established form of law: namely, *ex post* response to damage, injury or risk of injury of a civil character in accordance with public law, thus distinguishing it from 'remedies' as belonging to the realm of private law. See further Steele, 'Remedies and Remediation: Foundational Issues in Environmental Liability' (1995) 58 MLR 615.

Riparian Rights and the Policy of 'Rivers Control'[7]

Before examining the debate concerning the subordination of tort to regulatory law it is helpful to introduce a consideration which is crucial to the assessment here: the wider policy framework within which rivers pollution regulation has unfolded throughout the period in question. It will be argued that there is a paradox arising from the degree of popular support which will be seen to have existed for tort coexisting unqualified in the context of regulatory law, coupled with the absence of any clear conception as to the basis for accommodating tort within the wider policy framework underpinning regulation in this field. Indeed, it is possible to go as far as to suggest that the policy context not only fails to accommodate but, rather, is in many respects at odds with the continuing common law protection of the riparian right to purity.[8]

An Early Policy Discussion

The earliest discussion of policy in the field of rivers pollution generally is also one of the most explicit in its engagement with the significance of the tort of private nuisance.[9] Appointed in 1868 to inquire into the 'best means of preventing the pollution of rivers', paying 'due regard to those large interests of both population and capital which have become involved in the use and abuse of river water',[10] the River Pollution Commissioners gathered extensive evidence relating to the efficacy of the existing common law framework for the protection of riparian rights. Intriguingly, it was found that the predominant criticisms came

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7 The notion of 'rivers control' is taken from the Milne Committee Report of 1943, below n 16. It is cited here because it evokes well the relativity of the objectives of pollution prevention and control when viewed in terms of other policy considerations relevant to the water environment.

8 The scope for accommodating tort and regulatory law in terms of the relevant public policy framework is an issue which is introduced, briefly, in final section of Chapter Four. One of the main purposes of the present Chapter is to explore this issue in depth, albeit in the particular context of rivers pollution.

9 First Report of the Rivers Pollution Commission 1868 (1870), PPXL.

10 Id, p 1.

not from witnesses representing recreational and amenity interests (as in the context of, for example, alkali pollution considered in the previous chapter), but from those representing the interests of industry and sewage disposal.

The principal object of criticism of the common law lay in its widely-perceived insensitivity towards public interest considerations, particularly in the award of the remedy of an injunction. In view of its status as cause celebre in modern commentary on the subject of nuisance and the industrial revolution, it is perhaps surprising that the sewage disposal case of *A-G v Birmingham Corporation*[11] is not itself mentioned in either the recommendations of the report or the Report's minutes of evidence.[12] Instead, the far reaching consequences of the exclusion of wider social interests from the assessment of actionability under the common law in this context is illustrated by a number of local instances, less familiar now, in which the scope for town drainage and the pace of sewage treatment is dictated by common law protection afforded to individual riparian owners.[13]

To the extent that the principal critics of the common law represented interests of the 'population' and 'capital', the Commission was bound by its terms of reference to take these criticisms of private nuisance seriously. In the event, the Commissioners disclosed considerable sympathy in concluding that for the common law to continue to offer unqualified protection of riparian rights was an arrangement which could no longer be justified.[14] It was argued that public policy demanded a regulatory law framework for the prevention of pollution in the public interest, as an adjunct to which the appropriate enforcing authority would have the power to 'stay proceedings' brought by riparian owners 'when satisfied that the offender is honestly trying to abate' the nuisance at issue. Whilst it was 'not desire[d]' that a plaintiff 'should be finally silenced', or that 'any just claim for damages' should be 'absolutely barred by the mere fact that a scheme for the abatement of the nuisance had received official sanction', nevertheless, the 'general interest' demanded that the regulatory body would be able to 'exonerate from legal liability' any individual or

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11 (1858) 70 ER 220.

12 For a discussion of this case - and its historical significance - see McLaren, 'Nuisance Law and the Industrial Revolution: Some Lessons from Social History', (1983) 3 *Oxford Journal of Legal Studies* 155.

13 The forestalling of Bolton's plans for town drainage being a particularly vivid example in this respect: Rivers Pollution Commission, above n 9, Evidence, Q.2476ff.

14 Id, 130, from which the quotations immediately below are taken.

corporate body employing all reasonable means to render effluent harmless. These concerns of the River Pollution Commission later reflected themselves in proposals for subordinating common law protection of riparian rights to regulatory law leading up to the enactment of the Rivers Pollution Prevention Act 1876, discussed below.

Official Policy After the Second World War

It is equally difficult to envisage the scope for accommodating the riparian right to purity within the policy framework underpinning wartime and post-war reforms, beginning with the River Boards Act 1948 and Rivers (Prevention of Pollution) Act 1951.[15] The first major policy document of this period - the Milne Committee Report 1943 - is particularly inhospitable from the standpoint of unqualified common law protection, although it did not explicitly address tort's subordination to regulatory law as had the River Pollution Commissioners in the previous century.[16] Once again, the terms of reference of the inquiry are significant.

The Milne Committee was charged with recommending an institutional structure which would enable the co-ordination of the patchwork of administrative bodies which had evolved in response to the diverse interests bound up with the water environment. Proponents of the goal of 'prevention of pollution' were addressed by the Committee alongside a variety of 'sectional interests' including those of sewage authorities, land drainage and water supply and, significantly, riparian interests. The latter were defined broadly so as to encompass common law rights to the use of water resources, rather than any specific entitlements to quantity and quality.[17] It is of particular relevance to the intersection of tort and regulatory law that the Committee recommended the creation of multi-functional, local 'river control' authorities, which would 'be in a position to estimate fully the available resources and requirements of the various interests';[18] to 'co-ordinate' and

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15 For an introduction to the policy documents discussed in this section see Howarth, n 1.

16 *River Boards*, Third Report of the Central Advisory Water Committee (1943, Cm 6465). This departmental report provides the principal policy background to the River Boards Act 1948.

17 Id, para 31.

18 Id, para 58.

'reconcile sectional interests and, if necessary, to decide which must prevail';[19] and, ultimately, to ensure that 'all interests are adequately and suitably safeguarded in due proportion to their public value'.[20] This is the rhetoric of government-planned use of resources, the strong implication of which is that the protection in any given instance of rights to, say, purity, would ultimately be relative to the protection of the public interest in the effective utilisation of the watercourse more generally. The practical upshot of these recommendations was to provide the policy justification for the creation of River Boards - the new regulators of rivers pollution under the 1948 Act - soon to be furnished with powers of prior approval under the 1951 Act.

The Hobday Committee recommendations for reform in the *substance* of river pollution law are particularly curious in their stance as regards the intersection of tort and regulatory law. Whilst emphasising the value of building upon the recommendations of the 1868 River Pollution Commission concerning the need for a regulatory law foundation of law in this field, they came down in favour of leaving the riparian entitlement to purity unqualified.[21] The Hobday Committee's recommendation on this point is all the more curious in light of the importance attributed by the Milne Committee to the enforcement authority's powers to decide which interests (of the many relevant to 'rivers control') must, in the event of conflict, prevail. It is equally difficult, moreover, to reconcile the Hobday Committee's recommendation of unqualified tort protection with other of its conclusions which reflect the assumptions of forward planning in this context: notably, the importance of 'fixing standards' by way of *discharge consent*;[22] the importance of having regard to scientific definitions of pollution, and regard too to the economic and technical practicability of effluent treatment in the fixing of standards;[23] and, most fundamental of all, the desirability of this standard-setting task being ultimately vested in a public authority with suitable expertise.[24] It is of particular significance to the coherence of the Committee's

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19 Id, para 61.

20 Id, para 64.

21 Report of the River Pollution Prevention Sub-Committee of the Central Advisory Water Committee, 1949, para 163. This departmental report provided the principal policy background for the enactment of the discharge consent regime under the Rivers Pollution Prevention Act 1951.

22 Id, para 73.

23 Id, para 68.

24 Id, para 79.

recommendations for unqualified tort provision in the shadow of regulatory law that it considered the courts ill-equipped 'to decide whether an effluent is polluting'.[25]

Moving beyond the immediate post-war period, it is significant that reforms of the early 1970s, culminating in the Control of Pollution Act 1974, reflect a policy unprecedented in its emphasis on issues of accountability in the implementation of regulatory law. As a background to this novel emphasis on accountability, and to the challenges it presented for the future of tort, it is helpful to appreciate that the Act of 1951 which introduced the discharge consent regime had been amended by the Rivers (Prevention of Pollution) Act 1961 (section 12) to make disclosure of information gathered in the course of the discharge consent process an offence. The principal objective behind the accountability reforms contained in the abortive Protection of the Environment Bill 1973 and Part II of COPA 1974 was to remove this criminal prohibition, and to provide new statutory opportunities for public involvement in the discharge consent process. There is some evidence that proposals for statutory rights to, for example, public information and third party appeals against regulatory decisions were formulated with issues of the implications of coexisting common law rights to purity firmly in mind. For example, it is significant that the Royal Commission on Environmental Pollution had argued shortly prior to COPA 1974 that opening up the discharge consent regime to wider public scrutiny would justify, in turn, re-opening the question of tort's subordination to regulatory law.[26] The effect of statements such as these is to reinforce the profound sense of tension emerging from early policy developments: certainly, policy in the context of accountability is presented as one of tort and regulatory law representing distinctive frameworks which are more appropriately conceived as alternatives to be traded-off against one another, rather than complementary and suitably permitted to run in tandem.

What, then, is to be concluded from this brief examination of 'foundational' policy statements? The point to emphasise, once again, is that no clear conception of the means for accommodating tort has existed in this context. The paradox lies in the fact that notwithstanding that no reasons were given by the Hobday Committee for its recommendation that tort should persist alongside the emerging regulatory law framework

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25 Id.

26 First Report of the Royal Commission on Environmental Pollution, *Three Issues in Industrial Pollution* (1972, Cm 4894), para 6. It will be seen that the Royal Commission's position on this point was affirmed in the parliamentary debate concerning the Protection of the Environment Bill, below n 75.

unqualified; and notwithstanding too that the recommendation here sat less than comfortably with other of the Committee's more central recommendations together with policy in respect of 'river control' and accountability broadly, the Committee nevertheless accurately pre-empted the political climate relevant to the question of tort's subordination to regulatory law in the ensuing decades. As will be examined closely below, Government proposals for curtailing riparian rights with reference to regulatory law in the context of the Rivers (Prevention of Pollution) Act 1951 and the Control of Pollution Act 1974 failed in the face of overwhelming resistance. Meanwhile, although the issue of whether or not tort should remain unqualified by regulatory law presented the only issue to divide the Armer Committee in its influential report concerning the future of the discharge consent regime,[27] the case for tort being unqualified commanded the support of the majority no less than it had done before or was to after. Such was the hostility to the idea of the subordination of tort on the eve of the introduction of the Rivers (Prevention of Pollution) Act 1961 that the Government quickly dismissed any prospect of reform on this point winning acceptance, siding instead with the Armer Committee majority. It falls now to examine the basis for this resistance, the arguments put forward in support of Government proposals, and to assess the significance of this local debate against the policy backdrop outlined immediately above. Fundamentally, this is to address the question of the extent to which the continued protection of riparian rights to purity represented a challenge to a policy framework whose central motifs can be summarised in terms of a reliance upon the peculiar expertise and statutory accountability associated with competent authorities implementing regulatory law.

Foreshadowing the Discharge Consent Debate

Section 16 of the 1876 Act reflects *modest* steps being taken towards implementing the recommendations of the River Pollution Commission in its Report of 1870.[28] The debate in Parliament centred around an earlier draft of the clause which had been introduced without discussion during the Committee of the Commons, and which differed from the clause as enacted. Whereas the clause enacted required only that the court 'take into consideration' a certificate of best practical means (BPM) in any nuisance proceedings before it; the earlier draft rendered a certificate of BPM *dispositive* of the matter of nuisance law significance

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27 Final Report of the Trade Effluent Sub-Committee, Central Advisory Water Committee, Final Report (1960) (*Armer Committee Report*).

28 Above, n 9.

(albeit only with regard to the remedy of injunction).[29] As such, the abandoned Commons Committee draft went further in implementing what is surely the crux of the River Pollution Commission recommendation (outlined above), namely, that the ultimate power of staying the nuisance proceedings, at least in respect of injunctive relief, should be vested in the regulatory authority and not the courts.

In seeking evidence of the mischief to which this abortive Commons Committee clause was aimed, a memorandum of the Office of Parliamentary Counsel concerning the clause is significant in highlighting the prospect of a profound overlap of common law and regulatory law were tort to have remained entirely unqualified.[30] Unlike the *modern* discharge consent regime (which takes the form of prior approval backed by criminal sanctions), regulation under the 1876 Act took the form of a general prohibition on solid, sewage or industrial effluent subject to the defence of BPM being used for rendering the pollution 'harmless', enforced not by criminal proceedings but by injunction. Thus, quoting from a memorandum of the Office of Parliamentary Council:

> 'A person might sue a manufacturer in a county court if he thought that the use of best practical means would abate the nuisance [the statutory route]. On the other hand, if he conceived that the nuisance could not be so abated, he might take the usual means of getting an injunction and stopping the nuisance altogether [the common law route].'[31]

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29 Clause 14, as amended in the Committee of the Commons, 28 July 1876, read:

'The powers given by this Act shall not be deemed to prejudice or affect any other rights or powers...now...existing...Provided nevertheless, that during the continuance in force of a certificate granted to any person under...this Act no proceedings for an injunction shall be taken in continued against such person in relation to any matter which, had it not been for such a certificate, might have been the subject of proceedings under this Act'

As amended in the House of Lords, again undebated (10 August 1876), the clause qualified the general saving of common law provision as follows:

'Provided nevertheless, that in any proceedings for enforcing against any person such rights or powers the court before which such proceedings are pending shall take into consideration any certificate granted to such person under this Act'.

30 Office of Parliamentary Counsel, Rivers Pollution Bills and Memoranda 1876.

31 Id.

The intention underlying the proposed subordination of tort to regulatory law is further elaborated by Sclater-Booth (President of the Local Government Board), the Bill's sponsor, who argued that the Commons Committee amendment amounted to a 'reasonable proposal'.[32] Sclater-Booth (as the Royal Commission had earlier) drew particular attention to the onerous position of a manufacturer or a sewage undertaker were the use of BPM not to offer any protection against an injunction on the basis of nuisance. He also emphasised the modesty of the clause in the sense that the period of stay provided by a certificate of BPM was finite (s 12), and the fact that the scope for regulatory law here bringing with it its own public law avenues for redress had been exploited in the shape of third party rights of appeal against a certificate's grant.[33]

It is significant that Sclater-Booth's arguments were later reflected in post-war debate arising in the context of the discharge consent regime. Where the early debate differs from later ones is, first, in its outcome; and, secondly, in the willingness of those resisting the subordination of nuisance to regulatory law at that stage to rely upon a sense of indignation at the prospect of change, rather than reasoning their resistance through to its conclusion. The Office of Parliamentary Counsel provides a particularly good illustration of indignation in this respect, concluding its memorandum on the Commons Committee amendment with the blunt message to the Lord Chancellor 'that it is essential' that the 'proviso in relation to injunctions' should be 'struck out of the Bill'. In a similar vein is the speech of Dillwyn (MP for Swansea), asserting that the power to stay remedies in nuisance is so 'perfectly monstrous' that he 'should be glad if the Bill had been recommitted with a view to the withdrawal of [the] clause' to that effect.[34] Post-war debate is, in contrast, far more revealing of the thinking underlying the conclusion that tort should remain unqualified by regulatory law.

Post-War Debate Concerning Subordination of Riparian Rights to Discharge Consent

Building upon the broad consensus in support of the Milne and Hobday Committee recommendations regarding the efficacy of ambient and effluent standards prescribed by competent regulatory authorities, the Government proposed to make compliance with such

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32 Sclater-Booth, House of Commons, Third Reading, 4 August 1876, 557-58.

33 In this instance rights of third party appeal to the Local Government Board against the grant of a certificate of BPM, s.12.

34 Dillwyn, above n 32, 556.

standards a defence in civil as well as criminal proceedings.[35] The debate generated by this and subsequent proposals for tort's subordination to regulatory law has not figured in any of the academic accounts of the history of rivers pollution, which have tended to offer an acontextual presentation of tort and developments in regulatory law as if isolated fragments of a wider legal framework, which do not in any significant sense intersect.[36] There is in consequence little indication in the literature of the principal themes which have occupied both proponents and critics of tort's subordination to regulatory law. It is the purpose of this section to identify and elaborate upon these themes. The questions that are of particular relevance here relate not just to the content of the arguments which figured most prominently in the cases for and against tort's regulatory law subordination, or how the emphasis within the arguments shifted over the period 1950 (when post-war proposals to qualify riparian rights were first introduced) and 1974 (when it was announced for the last time that case for unqualified provision of tort alongside regulatory law had been conceded). It is also important to assess these local arguments in connection with broader statements of regulatory policy in respect of rivers pollution.

Arguments in Defence of Tort

Taking the arguments put forward in defence of tort first, it is meaningful to distinguish two principal themes which are apparent throughout the period in question. First, tort's defence had recourse to an instrumental theme relating to the objective of preventing pollution. This

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35 Rivers (Prevention of Pollution) Bill No 17, 1950, clause 4(5) and (6):

> 4(5) No matter entering a stream shall, in any respect in which it complies with a standard so prescribed, be treated either-
>
> (a) for the purposes of the law relating to nuisance as being prejudicial to the natural quality or condition of the water;...
>
> (6) Where (before or after the passing of this Act) an injunction or order has been granted or made for the protection or enforcement of any right over the water of a stream, and, on an application made by any person interested to the court making or granting the injunction or order, the court is of the opinion that the said right has by virtue of the last foregoing subsection been restricted or enlarged by the coming into force of any bye-laws, the court shall make such variation (if any) of the injunction or order as the court thinks necessary to secure that it gives effect to the said right as so restricted or enlarged.'

36 Above, n 2.

finds expression in a series of arguments appealing, generally, to the sense in which any qualification of tort's protection of riparian rights would constitute a retrograde *policy* measure. Secondly, tort's defence had recourse to the theme of tort's preservation as a matter of fundamental rights independent of any contribution to pollution policy, or to the policy of 'rivers control' more broadly. These themes are now enlarged upon in turn.

(a) Instrumental Themes

Arguments concerning tort as an instrument of policy invariably took as their starting-point the pressures within rivers boards from 'sectional interests' (such as those identified by the Milne Committee Report),[37] for whom the environmental quality of watercourses would not necessarily be paramount.[38] A good example of this is to be found in the speech of A J Irvine (MP for Liverpool, Edge Hill), in which significance is attributed to the fact that:

> 'the river boards will have much wider and more varied considerations in mind in applying their standards than those to which a judge would have to apply his mind in a particular case'.[39]

In a similar vein is the concern expressed by Lt Colonel Elliot (MP for Glasgow Kelvingrove), who spoke out in fear of 'the caprice' of a standard-setting process in which 'all sorts of persons, [potential] offenders as well as improvers, will be represented'.[40] Anthony Greenwood (MP for Rossendale) is more specific in this context, focusing upon the conflict between pollution prevention and local authority sewage disposal. For him there were 'grounds for supposing that some river boards may be unduly sympathetic to the interests of the local authorities in their area' in discharging their sewage functions.[41]

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37 Above, n 16.

38 Notably, the interests of local authorities, themselves typically major polluters, who under the River Boards Act 1948, s 2, enjoyed not less than three fifths representation on each river board.

39 Irvine, Standing Committee A, 6 March 1951, 211. Similarly Col Clarke, Second Reading, 27 November 1950, col 858; Paton, Standing Committee, 6 March 1951, cols 196-197.

40 Lt-Col Elliot, Standing Committee A, 27 February 1951, cols 184-185.

41 Greenwood, Standing Committee A, 27 February 1951, col 187.

David Renton (MP for Huntingdon) put the defence of tort in perhaps the most positive terms when, after reiterating the pervasive concern at the composition of the river boards, he concluded that:

> 'there must be great advantage in allowing the private citizen, with the aid of the courts, to do something which perhaps a river board exercising its powers under this Bill would be reluctant to do'.[42]

Yet it is significant that - in the absence of any experience of the river board system in practice at this early stage - there were no specific examples of regulatory behaviour in this context from which the case against tort's subordination was able to draw. In consequence, the debate is pitched at a largely impressionist level. Much of the argument focused not upon empirical claims but rather upon logic. For example Enoch Powell (MP for Wolverhampton South-West), who questioned Government attempts to reconcile 'the elimination of civil protection on the ground that to include it would be unduly harsh and penalising the polluters' with the legislature's avowed objectives of pollution prevention.[43]

The 1950-51 defence of tort is of further significance in its refusal to accept a compromise clause put forward by the Government qualifying only the scope for injunctive relief - preserving an action in damages.[44] This presents an important contrast with the debate in the field of alkali regulation and factory safety, where the concern in the face of pollution causing interference with property (or, in the context of factory safety personal injury) had been to facilitate compensation. By way of contrast, the overriding concern in the rivers pollution context was the protection of entitlements to purity by means of an injunction. To facilitate 'compulsory trade' in them was widely perceived as an unacceptable regression.[45]

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42 Renton, Report, 31 May 1951, col 526. It is of interest that this is an argument that is given short shrift in tort literature, notably Michelman as discussed in Chapter Two. *Cook v South West Water*, discussed in the Postscript to Chapter Three, provides a recent and concrete example of private nuisance as a private law counter-current to the pressure upon regulatory authorities to relax standards of a public law character.

43 Powell, Standing Committee A, 6 March 1951, col 198.

44 Proposals mooted by Dalton, Standing Committee A, 6 March 1951, col 194.

45 Lucas-Tooth, Standing Committee A, 6 March 1951, cols 202-203; Turton, id, cols 206-208; Hutchinson, id, col 220.

(b) Rights Themes

The emphasis upon injunctive relief opens out onto the second theme in the defence of tort. For many who put forward arguments on policy grounds, the more profound issue in the case against the Government's proposal lay in terms of the protection of long-established rights. For example, Colonel R S Clarke (MP for East Grinstead), for whom riparian rights were not just instruments of policy, but 'embod[ied] the custom of good neighbourliness that has grown up over many centuries in this country'.[46] In a similar vein is an argument put forward by Greenwood, who considered that it would be 'morally wrong to interfere with the traditional rights of people':[47] 'the kernel of the problem' is that 'people have certain fundamental rights'[48] which should not be subordinated to regulatory decisions made in accordance with public law.[49]

(c) Arguments of the Later Post-War Period

In the discussion of common law protection of riparian rights during the period *after* the successful resistance to the 1950/51 Government proposals, the arguments in defence of tort continued to reflect one or other, or both, of a concern with a policy of pollution prevention

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46 Colonel Clarke, Standing Committee, 6 March, cols 210-211. A custom of reciprocity to the effect that 'those who live on a river and share its amenities try to pass on those amenities to the people below them in the same condition as they themselves enjoy' (id).

