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HUMAN RIGHTS AND CIVIL WRONGS: TORT LAW UNDER THE SPOTLIGHT

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Introduction

Lectures are regularly given, and articles written, about the effect of the jurisprudence of the European Convention on Human Rights on public law or criminal law. However, very little attention is given to its effect on the law of tort. This therefore seemed to me to be a more unusual and challenging topic, and thus the topic on which I have chosen to speak to this evening.

Background

This lecture is named in honour of a previous Lord Chancellor. When one of his successors, Lord Irvine of Lairg, gave the Tom Sargent Memorial Lecture in 2000, he expressed the view that :

> *"As we move away from the traditional Diceyan model of the common law to a rights based system, the effects will be felt throughout the common law and in the very process of our judicial decision making. This will be a healthy and dynamic development in our law."* [1]

Likewise, soon after new legislation came into force, Lord Hope said:

> *"It is now plain that the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary."* [2]

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[1] http://btinternet.com/~peterhill34/irvine.htm.

[2] *R v DPP ex parte Kebilene* [2000] 2 AC 326, 375.

In this lecture, we will be looking to see how far these very general statements have been borne out in the law of tort.

The scheme of the European Convention on Human Rights ("the Convention") and the Human Rights Act 1998 ("the HRA") are now very familiar. There are four particular points to note about the HRA for the purposes of this lecture. First, when the courts are determining a question arising in connection with a Convention right, they are required "to take into account" the Strasbourg jurisprudence.[3] They are not bound by it but the House of Lords has on several occasions said that English courts should follow Strasbourg jurisprudence, "no more, but certainly no less".[4] Secondly, it is only unlawful for *public* authorities to act incompatibly with human rights. Individuals are not so bound. Thirdly, the HRA creates a right of action for violation of Convention rights.[5] But any award of damages must take account of the principles applied by the Strasbourg court,[6] which awards only small amounts of damages, generally less than those available for a tort in domestic law. In addition, the limitation period under the HRA is in general only one year, whereas in England the limitation period for torts is generally six years from the wrongful act.[7] Fourthly, in general, the HRA does not have retrospective effect.[8] Each of these points plays a part in the discussion that follows.

Aims of this lecture

There is no obvious connection between the Convention and torts under the domestic law of a contracting state. The Convention does not guarantee that there will be any particular rights or remedies in the private law of contracting states. A further limitation in the Convention system is that it only protects the individual against the acts of public authorities and not the acts of other citizens. If the Convention were to have any impact on wrongs as between ordinary citizens, a way would have to be found round this restriction. If the matter stopped there, we should probably conclude that the development of the law of tort in ordinary cases between private citizens would be unaffected by the Convention.

But the matter is not as simple as that. There are two conflicting signals in the HRA as opposed to the Convention. The first signal suggests that Convention rights are to have no impact on domestic law: that signal is the provision in the HRA for its own system of remedies for violation of Convention rights. From this, it is arguable that Parliament intended that violations of human rights should only be actionable using that procedure. But there is another signal emitting the opposite message. The HRA makes the court a public authority.[9] When the Human Rights Bill was introduced, this was perceived to be the stronger signal. Before the HRA was passed, many thought that the courts would use the Convention proactively to develop common law rights of action. This raised an issue which became known as "horizontality".

I am not going to spend much time on explaining the debate on horizontality because it has ceased to be important due to the way the law has actually developed. Three main views were put forward. The first school of thought was that judges could never

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[3] s 2(1).
[4] *R (o/a Ullah) v Special Adjudicator* [2004] 2 AC 323, 350. This is not the case if the court is satisfied that the Strasbourg court misunderstood English law or procedure: *Doherty v Birmingham City Council* [2008] UKHL 57.
[5] s 7.
[6] s 8(3).
[7] s 7(5).
[8] s 22(4).
[9] S 6(3).

act incompatibly with the Convention. This led Professor Wade to conclude that "the citizen can legitimately expect that his human rights will be respected by his neighbour as well as by his government."[10] The second school of thought is exemplified by Murray Hunt. He argued that while the HRA does not permit direct horizontal effect, there is an indirect horizontal effect flowing from the duty imposed by section 6. Thus:

> *"Law which already exists and governs private relations must be interpreted, applied and if necessary developed so as to achieve compatibility with the Convention. But where no cause of action exists, and there is therefore no law to apply, the courts cannot invent new causes of action, as that would be to embrace full horizontality."* [11]

The third school of thought is exemplified by Gavin Phillipson. He accepted that the HRA would have some form of horizontal effect. This could be seen from the interpretive duty under section 3 in relation to legislation. However, he considered that the attempt to deduce from the HRA a general duty to achieve conformity of the common law with Convention rights would not be accepted by the courts.[12]
The discussion about the first two schools of thought, at least, on horizontality assumed that there would be a uniform approach to using Convention values in tort law. But that has not turned out to be the case. The position is more nuanced. In this lecture, I will identify the four techniques:

a. The Convention has in some cases inspired change in the law. Thus the Convention has been used to develop the law on breach of confidence so as to provide stronger remedies against the wrongful disclosure of confidential information.
b. In other cases, the courts have not sought to extend existing remedies so as to encompass violations of Convention rights. In particular, there is no general tort of wrongful invasions of privacy, and, in the field of negligence, domestic rights of action and remedies have been developed separately from remedies for breach of a Convention right. Indeed, the court has categorised the remedy under the HRA as a parallel remedy that ought developed separately.
c. The Strasbourg jurisprudence has been used as a launch pad for new ideas for the way in which eg claims for damages might be developed.
d. The Strasbourg jurisprudence has been used as a cross-check for conclusions already reached.

