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By Leslie Blake, John Pointing and Tim Sinnamon

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Leslie Blake, Lecturer in Law, Department of Law, University of Surrey, Guildford, Surrey, GU2 7XH, l.w.blake@surrey.ac.uk

John Pointing, Barrister and Senior Lecturer in Law, School of Surveying, Kingston University, Penrhyn Road, Kingston upon Thames, Surrey, KT1 2QJ, j.pointing@kingston.ac.uk

Tim Sinnamon, Associate Lecturer in Law, Department of Law, University of Surrey, Guildford, Surrey, GU2 7XH, t.sinnamon@surrey.ac.uk

Corresponding author:

John Pointing: j.pointing@kingston.ac.uk

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By Leslie Blake², John Pointing³ and Tim Sinnamon⁴

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Abstract

It is becoming a common concern amongst the judiciary, practising lawyers, academics, and those who draft legislation, that an acceptable standard of drafting is not always being achieved in primary legislation and, still less so, in secondary legislation. This paper discusses whether legislative bodies are, or should become, legally responsible for substandard legislation, especially where this negligence affects individuals disproportionately. It also considers some of the legal and practical problems that may arise in the case of negligently-drafted primary legislation and contrasts this with the less defensible position of subordinate legislation. The problem of immunity from legal action in respect of negligent legislative acts is discussed and it is postulated that European Community law may provide a model for developing a new tort of legislative negligence.

¹ This paper is based on an earlier version presented to the Commonwealth Legal Education Association conference, held in Greenwich, London, in September 2005. Thanks to participants at the conference and to colleagues in the Department of Law, University of Surrey, and especially to Amanda Cleary, for their helpful comments, criticisms and suggestions. Thanks also to the University of Surrey for funding Tim Sinnamon to enable him to participate in the research for and writing of this paper. All omissions, errors of fact and emphasis remain the responsibility of the authors of this paper.

² Leslie Blake, Lecturer in Law, Department of Law, University of Surrey, Guildford, Surrey, GU2 7XH, l.w.blake@surrey.ac.uk

³ John Pointing, Barrister and Senior Lecturer in Law, School of Surveying, Kingston University, Kingston upon Thames, Surrey, KT1 2QJ, j.pointing@kingston.ac.uk

⁴ Tim Sinnamon, Associate Lecturer in Law, Department of Law, University of Surrey, Guildford, Surrey, GU2 7XH, t.sinnamon@surrey.ac.uk

The Common Law

One of the reasons why so many people died when the *RMS Titanic* sank in 1912 was because the Board of Trade rules relating to the number (and capacity) of lifeboats that had to be carried on such a ship had not been changed since 1894. Those rules were based upon the tonnage of ships rather than on the number of passengers and crew carried in them.⁵ Although the *Titanic* had carried more lifeboats, floats, and rafts than the Board of Trade rules then required (sufficient to save 1,178 lives instead of the 'statutory' number of 962) even this capacity would have saved no more than 52% of the 2,207 people on board.⁶ In fact only 651 people were lowered into the boats.⁷

This paper is not about the *Titanic* disaster, nor is that notorious example of 'legislative negligence' the only inspiration for the ideas which this paper now wishes to address. But the loss of life in that disaster and the disaster itself are being used to illustrate three points:

1. Legislative negligence is not limited to instances where pure economic loss is caused to individuals. Such negligence can also cause loss of life and personal injuries.⁸ Thus, even if we accept the *Murphy*⁹ principle - that the tort of negligence should not normally extend to instances of pure economic loss - the consequences of legislative negligence can be more serious than this.¹⁰

⁵ The 1894 Rules for Life-Saving Appliances, made under s.427, Merchant Shipping Act 1894, did no more than treat the *Titanic* as a vessel of 'over 10,000 tons', even though it was a vessel of the unprecedented tonnage of 46,328 tons.

⁶ W. Lord, *A Night to Remember* (London: Penguin ed., 1978) p127.

⁷ *Ibid*, p197.

⁸ For another example of legislation which might endanger health and safety see the Building Regulations relating to thermal insulation and their failure to take account of indoor exposure to radon gas. This exposure is estimated to cause 2,500 lung cancer deaths per year in the U.K. It is difficult to see how any promoter of new thermal insulation regulations could rely on the 'state of the art' defence when the risks of such deaths have already been widely publicised even to students. See: 'Dealing with radon gas' [by P. Adams], 'Mainly for Students' series, *Estates Gazette*, 9 December 1989.

⁹ *Murphy v Brentwood District Council* [1991] AC 398, a case which might not be followed in all Commonwealth jurisdictions and which might, in any event, have been decided *per incuriam* for failing to consider the Latent Damage Act 1986.

¹⁰ For a criticism of the new building regulations see: 'A cost of global warming they'd rather keep hidden', J. Howell, *Sunday Telegraph*, 14 November 2004.

2. Legislative negligence is not confined to primary legislation enacted by a sovereign legislature. Secondary legislation (and quasi-legislation) drafted by someone in a government department, local authority, or statutory body is just as likely to be affected. Secondary legislation enacted under delegated powers receives no Parliamentary scrutiny. As the law lords have impliedly recognised, it would be an over-generous interpretation of the Bill of Rights 1688 to give to modern delegated legislation the same immunity from judicial scrutiny which is given, by that statute, to 'freedom of speech and debates or proceedings in Parliament'.¹¹

3. Legislative negligence includes failing to revoke or to amend out of date legislation, no less than it includes enacting defective legislation in the first place - assuming, of course, that a government minister had been obligated by Parliament to keep that legislation under review.

What is Legislative Negligence?