47 Greenwood, Standing Committee A, 27 February 1951, col 188.

48 Greenwood, id, 6 March 1951, col 215.

49 Perhaps rather surprisingly, the economic value (to the owner) of the riparian entitlement to purity played little part in the defence of unqualified common law provision. However, issues of pecuniary value did figure prominently on one occasion, namely, in the criticisms of the Government's proposals of the Attorney General, Lord Shawcross, in a memorandum to Aneurin Bevan of 27 November 1950: 'It is said, with truth, that this right...is a valuable right of property especially when it has been crystallised by the protection of an injunction and that to allow such a right to be done away with by the delegated legislation of a local board without any provision whatever for compensation is, in fact, an instance of confiscation of property rights such as has never previously been legislated' (PRO, HLG 29 347). A comparison is implicit here with the 'confiscation' of rights of property represented by the Town and Country Planning Act 1947, which was provided for at the level of *primary* legislation.

and the protection of traditional rights. Thus, the arguments outlined above were rehearsed during the review of common law provision conducted by the Armer Committee in 1959;[50] and further during the final occasion on which Government proposals to qualify common law protection were put before Parliament, in 1973.[51]

Differences in emphasis are however apparent in later discussion: differences which will be seen below to reflect changes in the emphasis of the Government's own justification for qualifying riparian rights; and to reflect too evidence of the practical experience of the operation of the discharge consent regime that was lacking in 1950/51. Arguments in defence of tort in the context of the Protection of the Environment Bill 1973 are pervaded to a far greater extent than previously by the imagery of the 'rule of law'. A good example in this respect is Viscount Dilhorne's objection to putting 'the Water Authority over and above the law in relation to consent'.[52] Arguments in this later context are also more ambitious in their claims for nuisance as an instrument to the end of pollution prevention. Associated from the very first with a pollution campaign,[53] nuisance at this later stage is presented less as a safeguard against lapses in the regulatory law regime - a source of default pollution protection - and rather more as an instrument at the forefront of an anti-pollution policy.[54] These points will be returned to below in the context of the case *for* subordinating tort to statute.

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50 Above n 27.

51 Under the Protection of the Environment Bill, Bill No 16. These proposals sought only to qualify the availability of the remedy of injunction, and thus resembled the unsuccessful compromise proposal of Dalton prior to withdrawal of the 1951 measure, above, n 44 and associated text.

52 House of Lords, Committee, 29 January 1974, col 213. In a similar vein is Denning, id, col 218, who spoke out against putting 'the ultimate decision not in the hands of judges but in the hands of an executive authority'; and Baroness White, who linked riparian rights to 'the spirit of the rule of law', id, col 221.

53 John Grimston, Second Reading, 27 November 1950, col 862.

54 Viscount Bledisloe, House of Lords, Committee, 29 January 1974, col 213; Viscount Dilhorne, id, col 214; Denning, id ('the power of the courts should, and I suggest must, remain in the judges, to maintain the cleanliness of our rivers'). Denning's views in this regard were however long-standing: see for example his comments in *Pride of Derby v British Celanese* [1953] 1 All ER 179 at 204.

(d) Proponents of Tort's Unqualified Provision

It is important to appreciate not only the gist of the arguments put forward in defence of tort, as conveyed above, but also to look in closer detail at the *sources* of opposition to the Government's proposals. At least in so far as concerns the defence of tort during the parliamentary session of 1950/1951, support emanated from executive bodies involved in the implementation and enforcement of the discharge consent regime. Thus, in another interesting comparison with adjacent regulatory settings considered in the previous chapter - one which this time indicates underlying continuity - the Ministry of Agriculture Fisheries and Food (MAFF) opposed the Government's clause on the basis of a positive link between a strong underlying tort law and confidence among the public in the official regulatory authority. Preserving the protection afforded by tort would 'dispel a good deal of misgivings' among the public, and quash 'doubts as to the honesty of our intentions as to how standards should be employed'.[55] Public fears that river board standards 'may be a shield for the polluter' needed to be allayed if the pollution prevention objectives of the proposed Act were to carry any credibility.

The River Boards Association also opposed the Government's proposal.[56] Hence the intriguing position that the regulatory authority themselves sought to preserve 'the safeguards given by the general law'.[57] The River Boards position is made even more intriguing by its emphasis on the protection which the common law affords not only to the more obvious 'conservatory' interests - the angler and rambler for example. - but also to industrialists, whose economic activities are dependent upon a supply of water from a sufficiently pure watercourse. Subordination of the sort proposed by the Government:

> 'would have a particularly unfortunate effect in industrial areas, because industrialists who are riparian owners rely on the water they receive, which has been used by industries further upstream'.[58]

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55 PRO HLG 29 348, letter to the Ministry of Health, 19 February 1951.

56 PRO HLG 29 348, Joint Memorandum of the Catchment and Rivers Boards Associations, 16 January 1951.

57 Id.

58 Id.

Whilst this view suggests that the concerns of industry were not seen as necessarily antagonistic to interests in pollution prevention - as many of the critics of the Government proposals had feared - it also reinforces the fears identified above as to where the sympathies of the river boards ultimately lay in the event of a *conflict* of interest.

As a preliminary assessment of the defence of unqualified tort provision in the context of river pollution policy broadly, it is clear that many of the ingredients of a challenge to this policy are in place. Certainly, on the face of it at least (subject to the possible exception of the alignment of common law with industrial interests, immediately above), the defence of tort is couched in terms of an assertion of one interest in the water environment as overriding; and an assertion of the courts as the most appropriate institution for protecting that interest. More fundamental still, the defence of tort represents a departure from the very language of 'interests' in preference for the language of 'rights'.[59] This provisional assessment will be returned to after the case *for* qualifying tort has been addressed, and the double-edged significance in this debate of the Anglers Co-operative Association is elaborated.

Arguments for Qualifying Riparian Rights

Such was the opposition to the initial Government proposal of this post-war period to qualify tort that there was little opportunity for the case *for* qualifying tort being engaged with in any serious detail. The Minister for Local Government and Planning, Hugh Dalton, had justified the Government's 1950/51 proposals in terms of what he perceived to be the illogicality of tort and regulatory law coexisting.[60] However, this is an argument which he dropped on being forced to concede Powell's point that as a matter of fact the two 'systems' coexisted alongside one another in numerous other regulatory settings.[61] In place of

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59 For a general discussion of the distinction between interests and rights in this regard see Griffiths, 'The Political Constitution' (1979) 42 MLR 1.

60 Dalton, Standing Committee A, 6 March 1951, col 194: '[t]he present position is that the Bill as it stands, when a standard has been established, takes away the right to both civil damages and to an injunction. That is logical and right so far as I can understand, as a new era would open in which the standards would govern the matter'. It is arguable that this 'new era' has yet to make itself apparent, and is unlikely ever to do so. See further the conclusion to section two, below.

61 Powell, id, cols 198-199.

illogicality Dalton substituted the criticism of 'untidiness' and, more tellingly, pessimism towards the prospects of success of regulatory control:

> 'I still think it is rather an untidy and unsatisfactory arrangement to have the civil proceedings lying alongside criminal proceedings if we have any confidence at all that the scheme of this Bill is going to succeed.'[62]

If the debate around the Government's 1950-51 proposal was somewhat one-sided in the strength of partisan feeling against it, the quality of the debate had not been helped by Aneurin Bevan's (Minister for Health and sponsor of the Bill at Second Reading) outright denial that common law rights would be qualified in any way.[63]

A fuller indication of the Government's thinking underlying the initial proposal is provided in the background correspondence involving the relevant ministries, the Office of Parliamentary Counsel, and members of the public who forwarded written representations. The earliest case for qualifying the common law which can be found in departmental records is that put by S G Wilkinson in a memorandum to George Armer.[64] It is a reflection of the anticipated importance of the issue that for Wilkinson the question 'whether we should leave intact the riparian owner's right of action at common law' is, at this stage *prior* to the publication of the Bill, one of only 'two major points to be considered'. Wilkinson sets the scene on more specific arguments for subordinating riparian rights to standards under regulatory law by drawing an intriguing allusion to the Town and Country Planning Act

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62 Dalton, Standing Committee, id, col 217. He was prepared to give way to the opposition in the confidence that 'when this Bill passes into law and has been in operation for a short period, what are, in fact, the criminal proceedings will really have taken over the civil proceedings, which would hardly ever be used' (id).

63 Aneurin Bevan, 27 November 1950, col 823. It is somewhat surprising to discover that in earlier calling the Bill to the attention of the Cabinet Legislation Committee, 3 November 1950, Bevan had himself singled out the regulatory compliance defence to nuisance proceedings as not only one of the 'principal provisions' of the Bill, but also among those that are likely to be 'very controversial' (Office of Parliamentary Counsel, Rivers (Prevention of Pollution) Act, Volume Three).

64 Office of Parliamentary Counsel, id. All quotes in this and the following paragraph are taken from this source. Both Wilkinson and Armer were civil servants at this time in the Ministry of Housing and Local Government.

1947, arguing that such a measure would be modest in comparison with the subordination of common law rights in other modern contexts.[65]

In the event, four justifications for qualifying rights in the rivers pollution setting are identified by Wilkinson. First, the creation of River Boards 'which are representative and responsible local bodies', and whose pollution control mandate is such as to do away with the need for rights of 'independent action'. Secondly, the extent to which River Boards provide 'reasonable safeguards against individual hardship or injury to the public interest' which, in an argument reminiscent of the Royal Commission Report 1870, Wilkinson elaborates in terms of the potential anomalies arising from free-standing tort and regulatory law systems coexisting:

> 'It is quite anomalous that a private individual should have a right of action which ignores them [i.e. regulatory standards], and that there should be greater facilities for the protection of private interests than for the protection for example of public water supplies and public amenities'.

The availability of public law avenues of redress for parties aggrieved by a River Board's exercise of or failure to exercise its powers provides the third justification;[66] the representation of fisheries interests within the River Boards provides the fourth. If there is a theme underlying these four justifications offered in support of the curtailing of riparian rights, it is the accountability in terms of 'representativeness' of a system of local, public regulatory authorities exercising statutory powers under ministerial supervision. River Boards should be trusted to act in the public interest, safe in the knowledge that the composition of the boards was so regulated by statute so as to mitigate against the undue influence of any one sectional interest, together with the statutory provision of ministerial default powers.

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65 Consider in this context the letter of objection of MAFF, above n 55, which somewhat pre-empted this appeal to the broader picture of rights being subordinate to regulatory law by maintaining that the abolition of riparian rights was not 'fundamental' to the Bill, at least not as it was fundamental in the context of town planning. This, however, is rather to beg the central question here. See too the distinction implicit in Lord Shawcross' remarks, above n 49.

66 Albeit that redress was limited to an application to the Minister requesting that they bring to bear their default powers contained in the Bill.

Armer, who was later to chair an inquiry which came down *against* subordinating tort to regulatory law in this context, supported the subordination of tort at this early post-war stage on grounds which differed from those articulated by Wilkinson.[67] Armer placed his emphasis upon the importance of certainty and expertise. Neither wider legal developments in respect of, for example, town and country planning, nor the particular issue of accountability play any explicit part as they had in Wilkinson's arguments. The key for Armer is, on the one hand, ensuring that the regulated parties' legal position in respect of effluent enjoys the predictability of being governed by a single system. And, on the other hand, a belief in the expertise of the river boards as the body appropriate for implementing this system. Co-existing tort and regulatory law:

> 'would take away all the virtue of having standards if an industry or local authority did not know where they were, and surely the River Boards and the Ministers concerned, after studying all needs, are better fitted than the courts to decide what standards of effluent should in fact be required.'[68]

The expertise of river boards relative to individual riparian owners and the courts implicit in these remarks is the crux, too, of the Reservation contained in the Minority Report to the Armer Committee, dissenting from the majority recommendation on the subject of the common law.[69] For the minority there, rivers pollution control is an essentially scientific and technical matter. The main contribution of the 1951 Act is perceived to lie in its provision of a 'scientific system': a system whose integrity is necessarily undermined by intersecting, free-standing tort provision cutting across it:

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67 PRO HLG 29 348, 11 January 1951. Armer was responsible for the wording of the stock justification for the measure which the Government offered in correspondence with members of the public:

'In the Government's view it would be unfair to render a person liable to a fine or damages if he showed that he had complied with conditions imposed by the River Board, the public authority responsible for prevention of pollution, and confirmed by the Minister after consideration of the requirements of all the interests concerned with the river'.

PRO HLG 29 347, 5 December 1950.

68 Id.

69 Armer Committee Report, above n 27, p 46-47.

> 'We are wholeheartedly behind every sentence in this report that will produce cleaner rivers but we believe that to impose on a scientific system of control common law requirements, enforced at the demands of individuals who may have little interest in the water course as a whole and which act harshly on haphazardly selected victims, contributes nothing to the solution of this great problem.'[70]

In opposing science and the common law, and in its association of common law with haphazard operations, the Minority Report evokes many of the characteristics which the Alkali Inspectorate had objected to in the arrangements for civil litigation in the context of chemical pollution, nearly a century earlier.[71] However, there is an important contrast. Whereas the Alkali Inspectorate had sought the reform of the common law along more scientific lines with a view to its functioning as a system of redress *running alongside* the regulatory law regime, the Minority of the Armer Committee dismissed any prospect of effective common law reform. The Minority sought instead common law's *subordination* to regulatory law.

As has already been remarked upon briefly in the context of the case against the Government's measure for qualifying riparian rights contained in the Protection of the Environment Bill 1973,[72] 'rule of law' rhetoric came to enjoy considerable prominence amongst opponents of reform. Part of the explanation for this change in emphasis lies in the realisation of previously untested fears that the discharge consent regime would be insufficiently stringent for purposes of pollution control.[73] An equally important explanation lies in the need for proponents of the tort *status quo* to respond to a change in the Government's own policy emphasis. In particular, the Government's emphasis on *statutory* accountability in the exercise of governmental power, as an alternative to accountability based on common law protection of riparian rights. Accountability was not as such a novel ingredient in the debate. It played a crucial part in the case put at the outset of the post-war

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70 Id, p 47.

71 See Chapter Four, n 50.

72 Above, n 52 and associated text.

73 Among the problems which belied the 1951 Act's sponsors confidence in a 'new era' of control by discharge consent was the extent of the continued reliance upon 'deemed consents': see e.g. the Armer Committee Report, above n 27.

discussion by Wilkinson, and played a part too in the earliest case for subordinating tort to regulatory law put before Parliament by Sclater-Booth during the passage of the 1876 Act. Where the justification for reform in the context of the Protection of the Environment Bill 1973 is distinctive is in the emphasis that is placed upon strengthening public law avenues of accountability.[74]

The Government's argument that its proposals for new avenues of statutory accountability called for revisiting the question of tort's future in the context of regulatory law placed particular reliance on the proposals for third party rights of appeal against the grant of a discharge consent.[75] These were radical proposals, at least to the extent that the held out the prospect of institutionalisation of accountability concerns which would have exceeded the protection afforded to the interests of members of the public in, for example, the context of town planning. Yet such was the perceived interconnectedness of issues of tort, regulatory law and accountability that, in a letter informing Viscount Dilhorne that the Control of Pollution Bill would not purport to qualify private rights as its predecessor Bill of 1973 had, Shepherd wrote that the new Bill would also not be reintroducing the clause providing for third party appeals.[76] To reiterate the point made above, it was as if tort and regulatory law were less than complementary as regards accountability, and more appropriately traded-off against one another.

The Role of the Anglers' Co-operative Association

Criticisms of the common law did not unfold in a vacuum, abstracted from civil actions being pursued at the time. On the contrary, the incidence, and consequences, of litigation were crucial to the Government's case for subordinating standards in tort to standards in regulatory law.[77] Indeed, just as the 1876 Act measures had been significantly influenced by

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74 Earl of Courtown, House of Lords, Committee, 29 January 1974, col 217; Lord Aberdare, id, col 221.

75 Lord Aberdare cited the First Report of the Royal Commission on Environmental Pollution (above n 26) in support of the reopening of the question of tort's subordination to regulatory law: House of Lords Committee, 29 January 1974, 223.

76 Shepherd-Dilhorne, Office of Parliamentary Counsel, Control of Pollution Act, Volume Eight. The connection between the two is *implicit* in Shepherd's correspondence here: there is, accordingly, no elaboration of the Government's reasoning on this point.

77 A comparison can be made with the alkali and factory settings in this regard (see Chapter Four), albeit that it was the lack of success, rather than the incidence of

local examples of common law bringing great public works to a standstill, so too had the proposals for reform in the post-war context. The similar notoriety of nineteenth and twentieth century litigation extends to the involvement of sewage authority defendants. The symbolism associated with the 'suffering' of Bolton Borough Council in the nineteenth century[78] found a new object in this later context in the 'plight' of Luton Corporation at the hands of the litigant Lord Brocket.[79]

What made matters more pressing in the eyes of proponents of common law reform at this time was the recent formation of the Anglers Co-operative Association (ACA).[80] Widely understood to be a body formed solely for the purpose of conducting a strategy of litigation, the ACA was a source of concern to a Government wishing to avoid instances of acutely cash-strapped public authorities being obliged to meet common law standards of purity in the course of town drainage.[81] This concern was not confined to the Government: on the contrary, the response of the 'rival' National Federation of Anglers (NFA) to the initial proposals for curtailing riparian rights reveals a more widespread sensitivity to the onerous pace of sewage treatment being forced by litigious riparian owners. Hence the

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successful litigation in these contexts which helped stimulate the initiative for tort reform pursuant to statute.

78 Above n 13.

79 *Brocket v Luton Corporation* (unreported, Ch D, 1948) in respect of the pollution of the River Lea. This case figured in the discussion of tort reform throughout the 1950s. It appears that after spending 500,000 pounds on modernising their sewage disposal works during the war the defendants managed to stay execution of an injunction prohibiting the discharge of sewage matter until, after spending a further 209,000 pounds on sewage treatment plant and still being unable to comply with the plaintiff's entitlement to purity, they acquired the plaintiff's rights for 86,500 pounds in 1955. Interestingly, Lord Brocket was the Chairman of the Pure Rivers Society, itself part of the lobby against Government measures to subordinate private to public law (PRO HLG 29 348, letter 20 January 1951). This example reinforces Lord Shawcross' remarks concerning the pecuniary value of the riparian rights 'crystallised by an injunction', above, n 49.

80 The Anglers' Co-operative Association was formed in 1948 by John Eastwood KC: Interview with Simon Jackson, (1993) 4 *Water Law* 139.

81 In a memorandum to the Office of Parliamentary Counsel, Titherly referred to the ACA as 'the body who have been encouraging riparian actions for injunction or damages', 21 April 1951, PRO HLG 29 349. The ACA had a higher media profile than any other fishing association of this period. For example, it figured prominently in the three-part survey of river pollution and proposals for regulatory reform conducted by R Clarke of *The People* under the title 'The Scandal of Our Rivers' (first part on the 7 January 1951): PRO HLG 29 348.

ostentatious sense of resignation expressed by the NFA in the face of Government proposals for reform, drawing the relevant Government department's attention to an allegedly deep resentment which 'certain unrestrained activities of parties' had induced among powerful industrial and local authority interests.[82]

Aware of the sensitivity of the issue of civil litigation in this context, the ACA had taken the step of staying proceedings which were pending at the time of the parliamentary debate of 1950-51.[83] The ACA also met with representatives of the Ministry of Housing and Local Government and MAFF in order to put forward a compromise proposal, by which common law provision would remain untouched save that the defendant would have available a statutory procedure to suspend or vary an injunction in light of the terms of a River Board consent.[84]

In rejecting this compromise, the Government nevertheless acknowledged that the position of the ACA would be crucial to the fate of the Bill. This is evident from a memorandum to Blake from Titherly, in which it was noted with alarm that the ACA had been 'very successful in stirring up opposition' to the clause.[85] Indeed, such is the perceived force of the ACA in the wider lobby surrounding the Bill, that in the immediate aftermath of the ACA meeting the Ministry of Housing and Local Government was already considering the possibility of yielding on the issue.[86]

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82 PRO HLG 29/347, which contains an NFA 'stock letter' to members informing them of the Government's reform proposal, and reminding them that 'the General Purposes Committee....have feared that some such legislation would be forthcoming sooner or later' (21 November 1950). The NFA went as far as to offer wholesale support for the Bill in a letter to the Ministry of 22 January 1951, complaining about the 'dreary criticism' of the proposed qualification to the common law, (PRO, id).

83 John Eastwood KC, letter to the Ministry, 19 January 1951, stating that on MAFF advice the ACA had stayed over 100 actions pending the outcome of the lobby against the clause qualifying the common law (PRO HLG 29 348).

84 The meeting of Eastwood and Newsome, Gerrish and Cox (of the ACA), and Pearce, Titherly (Health), Pentelow and Boyce (MAFF), 13 December 1950, PRO HLG 29 347. Note that the Government's own compromise proposal (above n 44) was more far reaching than the ACA proposal here: it would have entailed all injunctive relief in conflict with a River Board's consent being suspended automatically.

85 11 January 1951, PRO HLG 29 348.

86 In his response to Titherly, id, Pearce acknowledges that 'the pressures in Committee may be that we shall have to yield a little' (PRO, id, 11 January 1951). Not officially abandoned until on Report, 21 May 1951, the first indication of the

The ACA thus had an ambivalent significance within the debate concerning common law reform. On one hand, it was an important source of the very fears about the compatibility of the common law and wider public policy which activated the calls for subordination of tort to regulatory law. On the other hand, it was an organised source of resistance by which legislative pressure towards subordination was effectively countered. Whilst not the only source of fear or resistance in this respect, it is apparent that no other individual or organisation brought together these competing pressures to the extent that the ACA did.

'Responsibility' in the Enforcement of Riparian Rights

What then of the significance of this local debate in terms of rivers pollution policy? It can be concluded that continuing common law protection of riparian rights in the shadow of regulatory law presented a challenge to many of the most fundamental characteristics of public policy in the field. This is particularly true given the sense of antagonism arising from proposals for the subordination of tort couched in terms of a confidence vote in an untested regulatory law form;[87] a rejection of the haphazard operation of the common law;[88] the heralding of a new era of scientific and technological solutions to pollution problems;[89] and a belief in the greater claims to legitimacy of emerging public law frameworks of accountability in regulatory decision-making.[90] This sense of antagonism is reinforced by opponents of reform, in their often conspicuous unwillingness to place trust in the emerging regulatory law regime; their emphasis upon fundamental rights and custom over science and

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final decision to withdraw the clause is contained in the response to an inquiry of the ACA of 17 April 1951, in the margins of which Armer's instructions are to inform them that the 'conclusion has been reached that common law rights should be left unaltered' (dated 23 April 1951). An Office of Parliamentary Counsel memorandum advising on the effect of any curtailing of the remedy of injunction upon damages *in lieu*, dated 13 April, suggests that the possibility of a proposal for tort's subordination continued to be contemplated even after the antipathy demonstrated towards the clause in Standing Committee: Office of Parliamentary Counsel, Rivers (Prevention of Pollution) Act, Volume Three.