In this lecture, I will illustrate these four techniques by examples from the law of breach of confidence and negligence.

That survey leads to some general questions: How should the court use a statement of human rights when deciding cases about common law torts between individual citizens? What should be the respective roles of the Strasbourg court and domestic courts in this field and more generally? On this latter question, Lord Hoffmann has recently given a powerful lecture in which he was critical of the Strasbourg court, and I shall consider some of the points which he made. taking our own as an example. To take any other view in this day and age would to my mind diminish the influence which English law can have.

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[10] W.Wade, *Horizons of Horizontality* (2000) 116 LQR 217, 224.
[11] M.Hunt, *The Horizontal Effect of the Human Rights Act* [1998] PL. 423, 442.
[12] Phillipson, *The Human Rights Act, Horizontal Effect on the Common Law. A Big Bang or a Whimper?* (1999) 62 MLR 824, 845.

Privacy

Before 1998, no cause of action in English law for invasion of an individual's privacy

English law historically failed to provide a remedy for breach of a person's privacy. Thus, in *Kaye v Robertson*[13], decided before the Human Rights Act 1998, a famous actor was photographed and interviewed by journalists in a hospital room having recently undergone surgery for serious head and brain injuries. The journalists claimed to have obtained Mr Kaye's permission to conduct the interview; however the evidence indicated that he was in no fit state to provide any informed consent. Mr Kaye sought to prevent publication of the interview and images. His case was pleaded on the basis of libel, malicious falsehood, trespass to the person and passing off. Despite the obvious gross violation of his privacy, Mr Kaye succeeded only in obtaining an injunction restraining the newspaper claiming, by way of malicious falsehood, that he had voluntarily given the interview.

In 1999, I gave a lecture entitled *The Future of the Law of Privacy*.[14] In it, I asked the question in what circumstances might a remedy be available in future under the HRA for invasions of privacy which was not then available. I referred to the debate on horizontality. I pointed out that it would be anomalous if the remedies available to an individual citizen against a public authority for an infringement of privacy were different from those available if the defendant was not a public authority. I stated that I would expect the court "to use the Convention as a catalyst to develop the law so as to diminish the differences between the rights against a public authority and the rights against a defendant who is not such an authority." I added that "This may be because the court conceives itself as bound to ensure equivalent protection in this situation or because it develops the existing torts. For example, following the lead given in *R v Khan* and *Hellewell v Chief Constable of Derbyshire*, the court may say that a claim for breach of confidence lies whenever there is an unauthorised breach of the claimant's privacy right." This has turned out to be an accurate prediction of the way that the tort of breach of confidence has developed since the HRA came into effect.

Just six and a half weeks after the HRA came into force, a celebrity wedding between Michael Douglas and Catherine Zeta-Jones gave rise to a dispute which would precipitate the first significant analysis by the English courts of the new HRA provisions in the context of an alleged breach of privacy. The couple had recently married at a lavish ceremony in a New York hotel and "OK!" magazine had paid a substantial sum of money for the exclusive right to publish photographs of the ceremony. Despite a heavy security operation "Hello!" magazine, the main rival to OK!, had managed to obtain unauthorised photographs taken at the wedding. Hello! intended to publish these photographs as a "spoiler" of OK!'s exclusive feature. The claimants sought an injunction restraining Hello! from publishing the unauthorised photographs.[15] The claim was pleaded as a breach of confidence; however counsel for the claimants said in argument that the case actually had more to do with privacy than confidentiality.

The Court of Appeal reversed the decision of the Divisional Court to grant an interim injunction. Sedley LJ in his judgment asked whether there was a right of privacy in English law. He replied that:

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[13] [1991] F.S.R. 62.
[14] (1999) KCLJ 1, 12.
[15] [2001] QB 967.

> *We have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy.*[16]

Sedley LJ explained his reasons for reaching this conclusion:

> *The reasons are twofold. First, equity and the common law are today in a position to respond to an increasingly invasive social environment by affirming that everybody has a right to some private space. Secondly, and in any event, the Human Rights Act 1998 requires the courts of this country to give appropriate effect to the right to respect for private and family life set out in article 8 of the [Convention]...the two sources of law now run in a single channel because, by virtue of section 2 and section 6 of the Act, the courts of this country must not only take into account jurisprudence of both the Commission and the European Court of Human Rights which points to a positive institutional obligation to respect privacy; they must themselves act compatibly with that and the other Convention rights. This, for reasons I now turn to, arguably gives the final impetus to the recognition of a right of privacy in English law."*[17]

Wainwright – No freestanding cause of action for invasion of privacy

The subsequent House of Lords decision in *Wainwright v Home Office* saw an emphatic repudiation of any notion that English law now recognised a general right to privacy.[18] In *Wainwright* the claimants had been strip searched during a prison visit. A number of prison rules were breached during the search, including the fact that the searches were conducted in front of a window overlooking a public street. The claimants brought an action against the Home Office alleging, inter alia, a breach of their right to privacy.