The concept of negligence imports a high threshold to making any claim. The definition encompasses instances in a European context where a Member State has failed to implement legislation or to fulfil its Community or international obligations. In the case of legislative institutions, problems arise over the 'legislative soup' created by the activities of those institutions. These activities are not confined to what occurs within a single institution. Legislative activity involves a complex web of interacting individuals acting within the constraints of a number of institutional settings. Each of these institutions functions in accordance with its own priorities and ways of doing business. They are all subject to the personal agendas of human actors and the capacity of these individuals to rationalise and obscure (what has been termed) their 'vocabularies of motive'.¹² Despite such pluralism there remains an overriding concern for efficiency and fairness in the way legislation is produced. Where harm is found to be directly attributable to legislative action (and inaction in cases where this

¹¹ See, for example: Town and Country Planning (Control of Advertisement) Regulations 1984, which led the law lords to take judicial notice of the fact that secondary legislation does not receive sufficient scrutiny and led them to rewrite those regulations in *Porter v Honey* [1988] 1 WLR 1420.

¹² H. Gerth and C. Wright Mills, *Character and Social Structure* (Boston: Beacon Press, 1953).

cannot be justified), it is necessary to find new ways of ensuring that individuals have proper and sufficient means of redress.

Legislative negligence is not the same thing as the enactment of an unpopular or unwise law; still less is it the enactment of a law without foreseeing the unintended consequences of the policy behind it. It is not directly concerned with ineffective legislation¹³ or, more generally, with the failure of legislative measures or the process of reform.¹⁴ Clearly, a policy may be unpopular, aberrant, quirky, old-fashioned, short-sighted, or even unreasonable (in the ordinary sense of that word) without it being unlawful.¹⁵

Legislative negligence, in the context of this paper, means such an obvious inattention to the consequences of the wording of legislation that, if such workmanship had been perpetrated by a lawyer drafting a lease, will, trust deed, or any other legal document, it would have amounted to professional negligence. This limitation should be enough to answer any allegation that such a cause of action would enable floods of discontented voters to claim damages at common law from their lawgivers.¹⁶ Placing the threshold for a cause of action as high as this begs the question of whether other forms of redress are needed to compensate for incompetence in drafting legislation where an individual suffers financial or other harm directly as a result of the wrongful act or omission.

Legislative negligence is not a cause of action entitling anyone to question the policies which (for good or ill) have inspired primary or secondary legislation. There may be other procedures for doing that.¹⁷ Legislative negligence is a cause of action

¹³ For example, the contaminated land regime established by the Environment Act 1995 and by Part IIA Environmental Protection Act 1990 is thought by many to be unworkable and was thought it would be so before it came into effect in April 2000. For a recent evaluation of this regime, see: 'Tension mounts as land remediation regime stalls', ENDS Report 375, April 2006, pp 35-39.

¹⁴ See J.E. Pointing and M. Bulos, 'Some implications of failed issues of reform: the case of leasehold enfranchisement', 8 *International Journal of Urban & Regional Research* (1984) 467-480.

¹⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹⁶ There appears to have been only one successful claim against a solicitor for the negligent drafting of such a document reported in the *Estates Gazette Law Reports*, 1975-2006: *Theodore Goddard v Fletcher King Services Ltd* [1997] 2 EGLR 131. (Surveyors had to make a 20% contribution to the damages paid by solicitors for their failure to include an 'upwards only' rent review clause in a lease).

¹⁷ For example, by alleging that the legislation is *ultra vires*.

arising out of the damage which has been caused by the failure of a government department or legislative draftsman to attend to the obvious adverse consequences¹⁸ of the legislation which the department is promoting. It is as if a solicitor was asked by a landlord to draft a business lease but drafted a rent review clause which (for 21 years or more) had had the effect of producing less than the market rent¹⁹, or as if such a solicitor omitted the user covenant or some of the other covenants intended to be binding on the tenant.

Negligence in Primary Legislation

It would be highly unusual to find examples of legislation that had deliberately been drafted incompetently. More common are examples of inadvertence, omission, or a failure to consider adequately the relationship between a piece of new legislation and earlier legislation. Those responsible for drafting legislation are constrained by time and by the complexity of statutes. There are many examples of judges criticising the wording of primary legislation, even in cases where the legislation in question was subject to conscientious scrutiny in Parliament.²⁰ Even those statutes which have been based on reports of the Law Commission (or the Criminal Law Revision Committee) are not immune from seemingly obvious errors.²¹ Not least important is the complexity of modern legislation and time available for drafting it. As the First Scottish Parliamentary Counsel has recently put it:

(W)hile the length and complexity of a statute is a consequence mainly of its

¹⁸ R. Jackson and J. Powell, *Professional Negligence* (London, Sweet & Maxwell, 6th ed., 2007) refers to one case where a negligently typed codicil to a will would have had the effect, if the Chancery Division had not intervened, of revoking the whole of clause 7 of the original will, instead of revoking only 'clause 7(iv)' as the testator had intended: *Re Morris* [1971] in Jackson and Powell, para. 11-226, n 66.

¹⁹ *Theodore Goddard v Fletcher King Services Ltd* [1997] 2 EGLR 131. See also: *County Personnel (Employment Agency) Ltd v Alan R. Pulver & Co* [1986] 2 EGLR 246, a case where a solicitor was held to be negligent for failing to advise a tenant of the effect of an unusual rent review clause in a sublease.

²⁰ The Criminal Attempts Act 1981 led to contradictory decisions of the House of Lords within a year of each other (19 May 1985-15 May 1986). Yet, when it was a Bill of Parliament, it had been scrutinised not only by a standing committee but also by a select committee which had heard expert witnesses. The contradictory decisions, relating to the question of conceptually 'impossible' attempts, were: *Anderton v Ryan* [1985] AC 560 and *R v Shivpuri* [1987] AC 1.