87 Dalton, above n 62.

88 Minority, Armer Committee Report, above n 69.

89 Id.

90 For example, Wilkinson, above n 64.

technology; and their adherence to a highly substantive conception of the rule of law, hostile to any statutory decision-making procedures which could lead to tort's protection of riparian rights being curtailed.

However, it would be misleading to go as far as viewing the success of the resistance as a vindication of earlier indignation at nineteenth century proposals to subordinate tort to regulatory law.[91] When in 1959 the Central Advisory Water Committee (CAWC) advised the Government that the only thing which would move the political climate away from its predisposition towards preserving the common law in this context would be a strict approach on the part of private interests towards the enforcement of riparian rights,[92] the point being made was that the defence of the common law right to purity rested upon the perception of 'responsibility' in its enforcement in practice. Trust did indeed play a major part in contributing to the general reluctance to embrace *regulatory law* as the sole framework for river pollution regulation. Yet it would be wrong to ignore the equally important part played by trust in the 'responsible' uses of tort.

It is to be stressed then that the outcome of the debate is not an unqualified victory for defenders of the common law as against the official policy of sensitivity to wider interests in the water environment. Whilst riparian owners continued to enjoy an uncompromising entitlement to purity in formal terms of doctrine, the pressure upon litigants to act 'responsibly' might be expected to ensure that at a practical level at least, the operation of the common law would be profoundly influenced by wider social concerns. This divergence between form and practice would have offered little comfort to those who objected as a matter of principle to an arrangement characterised by two systems of law running alongside one another, operating according to different criteria and protecting different interests. Those seeking to vest responsibility in competent representative authorities rather than private individuals and interest groups would have viewed the outcome of the debate with equal concern. However, it is far from true that the success of this defence of the common law constituted a mandate for a campaign against pollution centring upon unbridled, 'single-issue' recourse to the strict entitlements protected by nuisance - as critics had feared. The future of the common law was clearly contingent upon

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91 Above n 34 and associated text.

92 CAWC, PRO HLG 127 114 ('...only future strong and irresponsible action by fishing interests could still make a curb necessary, and practicable, at the same time. There is no sign at present of such action...'(para 29)). This picks up on the theme introduced in 1950 by the NFA, above n 82.

its strict protection of individual rights being enforced by individuals and associations with regard to wider issues of social responsibility.

II The Silent Overlapping of Remedies and Remediation

In marked contrast to the sustained controversy at the intersection of tort and regulatory law relevant to standards of an *ex ante* character, the intersection of these two 'systems' of law in the context of remedies and remediation has barely stirred any parliamentary interest whatsoever. In this respect the silent overlaying of statutory remedies for what may be termed 'misfortune' in the context of rivers pollution is analogous to the evolution of remedies in the context of personal injury, and personal security more broadly.[93] Remedies in respect of personal security have also evolved with rather less regard to issues of common law and statutory intersection than might have been expected, or desirable.[94] The idea of 'misfortune' popular in the personal security context is indeed a useful one to carry into a history of powers of remediation, as these relate to rivers pollution. It calls to mind an approach to the study of law of considerable relevance in its association with a shifting of the parameters in the academic discussion away from fault, cause and that series of concepts which reflect a preoccupation with individual obligations under tort, and towards a discussion in broader terms of remedy, conceived functionally, encompassing both tort and alternative systems.[95] Yet despite the fact that this functionalist discussion is now familiar - particularly within tort scholarship[96] - the issues which it raises have nevertheless remained largely unexplored beyond the sphere of personal security.[97] The aim in this section is to expand upon the neglected analytical potential of this functionalist standpoint. In so doing it will be asked whether the *de jure* preservation of tort in the shadow of regulatory law

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93 The term 'misfortune' is taken from Stapleton, *Disease and Compensation Debate* (1986). Its relevance to the Thesis is explained below.

94 See Chapter Two, n 127 and associated text.

95 For an introduction to the extensive literature see Atiyah, *Accidents, Compensation and the Law*, (1970); and Stapleton, id. More recently Atiyah, 'Personal Injuries in the Twenty First Century' in Birks, ed., *Wrongs and Remedies in the Twenty-First Century* (1996).

96 If less so in relation to public law, on which point see above, Chapter Two.

97 Chapter Two, above p 39-40.

described in the previous section is rendered purely formal by the *de facto* encroachment of regulatory law upon remedies of an *ex post* character.

The Evolution of the Power of Rivers Pollution Remediation

So recent is the explosion of interest relating to issues of remediation that it is easy to overlook the extent to which powers of this nature are long-standing.[98] Thus, powers of remediation of rivers pollution date back as far as section 76 of the Water Resources Act 1963 (WRA 1963), albeit that the form in which the power was couched there bears little resemblance to the present position, as provided for under section 161 and 161A of the Water Resources Act 1991 (WRA 1991).[99] Of the reforms which have taken place in the intervening period, those which are of particular significance from the standpoint of the intersection of remedies and remediation concern, first, a considerable broadening of the power's boundaries - a broadening in the circumstances in which the regulator is empowered to remediate an incident; and, secondly, an individualisation in the responsibility for the costs of remediation. These will now be elaborated in turn.

Defining the Boundaries of the Power of Remediation

(a) 'Accident or Other Unforeseen Event'

On its introduction late in the passage of the Water Resources Bill 1962-63, the power of rivers pollution remediation was presented in modest terms as an exercise merely in filling gaps. It was appreciated that water authorities under the 1963 Act were to inherit 'major powers of [predecessor] river authorities in respect of pollution prevention',[100] but the inability to 'take remedial action when pollution has occurred [constituted] a genuine gap in

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98 That interest has been sparked primarily by discussion in the context of contaminated land, largely dating from the House of Commons Environment Committee, *Contaminated Land*, Session 1989-1990 (HC Paper 170). See further the commentaries by Tromans and Turrall-Clarke, *Contaminated Land* (1994) and Graham, *Contaminated Land* (1995), neither of which, significantly, consider the history of powers of remediation in the context of rivers pollution.

99 Outlined in Hughes, *Environmental Law*, above n 2, pp 582-583.

100 This quote is taken from correspondence involving the Office of Parliamentary Counsel prior to the 1962-1963 Bill's publication: Office of Parliamentary Counsel, Water Resources Act v.10, (undated, p.236).

the legislation.'[101] It was the intention of the power contained in section 76 of the WRA 1963 to bridge that gap. However, despite the 'casualness' with which the remediation clause was introduced and, indeed, received in the Standing Committee, it is nevertheless apparent that the definition of the precise ambit of the power represented a source of considerable concern within the departments responsible for its drafting. Indeed, given the care that will be seen to have been taken to ensure that the power was not too widely drawn, the sponsor's statement of intention on introducing the clause is highly misleading in its references to breadth:

> 'The object of this clause is to enable river authorities, in effect, to take remedial action when pollution has occurred as a result of accident, negligence or any other cause.'[102]

This statement of the power's scope is contradicted by the very wording of the clause, which makes clear the requirement that the pollution must arise from an 'accident or other unforeseen act or event' before remedial action becomes lawful. It is also contradicted by the reference in the marginal note to 'emergency measures' which, whilst strictly speaking of limited interpretative value, does nevertheless imply an application considerably narrower than that of 'pollution' from 'any' cause.[103] Certainly, the sponsor's expansive remarks aside, the provision leaves little doubt that pollution *per se* is not intended to be a sufficient condition for the exercise of the remedial powers.

It is interesting to explore the factors which account for the narrow delineation of the early boundary relating to the power of remediation. In this respect, correspondence between the relevant ministries (Housing and Local Government and Health) and parliamentary counsel before the Bill had been published is relevant in suggesting that it was initially contemplated that the power would be framed in far broader terms. This is explicit in the original departmental instructions to counsel which stressed that:

> 'the circumstances in which the need for action arises cannot all be described as accidental. It is proposed that where it appears to a river authority that it is urgently

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101 Frederick Corfield (Joint-Parliamentary Secretary, Ministry of Housing and Local Government), Standing Committee F, 25 June 1963, cols 742-743.

102 Corfield, id.

103 The marginal note reads 'Emergency measures in the case of pollution of waters'.

> necessary or desirable to remove or combat the effects of any poisonous, noxious or polluting matter in the stream the authority should be authorised to take such action as it may think necessary for that purpose.'[104]

However, two areas of concern emerged in the period leading up to the publication of the Bill, which led, first, to the decision to omit a clause giving effect to a power of remediation and, later, to the introduction of a narrowly delineated power in the form in which it was to be enacted. These concerns centred on the scope for a broadly-bounded power opening up the water authorities to heavy expenditure,[105] together with the scope for a broadly-drawn power detracting from the emphasis upon prevention and ***ex ante*** control which the bulk of the other provisions of the Bill sought to reflect: in particular, a concern that such a clause would provide 'an escape route' from the demands of robust implementation of the discharge consent regime.[106] The sponsor of the clause makes this latter concern clear on introducing the clause in the Commons' Standing Committee:

> '[I]t is important that this should not come to be regarded as a cheap way of buying the right to pollute...[T]he proper way to control pollution is to stop a polluted effluent getting into a river rather than doing something about it once it has got there'.[107]

These concerns touch on fundamental issues regarding the function of remediation in the context of the wider legal framework of regulation: issues which are brought into further relief by the re-drawing of the boundaries of the power under the Control of Pollution Act 1974.

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104 Office of Parliamentary Counsel, above n 100.

105 Id, Blake-Krusin, 3 April 1963 ('Instructions for a new clause....').

106 Id.

107 Corfield, above n 101, col 742. Reference here to 'buying' is curious given the collective funding of remediation under s 76 WRA 1963 (see below). It can be speculated that a possible explanation for this terminology is its relevance to local authorities in their sewage disposal functions, who might consider it cheaper to pay to remedy pollution incidents after the event, rather than paying to operate systems for controlling discharges prospectively.

(b) The Relevance of Compliance with a Discharge Consent

Section 46 of the Control of Pollution Act 1974 (COPA 1974) removed the qualifications to the remediation power under the WRA 1963 of 'emergency', 'accident' and 'unforeseen event'. In their place COPA 1974 introduced a distinction between the remediation of 'pollution injurious to the fauna and flora of a stream' caused by a discharge in compliance with a consent; and that of 'poisonous, noxious or polluting matter' likely to be or actually present in the stream irrespective of whether or not consented. In the context of the latter, regional water authorities had the power to undertake remedial measures. In the context of the former remediation was mandatory.

The *duty* of remediation under COPA 1974 was never brought into force.[108] Indeed, the very enactment of this provision is curious in at least two respects. First, it is a radical departure from a position in which remediation of an incident pursuant to consent was arguably not even *empowered* under the earlier provision.[109] Secondly, and more fundamental, it reflects a new conception of rivers pollution regulation within which an *ex post* response is *integral* to a wider framework previously dominated by *ex ante* control. This point must be understood against the backdrop of the 'foundational' statement of rationale underlying the discharge consent system provided by the Hobday Committee, which was responsible for the system's conception. In particular, the Committee's general broadside against 'reactive' regulation, which is well illustrated in its advice regarding the setting of municipal sewage and town drainage consents:

> 'The main concern is to ensure the local authority plan its drainage so that normal discharges will not be polluting. There may however be emergencies in which the standard is temporarily not maintained and we suggest that a River Board would not normally think it necessary to take action in such cases.'[110]

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108 The intention ultimately to repeal the unimplemented s 46(1)-(3) was first announced in *Water Environment - The Next Steps* (DOE 1986), para 4.14.

109 The WRA 1963 precondition of 'accident or unforeseen event' is surely difficult (if not impossible) to reconcile with an incident arising from a discharge that is consented. Much of course depends upon an answer to the question of precisely what, in law, the consent relates to.

110 Hobday Committee Report, above n 21, para 73.

111 Id, para 68.

The idea - implicit in this passage - that remedial action can be dispensed with in the course of effluent control strategies aiming at forward planning is difficult to reconcile with the imperative of remediation under the 1974 Act, which appears thus to signal a change in emphasis. For the Hobday Committee, the fallibility of prospective control simply did not present itself as a problem. This is not to say that pollution incidents arising from discharges within the terms of a consent were not anticipated - it is clear from the passage quoted above that they were - but, rather, that regulatory action in direct response to them could legitimately be traded-off in favour of implementing longer term improvements pursuant to consent. It is particularly revealing that one of the chief virtues of the discharge consent system for the potential polluter put forward by the Hobday Committee lay in the certainty it would bring with it as to the legality of individual discharges in compliance.[111] COPA 1974 therefore represents a departure from this early conception of the system by purporting to take away this certainty, placing upon the regulator a duty to remediate pollution in such circumstances and, as discussed further below, liability upon the regulated party for the costs of remediation.[112]

From Collective to Individual Responsibility

A more lasting impact of the Control of Pollution Act 1974 derives from its provision of the original power of remediation cost-recovery. Initial intervention in this field (pursuant to the WRA 1963) required, albeit *implicitly*, that the financial burden of emergency measures rest upon the public regulator. Prior to COPA 1974, remediation had represented what is aptly described as a 'service' in respect of the water environment, the cost of which was to be borne collectively. The question of responsibility at this early stage was not confronted in the course of parliamentary debate or background correspondence, at least not in the sense of a choice between collective and more individualised forms. Nevertheless, it is difficult to see how the non-recoverability of costs under section 76 of the WRA 1963 can be explained in any way other than as a conscious judgement of the collective nature of responsibility for remediation. This is particularly so when it is appreciated that emphasis is given in

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112 It is not unreasonable to speculate (there is no evidence either way) that the principal resistance to implementation of COPA 1974's duty to remediate was provided by the regional water authorities (created under the Water Act 1973), who would have been entrusted with the provision's enforcement. Certainly, empirical findings presented in Annex Two suggest that what discretion today's regulatory authority possesses here is valued highly by officers in the field.

correspondence between the ministry and parliamentary counsel to the 'public interest' nature of the power;[113] the fact that there existed a long-established 'model' for cost-recovery in the context of statutory nuisance which it would have been easy to extend, were individualised responsibility intended;[114] and the fears touched on above concerning a power of remediation constituting a drain on public resources, which make less sense if it is the individual party responsible for the pollution who is to bear the costs of its remediation.[115]

What is less clear is the thinking underlying the ***introduction*** of the power of cost-recovery. Interestingly, the statutory basis of individual responsibility in this context is (and continues to be) similar to criminal responsibility under the principal pollution offences. That is to say, liability attaches to the person having 'caused or knowingly permitted' the 'poisonous, noxious or polluting matter' to be at risk of entering, or having entered the watercourse.[116] Yet it was not until the Water Act 1989 (WA 1989) that any official scrutiny was given to the question of responsibility for the costs of remediation, in which context it is intriguing to find that the emphasis having been transformed from one of ensuring that accidental pollution or pollution more broadly is remedied, as it was in the context of the WRA 1963, to ensuring that liability for pollution is fully brought home to any individual responsible.[117]

In terms of its details, the debate in the context of the WA 1989 concerning individualised responsibility for remediation centred upon an Opposition amendment to a

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113 Office of Parliamentary Counsel, above n 100, 237 ('It is in the public interest that such action should be taken').

114 Whose origins dated back to Public Health Act 1875 s 104. Indeed, even further back to the Public Health Act 1848 in the context of swines, cesspits and other 'inchoate' statutory nuisances.

115 Above, n 105 and associated text.

116 COPA 74, s46(5), as amended by Water Act 1989, s.115, and Water Resources Act 1991 (WRA 1991), s 161. The Environment Act 1995 has brought about further amendment, by inserting into the WRA 1991 s 161A, which is not yet in force. It should however be made clear that the similarity between the civil and the criminal provision in this context does not extend to the creation of a mere *risk* of 'poisonous, noxious or polluting' matter entering controlled water, which applies only to remediation liability (s 85 WRA 1991).

117 See the debate around the opposition amendment, below, n 118, cols 965-982.

measure which the Government itself proposed, enacted as section 115 of the WA 1989, and which - like COPA 1974's equivalent - provided for the *power* of cost recovery. Defining the issue in terms of how 'properly to allocate the costs of pollution', the Opposition amendment purported to impose a *duty* on the regulatory authority to make the 'polluter' pay:

> 'It shall be the duty of the Secretary of State and of the Authority to ensure that in all reasonable circumstances the person who causes any pollution of a river or other water source, whether that person is a body incorporate [sic], water or sewage undertaker or an individual, shall bear the cost of remedying that pollution and of taking steps to prevent any recurrence'.[118]

Although unsuccessful - cost-recovery remains a power and not a duty - it is significant that Environment Agency guidance does now go some way towards giving *non-statutory* effect to this Opposition amendment. It lays down a presumption in favour of cost-recovery which is justified explicitly in terms of the justice of making the polluter pay.[119]

However, it would be wrong to exaggerate the extent to which discretion is no longer exercised in practice regarding the recovery of remediation costs - a point which is returned to in the Chapter which follows; and it would be wrong too to exaggerate the extent to which the thinking underlying the power of cost-recovery is grounded primarily, let alone exclusively, in terms of considerations of justice. It is particularly significant in this regard that accounting imperatives which operated at the very outset of the power of remediation continue to exert influence.[120] The major difference between then and now appears more one of the form in which these imperatives reflect themselves in the relevant statutory provision. Whereas considerations of public sector finance once reflected themselves in the narrow delineation of the boundaries of the power of remediation, financial considerations are today reflected in a comprehensive power backed by apportionment of costs in terms of individual responsibility.

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118 Cunningham, Standing Committee D, 21 March 1989, 965.

119 NRA, 'Recording and Recovery of Costs Incurred in Dealing with Pollution Incidents', March 1993, as subsequently redrafted in November 1993 and August 1995.

120 Id.

Implications of and for Tort

The convergence of overlapping tort and regulatory law remedies is considered only once in the parliamentary debates relating to the evolution of the power of rivers pollution remediation. This is a reference to those remarks made in connection with the clause later enacted as section 46(7) COPA 1974, which provided for the off-setting of any benefits to the plaintiff (in tort proceedings) arising from the clean up of the incident pursuant to statutory powers of remediation.

> '[T]he intention is clear that when a riparian owner seeks damages at common law the subsection requires the court to take account of restoration undertaken, or to be undertaken, by the water authority under the new clause. Otherwise, the riparian owner might be given compensation twice over.'[121]

In an intriguing *misreading* of section 46(7) COPA 1974, William Howarth describes the purpose of the clause as having the opposite effect to that given expression (in Parliament) by the Bill's sponsor. Howarth assumes that the intention is not to guard against the plaintiff being overcompensated, but to ensure that the liability of the party responsible for the incident is not reduced or altogether eliminated in the course of remedial measures undertaken in accordance with public law:

> 'It would be improper if, where the endeavours of a water authority were to be exercised to prevent pollution causing damage, this were then used by the person causing the pollution as a ground to escape or reduce civil liability.'[122]

Howarth's misinterpretation of this clause is all the more perplexing for its having no regard to the power which enables the burden of remediation to be apportioned individually: a power whose exercise would go a long way to meeting his concern at the prospect of the polluter being shielded from individual responsibility. However, the scope for regulatory law undercutting private law conceptions of justice of the kind attributed to the tort of nuisance - elaborated below - is nevertheless an important consideration in any assessment of the

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121 Lord Aberdare, the Bill's sponsor, House of Lords, Committee, 29 January 1974, col 248.

122 Howarth, *Water Pollution Law* above n 1, 178-79.

intersection of the two 'systems'. As such, Howarth's remarks are valuable in focusing attention upon the more important implications of any differences between conceptions of responsibility underpinning tort and regulatory law here.

To begin by isolating the principal differences between tort and regulatory law provision in the context of a rivers pollution incident, three differences stand out. First, there are differences in the nature of the injury arising from the incident to which the two systems of remedy relate. Tort is broader in the sense that the object of liability extends beyond remedial measures reasonably incurred, to encompass a range of consequential loss including that to the individual riparian owner's amenity,[123] and profits. Secondly, there are differences in both the standard of liability and the availability of defences. Liability in tort in this setting is arguably limited by the apparently general requirement of reasonable foreseeability.[124] Also, and more settled, liability is limited by the defence of prescription.[125] In contrast, liability pursuant to statutory remediation lacks this or indeed any explicit defences, nor is it confined to reasonably foreseeable loss: causing or, alternatively, knowingly permitting the pollution or pollution risk suffices. Thirdly, there are differences in the 'moral structure' of the respective remedies.[126] The relationship between damage and liability in the context of the regulatory law on this point is contingent upon the exercise of Agency discretion. This sense of contingency is highly significant in terms of tort theories which understand tort's distinctive moral structure to lie in liability for harm being *intrinsic* to the causing of harm.[127]

There is a familiar ring about all three of these lines of demarcation, and it is not suggested that there is anything distinctive about rivers pollution on these bases alone. On

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123 Id, p 87-88. Whether loss of amenity is in law consequential upon or integral to the interference is however a little less clear after the House of Lords ruling in *Hunter v Canary Wharf* (1997) 9 JEL 345: see the comment of Steele, 'Being There is Not Enough - The House of Lords Puts the Brakes on Nuisance in the Home', id.

124 *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264.

125 Howarth, above n 1, p 97-98.

126 Differences which are at their most striking when approaching an understanding of tort through Weinrib's Kantian framework, Weinrib, 'The Special Morality of Tort Law' (1989) 34 *McGill Law Journal* 403.

127 Weinrib, id. It does not follow from liability being integral to harm that harm - or in more common terminology damage - is a necessary condition for liability: Howarth, above n 1, p 85-86, regarding interference with riparian rights being actionable *per se*.

the contrary, the point that needs to be stressed here is the value of rivers pollution in illustrating themes which have a more general currency, but which have tended to be confined in their exploration in the literature to the context of personal injury and, more broadly personal security. Thus, the rivers pollution example is valuable in reinforcing a sense of the distinctiveness of the boundaries of tort and, loosely, administrative provision, whether distinctiveness here relates to the relevance or irrelevance of fault, or any other preconditions for remedy under tort and its 'alternatives'.[128] It reinforces too the impression of statutory schemes providing broader security against a narrower range of loss relative to tort: that is to say, collective schemes providing compensation in respect of more injuries less generously. Furthermore, it offers a fresh standpoint from which to address themes relating to differences in the conceptions of responsibility underpinning tort and administrative provision.