Although the events in question took place before the commencement of the HRA, the House of Lords considered whether there would have been breaches of any Convention right. The House of Lords specifically rejected a submission that, following the commencement of the HRA, English law should recognise a general cause of action for invasion of privacy. The House also rejected a submission that the failure of English law to provide a remedy in these circumstances would leave the UK open to an adverse judgment of the Strasbourg court. Lord Hoffmann stated that Sedley LJ's remarks in *Douglas* were nothing more than a suggestion that, in relation to personal information obtained by intrusion, the common law breach of confidence has reached the point at which a confidential relationship has become unnecessary. [19]

Breach of confidence and intrusive media attention

In *A v B plc*[20] , a prominent footballer sought an injunction against the "Sunday People" newspaper to prevent it from publishing a story which had been sold to it by two women who had each had an affair with the footballer. The court was confronted by the question of what duty it had to respect Convention rights in circumstances in which no public authority was involved. Did the State's positive obligations under

[16] At 997.
[17] Ibid.
[18] [2004] 2 AC 406.
[19] The Strasbourg court subsequently held that there had been no violation of article 3 in this case, but that there had been a violation of article 8. It awarded the sum of €3000 to each of the applicants, together with their costs and expenses: (2007) 44 EHRR 40.
[20] [2003] QB 195.

article 8 to afford respect to private life require the courts to offer a remedy against intrusion into private life by a non-state actor? The claimant obtained an interim from a High Court judge who held that there was no distinction between brief extra-marital affairs and sexual relationships within marriage. The Court of Appeal disagreed. While it did not rule out the possibility that information about brief extra-marital relationships would be protected from disclosure in some situations, in this case they were not the sort of relationships that the court would be astute to protect when the other parties to the relationships did not want them to remain confidential.

As to the role of Convention rights, Lord Woolf CJ held:

> *Under s.6 of the [HRA], the court, as a public authority, is required not to act 'in a way which is incompatible with a Convention right'. The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.* [21]

Lord Woolf CJ went on to hold that articles 8 and 10 are:

> *the new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified.*[22]

The House of Lords developed this approach in *Campbell v MGN*.[23] The claimant was Naomi Campbell, a famous fashion model. The defendant was MGN Limited, publishers of the Mirror, a British tabloid newspaper. In February 2001 the Mirror had published a series of articles detailing the claimant's attendance at meetings of Narcotics Anonymous. The articles were accompanied by a series of pictures of the claimant leaving one of those meetings. (Modern technology can enhance the intrusiveness of invasions of privacy). The claimant sought damages for breach of confidence. Prior to the HRA, it had been necessary to show that the information had been disclosed in circumstances importing an obligation of confidence. The claimant succeeded in the House of Lords by a majority of 3:2 (Lord Nicholls and Lord Hoffmann dissenting), but the differences largely related to the way in which the right to respect for private life and freedom of expression should be balanced rather than to the statements of principle about the cause of action for breach of confidence.

Lord Nicholls began by confirming what was made clear in *Wainwright* - that in England there is "no over-arching, all-embracing cause of action for 'invasion of privacy'". However he also noted that "protection of various aspects of privacy is a fast developing area of the law" and specifically drew attention to the fact that development of the law had been spurred by the enactment of the HRA. Lord Nicholls then went on to say that following the HRA the cause of action for breach of confidence had firmly shaken off the constraint of the need for an initial confidential relationship. In so doing it had "changed its nature" and was therefore "better encapsulated now as misuse of private information".

In essence, the right of the claimant to privacy had to be balanced against the right of MGN to freedom of expression. As Lord Hope put it:

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[21] At 202.
[22] Ibid.
[23] [2004] 2 AC 457.

> *Article 8(1) protects the right to respect for private life, but recognition is given in article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but article 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life.*[24]

Several strands of reasoning are reflected across the judgments of the House of Lords on the issue of how the HRA has influenced the common law in this area. Lord Nicholls did not consider it necessary to decide whether the duty imposed by s 6 of the HRA extended to questions of substantive law. Lord Hoffmann, on the other hand, held that the HRA does not have horizontal effect as between private citizens and considered that the new approach was due to the fact that a different view was now taken as to the underlying value that the law protects. Lord Hope considered that the exercise in balancing the parties' competing rights was essentially the same as before the HRA but that the jurisprudence of the Strasbourg court offered important guidance as to how they should be approached and analysed.

Baroness Hale went further than the other members of the House. She held:

> *The 1998 Act does not create any new cause of action between private persons. But if there is a relevant cause of action applicable, the court as a public authority must act compatibly with both parties' Convention rights. In a case such as this, the relevant vehicle will usually be the action for breach of confidence.* [25]

Lord Hope also relied on the court's duty not to act incompatibly with Convention rights.[26] Lord Carswell agreed with Lord Hope and Baroness Hale.

Campbell has been followed in several cases, usually brought by celebrities and public figures as a result of intrusive press reporting of their private lives. A recent example is the case of *Mosley*, where a former president of a body responsible for organising motor-racing, succeeded in obtaining damages against a newspaper which had published details of his involvement in a sadomasochistic orgy.[27]

Some conclusions in relation to privacy

Effect of the convention - Convention rights have had a powerful influence and they have led to the development of a right of action for breach of confidence, but not for invasions of privacy generally. The right of action for breach of confidence has been developed along the lines of Convention rights, not because English judges were compelled to do this, but because it was generally felt that the law did not provide adequate remedies against the intrusions by the paparazzi. The English courts chose to accept the Convention value of privacy as interpreted by the Strasbourg court.

