I General Introduction

The imposition of liability for the negligent exercise of statutory duties and powers has been cautiously approached over the past decades. There are varying approaches to the imposition of liability around the common law world. The English courts have adopted a restrictive approach, in theory, to the issue but at the same time reserving to themselves the right to impose liability when it is considered “fair, just and reasonable” to do so. Other jurisdictions such as Australia, Canada and New Zealand have been more willing to impose liability on public bodies in the exercise of their public functions.

Part of the problem with imposing liability in negligence on public bodies is the very fact that these are public bodies in nature rather than private ones. Tort law in general deals with imposing duties on private individuals and public law remedies area more appropriate to deal with public institutions.

Another part of the problem lies with the concept of superimposing on a statutory duty a common law remedy in the form of the ordinary duty of care as developed by the law of negligence. Whether the duty will held to be imposed ultimately involves the question of statutory interpretation and in particular whether the plaintiff is an individual the statute intended to protect.

Nonetheless it is clearly established in all common law jurisdictions that public bodies can be held liable in negligence for the negligent exercise of statutory duties and powers.

This paper deals with a number of cases before the English courts in the recent past involving local authorities exercising their powers and duties in the child care area.
II The English Approach

In *Home Office v. Dorset Yacht Co. Ltd*\(^1\) indicated that before liability could arise for the negligent breach of a statutory duty, the plaintiff would first have to establish that the exercise of the power by the public body in question was ultra vires the public body. Subsequently in *Ann's v. London Borough of Merton*\(^2\) Lord Wilberforce set out when a private law remedy would exist alongside a public law power and duty. In so doing he identified the policy / discretion element as distinct from the operational element to the exercise of a statutory duty or power. Where the exercise of the power or duty in question involves some element of policy decision making or discretion, then that matter is entirely one for the public body in question and is not a matter for the courts. Lord Wilberforce did, however, state that that did not mean that public bodies were unanswerable to the court in the exercise of their public functions. On the other hand, where the exercise of the power or duty in question involved some operational element to it in the practical implementation of the decision in question then this element was more likely to be the subject of a common law duty of care. Lord Wilberforce went on to stress that the plaintiff must also establish that the action taken by the public body must not have been within the discretion bona fide exercised by the public body.

The House of Lords considered the liability of a local authority specifically in the child care area in *X (Minors) et al v Bedfordhire L.A.*\(^3\). The cases concerned whether social workers owed a duty of care to the children at risk in the local authority's area. A decision was taken not to take a number of siblings into care who were found and known to be appallingly provided for by the parents and in the related matter a decision was made to take a child unnecessarily into care who was not at risk. The House of Lords in applying the Caparo\(^4\) three stage test held that it was not fair, just and reasonable to impose a duty of care on the persons responsible for taking the decisions. The House of Lords advanced a number of policy reasons for reaching this conclusion.\(^5\) The House of Lords then identified how a claim of breach of statutory duty could arise. Firstly, claim of a breach of statutory duty simpliciter could only be maintained upon an interpretation of the statute that intended to confer a common law right of action. A simple claim of a breach of the statute could not be maintained on its own. As statutes rarely specifically confer a common law right of action on individuals, a common law right of action, however, could be inferred in the interpretation of the statute if the statute was intended to protect a particular class of person. A second claim of the negligent or careless performance of a statutory duty or power could be maintained provided the plaintiff could establish the first claim of breach of statutory duty. In this regard the plaintiff must establish that the duty of

\(^1\) [1970] A.C. 1004
\(^2\) [1978] A.C. 278
\(^3\) [1995] 3 ALL E.R. 353.
\(^4\) *Caparo Industries v. Dickman* [1990] 2 A.C. 605
\(^5\) The House of Lords laid emphasis upon the multi-disciplinary involvement in the decision making process as well as the delicate nature of the decisions to be made.
care exists at common law and that decisions that contain some discretionary or policy element are not a matter for the courts and are entirely within decision making capacity of the public body in question. Once a plaintiff has established these matters he must then show that the decision as made is *ultra vires* the public body. Where the decision is *ultra vires* the public body the plaintiff must establish the Caparo\(^6\) three stage test as well as establish that the imposition of a duty of care is not inconsistent with or discourage the performance of the statutory duty in question.\(^7\) In applying this template to the facts of the case. The first approach of a breach of the statute failed as no duty was owed because of the subjective nature of the decision to take or not take the child[ren] into care was a discretionary one and ultimately the exercise of a an administrative function. In this regard the nature of the statutory duty imposed upon the public body was far too general in nature to generate a specific duty of care owed to the plaintiffs. As for the claim of a negligent or careless performance of a statutory duty such was viewed as a discretionary decision and was not, in general, reviewable by the courts. However, if the decision as made was unreasonable in the circumstances, then this would render it *ultra vires* the public body and make it reviewable by the courts. In relation to the Caparo\(^8\) three stage test the elements of proximity of relationship between the parties was clearly established as was the requirement of reasonable forseeability of conduct causing harm from the defendant’s perspective. The third stage, however, was not established as it was not fair, just and reasonable to impose a duty in the circumstances and this was largely due to policy considerations.\(^9\) The approach of the House of Lords in this case was clearly to erect as many barriers to recovery in negligence as was possible and essentially confer an immunity on social workers who were negligent in the exercise of the powers conferred upon them under the Children Act 1989.