However, on closer examination, the analogy between rivers pollution and personal security begins to break down. And it is in the prospect of a significant *contrast* as between the two settings that the interest in the comparison developed immediately above is greatest. A distinction needs to be made between contrasts which imply of tort a more precarious future in the shadow of regulatory law than that attributed to tort in the context of personal security; and a contrast which suggests that tort in a rivers pollution context has something distinctive and valuable to bring to bear.

The Obsolescence of Tort?

In assessing the obsolescence of tort in the context of rivers pollution, three areas of contrast with the context of personal security merit particular attention. The first concerns the comprehensive nature of today's powers of rivers pollution remediation, which is significant in that the *absence* of a comprehensive system of administrative remedies in the personal security context has been used as a justification for the continued relevance of tort. This view depicts negligence not so much as a system of remedy which is heavily circumscribed by, for example, considerations of fault and cause (as discussed in Chapter Two), but as a system which in spite of its obvious limitations operates at a high level of generality, contrasting with the patchwork of specific administrative provisions which have grown up on an *ad hoc* basis, leaving in their midst significant gaps. To the extent that an extremely

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[128] Most famously, Atiyah and Stapleton, above n 95.

broad range of remedial measures encompassing restoration of a damaged ecology are empowered whatever the circumstances of the damage arising,[129] this justification does not or, rather, no longer has the same force it once had (in connection with section 76 of the WRA 1963) in the rivers pollution context. If the patchwork and - more to the point - *patchy* nature of administrative provision in a personal security context is a compelling reason for the continued relevance of tort there, it is one compelling reason which is conspicuously absent in the context of rivers pollution.

The second area of contrast concerns the apportionment of responsibility, and is perhaps more complex than the first. There is clearly the prospect of *conflict* between a system - that of nuisance - oriented around corrective justice (if, indeed, that is what it *is* oriented around)[130] and a system of remediation which may involve apportioning responsibility collectively, if that is how the regulator chooses to exercise its discretion. To take a hypothetical example, it may be the case that the regulator has decided not to apportion liability for remediation on an individual basis because it is considered that it would be unjust and inexpedient in terms, say, of longer-term relations between regulator and regulated.[131] This may be the case where the individual 'responsible' has been co-operative in helping the regulator identify the incident's source, and that the cause of the incident is not considered by the regulator to be anyone's fault. The effectiveness of judgements such as these must surely be viewed as capable of being undercut by the prospect of private enforcement of entitlements to purity protected by tort on the basis of the causing of damage alone, regardless of fault or regulatory expediency.[132]

Yet, and continuing with the practical theme, it may also be possible to exaggerate the likelihood of such conflicts arising in practice. For what is surely likely to be most distinctive in practice about the intersection of tort and regulatory law in the context of rivers pollution is not so much the scope for conflict between remedies and remediation, but the scope for convergence. To a greater or lesser extent - precisely which is a matter for empirical study - liability under tort and regulatory law in a rivers pollution context will

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129 Roberts (1987) 43 *The Magistrate* 150.

130 The ambivalence on this point is elucidated in Epstein, 'Nuisance Law: Corrective Justice and its Utilitarian Constraints (1979) 8 *Journal of Legal Studies* 49.

131 This is an important consideration in practice, and will be returned to in Annex Two.

132 This is a practical point distinct from the more theoretical one made above regarding the difference between liability being contingent and inherent in the face of damage.

have in common not only the likelihood of attaching to the same individual party responsible, but also relating to the same damage, namely, liability for costs of removing polluting matter, preventing or minimising ecological mortality and, so far as is practicable, restoring the ecological status quo. It may be speculated (in the absence of evidence either way) that loss of amenity and economic loss consequential upon a pollution incident (in respect of which tort is distinctive) will in practice only occasionally be a significant component of damages. Personal security, by contrast, is discussed as highlighting not only the difference between tort and administrative remedies in terms of an individual being liable and liability lying with the public as a whole;[133] but also the divergence between the heads of damage and quantum involved in a personal injury action in negligence (which is typically high, particularly as regards pain, suffering and loss of amenity), and security pursuant to administrative provision. The generous and individualised nature of remedies in tort when compared to administrative provision in a personal injury context is often put forward as an argument for continued tort provision. Whether or not this argument is persuasive, the point to make here is that this is an argument in favour of tort which is lacking in a rivers pollution context, where the financial sums involved in remedies in tort and regulatory law hold out the prospect of a far greater convergence.[134]

The third area of contrast between tort and administrative provision in the rivers pollution and personal security contexts concerns the behavioural implications imputed, particularly by scholars in a law and economics mould, to the difference between individual and collective liability for harm.[135] The point to make here is the extent to which arguments about the deterrent effects of tort relative to regulatory law familiar in the personal injury context have little currency in a rivers pollution context, given that both tort and regulatory systems in this latter context are each oriented around individualised liability. Once again, an argument in favour of tort in the shadow of regulatory law which may have something to

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133 Recent developments in statute and case law do however suggest an increasing individualisation in liability for, say, a benefit agency or health authority's expenditure upon victims of torts: see Atiyah, 'Personal Injuries in the Twenty First Century', above n 95.

134 However, in the absence of any research into the costs of bringing (and defending) an action for interference with riparian rights, it may only be speculated that these are typically less than those involved in a negligence action. It also speculation that the differential between tort and regulatory law is less pronounced. That this speculation is well-founded may be suggested by the strict nature of tort liability in the context of rivers pollution.

135 See Chapter Two.

commend it in a personal security context is apparently lacking any obvious force when applied in the context of rivers pollution.

A Future for Tort?

When Glanville Williams discerned in rivers pollution regulation the foundations for a future in which the social function of tort is eclipsed by emerging regulatory law forms, he appeared to be basing his observations upon Government measures for subordinating private nuisance to the discharge consent regime.[136] It is ironic therefore, that arguably the most searching questions concerning the continued practical relevance of tort in the shadow of regulatory law arise from regulatory law developments of a distinctive character, which post-dated Williams analysis, and which, crucially, were largely undebated for their tort law implications.

However, it would be premature to conclude that the silent overlaying of 'remediation' upon 'remedies' holds out the prospect of a withering of tort of the kind that Williams anticipated in the context of the discharge consent regime. Whilst it is true that the conclusion which must be drawn from the foregoing is that tort in this context does in the very least lack some of the most important lines of rationale that are claimed for it in adjacent contexts, notably personal injury, a more balanced conclusion requires significance to be attributed to the arguments put forward in justification for tort's unqualified provision in the shadow of regulatory law discussed in the previous section.

Returning briefly, then, to the defence of tort in respect of proposals for its subordination to *ex ante* regulatory control, it is significant that the arguments rested not so much upon any contribution tort offers as framework of economic incentives; nor indeed did the arguments always (or even often) stress the defence of a system of *individualised* justice. Tort is justified more as a 'safeguard' against regulatory authorities attaching weight to interests to which pollution prevention is secondary; and as a reflection of ancient customs relating to the watercourse which, though embodied in rights, nonetheless emphasise mutual dependency, and shared responsibility. One way of summing up these arguments is to suggest that tort is defended precisely because it offers a standpoint for making judgements about the acceptability of a pollution risk independent of regulatory law.[137] This is a line of

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136 Williams, 'Aims of the Law of Tort' [1951] *Current Legal Problems* 137, 175.

137 This complements Jenny Steele's discussion of the attractiveness of tort in more contemporary regulatory contexts - 'Assessing the Past: Tort Law and

defence which is noteworthy in implying a function for tort in respect of which no amount of expansion in regulatory law will ever offer a substitute. Surely, these considerations apply equally to regulatory law of an *ex post* form.

Two further themes in the defence of tort merit attention in this regard. At perhaps the most mundane but nonetheless important level, tort in this context is associated with the protection of a valuable property right, which it has proved politically difficult to 'confiscate' by means of regulatory devices.[138] Certainly, the burgeoning preference for administrative solutions to problems previously left to tort of this period prophesied by Williams has not resulted in an indiscriminate overriding of tort by administrative or even legislative means, with each case being considered on its merits.[139] Secondly, and more profoundly, the value of inter-dependence associated with tort in the rivers pollution context is consonant with emerging motifs in domestic environmental policy - notably, the notions of stewardship which are coming to play a central part in official articulations of the policy of sustainable development.[140]

When these points are taken together, the possibility must be entertained that the implications of the overlaying of regulatory upon tort law in this context are not one way, and the process of tort's eclipse in the hands of administrative structures is far from inexorable. On the contrary, it is appropriate to explore in closer detail whether and, if so, what influence tort exerts in the shadow of today's regulatory law.[141]

III Conclusion: The Implications of Tort for the Study of Legislative History

Drawing together the strands of this and the previous Chapter concerning the significance of tort as another dimension to the study of legislative history, the basic conclusion is the rather

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Environmental Risk' in Jewell and Steele (eds), *Law in Environmental Decision-Making* (forthcoming).

138 See above, n 49.

139 The merits in the context of town planning and rivers pollution are discussed in Chapter Three, and its Postscript.

140 Report of the House of Lords Select Committee on Sustainable Development, Session 1994-95 (1995 HL 72); see further Jewell and Steele, 'UK Regulatory Reform and the Pursuit of "Sustainable Development": The Environment Act 1995' (1996) 9 JEL 283.

141 A task which is taken up in Chapter Six.

straightforward one of tort clearly enjoying prominence to a degree which academic studies of the evolution of social regulation rarely even begin to get to grips with, let alone analyse in any depth. Moreover, even when tort is peripheral to the debate as it is in the context of remediation, this is not necessarily a reflection of its practical importance, one way or the other. On the contrary, measures which have proved uncontroversial are inextricably bound up with those that have been subject to heated controversy.

However, to attribute prominence or even importance to these developments within legislative history offers little rationale for studying the subject further, nor any indication of what form future study might usefully take. In addressing these issues in the following concluding remarks, it will be argued that a fruitful direction for research is a comparative one, notably, exploring continuity and difference in the regulatory fields at hand (and others too), explaining why debates take place at the time they do, and what they tell us of the role of tort in an age of regulatory law, and indeed, beyond. Richard Epstein's analysis of social consequences of common law rules is helpful in suggesting a point of departure.[142] Epstein's analysis is relevant in shifting the academic focus away from tort's definition within case law,[143] and onto tort as an object of reform through statute. As a critique of research attributing social significance to historic common law rules Epstein's analysis is also illuminating for what it says, first, of the role of self-interest in debate about reform and, secondly, the politicisation of tort within legislative history.

The Role of Self-interest and the Role of Reasoning in Legislative History

First, and at the most basic level, Epstein's analysis is of interest for its assumptions of a broadly public choice character,[144] in terms of which potential litigants are treated as economic agents presented with a choice between a litigation strategy and a strategy of legislative reform as the most efficient way of giving effect to their interest or 'class of interest'. To consider the relevance of Epstein's analysis is therefore to introduce a fourth

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142 Epstein, 'The Social Consequences of Common Law Rules' (1982) 95 *Harvard Law Review* 1717.

143 A focus which is reflected well in the study of historic nuisance law: see e.g. Brenner, 'Nuisance Law and the Industrial Revolution' (1974) 3 *Journal of Legal Studies* 403; Horwitz, *Transformation in American Law* (1977); McLaren, above n 12.

144 See generally Ogus, *Regulation* (1994), p 58ff.

methodology or model of government growth to the three addressed at the conclusion of the previous chapter: those of an evolutionary, ideology-oriented and market-failure character. In applying public choice analysis, it is noteworthy that the self-interest of participants is indeed a pervasive, albeit a sometimes incipient, theme. Certainly, some of the most intriguing findings in this thesis are those which lie in the links regulatory authorities perceived between an effective tort system and the preservation of their legitimacy as representatives of the public - something which is apparent, to varying degrees, in each of the three fields examined. However, Epstein does not refer to the interests of the regulatory authority in his analysis, but focuses his attention instead upon economic interests among citizens. It would be useful to consider what the evidence of the involvement of regulatory authorities in the debate about tort reform adds to public choice scholarship elsewhere, in which the interests of officials is indeed, in contrast to Epstein, among the most critical issues.[145]

It is also worthwhile to explore in closer detail the *reasoning* of the participants in the debates here. Although it must be acknowledged with Epstein that reasoned justification is not generally accorded the primacy in legislative proceedings that it is in proceedings of a judicial character,[146] it is nevertheless difficult to accept the reduction implicit in a public choice account (of legislative reform) of reason to political power. A crude illustration of the possible historical importance of reasoning in this connection can be drawn from the rivers pollution setting. It is provided by the fate of the early and uncritical indignation at proposals to subordinate tort in this context, in contrast to the more reasoned - and ultimately more successful - resistance to similar proposals post-war. Further research might usefully examine the nature of the arguments put forward in the context of proposals for tort reform and, in particular, the relationship between arguments appealing primarily to considerations of justice, and those appealing primarily to what has been described in this account as policy. Both continuity and contrast in this respect are apparent at a broad level across the various contexts of alkali, rivers pollution and factory safety regulation. It would be useful to make this aspect of the foregoing discussion the subject of more focused research.

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145 See generally Mueller, *The Public Choice Approach to Politics* (1993).

146 A point which Epstein uses to bolster his public choice assumptions, above, n 142, p 1720.

Epstein's account purports to explain why common law rules become the subject of legislative reform. As such, it carries *prima facie* relevance to the task of explaining the *fact* of the debates discussed in this and the previous chapters. The key explanatory factor for Epstein is the extent to which the common law *status quo* is biased in favour of a social grouping, such as to give rise to an homogenised 'class of interests' in tort reform. Bias in this respect is normally extremely limited, Epstein argues, by the common law's generality and the requirement of publicly reasoned judgement underpinning a common law rule:

> '[M]ost common law rules are not cast in class form; there is no easy one-to-one correspondence between a given rule and the advancement of a particular social class'.[147]

Epstein's account will have gone a long way to explaining the debates in the context of nuisance and pollution if the reforms at issue are indicative of a 'relatively compact group' prejudiced by the tort *status quo*. If, that is, they give rise to the kind of incentives to pursue a strategy of legislative reform which Epstein attributes to the defence of common employment (which 'flatly barred entire classes of claims').[148] Significantly, Epstein considers that the tort of nuisance is of an indeterminate character in this respect, which provides little incentive towards statutory reform. Intriguingly, his principal argument in this connection refers to interests in industrial pollution, in which context industrialists - as residents of property as well as owners of polluting plant - are considered by him to have had nothing to gain by a reversal of nuisance doctrine, at least as it concerns the most basic choices in the standard of liability as between strict liability and fault. [149]

Because the debates discussed in this and the previous chapters relate to more specific aspects of nuisance doctrine, namely, aspects concerning multi-party causation and the defence to an action for interference with riparian rights, the possibility must be contemplated that Epstein's analytical framework is indeed capable of explaining their occurrence. However, caution should be exercised here, for it does not follow from the fact

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147 Id, 1719.

148 Id, 1736.

149 The commentary which Epstein is particularly critical of in this regard is Horwitz, above n 143.

of debate being couched in relatively narrow terms that the issues debated clearly divide along class lines. On the contrary, the River Boards Association, in a memorandum referred to in the opening section of this Chapter,[150] made clear in the context of 1950/51 proposals for tort's subordination to the discharge consent regime that interests cut-across, for instance, the industrial/recreational divide. Similar considerations apply to the alkali setting, in which context rules relating to causation are surely 'plagued by a conflict of interests'[151] arising from industrialists' *residential* needs no less than rules relating to, for example, the difference between strict and fault liability. There are therefore major difficulties in the way of accounting for the existence of the legislative strategies described in this Part purely in terms of Epstein's 'class of interest' thesis.

A broader aspect of Epstein's account which would benefit more from further exploration concerns the politicised nature of the debates about tort reform. Certainly, it is clear from Chapter Four that organised associations of residents in the alkali context provided much of the initiative behind the raising of tort's profile as an issue for statutory reform. This is so even if this initiative alone would have carried less force without the support, from a quite different standpoint, of the alkali inspectorate; and even if the rhetoric employed by the organised lobby was of a strikingly non-partisan nature in comparison to that in the context of factory safety. Much the same can be said of the debate in the rivers pollution context, where the Anglers' Co-operative Association - in combination with a variety of other sources of support - played a major role in the collapse of Government proposals to subordinate tort to regulatory law, albeit once again without employing rhetoric of an antagonistic character. There is considerable scope for a more detailed examination of the role of interest groups in these settings, when compared with the role of, for example, trade unions in the more familiar setting of factory safety. Thus, if Epstein's notion of a 'class of interest' is cast in a somewhat crude light by developments described above in the context of nuisance, Epstein's emphasis upon notions of politicisation, broadly speaking, nevertheless appears crucial to any adequate explanation of historical developments in the field.

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150 Above n 142, 1736.

151 Id, 1736.

Conclusion

When looked at in the most practical terms, the legislative history of tort in the context of rivers pollution regulation is perhaps most significant in challenging county court judgments in which compliance with a discharge consent has been held to be - or as capable of being - a defence in nuisance proceedings.[152] Were the courts to examine statements by ministers in the course of the enactment of the discharge consent regime, it would be clear that the intention on this point is that riparian rights remain entirely unqualified by the grant of a discharge consent. The more interesting academic issues that arise from the debate, however, concern, first, the fact of the resistance to proposals for the subordination of tort to regulatory law; secondly, the interests which aligned themselves to the opposing contentions, with particular reference to the role that regulatory authorities themselves assumed; and, thirdly, the reasons with which the competing contentions were justified. On each count comparisons with the regulatory fields discussed in the previous chapter reveals significant areas of both continuity and contrast. In the upshot, comparison here is valuable in providing a sense of identity and common interest to what is superficially a disparate and marginal series of debates.

Rivers pollution is also significant in highlighting a number of themes fundamental to a study of the legislative history of tort broadly. One point to emphasise is the complex relationship between common law, regulatory law and the relevant framework of public policy, touched on at the conclusion of Chapter Four, and elaborated in this Chapter. Another point to emphasise is the extent to which liberal tort provision is not simply won or lost in a moment of legislative reform, but requires frequent justification at a more routine, 'day to day' level: that is to say, the importance of a 'socially responsible' approach to private law's *enforcement*. Perhaps most fundamental of all, the foregoing discussion cautions against focusing narrowly upon the more controversial proposals for legislative reform, when wider developments such as those relating to the development of powers of remediation also raise significant issues relevant to tort's future in the shadow of regulatory law.

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152 Judgments which are considered in the Postscript to Chapter Three.

Part Four
Fieldwork

Methodological Note

The findings in this Part are derived from a range of methods appropriate to gaining an insight into regulation in the field. The purpose of this prefatory note is to describe the methods used, and to explain the thinking underlying the key methodological choices that have been made.

The Methods

The methods adopted in Chapter Six owe much to an appreciation of the methods underpinning existing research in the field, upon which the chapter builds. In particular the account of Keith Hawkins, which is grounded in insights arising from participant observation conducted over a substantial period of time, involving two regional water authorities and 76 officers in the field (Hawkins 1984); also, 'lengthy' tape recorded conversations with both field officers and more senior staff, including staff within the water authorities' legal departments. In contrast, the account in Chapter Six is based around structured interviews involving just one field officer in each of the five regions of the Environment Agency sampled; a questionnaire relating to the financial significance of the subject matter of the fieldwork completed by the finance departments; and interviews with employees in the finance departments responsible for agency cost recharging. In common with Hawkins' account, the account in Chapter Six makes use of published agency materials and those internal agency documents to which access was given.

The choice of differing methods reflects in large part the contrasting significance of fieldwork within the project of Hawkins and the thesis at hand. Fieldwork is only one perspective among many from which the subject-matter of the thesis is approached, taking its place alongside legislative history and perspectives of a formal or more theoretical nature. In contrast, fieldwork is the essence of Hawkins' project, which justifies the demands upon time inherent in the method of participant observation. Also of relevance are differences in literary context, Hawkins starting from very much a clean slate, in contrast to the project at hand which has had Hawkins' own research to build upon. The thesis exploits the 'start' that Hawkins has made.

Structured interviews also enable the researcher to have a relatively high degree of control over the fieldwork, something which is either an advantage or disadvantage depending upon the research context. Control was not a priority for Hawkins, whose 'chief

concern' was to 'learn in detail about the business of pollution control at the field level, to experience personally the field man's world, the mundane activities as well as the occasional dramatic events' (229). The concern in this thesis is in contrast to learn about a specific aspect of the field officer's 'business' which is obscure in Hawkins' account, whether because it is downplayed, or because it assumed far less significance then than now. The emphasis is very much on the 'occasional dramatic events' - an emphasis of sufficient specificity as to call for a focused method.

Indeed, the preference for a focused method is closely bound up with what is arguably a limitation of Hawkins' reliance upon 'naturalistic observation', which his own methodological note overlooks: namely, the uncertain role which law assumes in the empirical analysis. There are well-remarked difficulties in the way of immersing oneself in the standpoint of a field officer, as indeed any other 'alien' perspective. Clearly, there are powerful forces tending towards the observer importing meaning 'of their own'. However, equally as important as the question marks relating to the *possibility* of the legal researcher ridding themselves of the interpretative structures of an academic lawyer, is the questionable *desirability* of them doing so. There is a strong sense in which it would have been better for Hawkins to have subjected what are aptly described as his own legal prejudices to closer scrutiny or, more radically, to have taken a more critical look at the formal statutory, and wider legal framework before undertaking the fieldwork: in particular, to have considered the role that law of a civil and *ex post* character (of the kind discussed in the previous Chapter) plays, as well as (and alongside) that of a criminal and *ex ante* character. As it stands, it is his failure to make clear to the reader precisely what provisions constitute the relevant legal framework that gives rise to the obscurity touched on immediately above, concerning uncertainty as to whether Hawkins has overlooked an aspect of law which is important to the pollution control business of the officer, or whether he is, rather, reflecting the extent to which the aspect of law in question is one that was not as important then as it appears to be today.

The reliance upon structured interviews for the research underpinning Chapter Six has its own limitations, of which Hawkins was familiar and, in the circumstances, able to guard against. In particular, the risk of the interviewee having an agenda of their own, which might lead them to exaggerate certain features of the activity in question; and, in a similar vein, the agenda of the interviewer themselves, by which the answers of the interviewee are susceptible to being led to the point that the insights arising are a distortion of the true position. Hawkins' own interviews were largely conducted after the method of participant observation had been undertaken, by which time a 'good rapport existed' (230). This he

considered as serving to reduce the risk of the interviewee misleading the interviewer. Moreover, his 'discussions were very loosely structured', avoiding 'even the hint of a contrived formal interview' (id). The value of this feature of the approach was to mitigate against a discernible agenda on the part of the interviewer. Since these are safeguards that were not open to the project at hand, the insights should be read critically with the very real dangers of distortion in mind.