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[24] At [105].
[25] At [132].
[26] at [114].
[27] *Mosley v News Group Newspapers* [2008] EMLR 10.

Social value of privacy - It would go outside the scope of this lecture to try to reach any conclusion about the value of privacy, because as I have said, the English courts have simply chosen to accept the Convention value.

The essence of the reason for protecting privacy is that privacy is a way of protecting individual autonomy. The individual should have as much freedom as possible so that he can develop his own personality, and the state should only interfere where the individual would cause harm to another member of society. This is in essence the harm principle put forward by J. S. Mill[28]. I have written elsewhere[29] about the analogy to be drawn between Convention rights in the harm principle, and privacy can be seen as one instance of that.

But there is certainly room for legitimate differences of opinion. In response to the development of the tort of breach of confidence, the media have often complained that the HRA has put too much power into the hands of the judges, and that this development has had a chilling effect on the press. We have to be wary of rights of privacy that are too extensive. It certainly appears that the court in *A v B* took a different view of the desirability of publishing information about a person's private life from that in *Mosley*.

It is to be noted that the English courts have adopted the Strasbourg tests without qualification. Indeed this is one of the objections that Paul Dacre, editor of *The Daily Mail*, has to the way that the courts have developed the law of breach of confidence. In this context, the courts have not left the victims of violations of Convention rights to rely on section 7 of the HRA. The courts have ordinarily incorporated Convention values because they considered that that was the best thing to do.

Liability of public bodies for negligence

The experience in the field of negligence in respect of acts of public authorities has been entirely different from that in the filed of breach of confidence. Here the courts have not extended the law of tort to provide remedies for violations of Convention rights involved in claims for negligence against public authorities but left such claims to be dealt with in proceedings under s 7 of the HRA.

A fundamental element of negligence liability is the establishment of a duty of care owed by the defendant towards the claimant. The English courts will only hold that a duty exists if they consider it "fair, just and reasonable"[30] to do so. This approach enables the courts to take account of policy considerations. In particular, it has been used to prevent the imposition of duties of care on public authorities in respect of the exercise of their statutory functions where this is considered to be contrary to public policy, for example because it might lead to defensive policing and divert resources from the police's primary functions. In other words, the determination that there is or is not a duty of care is a control device used by the courts to limit liability for negligence.

Under English law a claim for negligence does not lie against a public authority in respect of the exercise of its statutory functions because the public authority owes no duty of care. This is illustrated by the recent case of *Jain v Trent Health Authority*,[31]

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[28] *On Liberty*, J.S. Mill.

[29] *Tom Bingham and the Transformation of the Law: A Liber Amicorum*, eds M Andenas and D Fairgrieve, Oxford, April 2009.

[30] *Caparo Industries v Dickman* [1990] 2 AC 605.

[31] [2009] UKHL 4.

where the owners of a nursing home were held to have no cause of action against a registration authority which applied to the court under a statutory power for its immediate closure based on allegedly inaccurate information. Needless to say, the holding that there is no duty of care operates harshly against individuals who suffer harm.

An episode occurred which illustrates the difficulty that England and Wales sometimes has as one of the few common law jurisdictions in Europe. In some other jurisdictions in Europe, the courts do not draw a distinction between public authorities and other defendants when imposing liability for negligent acts. [32] On the contrary, it is part of the political and legal tradition of some civil law countries that if an individual citizen suffers loss at the hands of an organ of the state, the loss should be borne by the whole community. If necessary, the state has to find the resources to meet the liability. Accordingly, the individual citizen would have a remedy of some kind.

It is therefore perhaps not surprising that the Strasbourg court initially took the view that the determination by English courts that a public authority owed no duty of care in the exercise of its statutory functions was in effect the grant of an immunity to the state and a denial of access to court in breach of article 6 of the Convention. In *Osman v United Kingdom*, an application was made to the Strasbourg court by the relatives of a murder victim who was killed despite warnings to the police that he was in danger of serious harm from an identified individual.[33] Under domestic law, the police owe no duty of care to individual members of the public in the discharge of their general duty of combating investigating crime.[34] The Strasbourg court held that article 2 is violated where the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party, and failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

To the consternation of many English lawyers, the Strasbourg court in *Osman* also held that the denial of a cause of action in this situation amounted to the grant of a blanket immunity on the police in respect of negligence claims and a breach of article 6.

Osman was revisited by the Strasbourg court in *Z v United Kingdom*.[35] In *Z* the applicants were children who had suffered severe abuse at the hands of their parents. They brought a claim in the English courts against their local authority, alleging that it had failed to take adequate protective measures in respect of the severe neglect which they were known to be suffering. The House of Lords struck out their claim on the basis that the local authority owed no duty of care. The applicants took their case to the Strasbourg court which held that its earlier reasoning in *Osman* had to be reviewed in the light of subsequent domestic case law. The Court said that it was now satisfied that the "fair, just and reasonable criterion" was an intrinsic element of the duty of care. Therefore the domestic rule that the local authority did not owe the applicants a duty of care was not an "exclusion" or an "immunity" and so did not violate article 6. In this respect, *Z* heralded a significant retreat from *Osman*. However, while Strasbourg jurisprudence changed, there was no change in English law.