After the *X (Minors) v. Bedfordshire*\(^10\) the Court of Appeal in *H. v. Norfolk C.C.*\(^11\) held that the defendant did not owe to the plaintiff a duty of care in circumstances where the plaintiff had been sexually abused by a foster father. The plaintiff's case centered on the negligent supervision of the plaintiff while in foster care, the failure to investigate reports of abuse and the failure to remove the plaintiff from foster care. This decision was severely questioned in

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6 Caparo Industries v, Dickman [1990] 2 A.C. 605
7 The fourth part to the claim of breach of statutory duty relates to misfeasance of public office which dies not concern the issue in negligence.
8 Caparo Industries v, Dickman [1990] 2 A.C. 605
9 The main reasons given were that the effect of imposing a duty would interfere with the decision making process in care proceedings, that the decision in question was a delicate one which could provoke a negative response by social workers operating in the child care area. The other reasons offered were that the general purpose of the legislation was to secure the protection of weaker members of society and that there existed an alternative remedy in the form of a complaint procedure.
Barrett v. Enfield L.B.C.\textsuperscript{12} and overruled in S. v. Gloustershire C.C.\textsuperscript{13} where the Court of Appeal refused to strike out the case on a pre-trial motion brought by the defendant holding that there was an arguable case to answer where there was an allegation of failure to investigate and discover an allegation or suspicion of sexual abuse by a foster parent.\textsuperscript{14}

In this jurisdiction a claim for damages for breach of a public law right was denied in Paul Stephens v. Eastern Health Board.\textsuperscript{15} Whether a claim for damages arising out of a negligent exercise of a statutory power under the Child Care Acts 1991-2009 could succeed remains to be tested, though the tenor of Geoghegan J.’ s judgment suggests that it might not succeed but this has to be definitively tested. What is known is that liability can arise out of the negligent exercise of a statutory duty as provided for in the seminal case of Ward v. McMaster\textsuperscript{16} in which the Supreme Court held Louth County Council liable to the plaintiff for a failure to comply with the Housing Act 1966. Since then there has been the important decision of Glencar Explorations plc v. Mayo Council\textsuperscript{17}. Here the Supreme Court adopted the Caparo\textsuperscript{18} three stage test over the long standing Wilberforcian two stage test first developed in Anns v. London Borough of Merton\textsuperscript{19} which decision had been endorsed by McCarthy J. in Ward v. McMaster.\textsuperscript{20}

What is of interest is what direction the Irish courts might go in light of the adoption of the three stage Caparo test and some relatively recent developments in the English courts in the past decade concerning the liability of local authorities in the child care area. A change in direction occurred in the English courts on the issue of local authority liability in negligence in the child care area in Barrett v. Enfield L.B.C.\textsuperscript{21} The plaintiff had been taken into care at the age of 10 months until the age of seventeen. During that period he was placed nine separate times with different foster families. After leaving state care he developed alcohol problems and was unemployed which lead in turn to psychiatric problems. The essence of his claim was that the local authority has been negligent in the management of his care plan and in particular placing him with unsuitable foster parents, separating him from his half sister, failing to have