The Sample

The sample taken here differs too from that of Hawkins, notwithstanding that there may be some overlap in the regions covered. Whereas Hawkins addressed a 'deep' sample involving just two regions, the sample here is a more superficial one involving five regions. The reason underlying this preference for breadth lies in the expectation that regional variation would be a major issue in terms of the subject-matter of this thesis, in contrast to Hawkins who anticipated that any variation would be confined to the difference between the business of a pollution control officer in a predominantly urban and a predominantly rural catchment (225). Thus, the sample in what follows includes both predominantly urban and rural catchments, and catchments which are roughly an equal mixture of the two; southern and northern regions (*pace* Hawkins), as well as eastern and western and central. The regions were also selected on the basis of information gathered from the relevant agency's annual reports into pollution incidents, which contain figures relating to the number and nature of pollution incidents, and 'legal action', encompassing both criminal and civil measures. It soon became clear in the course of the fieldwork that more would have been gained by a deeper and broader sample, involving comparison of areas within regions, and different officers within areas. However, time constraints operated against extending the sample beyond the initial selection.

The more profound issue concerns the choice of water pollution as the regulatory focus of attention. When Hawkins addressed his choice of focus, he stressed the 'bounded and manageable' character of regulation in this context, possessing a 'kind of tangibility' which separated it from regulation in other contexts such as noise and air. Leaving aside the extent to which this is more an argument against than in favour of focusing on water pollution - certainly, this explanation is particularly questionable now that the tendency within environmental law is towards multi-media, pollutant and process integration - it is important to emphasise that the choice of water pollution here is based on different considerations, of which two in particular merit a mention. First, river pollution is

exemplary of the structure of modern environmental regulation, constituted as it is by *ex ante* provisions of a 'command and control' character; public law powers to 'physically' remedy the effects of a pollution incident; and the potential convergence of freestanding private law, common law remedies, notably those in tort. Secondly, in each of the above respects the legal structure of regulation here is deep-rooted historically, making rivers pollution a good platform from which to explore 'later' additions to the law relating to the environment. This is particularly true of civil litigation which, led largely by the Anglers' Co-operative Association, is and has for some time been a more pervasive feature of this than other domestic environmental settings. As such, it presents a useful backdrop from which to appreciate issues arising from the emerging prominence, broadly, of tort intersecting regulatory law.

Chapter Six
The Intersection of Tort and Regulatory Law in the Field

Much has changed in the context of rivers pollution regulation since the publication of Hawkins' now canonical study of implementation in the field.[1] There is evidence of a new formalism in the setting of water quality standards,[2] and in the enforcement of pollution offences.[3] Regulatory 'services' are now charged to the regulated.[4] Moreover, there is an increasing emphasis upon the separation of 'regulatory' and 'operational' functions, and integration in the institutions of environmental regulation broadly.[5] Fundamentally, the very object of study is under threat, discussion of effluent charging, permit trading and economic instruments on the whole casting doubt upon the dominance of the criminal-administrative form.[6] Developments of this nature go to the root of the existing account, suggesting a profoundly altered framework of 'regulatory law' and policy today from that of the period during which the fieldwork into the 'regulatory activity' underpinning Hawkins' study was conducted. When taken together with the possibility that social attitudes towards pollution

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1 Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (1984). The fieldwork for this study is reported to have taken place in the 30 month period from June 1976, pp 226-227.

2 Macrory, 'Environmental Law: Shifting Discretion and the New Formalism' in Lomas (ed), *Frontiers of Environmental Law* (1991), as evidenced by SI 1989/1148; SI 1989/2286; SI 1992/337; SI 1994/1057, as amended.

3 Jewell, 'Agricultural Water Pollution Issues and NRA Enforcement Policy'[1991] LMELR 110.

4 Hughes, 'The NRA's Proposed Scheme of Charges' [1990] LMELR 110; and 'The NRA Scheme of Charges in Respect of Discharges into Controlled Waters' [1991] LMELR 115. Effluent charging is long-standing in the context of discharges to sewers, with considerable significance in practice: Richardson, Ogus and Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (1983), especially 145-149.

5 Jewell and Steele, 'UK Regulatory Reform and the Pursuit of Sustainable Development: The Environment Act 1995 (1996) 9 JEL 283.

6 Discussion of alternatives to criminal administration is long-standing in the rivers pollution sphere. Certainly, a 'market' approach has been mooted as early as the Third Report of the Royal Commission on Environmental Pollution, *Pollution in Estuaries and Coastal Waters*, Third Report (1972, Cm 5054); and, more recently, the Sixteenth Report of the Royal Commission on Environmental Pollution, *Freshwater Quality* (1992, Cm 1966). The matter is currently under review: *Economic Instruments for Water Pollution* (DETR 1997).

lack the degree of tolerance that was apparent in the mid to late 1970s,[7] it is clear that developments here call for a reappraisal of Hawkins' findings.

As has already been remarked upon in connection with the discussion of methodology, the idea that the empirical study of regulation can become outdated as a result of changes in the formal legal framework raises basic but nonetheless important questions concerning the role that 'law' plays in the analysis. In Hawkins' account there is a striking ambivalence in the role of law which arises from its concern with, on the one hand, the relevance of 'the formal legal process' to the implementation of regulation in the field;[8] and, on the other, the care taken in guarding against importing too 'lawyerly' a perspective.[9] It will be argued that the result of this ambivalence is a largely implicit trade-off between soundness in the assumptions relating to the formal legal framework, and the avoidance of prior reflection on this framework such as to compromise the participant observer's objectivity. The effect of this trade-off in Hawkins' analysis is illustrated by the focus there on the most conspicuous aspects of the legal framework, namely, the *ex ante*, criminal-administrative form represented by the discharge consent regime. Less conspicuous but nonetheless important aspects of the legal framework are neglected. This is particularly true of the tort law framework whose considerable significance from the standpoint of legislative history was examined in Chapter Five. It is also true of another aspect of legislative history discussed in the previous Chapter, namely, remediation, illustrating statutory provision of an *ex post* character.

Not only are questions raised of the continued pertinence of Hawkins' account, then, but of its historical accuracy too: the 1970s legal framework was, at least at a formal level, clearly more heterogeneous than Hawkins' assumptions admit. Perhaps more profound however are the questions which relate to the image of law which Hawkins' assumptions about the proper focus of emprical research reflect and, in particular, the sense in which the reduction of regulatory law to criminal administration in Hawkins' account serves to

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7 See *Environment and Enforcement*, above n 1, p 12 ff.

8 *Environment and Enforcement*, id, 193, where it is stated that the aim of the study is to put 'forward a...view about strategies employed in enforcing regulation, emphasising the role of the formal legal process'.

9 *Environment and Enforcement*, above n 1, 229: 'I did not study any of the legislation before embarking on field work because I wanted to learn the law as the field officers knew it, and I wanted also to avoid the distortion arising from a particular sense of relevance which thorough prior knowledge of the formal structure of rules may have conferred on what I was actually observing'.

reinforce the very image of social regulation to which it sets out to offer a critique.[10] This is a reference to an image of law of Bentham, resting as it does upon the prioritisation of penal legal forms,[11] and an ideal of codified law whose completeness is undisturbed by the provisions of the common law.[12] If the aim of the existing socio-legal account is to question the sense in which regulation is comprehensive in its terms and uniformly enforced;[13] a self-referential developer of its own system of norms, transcending those of other institutions and social conventions;[14] and, most broadly, to lift the veil on an orthodox image of law revealing a 'more complex and more interesting reality' in which law is - pace Rock - 'empirically problematic, grounded in meaning, negotiated and emergent',[15] it is difficult to envisage a better opportunity to do so than to explore the relevance alongside law structured around penal, *ex ante* control, of private law of a largely *ex post* character. This point will be returned to in the concluding section of this chapter. First, it is necessary to explore the implications for the activity of regulation of discharges to rivers being 'regulated' not just by statute but also by the common law. The findings of empirical research into remediation - the other major area of the legal framework discussed in the previous chapter but largely neglected in Hawkins' account - are presented in Appendix 2.

I The Significance of Remedies in Private Law

The main oversight in Hawkins' account concerning the formal legal framework relating to rivers pollution regulation is in the definition there of the framework within which the regulatory activity unfolds in terms of an exclusively statutory, criminal-administrative form. What is particularly lacking is any attempt to think through the implications in the field, if any, of the water environment being subject to the legal protection of riparian rights

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10 Particularly illuminating in this respect is Galligan's introduction to the special issue 'Socio-Legal Studies in Context: The Oxford Centre Past and Present' (1995) 22 J Law and Soc, 1.

11 See further Postema, *Bentham and the Common Law Tradition* (1986), 175-182.

12 Lieberman, *The Province of Legislation Determined* (1989) and, more generally, chapter two above.

13 Galligan, above n 10, 3-7.

14 Id.

15 Rock, 'Sociology and the Stereotype of the Police' (1995) 22 J Law and Soc, 17.

by means of the common law. Hawkins does indeed acknowledge that the water environment supports fish and livestock in respect of which individuals have rights.[16] Nevertheless, Hawkins' remarks here are cursory, with his emphasis instead being upon the broader public interest associated with the water environment, and the reflection which this interest finds in regulatory law, and, in turn, regulatory activity. There is in consequence a one-dimensionality to the legal framework in Hawkins' account which is most vividly illustrated in the remarks of his linking rivers pollution with victimless crime:

> '[It is] difficult to speak, for example, of the 'victims' of water pollution. In some cases downstream users may have to close their intakes, and anglers may be appalled at the sight of dead fish. But when a pipe is discharging polluting water into a river which is largely an effluent channel, the only victim may be the public, with the impairment to such amenity as may remain.'[17]

The implication which needs to be questioned is that pollution does not infringe private rights - giving rise to potentially substantial civil liabilities - and, more to the point, that the legal protection of private rights represented by fields of common law such as tort is irrelevant to the implementation of statutory regulation.

The unquestioned disengagement of regulation from any context which it may have in the freestanding provisions of the common law is a general feature of much socio-legal study of an empirical character, and, indeed, study of regulatory law more broadly still.[18] As such, Hawkins' disinterest in issues at the intersection of tort and regulatory law is best appreciated as illustrative of a wider academic lack of concern. This section builds on the increasing academic interest concerning the interrelationship of regulatory law and tort.[19] Attention is given to the effect this area of common law has upon the activity of regulation, viewed from the perspective of the field officer and, in particular, the relevance to the field officer's enforcement of regulatory law, if any, of the polluter's potential liability in nuisance.

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16 *Environment and Enforcement*, above n 1, 156.

17 Id, 7.

18 See further Chapter Two, p 29-30.

19 James George, 'Responsible Regulation? The Effects of Liability on Regulatory Enforcement', paper given to the Annual Conference, *Socio-Legal Studies Association*, 1 April 1996, noted in Chapter One.

Issues arising from Legislative History

It has been seen in Chapter Five that the legislative history of rivers pollution regulation is in large part one of a conflict between those who sought the subordination of private nuisance to regulatory law, and those who advocated the coexistence of the two. The principal flash point of the debate centred around proposals for *ex ante* control by way of discharge consent replacing common law protection of the riparian right to purity, with rather less attention being given to the relationship between common law and other aspects of the emerging statutory framework, notably, powers of remediation.[20] A number of issues appropriate to empirical analysis arise from this legislative history, which it is the purpose of this section to examine.

Evidence of Conflict between Tort and Regulatory Law

Conflicts of the kind envisaged by Wilkinson and Armer and other opponents of tort's unqualified provision in the shadow of regulatory law are far from pervasive when examined from the standpoint of officers in the field.[21] Indeed, field officers generally experienced few problems with an arrangement by which common law and statutory provisions coexist. A sense of conflict was not entirely absent however, as is illustrated by the following examples.

An outstanding example of tension between tort and regulatory law in this respect concerns the extensive costs involved in the prevention of temporary downstream discoloration arising from the reclamation of a coal tip at the edge of a river in one of the regions sampled. The environmental impact of discoloration here was considered by the officer to be negligible, yet riparian owners would not tolerate it, threatening legal action against the public bodies who were funding and managing the work. The officer involved captures the problem well:

> 'The people who were doing the work were finding it very frustrating because they could see at the end of the day that everything was going to be great - that we can turn this awful mining valley into something like a country park. Yet the riparian

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20 The relationship between remedies in common law, remediation and the discharge consent regime is examined in Appendix 2.

21 Chapter Five, n 64-71 and associated text.

owners were having none of it. They were prepared to see 25000 pounds of public money diverted from a project of immense long term environmental benefit, and into preventing damage of a short term and largely cosmetic nature'.

Riparian rights in this context were understood as a source of 'a tremendous amount of conflict'.

Officers also found it unsatisfactory that they were occasionally requested by riparian owners to conduct samples in the aftermath of a remediated incident, whose principal function was to assist the individual in the decision whether to commence proceedings in tort. Not only was this perceived as an unnecessary burden on the authority's resources, but it was understood as a slight against the officer's own judgement as to the significance of the level of contamination remaining. Riparian owners in this context assume the status of complainers, or 'nuisances' (in the non-technical sense): something which Hawkins' account itself touches on in the context of angling interests.[22] The implication which Hawkins neglects to draw however is a significant one, namely, that there is some evidence of a connection between the nature of the relationship which the authority has with members of the public - 'troublemakers' in particular - and individual rights to purity defined and protected by the common law. Property owners and members of the public generally are conflated in Hawkins' account, which somewhat obscures the private law-related demands on an officials time of the kind noted immediately above.

However, other areas in which conflict might be anticipated appear not to manifest themselves in practice. Of particular significance in this respect is the fact that antagonism at the intersection of tort and regulatory law of the kind raised in the setting of health and safety at work is not in evidence in the context of rivers pollution. The Robens Commission's criticisms of the 'unfortunate feedback' arising from the 'interplay between compensation arrangements and accident prevention arrangements'[23] are not generalisable to the context at hand, which lacks any comparable evidence that the threat of tort litigation from aggrieved riparian owners leads, as in the context of health and safety, to a 'buttoning

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22 *Environment and Enforcement*, above n 1, 97.

23 Report of the Royal Commission on Safety and Health at Work (1972, Cm 5034), para 424.

down of the hatches', impeding the 'speedy and co-operative investigation of accidents' on the part of the regulator.[24]

That no such tension is evident in the context of rivers pollution may be accounted for in a number of ways. The relative insignificance of fault underpinning tort in this context when compared to health and safety is one possibility.[25] Another possibility is that the threat of nuisance proceedings is, for whatever reason, taken less seriously than the threat of criminal proceedings.[26] Principally engaged with the task of averting the latter, it will be made clear to the alleged offender that the chances of doing so are greatly enhanced by co-operating with the authority, amongst other things, in identifying the cause of the incident.[27]

Evidence of a Complementary relationship between Tort and Regulatory Law

However, even if the threat of liability in tort in the rivers pollution context is of less concern to the potential liable party than it is elsewhere, it is nevertheless perceived to be sufficiently grave for field officers themselves to seek to exploit it for purposes of reinforcing a strategy of pollution prevention. One officer spoke particularly clearly of the strategic deployment of a polluter's potential liability in tort:

> 'Personally, I've used the threat of riparian rights as part of my negotiating tactics with people saying "well look here, if you mess up and cause pollution it's not just us you've got to worry about. You've got a hoard of screaming anglers up there who'd come down and sting you for civil claims as well". I've actually written letters, laying on thick the civil issues the farmer or what have you should worry about.'

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24 Id, para 436.

25 The need to prove fault or, more to the point, defend against an allegation of fault was considered by the Robens Commission, n 23, to be crucial to an incident in a factory safety context leading to the 'buttoning down of the hatches' described immediately above.

26 A possibility which is consistent with observations in connection with civil liability for the costs of remediation, discussed in Appendix 2.

27 Willingness to undertake measures relevant to remediation is one of the most important ways in which the regulated party can demonstrate that their 'co-operativeness' for purposes of the decision whether to recommend criminal prosecution - a point which Hawkins makes, above, n 1, Chapter 6.

This is not however an approach shared by all officers in the field. Indeed, other officers stressed the importance of encouraging the public to cooperate in the use of water resources, and the desire not to have any official involvement, however remote, with what is perceived to be the inherently divisive operation of the common law. Strategic deployment of the common law was for the most part perceived as risking fuelling hostilities as much - if not more than - helping engender anti-pollution practices.

Whilst the deterrent value of tort has been seen, in Chapter Five, to be a theme in the defence of the continued coexistence of tort alongside regulatory law,[28] perhaps the overriding concern of defenders of the *status quo* centred upon the safeguard which the common law was perceived to represent against a lowering of standards legitimate in the language of public law. Intriguingly, this is an aspect of the common law which is considered to make an important contribution in the field, particularly where 'political' considerations leave the regulator no choice but to relax the terms of a consent.[29]

> 'Us officers ultimately have little or no control over the terms on which a discharge consent is held. It is not unheard of for a big company - a water company for example - to put pressure on my superiors to relax a consent, say, by allowing more "x" & "y" to be discharged. The common law is not open to the same political pressures. It is, if you like, a bottom-line which polluters aren't able to manipulate to their advantage; it is something they simply have to live with.'

The negotiability of discharge consent conditions is perceived as a 'problem' which the availability of an injunction to protect riparian rights is understood as helping 'get around'.

Yet it would be wrong to generalise too far from these examples of common law on the one hand conflicting with and, on the other, positively reinforcing the regulation of the water environment in the public interest. Far and away the most persistent message in the field is of the two systems operating independently of one another, rarely converging for better or for worse. Field officers have a broad sense of pollution incidents indeed giving rise to settlements or even actions in respect of damages. But these will be considered fundamentally separate from the standpoint of the field officer, a distance which on the

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28 Above, Chapter Five, p 147.

29 Considerations of this sort most often arise in the context of sewage disposal, an example of which is the case of *Cook* addressed in the Postscript to Chapter Three.

whole the officer is keen to preserve. True, a pervasive role *is* assumed by private rights in the sense that a considerable proportion of 'third parties' which the officer encounters will be members of the public who have a legally protected interest in the water environment. As such, the account of Hawkins is somewhat misleading in its characterisation of the purity of watercourses as predominantly a matter of public interest. However, the account is nevertheless accurate in implying that any distinction between persons with and without riparian rights is often irrelevant from the standpoint of officers in the field, for whom the public are typically a relatively homogeneous body of interests to be protected by the implementation of regulatory law.

II Conclusions: Beyond Criminal-Administrative Law in Socio-Legal Study

As an analysis of the implementation of the criminal law framework of social regulation, Hawkins' is a sophisticated work.[30] Compliance versus sanctioning approaches to enforcement;[31] low versus high visibility victims of crime; episodic versus sporadic forms of deviance; prevention versus punishment as objectives of enforcement; social harm versus individual guilt as measures of criminality; and ambivalent versus categorical perceptions of the morality at stake[32] are each distinctions which provide a useful optic through which to differentiate *within* an otherwise homogeneous criminal law form. Hawkins is not then to be taken issue with for his emphasis upon criminal law, which is both appropriate and illuminating. Rather, what is disappointing in Hawkins' study is the exclusivity of the emphasis upon this particular form, and its neglect of whether it is meaningful to entirely bracket-off criminal and civil aspects of the legal framework and regulatory activity. It is as if the regulatory framework is entirely criminal-administrative in form which, of course, it is not: both today and at the time of Hawkins' study, the legal framework compromises common law remedies - and remediation pursuant to statute - as well as criminal-administrative law.

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30 See Hawkins defence of his analysis of criminal regulation in the exchange with Pearce and Tombs: Pearce and Tombs, 'Ideology, Hegemony and Empiricism' (1990) 30 *British Journal of Criminology* 423; Hawkins, 'Compliance Strategy, Prosecution Policy and Aunt Sally' id, 444.

31 *Environment and Enforcement*, above n 1, 3-4. The points immediately following are taken from pp 5, 6, 7 and 13 respectively.

32 Id, 8-9.

At the most mundane level, then, the study of the significance of remedies in the field represents a broadening of existing understanding of rivers pollution regulation beyond its current confines in the discharge consent regime. Equally, it is an opportunity to reaffirm the currency of Hawkins' principal themes. In particular, the negotiability of implementation in the field; the lack of uniformity in enforcement; and the complex interrelationship between the norms which the officer brings to bear in determining issues of justice and the norms emanating from the wider public.[33] It is clear from the foregoing study of remedies that these characteristics of social regulation in the field continue to hold true, and do so beyond the criminal-administrative form.

It is also clear that Hawkins' neglect of the common law is not as significant an oversight in practice as one might anticipate from a study of the relevant legislative history. Whilst the impression one gains from Hawkins' account of common law as having no relevance to the activity of regulation is not entirely accurate given the foregoing observations, it is nevertheless easy to exaggerate the significance of common law in the field, which does not fully reflect the controversy this area of law assumed in the context of statutory proposals for the subordination of common law to the discharge consent regime.

Images and Realities of Regulatory Law

Yet in connection with the relevance of Hawkins' study to a more far reaching critique of dominant images of social regulation, the neglected aspects of the legal framework addressed in this chapter take on board altogether more profound significance. It is clear that any empirical study which neglects common law aspects of the legal framework, as Hawkins' does, serves to reinforce, not challenge the dominance of an image of law of Bentham.

The lack of a significant presence of common law from the standpoint of the officer in the field may on the one hand be taken as an affirmation of an image of law as exclusively statutory. On the other hand, it may be taken as a challenge to it. Much depends upon whether the common law is better understood as *irrelevant* to rivers pollution regulation in the public interest or, rather, as *complementary*. Evidence in support of each has been presented in the foregoing analysis. Certainly, there are officers for whom the common law is at the very least highly peripheral to the regulatory activity, if it has any bearing at all. Here, it matters not whether the public have rights protected by tort: submissions on the part of 'third parties' will be taken seriously regardless of whether the person in question is

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[33] See further Appendix 2, where these characteristics are illustrated in the context of remediation.

seeking to protect a valuable property interest or the environment in a broadest sense. As to the beneficial effects of common law coexisting alongside statute, the regulatory challenges both of a shorter and longer term nature would not be substantially greater nor less were this system to be abolished.

Equally, there are those for whom the common law is a useful complement to public interest regulation in the field. The common law from this standpoint represents a valuable safeguard in the event that 'political expediency' beyond the officer's control requires a weakening in the public law regime; and also an added consideration which the officer can weigh in in support of preventative strategies. Riparian interests can indeed create unnecessary work for the officer, particularly in the context of 'unreasonable' demands in respect of sampling and investigative measures broadly. Furthermore, the protection of riparian rights to purity is, on occasion, perceived to channel resources away from longer term improvements in quality. On balance, however, the common law is perceived as complementary, a particularly intriguing implication being that the right of action independent of the regulatory authority is valuable in channelling some of the higher expectations among the public away from the specific contribution to water quality which is able to be brought to bear by the regulatory officer.[34]

To suggest then that it is easy to exaggerate the prominence of common law is not to detract from the fact that tort clearly takes on board *some* practical relevance from the standpoint of the officer in the field and, in so doing, represents a fundamental challenge to an image of law which is exclusively statutory. So long as the relevance of the common law is overlooked, the socio-legal account is complicit with the very Benthamite image of law it is seeking to challenge.