²¹ The Theft Act 1968 and the Criminal Damage Act 1971 are obvious examples, even though those statutes were intended to reform serious criminal offences- an area of the law where ambiguities are

subject matter, it is also a consequence of the amount of time available for its preparation and the number of civil service specialists available to contribute to what it says.²²

There are times when the problems go rather deeper. The analysis of Rose LJ in *Bradley* points to a wider malaise. In respect of the ‘bad character’ provisions in the Criminal Justice Act 2003, he opines²³:

It is in the public interest that the criminal law and its procedures, so far as possible, be clear and straightforward so that all those directly affected, in particular, defendants, victims, the police, the probation service, jurors, lawyers for defence or prosecution, judges and magistrates, professional and lay, should be readily able to understand it. Sadly the provisions of the Criminal Justice Act 2003, which we have had to consider on this appeal, are, as is apparent, conspicuously unclear in circumstances where clarity could easily have been achieved. It is not this Court's function to identify whether the government, Parliament or Parliamentary draftsmen are responsible for this perplexing legislation. It is this Court's duty loyally to glean from the statutory language, if it can, Parliament's intention and this we have sought to do in the face of obfuscatory language. The public is entitled to know of the difficulties which such legislation creates for all concerned. The point is graphically highlighted in the present case, because the Crown have advanced to this Court a construction of the statute which is completely contrary to that suggested by the Home Office press release on the day the provisions came into force.

It is more than a decade since the late Lord Taylor of Gosforth C.J. called for a reduction in the torrent of legislation affecting criminal justice. Regrettably, that call has gone unheeded by successive governments. Indeed, the quantity of such legislation has increased and its quality has, if anything, diminished. The 2003 Act has 339 sections and 38 schedules and runs to 453 pages. It is,

impermissible.

²² J. McCluskie, ‘New Approaches to UK Legislative Drafting: The View from Scotland’ (2004) 25 *Statute Law Review* 137.

²³ *R v Bradley* [2005] EWCA, Crim 20, paras 38,39.

in pre-metric terms, an inch thick. The provisions which we have considered have been brought into force prematurely, before appropriate training could be given by the Judicial Studies Board or otherwise to approximately 2,000 Crown Court and Supreme Court judges and 30,000 magistrates. In the meantime, the judiciary and, no doubt, the many criminal justice agencies for which this Court cannot speak, must, in the phrase familiar during the Second World War "make do and mend". That is what we have been obliged to do in the present appeal and it has been an unsatisfactory activity, wasteful of scarce resources in public money and judicial time.

The Need for Precision in Property Law

Examples of legislative negligence can be found in almost every area of the law, even in those areas where certainty is supposed to be the pearl of great price. For example, in landlord and tenant law, where property rights depend upon the lack of ambiguities in statutes, the draftsman of the Rent Act 1977 evidently failed to recall that a landlord's interest may be jointly owned by two or more people. Section 12 of the Rent Act 1977 was intended to benefit resident landlords and to prevent their tenants from obtaining full statutory protection. However, this section was worded in such a way that it was not made clear what the position of the tenant would be if the landlord's interest was jointly owned by two or more people, one of whom lived in the property and the other (or others) lived elsewhere. This led to at least two conflicting county court decisions.²⁴

A subsequent case involving joint landlords, heard in the Court of Appeal, decided the issue in favour of the landlords.²⁵ The unsuccessful resident landlord in the earlier county court case, which had been decided in favour of the tenant, had, by that time, already paid his tenant in order to obtain vacant possession of the demised premises.²⁶ He afterwards sought advice about whether he could sue the appropriate government

²⁴ *Szachno, Krasinskam and Skwarcynski v Gough* (unreported) (Kingston-upon-Thames County Court, 15 December 1977) where it was held that the tenant was not a protected tenant, discussed in the Conveyancer's Notebook [1978] Conveyancer 6, and *Baran and Bednar v Magas* (unreported). (Clerkenwell County Court, 21 October 1982) where it was held that the tenant was a protected tenant.

²⁵ *Cooper v Tait* (1984) 271 EG 105.

²⁶ See n 24, *supra*.

department, or the Attorney-General, for the negligent draftsmanship of the legislation. Because the legislation was primary legislation, he was discouraged from doing so by the Bill of Rights 1688 and by decisions such as *Manuel v Attorney-General* [1988] 2 Ch 77 (a case concerning the Canada Act 1982 and the Statute of Westminster 1931).²⁷

Questions Facing the Common Law

The drafting ambiguity in the Rent Act 1977, which led to the conflicting decisions discussed above, gives rise to three cardinal questions:

1. Would it have made any difference if the defective provisions in the Rent Act 1977 had not been incorporated in an Act of Parliament, but in one of the 3,000 or so statutory instruments which are enacted under delegated powers in the UK every year? It is submitted that if government departments seek to avoid Parliamentary scrutiny (and the opportunity for legislative amendments) by using delegated legislation as a form of law making, those departments should not be allowed to hide behind the pretence that these statutory instruments are 'proceedings in Parliament'. In sum, the Bill of Rights 1688 ought not to prevent the government from being sued for legislative negligence in regard to statutory instruments.

2. Does the Human Rights Act 1998 preclude public authorities from claiming a blanket immunity from being sued by injured parties? It is significant that the blanket immunity from actions in negligence given to the police by the Court of Appeal in *Osman v Ferguson*²⁸ was held to be contrary to the European Convention on Human Rights in *Osman v UK*.²⁹ It is clear that the rejection by the European Court of Human Rights, in such cases as *Z v U.K.*³⁰, of the U.S. doctrine of 'substantive due process' will not put an end to disputes about whether immunities from actions in negligence are substantive

²⁷ Private information from Mr George Bednar (the resident landlord) who had taken leading counsel's opinion.

²⁸ [1993] 4 All ER 344.

²⁹ (2000) 29 EHRR 245.

in nature or merely procedural devices to protect privileged parties.³¹ In any event, even substantive immunities can find themselves out of kilter with the times.³² Arguably, a *prima facie* case would arise if a loss of property rights (in breach of Article 1 of the First Protocol of the European Convention), or a breach of family and private rights (Article 8), were directly attributable to legislative negligence, as in *Baran and Bednar v Magas*.³³

3. Do common law jurisdictions have anything to learn from the approach of the European Community to negligent drafting of EU regulations or directives?