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\item \textsuperscript{12} [1999] 3 All ER 193.
\item \textsuperscript{13} [000] 3 All ER 346.
\item \textsuperscript{14} See L. v. Tower Hamlets L.B.C. [2001] 1 W.L.R. 825 where the defendant conducted a rigorous and detailed assessment of the foster parents prior to placing the child with the foster parents the father of whom proceeded to sexually abuse the plaintiff. By contrast in C. v. Flintshire C.C. [2001] FLR 33, the plaintiff received £70,000 damages against the local authority that had twice placed the plaintiff in residential care where she was subjected to bullying by the other children and abuse and sexual abuse by the care workers. The defendant admitted liability in this case.
\item \textsuperscript{15} Unreported, High Court 27 July 1994, Geoghegan J.
\item \textsuperscript{16} [1988] IR 377.
\item \textsuperscript{17} [2002] 1 IR 112.
\item \textsuperscript{18} [1990] 2 A.C. 605
\item \textsuperscript{19} [1978] A.C. 728.
\item \textsuperscript{20} [1988] IR 377.
\item \textsuperscript{21} [1999] 3 All ER 193.
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him adopted and failing to re-unite him with his mother. The Court of Appeal struck out the action on the authority of X (Minors) v. Bedfordshire C.C.\textsuperscript{22} The House of Lords reversed this decision holding the defendant liable and distinguished the X (Minors) decision on that basis that that case concerned a decision to take or not to take a child into care whereas this case concerned the negligence of the local authority after the plaintiff had been taken into care.\textsuperscript{23} Ultimately the House of Lords held that liability could arise from the exercising of a statutory power that contained some element of discretion or policy. The case clearly establishes that a duty of care is owed to a child in the care of a local authority. This has been restated more recently in JD v. East Berkshire Community Health, MAR v. Dewsbury Health Care NHS Trust and RK v. Oldham NHS Trust\textsuperscript{24} which cases decided that a duty of care was owed to children who were negligently taken into care but that no duty was owed to the parents. JD was a claim by the plaintiff mother where her child was incorrectly placed on the “At Risk Register” for three months due to the fears of the defendant local authority that the mother was incapable of caring for the child. The unfounded fear arose form a misdiagnosis that the mother was suffering from Munchausen's Syndrom by Proxy. MAR concerned a girl suffering from a skin condition that caused discolouring which the doctor incorrectly assumed was caused by sexual abuse perpetrated by the father. The child was unnecessarily separated from her father for a period of 10 days. RK concerned a negligent misdiagnosis of non accidental injury to the child when the child suffered from a brittle bone condition where parents and child were separated for six months. In all three cases the Court of Appeal upheld the actions by the children but denied the parents a cause of action on the basis that no duty wa s owed to them. This was later upheld by a majority in the House of Lords.\textsuperscript{25}

There have been a few cases where a duty has been held to exist to third parties. In L & P v. Reading BC\textsuperscript{26} the daughter and father who sued a social worker and police officer for the

\textsuperscript{22}[1995] 3 All ER 353.
\textsuperscript{23}Numerous policy reasons were identified for imposing a duty and holding the local authority liable. Primarily the policy of the law should be to provide a remedy where there has been a wrong committed. This would lead to improved standards. The alternative remedy of making a complaint was inadequate. The law recognises that liability can arise where one person assumes responsibility for another (negligent misstatements and omissions). The plaintiff was already in the care of the defendant at the time of the alleged negligence. Lord Steyn identified certain crucial differences from the earlier X (Minors) v. Bedfordshire decision in that the plaintiff was not in the care of his mother at the time (this is a veiled reference to the concept of reliance which is a critical criterion in liability under Hedley Byrne which has been utilised to impose liability in novel cases involving the recovery of pure economic loss – see White v. Jones [1993] 3 W.L.R. 756). Further Lord Steyn stated that this was not an issue of failing to investigate abuse and there was no delicate decision to be made in the case. The cautious reaction argument was of little weight (bear in mind the former barrister’s immunity had been abolished in Hall v. Simmons [2002] 1 A.C. 605 and that there was no interdisciplinary involvement with other professionals in the child care area. The plaintiff in this case was a clearly identified individual rather than a member of the public and even though there was an alternative remedy available that was no reason in itself not to provide a tortuous remedy.
\textsuperscript{24}[2003] 4 All ER 796.
\textsuperscript{25}[2005] UKHL 23.
\textsuperscript{26}[2001] 1 W.L.R. 1575.
negligent investigation of a sexual abuse claim resulting in the daughter being unnecessarily taken into care. The defendants sought to strike the cases which was refused.

In W. Essex CC\textsuperscript{27} the parents of four natural children suffered post traumatic stress disorder on learning that each child had been sexually abused by a foster child placed with the family by the defendant local authority. The parents had agreed to act as foster parents on the understanding that they would not have placed with them a child who had been sexually abused. The House of Lords allowed the parents' action for "nervous shock".

There are a number of New Zealand decisions that also establish that a duty of care is owed to children in the child care area. \textit{The Attorney General v. Price Gardner}\textsuperscript{28} held that adopted plaintiff was owed a duty of care where he was abused by adopters and \textit{B. v. Attorney General}\textsuperscript{29} held that a duty of care was owed to the plaintiff daughter who had been negligently misdiagnosed by a clinic psychologist as having been sexually abused by her father. The Privy Council was unable to distinguish this case from the \textit{Price Gardner} decision in holding a duty of care existed towards the child but towards the father.

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\textsuperscript{27} [1998] 3 All ER 111.  
\textsuperscript{28} [1998] 1 N.Z.L.R. 262.  
\textsuperscript{29} [2003] UKPC 63