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[34] Albeit that whereas this is explicit in arguments in favour of tort voiced by officials in the context of both this and other regulatory settings at the level of legislative history (on which point see Chapter Four, p 94-95, and Chapter Five, n 55-56 and associated text), it is only implicit 'in the field.' Implicit, for example, in the remarks of officers concerning the importance of tort as a safeguard against a politically expedient lowering of standards, above n 29 and associated text.

Part Five
Conclusions

Chapter Seven
Conclusion

The character of the intersection of tort and regulatory law is inextricably bound up with the standpoint from which it is evaluated. Viewed from the standpoint of theoretical scholarship adopted in Chapter Two, a Blackstonian image of heterogeneous legal provision as complementary appears unconvincing. This is particularly true to the extent that it pays insufficient attention to the potential sources of tension arising, first, from the differing sovereignty implication and, secondly, the differing competence implications of the courts and the legislature; thirdly, the differing values typically associated with common law and statute, with particular reference to the 'private' and the 'public'; and, finally, the differing modes of reasoning which are widely argued to underpin substantive provisions here. Meanwhile, a Benthamite image of law as legislation appears overly reductive, ignoring what might be expected to be the great extent to which common, private law does and indeed should persist in the shadow of statutory intervention. A better image of law is one which reflects critically upon the scope both for mutuality and tension at the intersection in question.

The assessment of case law at the intersection of tort and statute in Chapter Three reinforces the conclusion arising from the discussion of legal theory. It is particularly significant that there is a casualness in the courts' approach to method at the intersection in question, which manifests itself in a loose variety of methods for resolving the points at issue. This cannot but have profound implications for coherence in the substance of law. One substantive area that remains strikingly unsettled concerns the tort law significance of discretion and, in particular, the extent to which an activity lawful in public law terms can nevertheless give rise to obligations in terms of private law. Case law in the field of nuisance and planning is a good and topical illustration of this point. However, it would be premature to conclude that the difficulties the courts have experienced in arriving at a stable body of principle at the intersection of tort and statute reflect tensions of an inherent 'societal' nature. It is conceivable that with a more consistent method and an eye to the broader picture, case law could indeed provide a much needed convincing resolution of the issues arising.

It is significant that both tensions and opportunities are apparent at the intersection of tort and regulatory law in more concrete 'empirical' settings, namely, of legislative history and the implementation of regulation in the field, discussed in Chapters Four to Six.

On balance, however, it is intriguing that the image of law which is best reflected in these settings is more Blackstonian than Benthamite, at least in the sense that it is the mutually reinforcing character of the intersection in question which 'shines through'.[1] Particularly noteworthy in this respect is the consistent alignment at the level of legislative history of public regulators with the case for preserving or, where appropriate, expanding tort in the shadow of regulatory law. It is therefore no surprise to discover that officers in the field of rivers pollution are on the whole sympathetic to the coexistence alongside regulatory law of tort, perceiving the convergence of the two to be by and large complementary.

Tensions are nevertheless evident and, in the absence of further empirical research involving adjacent regulatory settings, it is meaningful to conclude that both 'tension' and 'opportunity' are very much dependent upon the tort and regulatory setting at issue. Certainly, of the settings touched in the foregoing, occupational health and safety does stand out for the degree of antagonism that is apparent in this context, whether (*pace* Bartrip and Burman) at the level of legislative history; or (*pace* the Robens Commission) at the level of implementation 'on the ground'. This said, however, tort is politicised to some degree or other in all of the settings at issue.

A number of questions arise from what is in many respects a preliminary inquiry into the intersection of common law and statute broadly. In particular, it is uncertain whether the prominence accorded to tort in the shadow of regulatory law is peculiar to the regulatory and historical settings that have been singled out for attention here. Clearly, to have picked any period other than 1863-1881 in the evolution of chemical pollution regulation would have revealed a striking disinterest in tort to rival the prominence assumed by this common law form during the period isolated for purposes of discussion: any other period would have gone a long way to vindicating the academic disinterest in the subject matter. It is therefore important to test the generality of the intersection of tort and regulatory law as an empirical issue in the context of adjacent areas of social legislation.[2]

Perhaps most fundamental of all is the reappraisal this thesis invites of any straightforward association of tort with modes of social ordering, loosely, that are anachronistic or in any other sense necessarily 'out of kilter' with developments in the

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1 What makes this conclusion all the more intriguing is the fact that it is the Benthamite image of law which is the most prevalent when it comes to the study of legislation today, a point made in Chapter Two, p 29-30.

2 Town planning would be a useful area to explore in this respect, having very briefly been alluded to in the context of the legislative history of rivers pollution regulation (Chapter Five), and providing much of the focus of the analysis of case law in Chapter Three.

modern function of law. Commentary has tended to focus on change in the social function of law as it is reflected in the developments in the extent and character of regulatory law. Whilst tort theorists have been alive to the functioning of tort within a wider social system, general social theorists and tort theorists have not always shared the same analytical concepts for appreciating law in terms of these wider social structures and forces. The upshot is that some of the more interesting and sophisticated frameworks for evaluating the social role of law have become disengaged from areas of common law such as tort, thus deferring what is clearly a profoundly important discussion. It is too easy to emphasise the historic, feudal or individualistic origins of modern tort, and ignore the role that both its persistence and adaptation have played in the context of wider changes of a societal nature. Given the prominence accorded to tort in 'concrete' empirical settings of legislative history and the implementation of social regulation, it is necessary to be more clear about just what sociological contribution this field of common law makes to social order.

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(1993) `Remedying Environmental Damage', House of Lords Select Committee on the European Communities 3rd Report 1993-94 (HL 10)

(1994) `Paying for our Past', Department of Environment Consultation Paper (March 1994)

(1994) `Framework for Contaminated Land', Outcome of the Government's Policy Review and Conclusions from the Consultation Paper Paying for our Past (November 1994)

(1995) Draft Guidance on Determination of Whether Land is Contaminated under the Provisions of Part IIA of the Environmental Protection Act 1990

Statutes

Alkali Act 1863
Alkali Amendment Act 1874
Alkali & Works etc Regulation Act 1881
Control of Pollution Act 1974
Employers Liability Act 1880
Environmental Protection Act 1990
Environment Act 1995
Factory Act 1844
Law Reform (Personal Injuries) Act 1948
Rivers Pollution Prevention Act 1876
River Boards Act 1948
Rivers (Prevention of Pollution) Act 1951
Rivers (Prevention of Pollution) Act 1961
Water Act 1989
Water Resources Act 1963
Water Resources Act 1991

Appendices

'Remediation' of River Pollution Incidents
Interview Structure[1]

Purpose of the interview

In his study of rivers pollution regulation, *Environment and Enforcement* (1984), Keith Hawkins states that a 'pollution incident' represents a 'serious blow' to the officer's 'careful tending of the environment to be healed as quickly as possible' (p 7). When confronted with an incident, the officer's 'instincts are to stop the pollution, identify its source and negotiate for...remedial measures' (ibid). However, little is said about the practicalities of 'healing' an incident or of negotiating 'remedial measures'. Neither is any serious attention given to the interrelation of these and other of the field officer's concerns or functions. Instead, the focus is upon the various tactics the field officer can deploy to prevent pollution incidents arising in the first place - principally the selective use of the criminal sanction. The essentially reactive aspects of regulation which come into play if preventative efforts are unsuccessful are neglected.

Using the topical term 'remediation' broadly, as an umbrella for a range of issues which the field officer will confront in the course of the remedying of a pollution incident and the apportionment of the costs of doing so, the purpose of this interview is to shed light on this important but all too obscure aspect of rivers pollution regulation. The information that I am looking for cannot be obtained from current published material or internal guidance. As with the account of Hawkins, what is required is the insight of the officer in the field.

Subject areas of the interview

The proposed content of the interview is divided into three distinct but related groups of issues. **Group one** addresses background issues to do with who typically does what, when, and governed by what standards. This group also touches very broadly on any features of the 'job' of remediation which distinguish it from other aspects of the officer's work. **Group two** deals with issues to do more specifically with the *financing* of remedial operations, ranging from the matter of the costs that are taken into account in the process of cost-recovery, through to the officer's perceptions of the relationship between objectives of pollution prevention, the liability of the polluter with respect to the funding of pollution incident

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[1] Interviews with officials of the regions of the sample took place on the following dates:

Region 1	10 March 1997
Region 2	28 February 1997
Region 3	7 March 1997
Region 4	3 March 1997
Region 5	4 March 1997

In each case the interview was structured around a series of written questions, together with explanatory remarks, sent to the interviewee in advance. This appendix reproduces these materials.

remediation, and criminal prosecution. **Group three** covers issues which may prove to be rather remote from the field officer's perspective. They concern a quirk in the legal system whereby river quality is `managed' simultaneously by officials having statutory powers exercisable in the public interest, and by riparian owners possessing common law entitlements to purity in the interests of individuals. This final grouping is particularly important to my research project. Nowhere is this dual statute law/common law arrangement likely to be more starkly exposed than in the event of a pollution incident raising issues of remedy. Even if it proves to be the case that there is no apparent interaction of the two systems from the standpoint of the field officer, this would itself be a significant observation.

In what follows, the specific issues I would like to address are introduced in a little more detail, and presented in the form of questions.

GROUP ONE: *BACKGROUND ISSUES*

Established powers under s.161 Water Resources Act 1991 leave considerable scope for the officer to get involved in remedial functions at both `operational' and `regulatory' levels. That is to say, scope for the field officer to physically undertake clean-up operations as well as having responsibility for determining when such operations are required and what standards will govern their selection. Questions arise concerning the proportion of remedial operations that are in fact undertaken voluntarily or by negotiation with the Agency by the party responsible; and, crucially, the nature and content of the standards or criteria that will be used to determine whether remedial work is necessary, and what level of clean-up will be considered acceptable.

Another area which is of interest is the role played in any negotiations which take place regarding clean up operations by parties *other than* the regulator and the polluter. So far as the *discharge consent regime* is concerned, Hawkins' (above) depicts the environment within which negotiation takes place as narrow or closed, typically involving the regulated and the regulator alone. However Agency guidance suggests that the occurrence of a pollution incident will normally involve consultation with a range of `third parties' (from emergency services to certain downstream owners). I hope to learn something of the impact of third party consultation upon the climate within which remediation decisions are taken (whether contributing, for example, to a heightened sense of controversy relative to other areas of the officer's work); and any impact third party involvement has upon the outcome of the decisions themselves.

Continuing with the discharge consent comparison, Hawkins also discusses the vocational demands which the discharge consent regime makes of the officers responsible for its implementation. Not only must the officer be able to apply scientific and technical knowledge necessary to set consent standards and monitor compliance, but they must also be able to exercise their authority with respect to regulated parties in a manner which is fair, making full use of the ultimate threat of formal legal proceedings to bring about compliance *consensually*. The general impression is one of a vocation demanding constant interpretation and judgement. The concluding issue of this group concerns the extent to which this characterisation holds true, too, in the field of remediation.

First, the kind of incidents that are typically remediated.

Types of Pollution Incident

What types of pollution incident are the normal subject of remediation? In particular, roughly what proportion of incidents remediated are of a gradual nature, deriving from the gradual accumulation and mixing of pollutants? What proportion are of a sudden/accidental nature?

Responsibility for undertaking remedial operations

Is it exceptional for remedial operations to be undertaken voluntarily by the party responsible?

When to remediate and according to what standard?

What factors will the officer take into account in deciding whether or not to require clean up of a confirmed pollution incident? Is it basically a question of the seriousness of the incident in environmental/health terms? Or is the ability to identify a party responsible also relevant?

What is the source of the standards applied in remedial operations for determining both the method and the extent of clean up appropriate in any given instance? How rigid are these standards? Do they apply equally to remedial measures undertaken by the party responsible as they do measures undertaken by the Agency?

Third parties

Is the remediation of a pollution incident influenced by the views of 'third parties'? Are the concerns of certain third parties typically given particular weight over the concerns of others: e.g. the concerns of emergency services in relation to those downstream riparian owners? Or vice versa?

A job within a job

Relative to other areas of the field officer's work - e.g. standard setting or the policing of discharge consents - to what extent does the remedying of a pollution incident call upon different skills or otherwise present the officer with a distinctive challenge? What skills and how different? In particular, to what extent is remediation largely a mechanical exercise, involving little element of judgement or negotiation?

GROUP TWO: *APPORTIONING FINANCIAL RESPONSIBILITY*

The original remedial powers (Water Resources Act 1963) provided only a power to clean up an incident. There was no explicit provision for bringing home the financial consequences of the incident to the person responsible. The subsequent provision of a power of cost recovery raises a number of questions of a practical nature. At a mundane level, this power might be expected to serve as a means of relieving the general public of the financial burden of remediation. At a more profound level, it may be understood as a means of attaching financial consequences to an officer's judgement about individual responsibility. Given that

there is now this cost-recovery power, it is no longer possible to take for granted (as Hawkins' account does) the threat of prosecution as being the only (or indeed principal) legal sanction at the disposal of the field officer. How remediation powers interrelate with criminal sanctions and preventative goals is thus a question that needs to be asked.

Defining recoverable costs and billing the party responsible

The Agency's internal guidance has clarified that investigation costs *do* fall within costs that are recoverable. What other costs? In particular, is loss of amenity arising from the pollution incident ever factored into the process?

Is there any opportunity, after the Agency has undertaken remedial measures, for the party responsible for the incident to influence the amount they are billed? If so, how?

Relationship between financing remedial measures and criminal prosecution

Will the willingness of the party responsible for an incident to fund its remediation have any significant bearing upon the decision whether to prosecute?

Cost-recovery and deterrence

Is the prospect of liability for the costs of remediation perceived by the officer as a deterrent to the taking of pollution risks? When compared to the threat of prosecution, is it a *significant* deterrent?

GROUP THREE: *STATUTE LAW AND COMMON LAW*

Research into the history of rivers pollution legislation has revealed an intriguing and recurrent controversy surrounding the question whether statutory powers to regulate water quality in the public interest should supersede riparian rights to purity provided by the common law in the interest of individuals. Those who would have the common law system abolished emphasise the wide impact of the common law rule by which `[e]very riparian owner is...entitled to the water of his stream in its natural flow, without sensible diminution or increase, and without sensible alteration in its character or quality' (*John Young and Co v Bankier Distillery* [1891-94] All ER 439 at 441). Opponents of the common law also criticise the indeterminacy and `unscientific' qualities inherent in any system of environmental protection which depends for its enforcement on property owners.

The pro-common law response ranges from the outlandish championing of the remedy of the injunction restraining interferences with riparian rights as *the* principal weapon in the fight against river pollution, to the more modest view that common law serves important residual functions operating in the shadow of statutory, public interest regulation. To date, the outcome of this debate is that proponents of the common law system for protecting riparian rights have carried the day, with the result that today the statutory and common law systems continue to co-exist alongside one another. Whether this co-existence makes itself felt in practice from the standpoint of the field officer, is what is at issue here.

Who notifies the Agency of pollution incidents?

Is there any evidence that riparian owners downstream of an incident are the *predominant* source of pollution incident notification?

Agency involvement in *private* proceedings

Do riparian owners contemplating/defending private proceedings ever (a) seek and (b) receive the advice or assistance of the field officer in this connection? Is the officer ever involved in private proceedings in a capacity of expert witness?

Adverse effect of private proceedings upon relations between regulator and polluter

Is there any evidence that the fear of opening themselves up to liability in *private* proceedings adversely affects the willingness of the person responsible for the incident to cooperate with the *officer* in its remediation? Does the officer consider that the job of building up a profile of the cause of an incident would be easier without the background threat (faced by the polluter) of subsequent private proceedings?

A general impression

Does the officer consider that the existence of riparian rights to purity complements, frustrates or is entirely irrelevant to statutory regulation?

BP 97

Appendix Two
Remediation in the Field

I Background: The Significance of Remediation in *Environment and Enforcement*[1]

It is helpful to situate the examination of the implementation of powers of rivers pollution remediation in this section against the backdrop of the light Hawkins' study sheds on the subject.[2] Remediation is clearly a secondary concern of Hawkins in his account, the principal concern of which is to distinguish *within* criminal law between 'compliance' and 'sanctioning' strategies of enforcement. Nevertheless, Hawkins makes observations regarding the importance of remedying a pollution incident to the officer in the field which open out onto a series of issues of the relevance of civil law, and which merit elaboration. It is possible to discern in Hawkins' account two levels of significance which remediation assumes from the standpoint of the field officer. First, remediation is of significance at an instrumental level, as a factor in the control of future pollution. Secondly, it is of significance as an 'intrinsically' valued component of a pollution incident response.

As regards the control of future pollution, Hawkins interprets 'major pollutions' - though rare - as exerting a day to day influence upon regulation.[3] In this respect, his account foreshadows insights arising from more recent research concerning the significance of accidents and their response in the context of health and safety.[4] Not only is the occurrence of an incident a means to a better understanding of a 'technical' character relating, for example, to areas in which a given technology and risk management practice is at its weakest, but an incident has a 'powerful social and psychological impact' which serves to strengthen the hand of the official in negotiating improvements in the way of stricter preventative measures.[5]

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1 Hawkins, *Environment and Enforcement* (1984).

2 Id.

3 Id, 106.

4 Hutter and Lloyd-Bostock, 'The Power of Accidents' (1990) 30 *British Journal of Criminology*, 409; and Manning, 'Big Bang Decisions: Notes on a Naturalistic Approach' in Hawkins (ed), *The Uses of Discretion* (1993).

5 *Environment and Enforcement*, above n 1, 106. Hutter and Lloyd-Bostock capture well the contribution of incidents to the assessment and management of risk in making the point that 'accidents and disasters can have a powerful social and psychological impact. A concrete instance of harm brings home the realities of risk

Yet to conclude that remediation is principally an instrument in the service of strategic, preventative ends would be to distort the 'intrinsic' qualities associated with this area of regulation in the field. This is the second level of significance which the remediation of a pollution incident assumes in Hawkins' account. Incidents are 'a serious blow to his [the field officer's] careful tending of the environment to be healed as quickly as possible'.[6] In the immediate aftermath of an incident the 'only concern [is] to have the discharge stopped and any ill-effects rectified, fish restocked, sludge removed, oils cleaned up'.[7] Punishment of the person responsible by means of the criminal law, and changes to the terms of the discharge consent in these circumstances are secondary, as are lessons to be learned and applied in the future. When 'confronted with an instance of deviance [e.g. breach of a discharge consent leading to pollution], the field man's instincts are to stop the pollution, identify its sources, and negotiate for...remedial measures'.[8]

This analysis opens up a number of questions concerning the legal and non-legal factors which constrain the field officer's 'instincts' relating to remediation. We learn from Hawkins' account that remediation is important, and at what levels, but not what factors underpin the implementation of this aspect of the officer's powers. This is in marked contrast to the setting and enforcement of discharge consents, in which context Hawkins is at pains to stress the relevance of formal legal constraints, and constraints of a more loosely practical or political character.[9] The overriding impression of remediation in Hawkins' account which merits critical examination is of an activity characterised by entirely unfettered discretion. In reading Hawkins' account of remediation it is as if there is nothing of the interplay between 'discretion' and 'the formal legal process' which is so crucial to the activity of punishing deviance by means of enforcing the criminal-administrative aspects of

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in a way that abstract information in the form of probabilities cannot do', above n 4, 410.

6 *Environment and Enforcement*, id, 7.

7 Id, 133.

8 Id, 7. The separation of the health and safety regulatory function from the treatment of victims of accidents would appear to distinguish this field of regulation from that of rivers pollution: remedy here does not take on board the intrinsic significance that it does in the context of rivers pollution, at least not from the standpoint of the regulator in the field.

9 Id, especially Chapter Eight.

the legal framework: as if the 'healing' of a pollution incident unfolds within a non-legal vacuum.

The remainder of this section discusses the findings of fieldwork undertaken to examine these impressions. It will be argued that the idea implicit in Hawkins' account of discretion unfettered by legal constraints does, in certain respects at least, capture the reality. This is particularly true of the standards which govern the field officer's decision-making concerning whether or not remedial work is undertaken and, in the event that it is, by whom, and the level of remedial work required. There is also scope for a significant measure of discretion to be exercised in the context of recovery of the costs of remediation - an aspect of remediation which receives no mention in Hawkins' account, and which is central to any reappraisal of it. Yet it would be wrong to exaggerate the extent to which the exercise of powers in these contexts is unshaped by formal law. For not only is discretion here profoundly influenced by considerations of formal legal proof and the statutory requirement that remediation has regard to operations that are reasonable,[10] but the common law has a bearing too through the definition and protection it offers of riparian rights to purity. Before developing these arguments further, useful background is provided by an analysis of the financial profile of remediation in relation to river pollution functions of the regulatory authority broadly.

Financial Significance of the Power of Remediation within the Authority's Accounts

It is difficult to get an idea of the financial significance of remediation by means of the published accounts of the regulatory authority for purposes of the study, the National Rivers Authority (NRA), which contain no details relating to this particular head of income and expenditure. Annual accounts go as far as outlining the various functions which fall within the rubric of 'water quality' broadly: general environmental monitoring, zoning for 'ensitive areas', putting water quality objective on a statutory footing, administering the discharge consent regime and pollution incidents and enforcement'. However, the financial significance of these individual functions is not made clear. Given the paucity of detail on this subject, it has been necessary to undertake a survey of income and expenditure on remediation, the results of which are presented immediately below.[11]

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10 Water Resources Act 1991, s 161(3) & (4).

11 Information relating to remediation is however beginning to emerge through published materials of the NRA and its successor, the Environment Agency. Data for 1995 and 1996 now exist for the number of individuals which the NRA billed

Expenditure on Remediation

The figures in this and the following sub-section are derived from a survey of four region's annual accounts, encompassing the financial years 1993/94, 1994/95 and 1995/96.[12] Taking net annual expenditure on remediation first, it is apparent from the figures contained in Table 1 that the costs incurred in respect of this function are not trivial.[13] Annual regional expenditure on this function typically runs into the hundreds more often than the tens of thousands of pounds.

Table 1 *Costs incurred in responding to pollution incidents* (pounds, 000s)

Region	1993-94	1994-95	1995-96
R1	208	130	564
R2	283	863	538
R3	98	148	268
R4	69	55	279

However, these figures suggest nothing of the significance of remediation in relation to other of the region's water quality functions. In this respect, Table 2 is more illuminating.