The European Dimension

Regulatory law in the UK is increasingly being shaped from a European perspective. Such law does not fit comfortably with common law traditions and can be slow to respond to fresh demands.³⁴ There is also a tradition of mythologizing about the common law.³⁵ European law has been widely criticised for being obscure, complex and inaccessible.³⁶ Accusations abound that the statutory law of the EC has become so burdensome and inflexible that it is damaging business, the economy and the

³⁰ [2001] 34 EHRR 97.

³¹ *Matthews v Ministry of Defence* [2003] ICR 247.

³² *Hall v Simmons* [2000] 3 WLR 543 (immunity of advocates); *Meadows v General Medical Council* [2007] 1 All ER 1 (immunity of expert witnesses from professional disciplinary proceedings). See also: R. English, 'Forensic Immunity Post-*Osman*', 64 MLR 300, an analysis which has not been outdated by the subsequent decision of the ECtHR in *Z v U.K.*

³³ See n 24, *supra*.

³⁴ See: J. Steele, 'Remedies and Remediation: Foundational Issues in Environmental Liability' (1995) 58 MLR 615; B. Pontin, 'Tort Law and Victorian Government Growth: The Historiographical Significance of Tort in the Shadow of Chemical Pollution and Factory Safety Regulation' (1998) 18 OJLS 661; J. Murphy, 'Noxious Emissions and Common Law Liability: Tort in the Shadow of Regulation', pp 52-76, in: J. Lowry and R. Edmunds, *Environmental Protection and the Common Law*, (Oxford: Hart, 2000); S. Coyle and K. Morrow, *The Philosophical Foundations of Environmental Law: Property Rights and Nature* (Oxford: Hart, 2004); R. Malcolm and J. Pointing, 'Statutory Nuisance: The Sanitary Paradigm and Judicial Conservatism' (2006) 18 JEL 37.

³⁵ For example, Sir Leon Radzinowicz in his Seldon Society lecture on the life of Sir James Stephen opined: 'The common law of this country, like the forces of growth which determine it, is sui generis; it constitutes an integral part of the national heritage and discharges a political, social and moral function which is much more precious than the shapely codes which the seekers after a legal paradise aspired to create' ['The Law Commission: Codification of the Criminal Law, a Report to the Law Commission' 143 Law Com (1985) at para. 6].

³⁶ *Making the Law: The Report of the Hansard Society Commission on the Legislative Process* (London: The Hansard Society, 1992).

prospects of European citizens.³⁷ The production and accumulation of law in the EU has been truly staggering. Issues of relevance, accuracy, context, legitimacy, transparency all conspire to affect the law and its subsequent application. The quality of drafting raises major concerns, whether these arise from typographical errors, omissions, ambiguities, obsolescence, negligence or insufficient consultation. The problems which the EU faces are, therefore, exactly the same as those faced in other jurisdictions, possibly more so, given that much of the legislation is concerned with technical standards and a requirement to transpose policy into 21 languages.

These problems are compounded by the legislative process. Briefly, drafting is in the hands of the Directorate General of the Commission, who is mainly concerned with the subject matter. The draftsman will usually be an expert in the field, but not necessarily a lawyer. The initial draft has to be passed on to the Commission's Legal Service. This process looks to the legal basis of the Treaty and is not primarily concerned with the precise details of the text. The draft then goes to the Commission for approval, and, if approved, is then translated.³⁸ Errors may be identified through this process, but due to translation problems some will be perpetuated or not identified at all. These processes take place before political 'horse-trading' within the Council starts. By this stage, political considerations, including the need for compromise and urgency, may prevail over the aim of producing legislation free from errors, omissions and ambiguities. In reality, much legislation and quasi-legislation is not given this level of scrutiny, particularly in highly technical areas of regulatory law.

The problems with law-making in the EC have not gone unrecognised. Five initiatives have sought to reform the law: the Sutherland Report³⁹, the Brussels Programme⁴⁰, the Molitor Report⁴¹, the SLIM project⁴² (Simpler Legislation for the Internal

³⁷ T. Burns, 'Better Lawmaking? An evaluation of lawmaking in the European Community', in: P. Craig & C. Harlow (eds), *Lawmaking in the European Union* (London: Kluwer Law International, 1998).

³⁸ Problems derived from translation into the languages of the Member States, represents a huge problem and one that is set to increase, given the recent enlargement of the EU.

³⁹ *The Internal Market After 1992: Meeting the Challenge*. Report presented to the Commission by the High Level Group on the Functioning of the Internal Market (The Sutherland Report), EC COM (1992).

⁴⁰ *The Brussels Programme*, COM (93) 545.

⁴¹ *The Molitor Report, The Report of the Group of Independent Experts on Legislative and Administrative Simplification*, COM SEC (95) 1379.

Market), and more recently the Better Regulation initiative.⁴³ However, the wider problem of individuals sustaining harm from poorly-drafted legislation has not been addressed directly until now.

EU Member State Liability

Member State Liability is concerned with entitlements to damages for individuals who have suffered losses caused by breaches of EC law by Member States. Academics have written about this extensively, particularly since *Francovich* was decided by the European Court of Justice (ECJ) in 1991.⁴⁴ In *Francovich*⁴⁵, the Court found that the State could be found liable in damages subject to the following conditions. Firstly, an applicant would need to show that the right being relied upon was one which could be identified from a Community measure. Secondly, he would need to show that a causal link existed between the State's breach of its obligation and the harm suffered. This even extended to measures that were not directly effective.

This principle was subsequently followed and developed in the *Factortame* and *Brasserie*⁴⁶ litigation, and now extends not only to the non-implementation of directives, but also where the implementation of legislation is found to be ineffectual and or insufficient.⁴⁷ Today, the opportunity to recover damages exists where a Member State has breached community law, provided that: (1) the rule of law infringed is intended to confer rights on individuals; (2) the breach is sufficiently serious; and (3) there is a direct causal link between the breach and the damage suffered. Recent case law has been preoccupied with defining the parameters of a

⁴² *Simpler Legislation for the Internal Market*. Accessed via: http://www.europa.eu.int/comm/internal_market/simplification/index_en.htm (last visited 25 October 2006).