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[32] See, for example, Dadomo and Farran, *French Substantive Law*, Sweet & Maxwell, 1997, pp 179-180; J.W.F. Allison, *A Continental Distinction in the Common Law*, Oxford, 2000, ch 8.

[33] (2000) 29 EHRR 245.

[34] *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

[35] (2002) 34 EHRR 3.

In 2008 the House of Lords considered two further police cases. In *Van Colle v Chief Constable of Hertfordshire Police*[36] the claimants were the relatives of a murder victim who had been killed by a man against whom he was due to give evidence. That man had made threats against the deceased, which had been reported to the police. The claimants brought an action under the HRA, alleging a breach of article 2. The House of Lords ruled that there was no breach of article 2 as it could not be said that the police should have anticipated that there was a real and immediate threat to life.

In *Smith v Northamptonshire CC,* the threats of violence had been made against the claimant by his former partner.[37] These threats were reported to the police, who took no action to prevent the partner from carrying out his threats. The claimant brought an action in common law negligence, claiming that the rule that there was no duty of care owed by the police in this situation should no longer apply following the enactment of the HRA. The Court of Appeal held in *Smith* that English law on this point should change where the facts also involved a violation of article 2 of the Convention. By contrast, however, the House of Lords (by a majority) held that the policy considerations still applied.

In this type of situation, domestic law will not mirror the Convention but provide parallel remedies. Lord Hope[38] and Lord Brown[39] also considered that the remedy in tort and the remedy under s 7 of the HRA should develop side by side, rather than converge. Lord Brown expressed the view that the function of the various remedies was different. A claim under s 7 of the HRA enabled breaches of Convention rights to be vindicated whereas the primary function of a claim in tort was to compensate for loss. The case of *Ashley*, considered below, shows that it is also a function of tort law to allow private rights to be vindicated, and not simply to provide damages to compensate for loss. It is not therefore always the case that the two remedies have a different function.

Lord Bingham dissented. He formulated a principle under which liability could be imposed on the police in the situation where the *Osman* principle applied. In a powerful passage he gave muted encouragement to the development of common law remedies in accordance with the Convention:

> *... one would ordinarily be surprised if conduct which violated a fundamental right or freedom of the individual did not find a reflection in a body of law ordinarily as sensitive to human needs as the common law, and it is demonstrable that the common law in some areas has evolved in a direction signalled by the Convention I agree with ... with Rimer LJ... that "where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it*

Using the Convention as a cross-check or launch pad - Ashley v Chief Constable of Sussex Police

The recent case of *Ashley v Chief Constable of Sussex Police*[40] raises a number of points relevant to this discussion. The events occurred before the HRA came into force and so the case did not directly concern human rights.

[36] [2009] 1 AC 225.
[37] [2009] 1 AC 225.
[38] [2009] 1 AC 225 at [82].
[39] Ibid at [138].
[40] [2008] 2 WLR 975.

The claim arose out of a fatal shooting by the police. The policeman involved had been charged with murder but the charge had been withdrawn from the jury because his case was that he thought at the time of shooting that the deceased had a gun. For the purposes of the criminal law, a person may rely on the defence of self-defence even if his belief that he was in imminent danger was not reasonable. One of the issues was whether the belief had to be reasonably held when relied on in civil proceedings, on which there was no clear authority.

In the civil proceedings brought by the deceased's family for negligence, battery and other claims, the police admitted negligence and offered to pay all the damages in full but the family still wished to proceed with their claim that there had been a battery as they wanted to know the full circumstances of the deceased's death. If the death had occurred after the HRA had come into force, the state would have been bound to hold an inquiry under article 2 of the Convention.

The House of Lords by a majority, affirming the decision of the Court of Appeal, held (1) that in civil proceedings there had to be a reasonable belief in a threat for the defence of self-defence to lie and (2) that the action could proceed notwithstanding the offer of settlement that had been made.

On the first point, even though the events occurred before the HRA came into force, I used Strasbourg jurisprudence to support my conclusion as to English law.[41] In a famous case about the killing by the SAS of IRA suspects in Gibraltar,[42] the Strasbourg court had made it clear that the acts of the individual soldiers did not violate article 2 where they reasonably but mistakenly believed that the suspects held remote devices for detonating bombs. I held:

> *There is of course no reason why the common law of battery should be the same as the jurisprudence of the Strasbourg court under article 2. But the co-incidence of jurisprudence affords some assurance that the common law remains up to date and in accordance with the standards to be expected of a modern democratic society. It provides a useful benchmark against which our common law can be tested, and against which it can be asked whether the rights of the parties are appropriately balanced.*

This illustrates another way in which Strasbourg jurisprudence can be used in the development of tort law.

On the second point, the House by a majority held that the claim could proceed even though no further damages could be recovered. The claim was still intact. The result did not turn on the fact that the defendants were the police though the decision has obvious relevance to the current debate here about the accountability of the police for their actions involving members of the public.

Lord Scott referred to Lord Hope's observation in *Chester v Afshar* that "The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached."