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for costs incurred in remediation: see *Water Pollution Incidents in England and Wales 1995* (Environment Agency 1996), p 40, and *Water Pollution Incidents in England and Wales 1996* (Environment Agency 1997). However, this data provides no indication of the total sums billed which are recovered or, more importantly, the sums recovered as a proportion of expenditure on remediation. These figures also give no indication of the wider picture, namely, of income and expenditure on remediation as a function of water quality regulation broadly.

12 1993/94 is the first year in which income and expenditure on remediation was differentiated within regional accounts from pollution functions broadly. Archives exist on which basis it would have been possible to compile a deeper historical sample, reaching back to the period when Hawkins' study was researched. However, this would be a major task, and reliance for historical understanding is placed instead upon evidence of a qualitative nature, arising from officers in the field.

13 Expenditure refers to human hours recorded and materials used on the part of the authority in responding to a pollution incident. This is not to be confused with the total sums expended in pollution incident response, which will, to an extent which varies regionally, involve expenditure on the part of third parties: see further below, n 23-26 and associated text.

Table 2 *Costs incurred in responding to pollution incidents as a proportion of expenditure on water quality in the aggregate* (per cent)

Region	1993-94	1994-95	1995-96
R1	1.2	0.8	3.2
R2	2.7	7.7	5.2
R3	1.0	1.4	2.3
R4	0.5	0.4	2.3

These tables illustrate that there is considerable regional variation in the proportion of water quality expenditure in any one year given over to remediation: in 1994/95, one region spent as little as 0.4% of its water quality expenditure on this function, in contrast to another region in which expenditure represented 7.7% of the aggregate. However, in no case is remediation so significant as to exceed 10 per cent of water quality expenditure broadly.[14]

These tables also suggest variation in expenditure of a historical character. Indeed, expenditure on remediation differs markedly over the period of the sample, with three out of the four regions spending at least twice as much on this function as a proportion of water quality expenditure in the latest than in the earliest year of the sample, the fourth spending 1.9 times as much. One provisional conclusion to draw from this evidence of historical variation is that remediation is assuming an increasingly important role within water quality functions broadly. This is a clear trend which merits explanation.

Data published relating to the quantity and quality of annual pollution incidents by region provides a useful starting-point in explaining the increase in expenditure on remediation over the period of the sample.[15] Intriguingly, however, this data reveals no correlation between the number and severity of regional pollution incidents, reproduced in Tables 3 and 4, and regional expenditure (Tables 1 and 2). Indeed, as Figure 4 suggests, the region which reports the sharpest decline in the number of serious pollution incidents is also

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14 No data has been compiled with which to draw comparisons between remediation and other specific water quality functions. However, it is clear from interviews with the region's finance departments that expenditure on the discharge consent regime constitutes the single most substantial head of expenditure within the category of 'water quality'. Remediation thus assumes an important - but not the most important - source of expenditure on water quality functions.

15 In particular, the survey published by the authority on a yearly basis since 1992 under the title 'Annual Pollution Incidents in England and Wales'. See further n 12.

the very region which discloses the most steady increase in expenditure on remediation. Figure 3 illustrates a similar lack of correlation, albeit less dramatic, when pollution incidents generally - regardless of severity - are taken into account. This conclusion has important consequences in that it directs attention away from the physical character of pollution incidents in seeking to explain increases in expenditure on remediation, and towards changes in the authority's policy towards pollution incident remediation.

Table 3 *Number of Substantiated Pollution Incidents*

Region	1993-94	1994-95	1995-96
R1	4129	4340	4558
R2	2945	3264	2990
R3	4876	4895	4259
R4	3642	3243	2576

Table 4 *Number of Category 1 Incidents*

Region	1993-94	1994-95	1995-96
R1	48	37	35
R2	30	24	33
R3	93	63	28
R4	61	38	36

Figure 3 *Expenditure upon remediation* ('C') *relative to the total number of substantiated pollution incidents* ('I'): *Region R3*

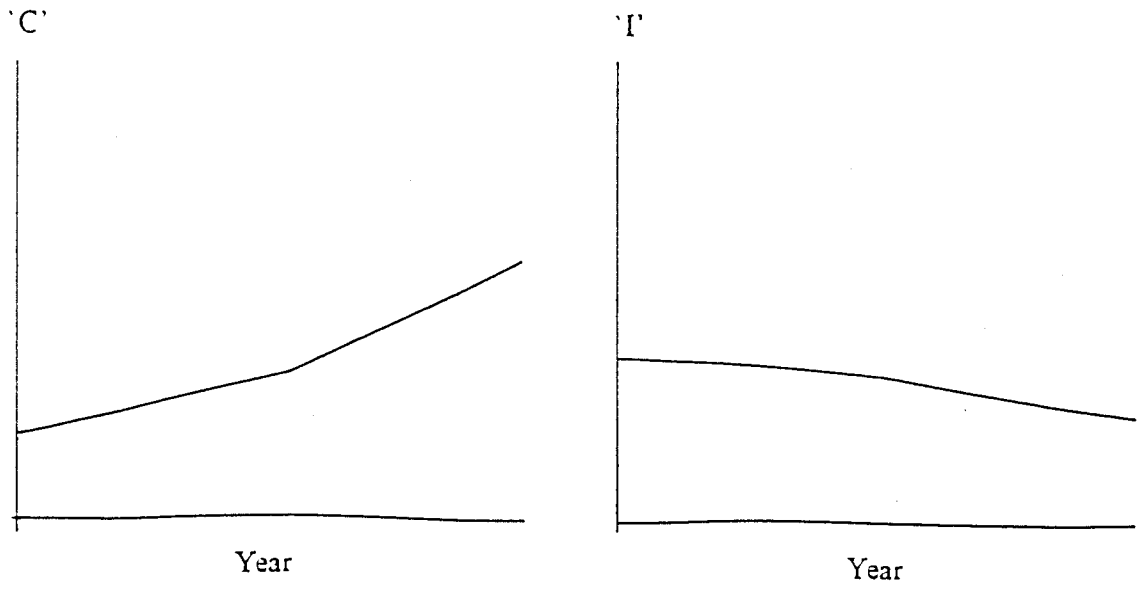
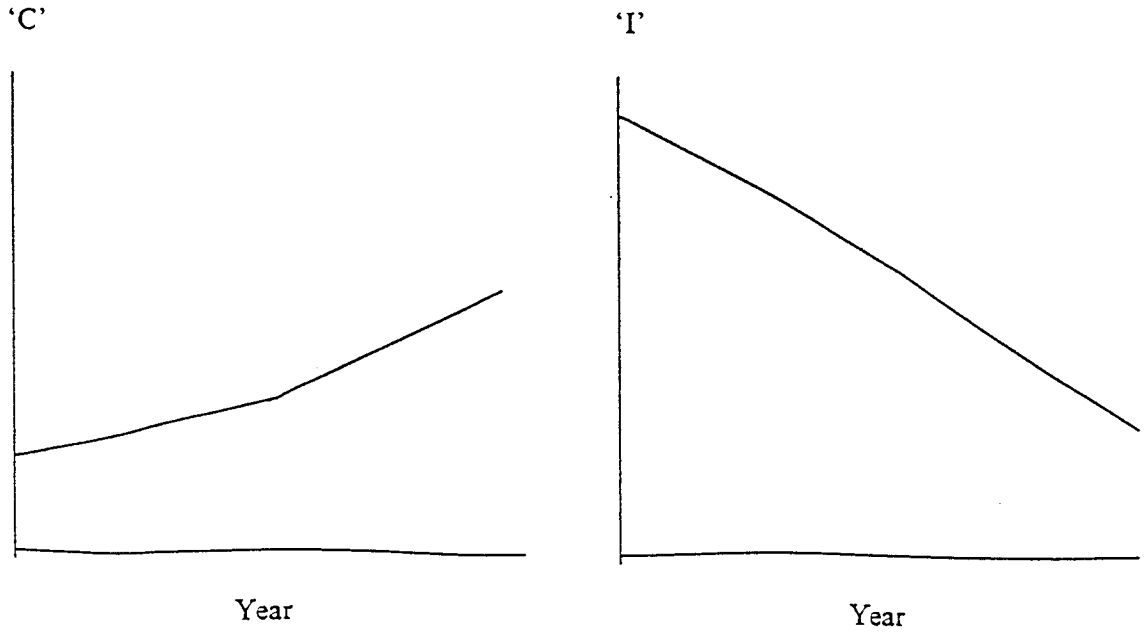


Figure 4 *Expenditure upon remediation* ('C') *relative to 'category 1' pollution incidents* ('I'): *Region R3*



Income from Remediation: Costs Recovered from the Party Responsible

Also of interest is the proportion of costs incurred in responding to pollution incidents recovered from the party responsible (Table 5). Indeed, putting to one side government subsidy of the authority's operations, which are represented in the published accounts as grant-in-aid, it is understood that the authority is entirely dependent upon this particular source of revenue in respect of remediation.[16] Variation from both a regional and historical perspective is equally as apparent in this context as it is in the context of expenditure, above.

As to variation of a regional character, Table 5 depicts one region - Region 3 - as consistently recovering a greater proportion of its costs from the person responsible than the others. Indeed, the divergence within the sample is substantial on this point, with Region 3 recovering more than ten times its expenditure in 1994-95 than Region 2.

As to variation of an historical character, Table 5 suggests a small but discernible decline in the costs recovered from the party responsible, when comparing the earlier and later periods in the sample. This downward trend in income recovered from the party responsible for an incident makes for an interesting comparison with the upward trend described above concerning expenditure on remediation.

Table 5 *Cost recovered as a percentage of costs incurred* (per cent)

Region	1993-94	1994-95	1995-6
R1	47	55	39
R2	36	10	29
R3	90	105*	82
R4	83	95	61

*This figure is the result of cost incurred in 1993-94 being recorded under the subsequent year's accounts.

[16] This is not to suggest that wider sources of public and private finance are lacking in the context of the remediation of large scale chronic sources of pollution of the kind, for example, associated with abandoned mines. Reliance upon grant-in-aid and recharging the person responsible is most clear in the case of medium and smaller scale incidents, whether sudden and accidental or of a more gradual character. Intriguingly, as an incentive for the authority to recover a greater proportion of its costs, the Government has let it be known that it has decided not to offset remediation costs recovered against grant-in-aid, at least not in the shorter term (source: interview, EA official, 16/8/96).

There are a number of ways to account for this decline in the percentage of costs recovered, which is the most intriguing aspect of the statistics relating to pollution incident income. One possibility is to explain this trend in terms of a link between cost recovery and serious pollution incidents, which are also on a downward trend (as noted above, Table 4). However, on closer examination of this data it is clear that cost recovery is independent of this variable. Of particular significance in this respect is the fact that the region - Region 3 - with the most dramatic decrease in 'category 1' incidents (Figure 4) is also the region with the most stable income from remediation (Table 3).[17]

However, trends on the subject of cost recovery are not as clear cut as those on the subject of expenditure, and should be approached with caution. Statistics here reveal the vulnerability of a limited historical sample, and the concomitant importance of interpreting data with reference to insights of a qualitative nature, notably, insights arising from observations in the field. Thus it is clear from interviews with field officers that throughout the period of the sample cost recovery had a higher profile, and involved a greater proportion of officer's time than in any period previously.[18] Although it would be wrong to dismiss the downward trend here as insignificant,[19] it is important to appreciate that the decline suggested by these statistics is capable of misleading. The decrease in expenditure over the past three years is better understood in terms of an unprecedented rise in the prominence of cost recovery as an aspect of remediation over a wider period, beginning with initial draft of internal guidance during the earliest period of the statistical sample.[20]

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17 Compare R3, Table 3 and Figure 4.

18 There is evidence of early cost recovery involving billing parties for materials consumed: South West, fieldwork, below n.36. Internal guidance drafted in 1993 expressed for the first time a presumption in favour of recovery of costs in terms of an officer's time spent in responding to an incident, as well as material consumption: NRA, 'Recording and Recovery of Costs Incurred in Dealing with Pollution Incidents' (Version 1, March 1993). The general view within the agency is that the principal stimulus for systematic cost recovery is more recent still, lying in a National Audit Office report published in March 1995, below n 20, which was critical of the NRA's record on this subject. However, this is not entirely consistent with the figures relating to the proportion of costs recovered, which are at their highest in 1993/94.

19 The National Audit Office in its study of agricultural pollution response took this matter seriously, condemning the 'low recovery rate given the Authority's stated aim of making the polluter pay': *National Rivers Authority: River Pollution from Farms in England*, (HC 235, Session 1994-95), para 2.25.

20 Ibid.

Perhaps most intriguing is a trend which is *not* reflected in these statistics, but which *does* begin to take shape when cost recovery is understood in a broader historical context. Namely, the possibility of a causal link between the heightened profile of cost recovery and the amount of remediation undertaken. In many ways such a link would be unsurprising. Certainly, it is to be expected that an activity will often be constrained by economic considerations, whether that activity is publicly or privately funded. Nevertheless, the idea that collective responsibility serves as a constraint upon the exercise of a regulatory function which is relieved by privatised responsibility is nonetheless profound. Moreover, the implications of any trend in this respect in terms of the difference between remediation now and at the time of Hawkins' study are potentially far reaching. Indeed, were it not for Hawkins' observations concerning the importance of remediation from the standpoint of officers in the field, it might be asked whether remediation is not a peculiarly modern feature of rivers pollution regulation - an activity which is heavily dependent upon systematic cost recovery which has hitherto been lacking. As it stands, at this preliminary stage, the relationship between practice past and present is best characterised in terms of shift in emphasis and a heightening in policy profile on the one hand; and, on the other, of added complexity insofar as the officer is increasingly involved not only with issues of criminal but also civil responsibility.

Remediation in the Field

To suggest that Hawkins' account of remediation implies an activity unfettered by formal legal constraints is apt in that very little *explicit* attention is given to the matter. Indeed, the broad issue of the role of law in this context is just one of a number of issues relating to remediation which his account leaves to one side in preference to a more sustained focus on the criminal-administrative dimension. The purpose in what follows is to build on the analysis of the financial trends outlined above, expanding upon this neglected civil aspect of regulation from the standpoint of interviews with officers in the field. It is of particular importance to give meaning to the standards which, in the absence of any detailed statutory provision,[21] officers import regarding the decisions of when to remediate and what operations are considered appropriate; the process of recovering remediation costs; and the role which remediation and civil liability for pollution incident response assumes in relation to more familiar, criminal-administrative aspects of regulation. First, it is helpful to examine

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[21] See above, n 10, for the relevant statutory provision.

an issue which an officer is confronted with immediately on substantiating a pollution incident, namely, who, if anyone, is to undertake remedial work. The answer to this question carries implications for the standards that will govern the extent and nature of the remediation required and, indeed, whether remediation will be required *per se*.

The Choice between Authority-Remediation & Self-Remediation

Regions vary in their approach to the 'who?' of remediation. At one extreme, there is the region in which the officer adopts a general presumption in favour of the party responsible undertaking the remediation: 'If you can, you always try and get the person responsible to do the clean up'.[22] In these circumstances, the typical involvement of the officer in remediation is more 'regulatory' than 'operational': 'We prefer to stand there and give guidance'.[23] It will frequently be the case that operations are performed by private specialists, contracted by the party responsible. The regulatory authority's involvement in such circumstances will often be confined to the accreditation of specialist contractors, a list of which will be passed on the party responsible for remediating the incident, and who will be allowed to get on with the job of remediation with minimal, if any, supervision. At the other extreme is the region in which the officer adopts a highly active operational role in remediation, supported by technical expertise and an armoury of remediation technology owned and in some cases designed by the regulatory authority.

However, officials in three of the five regions sampled fall between these two extremes, exercising discretion on this point with regard to the characteristics of the incident at hand and, in particular, the identity of the person responsible. For example, when confronted with an incident involving sewage the field officer's role will normally be confined to a preliminary assessment of the pollution, extending on occasions to the taking of formal samples. This is because sewage undertakers are perceived by the officer as

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22 Following Hawkins' practice, all quotes are drawn from the field without generally being attributed to their immediate source.

23 This application of the distinction between 'regulatory' and 'operational' is unfamiliar to the rivers pollution context, in which this distinction has tended to relate almost exclusively to the separation, under the Water Industry Act 1989, of criminal-administrative functions once combined within the regional water authorities. The observations in respect of remediation are thus of significance in that they help to make the hitherto neglected point that whether or not the authority's role is 'regulatory' or 'operational' does not necessarily depend on any statutory demarcation but, rather, may also depend, as in the case at hand, upon the officer's judgment as to what role is appropriate in the circumstances.

generally reliable and expert in undertaking incident response. Large chemical companies are considered in this bracket too, as indeed are larger companies on the whole.[24]

Factors other than perceived reliability also play a part in the decision to have remediation performed by the person responsible for the pollution. An officer in one region stressed the educational value of remediation being performed by the party responsible, a factor understood to be of particular relevance to smaller polluters who may be less aware of the risks than larger ones. This ties in with the inculcation of risk awareness touched on in Hawkins' account, above,[25] and returned to below.

A final and crucial issue affecting whether the authority is to undertake, or merely to regulate the undertaking of remediation is the issue of costs. Indeed, it is significant that the greatest stress laid upon costs is in that region most committed to a presumption in favour of remediation being undertaken by the party responsible: bluntly, it is understood in this region that 'self-remediation' is 'usually cheaper for them and easier for us'. This association of self-remediation and savings in terms of costs raises the broad issue of the standards of remediation and, in particular, the extent to which remediation by the party responsible for the incident involves less stringent measures than would otherwise be undertaken by the regulatory authority. This will be returned to below. The point to note in the present context is that the issue of costs is closely bound up with the perceived threat of a legal challenge to the authority's decision-making: there is a perception of 'a danger that it'll cost more if you get the clean up in [yourself], because the polluter could argue that they'd have done it for less'. The experience is one of billing for cost recovery after the event of remediation being more likely to be disputed than the requirement, in the immediate aftermath of a pollution incident, for the polluter to undertake self-remediation.

Standards of Remediation

As to the standards which will be brought to bear in determining whether or not remedial measures are required in respect of an incident and, in the event that they are, of what nature, there is a consensus across the regions of the sample that the officer will have regard to the local quality of the watercourse or groundwater at issue; and a consensus too regarding the relevance of the nature of damage which has occurred or is threatened. This

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24 Interestingly, there is no evidence that the exceptionally active role in respect of remediation practised by one regulatory authority in the sample is a source of any conflict with the sewage and other large commercial operators of the region.

25 Above, n 3.

will affect not only whether or not remediation is undertaken, but also the stringency of the measures required. For example, in the event that what is recognised as an important commercial or recreational interest is at risk from an incident, all officers echoed the sentiments of one: 'you'd probably pull out all the stops, tankers, pumps, the works'. In contrast, where, for example, oil escapes into a stream already polluted by farming practices, with few if any interests dependent upon purity, the officer would accept more modest remedial measures, falling short of 'the Rolls Royce approach'. Another officer described the overriding consideration as that of 'suitable for use', evoking the adjacent setting of contaminated land.[26] However, whilst the quality of the receiving watercourse and its existing uses is widely acknowledged as of great importance, other factors can also assume critical proportions.

Other factors that are important include practical issues, notably, of access to the pollution incident site. Getting heavy plant necessary for a major pumping and/or diversion exercise may not be practicable in more remote agricultural regions, or in high density urban settings. Also important are factors of a more strategic nature, independent of the extent of ecological damage or damage to other interests recognised as important by the officer, which may lead to *stricter* remedial standards being imposed. One officer spoke of 'teaching the polluter a lesson' by 'enforcing standards that might be higher than you might reasonably justify'. Here, it is not the extent of the damage that is crucial, but the culpability of the person responsible for the incident, as judged by the officer in the field. This educational dimension reinforces the strategic significance of remediation introduced above in the context of Hawkins' study, in which an incident is portrayed as offering an opportunity to inculcate greater risk awareness within the regulated community. It also reinforces an important point which Hawkins makes in connection with criminal-administrative regulation, namely, that notions of culpability are imported by the field officer, their having no formal basis in the relevant legal framework.[27]

However, the most consistently important factor alongside that of the quality of the watercourses and the uses to which they are put is the pressure exerted by the public. This may be indirect, as in the case of the use of booms on an estuary so rough on its surface that

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26 See the Department of the Environment's *[Draft] Guidance on Determination of Whether Land is Contaminated Land under the Provisions of [Part IIA] of the Environmental Protection Act 1990* (May 1995).

27 *Environment and Enforcement*, above n 1, chapters 6 and 9, especially pp 178, 180-181.

this technique has no real contribution to remedying the incident. The standard in this context is formulated to serve the function of reassuring the public that something is being done. In other circumstances the influence of the public may be more direct. For example, riparian owners may complain of an odour which they attribute to sewage in the watercourse, but which, after extensive and expensive investigations, is confirmed to emanate from a nearby culvert, thus confirming the regulatory authority's initial diagnosis. Or where, when an incident occurs, a local amenity action group informs the press who, in turn, take an interest in reporting on remedial measures subsequently undertaken.[28]

Yet it is important not to exaggerate the pressure exerted by the public in the decision whether to remediate and, in the event that remediation is appropriate, the nature of the measures that are considered necessary by the officer in the field. Remediation can indeed be a contentious matter, particularly where property owners or action groups are involved. However, it is frequently the case that discretion here is exercised without the constraints of heavy public scrutiny. Officers in all the regions echoed the following comments of one:

> 'Its quite surprising really. If someone had reported an incident you'd have thought they'd be interested in what you're doing. But they're not....Normally, they'll phone up, report a problem, you tell them what you've done [in response] and they're happy'.

As to the influence of what pressure is exerted, it is indeed clear that the scrutiny by the public of the authority's remediation decisions will often affect the stringency of the measures, including the willingness of the authority to require measures that are of greater symbolic than material significance.[29] Nevertheless, it is stressed throughout the regions that discretion is ultimately exercised by the authority, rather than the standards being dictated

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[28] One officer's summary of the factors underpinning discretion here is interesting for its stress upon the relevance of 'third parties'. Thus, determination of standards in respect of a pollution incident 'depends on lots of things':

> 'It depends on where it is. It depends on the scale of it. Often its down to third parties as well. For instance someone's complaining about it. Or if there's lots of people. Or its a high amenity area or if its somebody's land - they're a riparian owner - they'll want to see it spotless.'

[29] The highly visible but in other respects ineffectual use of booms, for example, above p 199.

by the public: 'whilst we're guided by the public, the public don't rule what we do'. Moreover, the officials in all regions stress too the checks imposed by the often competing pressures emanating from 'the public' and, in particular, the crucial importance of being seen to be reasonable both in the eyes of the party responsible for an incident, the 'victims' and members of public generally: the 'overriding thing of wanting to work with industry and water users on the whole'. In determining standards of remediation in any given instance, all officers considered that it was important that they were not perceived by the party responsible to be led by 'sectional interests' among the wider public, or the wider public to have perceived the officer to have been unduly influenced by any demands for moderation on the part of the person responsible for the incident.