⁴³ *Better Regulation – Simplification Initiative*. Accessed via : http://europa.eu.int/comm/enterprise/regulation/better_regulation/simplification.htm (last visited 25 October 2006).

⁴⁴ For further detail see T Tridimas, 'Liability for Breach of Community Law: Growing Up and Mellowing Down?' (2001) 38 CMLRev 301; G. Anagnostaras, 'The Allocation of Responsibility in State Liability Actions for Breach of Community Law' (2001) 26 EL Rev 139; P. Craig, 'Once More unto the Breach: The Community, the State and Damages Liability' (2001) 106 LQR 67.

⁴⁵ Case C-6, C-9/90, *Francovich and Boniface v Italy* [1991] ECR I-5357.

⁴⁶ Case C-46/93, *Brasserie du Pecheur SA v Germany* and Case C 48/93, *R v Secretary of State for Transport, ex parte Factotame Ltd and others* [1996] ECR I-1029.

⁴⁷ Case C-140/97, *Rehberger v Austria* [1999] ECR I-3499.

'sufficiently serious' breach.⁴⁸ The point to be emphasised is that Member States can be held tortiously liable where the relevant domestic policy body fails to initiate the requisite legislation, or where the draftsman fails to articulate the intention of EC secondary legislation properly.

Even though the parameters for awarding compensation are restrictive, State Liability extends nowadays to compensate for errors that originate from the drafting process. The obligation to transpose EC Law into State law is manifest in international law and is a recognised principle derived from the case law of the ECJ. In this context, liability stems from the actions of the legislature or the failure of the political system to initiate legislation. The well-documented development of State Liability challenges arguments that are hostile to the introduction of liability for negligent drafting in a domestic setting, where this results in ineffectual implementation. If State Liability applies where a Member State has reneged on a commitment to implement legislation, either on time or in the correct form, is there a sound argument for denying the extension of liability to legislation that has been drafted in a truly negligent way?

Critics of the introduction of such a concept may resort to a variant of the 'floodgates' argument. If an argument against introducing an action in legislative negligence is that it would bring a flood of litigants to the doors of the Court, then one need only draw a parallel with the number of successful cases brought in respect of State Liability. Here, the numbers are very low. Why, then, argue for a concept that is unlikely to be successful in any but the most persistent and disadvantaged cases? Part of the answer is that the threat of use is likely to be more effective than actual use. State Liability was developed as a result of a failure by Member States to complete the Single Market agenda and one reason given by the ECJ for its development was that the prospect of imposing liability resulting in damages would encourage Member States to fulfil their commitments. On the other hand, the introduction of a new tort for grounding a claim of legislative negligence would provide legislators with a powerful incentive to ensure that legislation is soundly based and correctly formulated. A potential liability in damages would help to tighten up the drafting

⁴⁸ Case C-46/93, *Brasserie du Pecheur SA v Germany* [1996] ECR I-1029, at para 56 'the clarity and precision of the EC rule breached, the measure of discretion left by that rule to the national or

process and improve the quality of legislation.

Using State Liability as a template, it is unlikely that the introduction of liability for negligent drafting in England and Wales (or in other EU Member States) would result in a flood of litigation, inhibit the drafting of legislation, or cause compensation to be awarded in any but the most deserving of cases. The contemporary system of State Liability is by no means perfect, but it signposts a concept that is already operational in the legal systems of all 27 Member States. These conditions, the authors argue, preclude any constitutional argument that might be used to resist the development of such a principle within a national legal system.

Non-Contractual Liability and the Institutions of the European Union

Having analysed State Liability, it is pertinent to take the European case a step further and to examine the extent to which the EU institutions can be held liable for negligence. Community non-contractual liability is governed by Articles 235⁴⁹ and 288⁵⁰. These Articles are Delphic and vague. In principle, the Community is liable for any damage which it causes, whether by its institutions⁵¹ or by its employees.⁵² Article 288(2) requires Community courts to determine liability 'in accordance with the general principles of the Member States'.⁵³ The prevailing academic opinion is that the intention of the treaty drafters was to empower the ECJ to 'develop a European standard of liability through the concretisation (sic) of general legal principles'.⁵⁴ The articulation and development of principles suitable for achieving

Community authorities, whether the infringement and the damage caused was intentional or voluntary, whether the error of law was excusable or non- excusable'.

⁴⁹ Article 235 EC Treaty; the Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288.

⁵⁰ Article 288(2) EC Treaty. In the case of non-contractual liability, the community shall, in accordance with the general principles common to the laws of the Member states, make good any damage caused by its institutions or by its servants or agents in the performance of their duties.

⁵¹ This is seen to be a derivation from the French (*a faute de service*). This terminology is used by the ECJ.

⁵² *a faute personnelle*.

⁵³ It is pertinent to note that if a number of Member States were to expand liability for negligent drafting, this may well compel the ECJ to build on its existing narrow principles.

⁵⁴ E. Grabitz, 'Liability for Legislative Acts' in H. Schermers & P. Mead (eds), *Non-Contractual Liability of the European Communities* (London: TMC Asser, 1988).

these ends appear to have been intentionally left ambiguous.⁵⁵ Consequently, these principles reflect the teleological and constructivist approaches of the ECJ.

On a first reading of Article 288, it would appear possible to use it to hold the institutions liable for poor drafting. Furthermore, the limits to non-contractual liability are generous⁵⁶; and applicants have a five-year limitation period running from the date when all the requirements for liability have materialised. Additionally, Article 288 does not maintain the strict locus standi requirements found in the Community's review procedures.⁵⁷ However, Article 288 has proved to be a cause of action having a very low success rate and the ECJ has all too often stopped short of awarding damages, even in instances where it has given a favourable judgment.