Lord Scott explored another interesting point. He held that in addition to the principal aim of compensating the claimants for a loss of dependency, there was no reason why compensatory damages should not also fulfil a *vindicatory* purpose. One might add that in human rights cases, as the jurisprudence of the Strasbourg

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[41] [2007] 1WLR 398 at [211] to [214].
[42] *McCann v United Kingdom* (1995) 21 EHRR 97, known as the "Death on the Rock" case.

court on just satisfaction recognises, vindication is the very thing that the applicant really wants. If the Chief Constable's submission were allowed to succeed then this would prevent "the deceased's right not to be subjected to a violent and deadly attack" from being vindicated. It was immaterial whether if the family succeeded they would be entitled to a declaration or to vindicatory damages. In reaching this conclusion Lord Scott drew upon the case law of several other common law jurisdictions where vindicatory damages can be awarded in respect of infringements of particular "constitutional rights". Lord Scott described such vindicatory damages as "rights-centred, awarded in order to demonstrate that the right in question should not have been infringed at all." Lord Scott referred to the right to life under article 2 of the Convention which he described as "at least equivalent to [those] constitutional rights". Only Lord Scott dealt with this point but his view is a further illustration of the influence of human rights on the law of tort. It is an example of a situation in which the court has used a convention right as a launch pad for a possible development of the law in future. In this way, Convention rights may be said to *energise* the common law.

Conclusions

Early expectations: Before the HRA came into force, there was much debate about the implications of the statutory duty imposed by s 6 on courts not to act incompatibly with Convention rights. Many people expressed the belief that s 6 would lead the courts to develop the law of tort to make it consistent with Convention rights. Our tort law is largely case law, and its development is often policy-driven. Convention jurisprudence reflects the values of the Convention, and thus could provide inspiration for decisions about developing tort law.

Since the commencement of the HRA: The courts have indeed in some cases proceeded to develop the common law by reference to Convention rights. Certainly the law of breach of confidence has been transformed by using Convention rights and values. Undoubtedly, the lack of a remedy at common law for invasions of privacy was widely regarded as a deficiency. In actions for disclosure of information in breach of confidence, English law now "mirrors" the Strasbourg jurisprudence.

But the developments have been subtler than forecast, and it is clear that s 6 does not have the full effect mooted before the HRA came into force. The law of England and Wales that public bodies should not in general owe a duty of care in the performance of statutory powers has not been qualified so as to provide a remedy where Convention rights have been violated. Another example can be taken from the law of nuisance. Even when a tenant suffers substantial interference with his home as a result of building work is carried out by his landlord, and can show a violation of his Convention right with respect to his home where his landlord is a public authority, he has no remedy in nuisance at common law.

Is there a principle? The position would seem to be that the English courts are not necessarily going to develop the common law in the field of tort by reference to Convention rights and values, but will do so only in specific cases where that is appropriate for domestic law reasons. It will not be appropriate where the Convention goes against the grain of some established principle of domestic law. The disappointed litigant will then be confined to his statutory remedy for violation of Convention rights. At the moment this is in general distinctly less generous than a tort law remedy in English law but if the Strasbourg jurisprudence on damages were to change there might well be a reason to reconsider the position in tort in domestic law rather than persist in the system of parallel remedies.

Other approaches: The use of the Convention in private law cases contrasts with the position in South Africa where the courts have used constitutional rights to develop private law since the adoption of the new Constitution in 1996. The Constitution in fact contains a provision for horizontality. Constitutional rights have been used to develop the liability of the police. Thus in *Minister of Safety and Security v Van Duivenboden* [43] the Supreme Court of Appeal found the police liable for failure to confiscate a firearm from a particular individual, who subsequently shot the claimant. The court said that what was needed was an assessment, in accordance with the norms of society, of the circumstances in which it should be unlawful to culpably cause loss. The Constitution being the "supreme law", no norms or values that are inconsistent with the Constitution could have legal validity. The Supreme Court of Appeal said that although the imposition of a duty of care on public authorities is often inhibited by the belief that it is important to allow them to carry out their functions without the chilling effect of the threat of litigation, this argument ought not to be exaggerated, as the need to establish negligence and legal causation meant that liability could be kept within acceptable boundaries.

The general position: The result is that there is a great deal of discretion in the hands of the judges to decide whether or not the common law will be developed in accordance with Convention rights, or whether a violation of a Convention right will be actionable only by means of the statutory remedy under section 7 of the HRA. It must be debatable whether Parliament intended to give this amount of discretion to the courts. The HRA does not provide that Convention rights shall apply horizontally and there must be some cases where the Convention right that an individual has against the state cannot be exercised in precisely the same way against a non-state actor. However, the absence of a provision for horizontality does not necessarily mean that Parliament did not intend the common law to be developed in accordance with Convention rights. The court is after all made a public authority for the purposes of the HRA. Parliament provided the statutory remedy in s 7 of the HRA. While this could be taken as a indication that there should be parallel remedies rather than that the common law of tort should be develop in line with Convention rights, s 7 is only a modest provision. Its intended function may simply have been as a failsafe to prevent the United Kingdom from being in breach of its obligation to provide a domestic remedy for all Convention violations.

Modernisation? The introduction of Convention values offered a means of modernising the common law when it became out of touch with the needs of contemporary society but this has not happened on a uniform basis. So there is no straightforward answer to the question when the domestic court will either use or should use a statement of human rights when deciding cases about private wrongs between individuals.