Returning to a question left open, above, there is indeed some evidence that the 'who?' of remediation will have a bearing on the standards of remediation. However, there is no clear correspondence between the party undertaking remediation and the stringency of the standards that will govern the remediation. For one officer, the standards demanded where remediation is financed by the party responsible are generally more onerous than would be demanded of the authority were it to be likely to have to bear the full costs: 'If you know you're going to get cost recovery, you're more likely to spend more time, more effort and more resources, which are limited after all'. This is consistent with the analysis of the financial statistics, above, which suggest that the increase in expenditure on remediation is linked to an increase in emphasis given to remediation cost recovery.[30] In some circumstances however the converse holds true, with remediation undertaken by the authority with or without the prospect of cost recovery being considered by the officers in the field more likely to lead to higher standards of remediation. One such circumstance - emphasised by all officers in the sample - concerns the potential for self-remediation to be undertaken by a party who it is discovered after the event lacks the relevant expertise. Such an eventuality would generally be interpreted by the officer as regulator's error, leading to greater thought being given in future to a more vigilant approach to the rooting-out of parties who cannot be relied on to undertake effective self-remediation.

The position is further complicated by the need to qualify the notion of standards being 'demanded' of self-remediation with reference to the extent to which such standards are frequently negotiated as between regulator and regulated. The negotiated character of standards as they concern self-remediation owes much to the doubts that exist on both the field officer and alleged polluter's part as to the ability of the officer to make their judgment

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30 Above, p 193-94.

regarding responsibility withstand legal proof. This is a fundamental point to make in this context, which suggests continuity with Hawkins' observations concerning, for example, the negotiation of standards relating to a discharge consent, or the strategic use on the part of the field officer of the threat of criminal sanctions.[31] One officer's reference to the uncertainty of legal proof as it concerns responsibility for purposes of self-remediation is particularly evocative in this respect:

> 'we know who is responsible, and they know we know. But they also know that we cannot necessarily prove it'.

In these circumstances, then, the most that the officer can expect is often for the alleged polluter to offer to undertake a degree of remediation as a gesture of goodwill, without prejudice to responsibility for the incident occurring. This is not an opportunity for the officer to negotiate exacting remedial measures, at least not of the kind that would exceed measures the authority itself would undertake if the burden was likely to be borne collectively.

This issue of legal proof opens out onto an issue of a broader character than that of the standards governing self-remediation, concerning the influence of law on standards of remediation more generally. It is particularly significant in this respect that all officers in the sample were aware not only of the need for and difficulties in proving responsibility for a pollution incident (in order, for example, to require self-remediation, or reimbursement of the authority's costs), but also the statutory requirement that remedial operations are 'reasonable.' The impact in practice of an awareness of this statutory requirement is that the officer will often err on the side of modest rather than ambitious standards of remediation. However, this will not always be the case, as much will depend ultimately on the officer's judgment as to what is open to legal challenge or, more to the point, what openings in the way of legal challenge are likely to be exploited.[32]

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31 The element of bluff and negotiation that is triggered by this issue of proof is a key theme throughout Hawkins study in the context of the discharge consent regime: see *Environment and Enforcement*, above n 1, 122ff and 149ff.

32 A distinction which is reflected in difference between willingness to push to the limits reasonableness in bringing to bear punitive considerations - 'teaching the polluter a lesson' - in contrast to the more acute sensitivity to the possibility of challenge in the context of recharging a party for costs incurred in remediation: see above, p 198.

A further legal constraint which is of particular interest given Hawkins' neglect of common law is the protection which tort offers the riparian entitlement to purity. This will be returned to below, where the interplay between common law and regulatory law will be elaborated. The point to note here is that there is a perception in the field of an association between, on the one hand, the common law and, on the other, demands on the part of the public for stringent standards of remediation in the event that an incident occurs: this association takes concrete form in the phenomenon of the riparian owner wanting to see that an incident is remediated to the point that the watercourse is 'spotless'.[33] Although clearly less direct a constraint on the field officer's exercise of discretion than that arising from the officer's statutory powers, the legal protection which the common law affords to a riparian owner's expectation of purity is nonetheless a constraint of some significance. Certainly, it is misleading to focus exclusively on the legal framework as arising under statute, dismissing - as Hawkins implicitly does - the common law as of no relevance to the activity of the officer in the field.

The impression which is gained from Hawkins' account of discretion unfettered by common law and legal constraints broadly thus merits qualification. Equally, however, it is apparent from the foregoing that discretion in the context of remediation is also constrained by a range of 'non-legal' considerations, of which three stand out as of particular importance. First, economic considerations and, in particular, the need to have regard to the costs involved in remediation, whether these be to the authority or the party responsible for the incident. Secondly, a range of strategic and tactical considerations relating to, for example, the preservation of long-term good relations with the regulated party and the wider public, and the value of making the most of an opportunity to inculcate risk awareness where it is lacking. Thirdly, considerations relating to the consequences of the pollution incident, whether these be defined in terms of the physical environment or impacts of an incident on 'sectional' interests bound up with the environment. These constraints are significant in suggesting that the regulatory activity associated with remediation is not so fundamentally dissimilar from that associated with the implementation and enforcement of the discharge consent regime as depicted by Hawkins: each are structured around the exercise of discretion which is profoundly influenced by the wider legal framework and social context within which the activity unfolds.

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[33] See above n 29.

Recovering Remediation Costs

The process of recovering costs incurred in responding to a pollution incident is now the subject of formal regulatory policy, a fact which calls to mind Hawkins' remarks concerning the organizational requirements of a regulatory authority. In particular, the fundamental tension between the need, on the one hand, for the authority to have control over its officers in the field and, on the other, to preserve the officer's discretion:

> 'Legal organisations, to be effective in attaining their mandate, have to transmit their policies to and make secure their control over the enforcement agent in the field. It is he who is in contact with the pollution (or whatever problems cause concern) and his discretion which gives practical expression to regulatory policy'.[34]

This paradoxical demand for both a high degree of 'organizational control' at the same time as a high degree of official autonomy is not confined to implementation of the discharge consent regime, but applies equally to remediation. This is well illustrated by formal policy and practice in the context of remediation cost recovery.

Until recently, field officers have chosen - and have been permitted by their superiors to chose - to exercise their powers of cost recovery sparingly.[35] Significant changes have however occurred in the way of organizational control, the upshot of which is

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34 *Environment and Enforcement*, above n 1, 70.

35 This is touched on above, n 33, where it is suggested that often cost recovery would amount to no more than the demand that materials consumed in the course of an incident response be replaced by the party responsible. This 'policy' is illustrated well by a letter of 4 April 1984:

> 'Dear Sir,
>
> Further to the recent oil spill....One bag of Drizit (oil absorbent material) was used by South West Water Authority in dealing with this pollution.
>
> It is the Authority's policy to reclaim materials used during a pollution incident from the discharger. I would therefore appreciate the replacement of the materials listed below from the Suppliers also listed below.[...].
>
> Please arrange for delivery to be made to [...].'
>
> The costs represented by the authority's time and use of durable equipment would have been borne collectively.

a statement of policy which in effect calls for a reversal of traditional practice.[36] This policy statement is an 'internal' document which is not in the public domain and, as such, contrasts with statements of policy on the subject of prosecution, which are available to the public.[37] The implications for the officer in the field are nevertheless similar, with prosecution and remediation cost-recovery policy each constituting a significant *formal* constraint upon the exercise of discretion. Indeed, the constraint imposed by policy on the subject of remediation costs is more rigid in its categorical language than that relating to prosecution policy.[38]

Formal policy in respect of cost-recovery is a source of considerable controversy within the field. Fundamentally, there is a divergence of opinion among officers in the sample concerning the desirability of the presumption in favour of recording and recovery of costs. This matter will be elaborated below, in the context of a more general discussion of remediation, *ex ante* control and regulatory functions on the whole. The point to stress here is that there are officers who - broadly supportive of the policy - are prepared to take an active role in the process of cost recovery, encompassing all that this might entail, including negotiations taking place in the aftermath of the responsible party being billed. Equally however, there are others who are less sympathetic to the policy - a sentiment which is reflected in the refusal to negotiate after the event of a billing, leaving any disputes to be settled by the financial accounting section of the region, advised by internal legal services.[39]

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36 Above, n 19.

37 NRA 'Guidance Note on Enforcement and Prosecution' (first circulated in 1989).

38 The prosecution policy is pervaded with language of a conditional nature - liberal use of 'normally' etc: see further Jewell, 'Agricultural Water Pollution Issues and NRA Enforcement Policy' [1991] LMELR 115. Guidance in respect of remediation cost recovery is however more categorical: if the person responsible can be identified, then they 'shall' be charged for the costs incurred, above, n 19.

39 The involvement of legal services or, rather, the lack of it, is a source of tension within the authority's organisation. A recurrent complaint on the part of employees within the regions' finance departments is that the legal services departments attach too little importance to the function of remediation cost recovery and, in particular, that they are often slow in responding to queries on points of law, leaving the complex grounds on which remediation bills are sometimes challenged to be addressed by persons in financial services who are both removed from the facts of the incident in the field, and largely without legal training. As to the grounds of challenge which the finance departments are typically required to address, a desktop survey of correspondance involving the party billed for cost recovery reveals that these include the argument that the incident in respect of which costs are sought had not been reasonably foreseeable; that the persons billed were merely the new owners of the site responsible for the contamination not the party who had caused the contamination; and hardship on the part of the person responsible. However, by far

One consequence of the differing commitment of officers to cost recovery is that negotiations involving the alleged party responsible for the incident may be conducted from different standpoints depending on the authority or officer concerned.[40]

The concept of negotiation in this context is once again fitting, notwithstanding the formal constraints which the present regulatory policy represents for the officer in the field. Certainly, discretion on the part of the officer continues to be exercised. For example, different officers have regard to different costs. Thus, whilst the majority of officers confine costs addressed to time spent and material resources consumed in responding to an incident, in contrast, for one officer an important part of the cost recovery process involves negotiating compensation for loss of amenity suffered by recreational users in the aftermath of an incident. This is not to suggest that the impact of an incident upon amenity is generally ignored in the field. The usual practice however is for aesthetic and otherwise recreational values to be weighed in by the authority in favour of any penalty pursuant to *criminal* proceedings.[41] Yet as far as compensation for loss of amenity is concerned, this is, subject to the exception noted immediately above, not generally a matter for the officer, but a matter for private parties having recourse to the common law.

More widespread is discretion exercised on the subject of whether or not readily identifiable responsible parties will be required to bear the costs of remediation, however they are defined; and, to the extent that they are, the proportion of costs incurred the recovery of which will be sought. The circumstances in which all costs will be 'written off' by the field officer are rare.[42] Indeed, the extent to which the application of the presumption in favour of cost recovery is rigid is illustrated by a case in which detergents in a beck had been traced to the washing of a car, leading to the owner being billed for the costs of incident investigation. However, the outcome in that instance was that the bill was cancelled:

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the most recurrent ground of challenge is the excessiveness of the expense incurred in relation to the incident.

40 What are the wider consequences of this is in terms of the outcome of any negotiations is unclear - the fieldwork for this Chapter focused on negotiations involving field officers, putting those involving finance and, where appropriate, legal personnel to one side.

41 Although this is not to suggest that matters of amenity, broadly speaking, are actually reflected in sentencing policy, about which little has been published, academic or otherwise.

42 The internal guidance, above n 19, states that costs consisting of less than one hour of one officer's time need not be billed to the party responsible. Regions operate their own *de minimis* rules for billings which, if contested, will not be pursued.

> 'Lots of people wash cars on a Sunday afternoon. We decided that there were going to be more political consequences in sticking with that bill than saying fair enough, we won't charge you this time but, in future, don't tip buckets of soapy water down the highway drain'.

The exercise of judgment concerning the proportion of the total costs a party is required to bear is more common. The crucial consideration on the part of the officer here is the 'reasonableness' of the costs incurred. For example, the reasonableness of recovering costs of biological surveys which extend sufficiently downstream of the pollution incident to reveal little more of its impact than surveys upstream have already done. A more frequent example concerns charging for only one officer's time, even though two might actually have attended the incident.[43] However, reasonableness in these senses will normally be a significant consideration in deciding what remedial measures are called for in the first place,[44] thus foreclosing somewhat the opportunities for negotiation after the event.

It remains the case however that much of the cost recovery negotiation takes place after the alleged party has been billed. Indeed, it was the prospect of this which provided the basis of the concerns among field officers at the outset of the policy of automatic recharging. It was anticipated that this radical change in regulatory policy would transform the nature of the regulatory activity from one of pollution incident response to one of resolving disputes concerning civil liability:

> 'When cost recovery was first introduced we were determined that we were not going to get too bogged down in recharging. We don't want phone calls every other day from people saying "we won't pay". We just don't want to know'.[45]

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43 On the other hand, some of the fixed costs for use of the authority's equipment are set at levels which represent a profit to the authority (source: interview, EA official, 10/3/96).

44 Above, p 202.

45 Parallels may be drawn here with the explanation being offered for the reluctance of NHS trusts to systematically recover the costs of treating victims of road traffic accidents from insurers: see 'The Times' 10 December 1997.

More important in terms of comparisons with Hawkins' account are the concerns grounded not so much in the prospect of an increase in telephone and paper work, as much as the prospect of an adverse impact of cost recovery upon relations between officer and the party regulated: 'we're the people who've got to go back and face these people who've been charged'. The account of Hawkins relating to the discharge consent regime makes it clear that the recommendation of formal criminal proceedings will be the product of a careful weighing of factors on the part of the officer concerned, taking into account longer term implications of prosecution.[46] In contrast, policy towards the recovery of clean up costs is perceived by the officer in the field to offer little room for the exercise of such judgment. Thus, the feared scenario, which is not uncommon, in which the costs incurred are subject to automatic recovery without any regard to the wider implications of so doing. In these circumstances the officer will feel compelled to explain the regulatory decision to the regulated party in terms of a central dictate over which there is little or no local control.

However, not all disputes subsequent to billing find the officer distancing themself from the apportionment of individual responsibility. Indeed, whilst it is apparent that negotiating clean up bills is rarely among the most rewarding of the activities of the officer in the field, many officers are alive to the importance of taking disputes seriously, not least because dealing with such disputes is considered vital to the wider objective of working with the regulated party, and the public generally.[47] A complex interplay of considerations of justice and sensitivity to the political consequences of cost recovery underlies the exercise of discretion in this context, which is illustrated well by a farming incident in which costs initially recorded as four thousand six hundred pounds were reduced in negotiations to a figure roughly in the order of two thousand pounds. Part of the reason for the substantial costs was the location of the pollution incident, which made for difficulties of access. It was felt by the officer that the polluter was not to blame for this 'practical' problem, and that costs could reasonably be reduced to reflect this 'unfortunate' (rather than blameworthy) component of the incident. Moreover, to have taken a more rigid line would have risked adversely impacting upon wider relations with farmers, which the authority had worked hard to construct around the imperative of being seen to be 'doing what is reasonable'.

One final factor of note in this context is the officer's willingness to have regard to the expense involved in administering the cost recovery process:

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46 *Environment and Enforcement*, above n 28.

47 Cf *Environmental and Enforcement*, n 1, p 195, where the crux of the relations between authority and public are analysed in terms of the management of appearances.

> 'Its about pursuing the polluter to the "nth degree". There has to be a balance between pursuing costs and the effectiveness of doing so.'

In the context of the farming example, above, negotiations involved a loss adjuster, who impressed upon the authority that separate negotiations and, most likely, formal proceedings would be necessary if the authority was to get the balance on the sum from the person insured. This negotiation was thus influenced not only by considerations of justice, but transaction costs and, more broadly, expediency.

Formal regulatory policy, then, although strict in its presumption of automatic cost recording and recovery, does not mitigate entirely against the exercise of discretion concerning the allocation of the costs of remediation. Discretion continues to be exercised in determining the nature of the costs that will be taken into account, together with whether and what proportion of the costs will be billed to the party responsible. However, the foregoing has made clear that formal policy here does nevertheless act as a significant constraint upon the breadth of discretion, with important implications for a comparison between the role of field officer in the respective processes of 'dispensing' justice of a civil and - *pace* Hawkins - criminal nature. Formal policy detracts from the scope for discretion in the apportionment of civil liability that is apparent in the sphere of criminal liability to the point that the officer will sometimes feel the need to disown judgements as to liability of a civil nature, in order that constructive relations with the parties regulated are preserved. Such constraints upon the exercise of discretion in the context of the discharge consent regime are remote. On the contrary, as the account of Hawkins makes clear, it is a defining characteristic of penal control in this field that the process is not a mechanical application of strict legal provision and policy statement to fact but rather, involves discretion which will be exercised with profound regard to the officer's appreciation of a polluter's culpability.[48]

The Function of Remediation

Field officers across the sample perceived remediation and associated cost recovery as fundamentally independent of enforcement of the discharge consent regime, even if the two are acknowledged, on occasions, to converge in practice. That the two are closely related but ultimately distinct in the eyes of the officers is illustrated by the evidence that remediation

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[48] Above n 29.

will often be viewed as a satisfactory alternative to prosecution in the aftermath of an incident. This may be the case notwithstanding that the pollution incident is severe:

> 'Where there is a high cost of clean up, and clean up is far and away the most important thing to us, then if it were a first offence, if there was a high element of accident as opposed to a contributory factor from the polluter, then we'd be more inclined to see them spending lots of money on clean up rather than the prosecution'.[49]

What is perhaps most interesting is that the officer perceives remediation divorced from prosecution as capable of satisfying the public's sense of justice. Thus, in the aftermath of public outcry at an overflow from a sewage treatment works causing substantial fish mortality, the regulatory authority's response was to draw attention to the remedial undertakings the local authority had made:

> 'We decided that the most important thing was to make a statement about who would be paying for the fish to be put back into the watercourse, when it would be done and on what basis we would decide to do it'.

In this respect field officers reveal the influence of a concept of corrective justice, loosely defined:

> 'If there is an accident - lets say a pollution that results from an act of third party vandalism - then you [the polluter] don't necessarily need to be seen by your neighbours to get taken to court and get a penalty. But what may be more important is that you are seen to put the environment right. You are seen to pay towards an aerator going into a watercourse so that whilst you've had an accident, its not killing fish and you've done what is right to prevent it killing fish.'

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[49] This is significant in that formal prosecution policy provides that where the incident is a serious one in terms, amongst others, of its environmental impact, a prosecution will usually be commenced subject only to the availability of sufficient evidence for the prosecution to succeed: above, n 38.

As well as reflecting conceptions of justice, of whatever nature, remediation is also seen as contributing positively to the objectives of pollution *deterrence*. Most often evoked in this connection are the economic implications of remediation liability:

> 'We use clean up costs as a strategy in pollution prevention. For instance, if you've got an industrial site with an unbunded oil tank we say "not only could you get prosecuted but you could face 'x' amount of pounds getting it cleaned up." We do that all the time.'

This passage is significant in highlighting the sense in which the game of bluff associated in Hawkins' account with the enforcement of criminal sanctions extends to threat of sanctions of a civil nature.[50]

However, it is generally acknowledged that the threat of criminal proceedings constitutes a considerably greater deterrent than civil liability for the costs of remediation. Officers perceive that it is less the economic implications of a fine (which is often easily borne) that account for the deterrence value of the criminal sanction, as the publicity associated with a formal trial, and the stigma attached to the criminal penalty. Civil liability for remediation lacks this stigma, with consequences for its contribution to objectives of pollution deterrence.

Indeed, opinion amongst officers is divided as to whether remediation contributes to the goal of deterring pollution risks at all. Alongside those who place considerable emphasis on clean up costs as a component of a strategy of pollution prevention, are those who consider that the deterrent implications of remediation liability can be greatly exaggerated. The view here is that polluters are on the whole willing to remedy an incident, or finance its remediation (an inclination which is all the stronger if the incident is a serious one, involving noticeable damage and attracting public outcry). A rigid, formal policy of cost recovery adds little to the incentives that already exist. On the other hand, the new policy does carry real costs of its own, imposing substantial administrative demands upon officers in the field, requiring them to painstakingly record remediation costs incurred and, more onerous still, to engage in protracted correspondence defending cost recoveries that would not otherwise have been required under the traditional discretionary approach. In the absence of any reason to believe that these costs are offset by savings in terms of incidents prevented, a return to the

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[50] Above, n 32.

traditional practice would be appropriate. A valuable deterrent to some, automatic cost recovery is seen by others as a misguided dogma, removed from the dynamics of pollution prevention in the field and, ultimately, a 'false economy'.

In this connection it is important to draw a distinction between the economic deterrent of cost recovery and the educational value of a polluter reflecting on the impact and causes of a pollution incident, which may also contribute to the meeting of objectives of pollution prevention. Whilst there is some dispute in the field as to whether the prospect of cost recovery exerts any significant influence on the potential polluters' practices, remediation and, in particular self-remediation, is widely perceived as a means of bringing home to the polluter the consequences of a lack of vigilance; and as a means of education broadly.[51] This makes explicit what is often implicit in Hawkins account: that a pollution incident and its remedial response is not a discrete, well-bounded event that can be bracketed-off from any study of regulation of an *ex ante* character. It is rather integral to an on-going strategy of pollution prevention.

It is also apparent that remediation is valued by the field officer independent of its contribution to objectives of justice and deterrence. The activity of remediation has intrinsic qualities which reinforce Hawkins' observations on this point.[52] As well as giving effect to the instinct to repair damage done, remediation is an opportunity for the officer to use their 'ingenuity' in a rich variety of practical settings: it is a recurrent theme that no two incidents are alike. This is in marked contrast to the bulk of discharge consent implementation, which is presented by the officer as repetitious and formulaic. However, it is possible to exaggerate the sense in which the *healing* of the consequences of an incident is the overriding concern, at least to the extent that is suggested by the remarks of Hawkins, above. Once the incident has been brought under control, the challenge generally shifts to ways in which it can in future be prevented. The activity of remedying the incident is itself often a mechanical one, with its own routine: booms, absorbents and skimmers for oil pollution; alkaline for acids; aerators for organic pollution; damming and/or diversion for incidents where, for example, major water supplies are at risk of contamination. As regards biological restoration, some regions only restock salmon and trout, and there is throughout the sample an emphasis on the desirability of allowing invertebrate and vertebrate life to recolonise the site of the pollution incident naturally. Certainly, the principal rewards for the field officer lie in tracing

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51 Above, p 197.

52 Above, n 7.

an obscure pollution to its source, or averting a major incident by timely and effective incident response.