The elements of liability under Article 288 are similar to those applicable to domestic English tort law. There must be: (1) a wrongful act or omission attributable to the Community; (2) damage to the claimant; and (3) a causal link between these two. Fault, as a concept, has rarely been debated, yet it is implicit that there must be some sort of fault for the Community to be liable under Article 288. The wrongful act must also be attributable to the EU. Its parameters are very wide and can be conceptualised under three headings: (1) negligent acts (by servants of the Community in the pursuit of their duties); (2) the adoption of wrongful legislative acts; (3) a failure of administration. The following analysis will focus on the last two of these.

It has been argued that when Article 288 came into effect it was unclear whether the compensation provision was to be used as a sanction against non-compliant institutions, or whether it was intended to resolve grievances between the institutions and individuals.⁵⁸ This ambiguity pervades the two routes by which it is possible to challenge poorly-drafted legislation. The first of these comprise challenges that result from the effects of the legislation. Secondly, it may be possible to challenge the

⁵⁵ See Cases 5, 7 13-24/66 *Kampffmeyer v Commission* [1967] ECR 317.

⁵⁶ S. Douglas-Scott, *Constitutional Law of the European Union* (London: Longman, 2002), p388.

⁵⁷ Article 230 EC Treaty (Judicial Review), on standing for non-privileged applicants, is governed by Part 4: 'Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

institutions by focusing on administrative acts: on the behaviour that preceded the legislation. As is highlighted in the following discussion, with both of these there are similarities in the requirements needed to establish a successful claim.

Legislative Acts

Where a legislative act does not entail any meaningful discretionary choice then it will normally suffice to show the existence of illegality, causation and damage.⁵⁹ Craig⁶⁰ notes that 'it is possible to list a variety of errors which might lead to liability'.⁶¹ Given the predominately economic background to the Union in its early years, it is no surprise that much of the early case law on the legislative aspect of Article 288 deals with parts of the Common Agricultural Policy (CAP). Where legislative action involves economic policy measures, it has been held that the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred. These conditions have come to be known as the *Schoppenstedt* criteria.⁶²

The distinction between legislative measures which involve economic policy considerations and those which do not has recently become blurred. It now appears that any general measure, any measure involving economic choices, and any measure involving discretionary choices will attract the strict *Schoppenstedt* conditions.⁶³ The ECJ has used these conditions in determining most cases, particularly those

⁵⁸ J. Wakefield, 'What is the Nature of the Non-Contractual Liability Claim?' in J. Wakefield (ed), *Judicial Protection Through the Use of Article 288(2)* (London: Kluwer Law International, 2002).

⁵⁹ Cases 44-51/77, *Union Malt v Commission* [1978] ECR 57; Case T-481 and 484/93, *Vereniging van Exporteurs in Levende Varkens v Commission (Live Pigs)* [1995] ECR II- 2941; Case 26/81, *Oleificio Mediterranei v EEC* [1982] ECR 3057, para 16; Case C-146/91, *KYDEP v Council and Commission* [1994] ECR I-4199; Cases C-258 and 259/90, *Pesquerias de Bermeo SA and Naviera Laida SA v Commission* [1992] ECR I-2901; Case T-175/94, *International Procurement Services v Commission* [1996] ECR II-729, para 44; Case T-178/98, *Fresh Marine Company SA v Commission* para 3; Cases T-79/96, 260/97, 117/98, *Camar Srl and Tico Srl v Commission* [2000] ECR II-2193, paras 204-5.

⁶⁰ P. Craig and G. De Burca, *EU Law Text Cases and Materials* (Oxford: Oxford University Publishing, 3rd ed, 2002), p558.

⁶¹ Examples include: the failure to gather the facts before reaching a decision, taking a decision based on irrelevant factors, failing to accord appropriate procedural rights to certain individuals before making a decision.

⁶² Case 5/71, *Zuckerfabrik Schoppenstedt v Council*, [1971] ECR 975 at 984 para 11.

considered to be sufficiently serious.⁶⁴ The burden of proof rests firmly on the applicant. The key criterion has been whether the breach was manifest and grave.⁶⁵ The case law indicates that there has been some assimilation of the term 'sufficiently serious' with the jurisprudence on State Liability.⁶⁶ Therefore, where a Community institution has only a limited discretion in legislative matters, the mere infringement of a right might amount to a sufficiently serious breach.⁶⁷

In principle, it should be easier for individuals in the future to recover compensation where the legislative act in question does not involve a wide discretion.⁶⁸ However, in areas where there are discretionary choices to be made, the hard task of proving the *Schoppenstedt* criteria still remains. There are few instances of successful challenges being made. In the *Dumortier* case the Court found that the Council had infringed the principle of equality, specifically: 'the Council was guilty of a grave and manifest disregard of the limits on the exercise of its discretionary powers in matters of the CAP'.⁶⁹

The Court has also awarded damages in situations where import provisions had violated the principle of legitimate expectation.⁷⁰ The parameters are by no means fixed and how far the ECJ will move in the future is a matter for speculation. With respect to liability for errors in drafting legislation, unless these involve matters where

⁶³ 1) there must be a breach of a superior rule of law, 2) the breach must be sufficiently serious, 3) the superior rule of law must be one for the protection of the individual.

⁶⁴ See Case 74/74, *Comptoir National Technique Agricole (CNTA) SA v Commission* [1975] ECR 533; Case 83, 94/76, 4,15, 40/77, *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG v Council and Commission* [1978] ECR 1209; Case 116 and 124/77, *Amylum NV and Tunnel Refineries Ltd. v Council and Commission* [1979] ECR 3497; Case C-352/98, *Laboratoires Pharmaceutiques Bergaderm SA and Goupil v Commission* ECR I-5291.

⁶⁵ Superior rules of law have included: principle of protection of legitimate expectation, the principle of proportionality, principle of equal treatment (equality or prohibition of discrimination), principle of care, principle of proper administration, prohibition of the misuse of powers, right to property, right to be heard, freedom to pursue an economic activity.