Relationship with the Strasbourg court and the views of Lord Hofmann: The approach of the English courts in this field naturally proceeds on the basis that it is the English courts and not the Strasbourg court that should be responsible for developing the substantive law of tort. The question of the application of Convention rights in the area of private wrongs has on occasion brought English law into conflict with the jurisprudence of the Strasbourg court, and the United Kingdom courts have yet to work out the relationship between themselves and the Strasbourg court. In a recent lecture[44], Lord Hoffmann expressed the view that while at the level of abstraction statements of universal application could be made about human rights, their application had to be dealt with on a national basis and within their particular

[43] (2002) (6) SA 431 (SCA).
[44] Judicial Studies Board Annual Lecture, 19 March 2009.

social context and that the Strasbourg court had failed sufficiently to recognise this. Lord Hoffmann said that: "because, for example, there is a human right to a fair trial, it does not follow that all the countries of the Council of Europe must have the same trial procedure."[45] Lord Hoffmann proceeded to criticise four particular decisions of the Strasbourg court. I shall try in the short space of time remaining to answer some of his points.

This is not the place to engage in a debate as to when human rights can be regarded as universal or as to the composition of the Strasbourg court, the appointment of its judges and its workload, which are other issues raised by Lord Hoffmann. These are matters for another day.

The principal issue raised by Lord Hoffmann, as it respectfully seems to me, is whether the Strasbourg court should exercise more restraint about ruling on individual cases that affect established legal principles or practices in the member states. However, the Strasbourg court already affords contracting states some measure of discretion about enforcing the standards it sets through what is called the margin of appreciation. Thus (in the case of qualified rights, such as article 8) the Strasbourg court leaves the decision on an issue to contracting states where it considers that the authorities in the contracting state are better able to determine some matter. The Strasbourg court also leaves the decision as to what the animating principle on some moral issue should be (again on a qualified right) to the contracting states where there is no consensus on that issue within the contracting states. Lord Hoffmann states that the Strasbourg court has not recognised that human rights have to be national in their application and so has not developed this doctrine sufficiently.

No doubt the doctrine of the margin of appreciation could be developed so as to give the contracting states more freedom to decide cases without interference, but one can readily understand that, from the point of the view of the Strasbourg court, there have to be limits on the margin of appreciation. Otherwise it would be liable to lead to a lowering of human rights standards in some countries. The whole point of an international human rights court is that it is able to give rulings that bind contracting states, and those rulings are bound to interfere with the way those states run their internal affairs, and to differ from rulings of the courts of the contracting states. Friction with contracting states is inevitable and interference in the internal affairs of contracting states is to some extent inherent in the Convention system.

Put another way, unlike the Court of Justice in Luxembourg, the Strasbourg court does not give its judgment in the form of a ruling on a preliminary reference submitted by the national court. That is a system designed to encourage co-operation in decision-making between the national and supranational court. The Strasbourg court is in general expected to give some decision on the particular case before it.

As it happens, it does not always disagree with our courts. It has on several occasions adopted and applied the reasoning of the Court of Appeal and House of Lords. One of those cases was *O'Halloran and Francis v United Kingdom*,[46] one of the four cases specially mentioned by Lord Hoffmann. He uses the reasoning in one of the dissenting judgments as an example of the type of reasoning in Strasbourg of which

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[45] Per Lord Hoffmann: "The problem is the Court; and the right of individual petition, which enables the Court to intervene in the details and nuances of the domestic laws of Member States."

[46] (2008) 46 EHRR 21.

he is critical, but I respectfully do not myself think that this is a particular powerful example given that it is taken from a dissenting judgment.

Lord Hoffmann also criticises the liberal way in which the Strasbourg court interprets the Convention. This is what is known as evolutive or dynamic interpretation. The language of the Convention is open-textured, and the Strasbourg court gives it a dynamic interpretation so as to keep the Convention in line with present-day conditions. This occurred in another of the cases singled out for criticism by Lord Hoffmann, namely *Hatton v United Kingdom*.[47] In that case, the Strasbourg court held that an issue could arise under article 8 where an individual was seriously affected by noise or other pollution. On the facts, it found that there was no violation – by applying the margin of appreciation. Given the open-textured nature of the Convention, and the nature of its subject-matter, it is not in principle, in my view, illegitimate for the Strasbourg Court to interpret the Convention dynamically. We may not always like its decisions, but we cannot pick and choose.

Lord Hoffmann took two other cases where he contended that the Strasbourg court overstepped the mark. As to *Saunders v United Kingdom* he criticised the Strasbourg court for holding that Mr Saunders had had "to tell [Companies Acts] inspectors about his actions" during Guinness' takeover of Distillers. But the violation of article 6 of the Convention did not occur at that stage but by the subsequent extensive use at Mr Saunders' criminal trial of those transcripts, which had been read to the jury over a period of three days. Lord Hoffmann further states that the Strasbourg court expressed its criticism in crude terms, thereby encouraging other cases, but the Strasbourg court was addressing the question of whether a Convention right had been violated not the subtleties in the privilege against self-incrimination under English law.

