

## **Tort and Public Law**

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A particular area of interest of mine is the intersection between tort and public law, and I have explored that intersection in papers on a range of topics, including tort and human rights law, the 'public law tort' of misfeasance in public office, tort and regulation and public authority liability in negligence.

The two central themes of my work on tort and public law are (1) the complexity of the relationship between the two; and (2) the need to conceive of the two areas of law as (for the most part) complementary normative systems with different rationales, foundational concepts and core principles.

In the presentation today, I want to expand on these two themes, and to give illustrations from my published work in this area and from an ongoing project on models of state liability.

My analysis divides into three parts:

(1) the basic principle of tort and public law as *parallels*, with two illustrative examples, namely the relationship between tort and regulation;

(2) the possibility of *overlaps* between tort and public law, using the example of the tort of misfeasance in public office; and

(3) the possibility of tort and public law as *alternatives*, using the example of private and public models of state liability.

### **I. PARALLELS**

#### **A. Tort and regulation**

Nolan, 'Tort and Regulation' in Goudkamp, Lunney and McDonald (eds), *Taking Law Seriously: Essays in Honour of Peter Cane* (2022)

##### **(i) Forms of interaction**

###### 1. Regulatory compliance as a defence

*Barr v Biffa Waste Services Ltd* [2011] EWHC 1003 (TCC), [2011] 4 All ER 1065

*Barr v Biffa Waste Services Ltd* [2012] EWCA Civ 312, [2013] QB 455

2. Regulatory non-compliance as a cause of action: breach of statutory duty  
Enterprise and Regulatory Reform Act 2013 (UK), s 69  
*R v Saskatchewan Wheat Pool* [1983] 1 SCR 205 (SCC)
3. Non-conclusive effect  
*Wilkes v DePuy International Ltd* [2016] EWHC 3096 (QB), [2018] QB 627

**(ii) Arguments against conclusive effect**

1. Public interest/private interest
2. Public enforcement/private enforcement
3. Specific rule/general standards
4. Ex ante intervention/ex post intervention
5. Administrative decision-making/judicial decision-making

**B. Tort and human rights law**

Nolan, ‘Negligence and Human Rights Law: The Case for Separate Development’ (2013) 76 MLR 286

Nolan, ‘Nuisance’ in Hoffman (ed), *The Impact of the UK Human Rights Act on Private Law* (2011)

**II. OVERLAPS**

Nolan, ‘Tort and Public Law: Overlapping Categories?’ (2019) 135 LQR 272

*Rookes v Barnard* [1964] AC 1129 (HL)

**III. ALTERNATIVES**

**A. The private law model of state liability**

‘[W]hen we speak of the “rule of law” as a characteristic of our country, [we mean] not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.’

Dicey, *Introduction to the Study of the Law of the Constitution*, 8th edn (1915)

‘[T]he law of negligence generally applies to public authorities in the same way that it applies to private individuals and bodies.’

*Robinson v CC of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 at [40] (Lord Reed)

**B. The public law model of state liability**

Fairgrieve and Lichere, ‘France’ in Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (2016)

**C. The mixed model of state liability**

*Ann v Merton London Borough Council* [1978] AC 728