⁶⁶ Crucially, the relative clarity of the rule which has been breached, the measure of discretion left to the authorities, whether the error of law was excusable or not and whether the breach was intentional or voluntary.

⁶⁷ M.H. Van Der Woude, 'Liability for Administrative Acts' in T. Heukels, and A. McDonnell (eds), *The Action for Damages in Community Law* (London: Kluwer Law International, 1997).

⁶⁸ S. Douglas-Scott, *Constitutional Law of the European Union* (London: Longman, 2002), p399.

⁶⁹ Joined Cases 64 and 113/76, 167 and 239/78, 28 and 45/79, *Dumortier Frere v Council* [1979] ECR 1795.

⁷⁰ Case C-152/88, *Sofrimport v Commission* [1990] ECR I-2477 and Case 120/86, *Mulder v Minister van Landbouw en Visserij (Mulder)* [1988] ECR 2321.

discretion is minimal and economic policy matters are not involved, the stricter *Schoppenstedt* criteria will prevail.⁷¹ Only where a serious drafting error has occurred could it be envisaged that institutions will be held accountable. The conclusion to be drawn is that although compensation remains a possibility, the parameters are very narrow for establishing a successful action.

Administrative Acts

Administrative acts have been defined as: 'acts by which the administration applies general rules in individual case(s) or otherwise exercises its executive power in an individual manner'.⁷² As many administrative measures involve discretionary choices, which are just as difficult to determine as those made in the context of legislation, the *Schoppenstedt* test will again have to be applied. Again, the Community should be held liable within Article 288(2) where there is damage, proof of a causal link between the damage claimed and the conduct, and the conduct constitutes illegality.⁷³

This legal test has led to liability of the EC on only a handful of occasions.⁷⁴ Van der Woude maintains that this is due to the regulatory nature of activities of the EC institutions, yet he foresees a general rise in the number of future claims.⁷⁵ In line with the general theme of this paper, the failure to exercise supervisory powers properly may give rise to liability for poorly or negligently drafted legislation. This principle can also be applied to the delegation of legislative powers. Where a Community institution delegates governmental powers to some other body, the acts of

⁷¹ C. Hilson, 'The Role of Discretion in EC Law on Non-Contractual Liability' (2005) 42 CML Rev 677.

⁷² E. Grabitz, 'Liability for Legislative Acts' in H. Schermers and P. Mead (eds), *Non-Contractual Liability of the European Communities* (London: TMC Asser, 1988).

⁷³ Various shortcomings in the performance of administrative acts have been held to constitute fault which may cause the Community to incur liability, including: lack of care in implementing powers, misuse of powers, failure to adopt a required act, defective systems adopted by an authority which can be attributed to the Community, lack of supervision, failure to rectify information in time once it becomes clear that the information provided was incorrect, failure to comply with internal rules and a breach of duty of confidentiality, failure to supervise subordinate officials or outside bodies to whom functions have been delegated, giving misleading information to the public, delay, lack of foresight.

⁷⁴ Cf. Case 145/83, *Adams v Commission*, [1985] ECR and Case T-514/93, *Cobrecaf v Commission*, [1995] ECR II-624.

⁷⁵ M.H. Van Der Woude, 'Liability for Administrative Acts' in T. Heukels and A. McDonnell (eds),

that body in the exercise of those powers may be imputed to the Community, and so the Community will become vicariously responsible.⁷⁶ Additionally, within the grounds that could constitute illegality - lack of foresight, delay and negligence in implementing powers - all of these stand as potential grounds for challenging poor drafting.⁷⁷

Deviation from an ideal standard of service will not usually constitute fault. Non-contractual liability carries with it a connotation of blameworthiness. Whilst a breach of this duty could constitute fault and hence illegality, there is a firm indication that Community institutions operate under what amounts to a 'presumption of good faith'.⁷⁸ To establish a claim, an applicant has to rebut this presumption. The *Fresh Marine*⁷⁹ case articulates this principle, albeit somewhat inelegantly:

in instances where there is an administrative measure, not involving economic policy choices and it confers only very little or no discretion, the finding of an error which, in analogous circumstances, an administrative authority, exercising ordinary care and diligence, would not have committed, this will support the conclusion that the conduct of the Community institution was unlawful in such a way as to render the Community liable under Article 288 EC.

To rebut the presumption of good faith, therefore, requires proof that a Community institution acted without 'ordinary care or diligence'. Where discretion is an issue, or where economic policy applies, then the rigid *Schoppenstedt* criteria will have to be applied. The result is that a claim for poor or negligent drafting will be much harder to establish. It is, however, the contention of the authors that were a piece of legislation to be so badly drafted, one of the above routes could (and should) yield some form of compensation.

The Action for Damages in Community Law (London: Kluwer Law International, 1997), p126.

⁷⁶ Case 32-3/58, *SNUPAT v High Authority*, [1959] ECR 127.

⁷⁷ T.C. Hartley, *The Foundations of European Community Law* (Oxford: Oxford University Press, 5th ed, 2003), p460.

⁷⁸ J.A. Usher, *General Principles of EC Law* (London: Longman, 1998), p120.

⁷⁹ Case T-178/98, *Fresh Marine* [2000] ECR II-3331.

The critical stumbling block is the level of proof required to sustain such an action. Whilst 'transparency' in the Community institutions is now a by-word, trying to ascertain the requisite evidence in the past would have been far too onerous. The ECJ has recognised on a number of occasions that standards of good administration had not been observed, but has gone on to express nothing more than judicial regret.⁸⁰ This parallels the Article 230 situation: a breach of the principle will only be successful to ground an action for annulment if it can be shown that the act at issue would have been different in the absence of the irregularity and the applicant had an interest in taking the point.

The difficulty of recovering compensation from the Community for losses caused by legislative measures has often been noted.⁸¹ The Court has given two reasons for adopting a strict approach. The first, cited in the *HNL*⁸² case, where the ECJ indicated that its view was:

explained by the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interest of individuals.