The last example which Lord Hoffmann takes is *Al-Khawaja and Tahery v United Kingdom*[48] , where the Strasbourg court held that there was a violation of article 6 when a defendant was convicted largely on the basis of hearsay evidence given by a witness whom he had not been able to cross-examine. I do not propose to deal with this case in any detail. Lord Hoffmann finds it extraordinary that the Strasbourg court should have reached this conclusion given that the matter was governed by legislation that had in turn been informed by the work of the Law Commission. Suffice it to say that, when the Law Commission made recommendations on this topic, it warned that there was a possibility of a violation of the Convention. [49]

One of the problems identified by Lord Hoffmann is the right of individual petition to the Strasbourg court once national remedies have been exhausted. But abolition of this right would probably mean that the United Kingdom had to cease to be a contracting party to the Convention and that it might well have to cease to be a member of the European Union. Some may not view that as an objection, but membership of the European Union has been approved by Parliament. By ceasing to be a party to the Convention, the United Kingdom would lose the advantage of being party to an international system for the enforcement of human rights. An international system of human rights has in fact considerable advantages for the United Kingdom. It subjects the institutions of the state to outside scrutiny, and that is particularly important when as in the United Kingdom there is a strong doctrine of Parliamentary sovereignty and the doctrine of *Wednesbury* unreasonableness. Even under the HRA, our courts cannot strike down primary legislation that violates the

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47 (2003) 37 EHRR 28.
48 Application nos 26766/05 and 22223/06.
49 *Evidence in Criminal Proceedings and Related Topics* (1997) (Law Com 245) para. 5.13.

Convention. The existence of supranational courts, establishing human rights principles, also empowers the domestic judiciary, and strengthens their independence as against the other institutions of their own state. Furthermore, the Convention system gives us a legitimate interest in how other countries in Europe treat their citizens, and this is a more powerful position than could be achieved at a political level alone. The Strasbourg court can bring about remarkable change and the raising of standards throughout Europe, in my experience its influence stretches far beyond the shores of Europe. As things stand, we have the opportunity to influence and contribute to its jurisprudence. If we left the Convention, we would be little Englanders rather than potential world leaders in the field of human rights.

The relationship with the Strasbourg court in the future: The real question, as I see it, is how the relationship between Strasbourg court and our own can be improved so that conflicts are minimised in future. In principle, the function of the Strasbourg court is to set standards of human rights guaranteed by the Convention. These standards are set in a way that allows the contracting state a choice as to how to implement them. The principles formulated by the Strasbourg court have been applied, sometimes with difficulty but often without difficulty, by the English courts.

However, it should be possible for the courts of the contracting state to apply the standards set by Strasbourg without the Strasbourg court having to intervene. The Strasbourg court suffers from a vast overload of cases: at the last count it had a backlog of some 100,000 cases and is said to be in danger of sinking under the weight of its own success. The Strasbourg court needs to find a way whereby it can focus its activities on important questions of principle. I would like to suggest there is one positive step that could be taken and that is to encourage the Strasbourg court to remit back to the English courts cases where the principle has been established and all that remains is for the domestic court to apply the doctrine of proportionality or, in the event of a violation having been found, to decide on the amount of any just satisfaction. (This might involve some small amendment to the HRA). If the English courts fail to do this work properly, the aggrieved party could always apply back to the Strasbourg court. It would be for the court to determine whether any such application was admissible.

In addition to this formal division of responsibility, there has to be a lively dialogue, in and out of court, between our courts and the Strasbourg court. Although our courts take the view that they should apply the Strasbourg jurisprudence "no more, but certainly no less", there is no reason why they should not express their own views if they consider that the Strasbourg jurisprudence has taken a wrong turn. It is clear from the respect given to judgments of the Court of Appeal and the House of Lords in judgments of the Strasbourg court that the view expressed by English courts is taken seriously. Moreover, if, exceptionally, the English courts consider the Strasbourg court has simply misunderstood our domestic law, they do not consider themselves bound to apply it. That gives the Strasbourg court a further opportunity to consider its position if an application is made to it. That is another example of the dialogue to which I have referred. In out-of-court discussions, we can obviously have a more free-flowing debate, and I agree with Lord Hoffmann that we should make it known when we disagree with the developments in Strasbourg jurisprudence.

Summary of conclusions: So, in conclusion, I return to the main theme of this lecture, namely the impact of the Convention on the law of tort. The Convention has informed developments in some areas of our tort law, but in other areas, not at all. The decision has been that of the judges. This has given enormous discretion to the judges. The result has been that in some cases the claimant has been left his remedy under the Convention if he has one, but that is a less generous remedy than he would

have had if the common law had been developed. It is not, of course, in every case that there is an overlap between domestic tort law and the Convention but certainly as we have seen it occurs in some cases.

It is open to argument that Parliament intended a more radical modernisation of the common law in line with Convention values. This may in time happen. It is still early days. But a fundamental rethinking of the impact that Convention rights should have on civil wrongs could well be the sort of issue that the new Supreme Court might consider.

Finally, we have seen that there has on occasion been a conflict between Strasbourg jurisprudence and the common law of tort. This raises a general issue about the relationship between the Strasbourg court and our own. That question goes well beyond tort law. I conclude that the role of the Strasbourg court is to lay down principles that can be applied throughout Europe. The role of the domestic court is to apply those principles.

I put forward the suggestion that cases could in fact be remitted to it by the Strasbourg court to help relieve the Strasbourg court of its overload of cases. I propose that a dialogue between the Strasbourg court and the domestic courts should take place at several levels. In my judgment this is a better way forward than the abolition of the right of individual petition.

The jurisprudence of the Strasbourg court has made an enormous contribution to several areas of our law, such as breach of confidence and proportionality.
We should, in turn, support its work.