Secondly, there is the argument that it would not be in the Community's interests for its potential liability in damages to be too wide should a mistake be made, due to the effects on the Community purse and on future legislative decision-making.

These two reasons explain the reluctance of the ECJ to expand the principle of culpability. As mentioned previously with respect to State Liability, there is the familiar 'floodgates' argument, applied to cover not only the number of claimants who may arrive at the door of the Court but also the size of payouts. Generally, those in control of any political and legal system would wish to limit the scope of its

⁸⁰ See Usher, n 78, *supra*.

⁸¹ A. Arnall, 'Liability for Legislative Acts Under Article 215(2)EC' in T. Heukels and A. McDonnell (eds), *The Action for Damages in Community Law* (London: Kluwer Law International, 2001).

⁸² Case C-390/95, *P. Antillean Rice Mills and Others v Commission* [1999] ECR I-769.

liability to a minimum. However, the EU is different in that it has departed from the orthodox position of immunity from suit, and with Article 288 it has developed liability for some of its actions, notably where gross negligence can be shown.

A number of other arguments can be made to explain the limited use and development of the concept. These include: the problems of balancing the public interest with private interests; the limited amount of legislation drafted by the EC that does not subsequently need to be validated by a domestic legislature; the general reluctance on the part of litigants to claim compensation for drafting errors; and, finally, regret on the part of the EC that this concept was ever introduced into the Treaty framework. The authors of this paper believe that such arguments excluding liability for drafting errors are not persuasive. Were the Community to protect itself from the consequences of negligent drafting of legislation too comprehensively, then there would come a point when such immunity becomes oppressive, denies individual rights, and over-protects institutions from legal challenge.

Conclusions

It has been shown in this article that European Union law requires Member States to provide limited remedies to citizens who have suffered from the consequences of negligently drafted legislation. The European Union is in a position where it has an elementary form of non-contractual liability for poorly drafted or non-existent legislation in the form of State Liability or under Article 288(2). On first reading, Article 288(2) appears to be a panacea for all the ills of legislative drafting. Whilst the EU has been assertive enough to engage directly with the concept of non-contractual liability, case law indicates that the floodgates have remained tightly shut. It is, and always has been, open to the courts to construe 'illegality' narrowly, or to define it so as to preclude liability unless there has been some serious error.

In this paper the authors argue that it cannot be right for individuals to have no redress for the harm inflicted by legislative negligence. The absence of suitable remedies calls into question the legitimacy of a legislative system. In the case of domestic legislation citizens are more at the mercy of their legislators. The Law Commission has played an important role in developing new legislation and in promoting change

in a common law system reliant on incremental rather than on more dramatic change. Even so, this body has not been able to curb the government's enthusiasm for change as exemplified by the reckless drafting of the 'bad character' provisions of the Criminal Justice Act 2003.⁸³ The scrutiny powers of the House of Lords as a legislative body go some way towards reducing the scope of governments to get things wrong, but do not remove the potential for legislative negligence.

The argument in favour of a tort of negligent legislative drafting becomes ever more compelling when fundamental issues going beyond pure economic loss are at stake, such as public health, food safety or property rights. On the other hand, effective immunity from actions in negligence would be contrary to entrenched human rights (such as those found in the European Convention on Human Rights and its protocols). In answer to the question: is there anything that can be learnt from the EU? it is the authors' contention that the answer is 'yes'. It is possible to establish a system of non-contractual liability which, in exceptional circumstances, has compensated an individual for the misdemeanours of Member States either through Member State Liability or the acts of Community institutions under Article 288(2). With the former, compensation becomes payable where there has been a failure to legislate or where legislation has been ineffective. In theory, Article 288(2) is broad enough to encompass the principle of culpability for negligent drafting.

As to how an action based on legislative negligence might be brought presently in the English and Welsh courts it is difficult to see how this could be grounded without constitutionally entrenched rights. Fundamental rights in the UK are protected under the European Convention on Human Rights. The relatively wide availability of judicial review provides important but limited forms of protection for individuals in respect of the administrative functions of public authorities. Uniquely, the Human Rights Act 1998 does give the High Court the right to test legislation against the basic tenets of the European Convention.⁸⁴ But there is no equivalent in England and Wales to the powers of the German Constitutional Court to declare an act of the State (or that of an individual) to be in breach of the Basic Law, or any powers like those of

⁸³ See Rose LJ's comments in *R v Bradley*, n 23, *supra*.

⁸⁴ Section 4 of the Act provides the higher courts with the power to make a declaration of incompatibility with the rights enshrined in the European Convention.

the United States Supreme Court to find legislative acts to be in breach of constitutional rights.⁸⁵ The complexity of this approach further supports the need for entrenched constitutional rights to challenge any legislation that is drafted negligently.

Whilst reform of the judicial functions of the House of Lords is looking to remain on the political agenda, perhaps the time is now ripe for developing a new tort regarding harm that results from negligent legislation. This could proceed alongside rights becoming enshrined in a form of basic law, because it would be over these rights that the new Supreme Court would exercise its jurisdiction. Development of such rights would leave judges significant scope to perform the balancing function which common law judges are traditionally adept at. The right which the authors see as needing to be protected by constitutional provisions (including the Human Rights Act 1998) would be broad. This would be the right to have legislation enacted that is not drafted in a way that is so negligent that it causes loss or harm to the claimant. It is accepted that this states a principle very broadly and that areas of harm will need to be particularised or limited to particular spheres, such as personal liberty, property rights, freedom of expression or public health. Ultimately, these are issues for the people to decide.

⁸⁵ For a discussion of the superiority of German law with regard to rights of privacy and the concept of a constitutional tort in German law, see: B. Markesinis, 'Privacy, Freedom of Expression, and the Horizontal Effects of the Human Rights Bill: Lessons from Germany' (1999) 115 LQR 47-88.