CHILDREN v. PARENTS:  
A NEW TORT DUTY-SITUATION FOR PSYCHIATRIC INJURY?  

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Summary: Recognition of liability in negligence for personal injury, whether physical or psychiatric, is a question of public policy par excellence. In English tort law, public policy is a transparent judicial requirement in fixing liability even when negligence is established otherwise. In considering the tortious liability of a local authority to children in its care, the English House of Lords has, in obiter dicta, raised doubts as a matter of public policy concerning the enforceability of claims for damages by children against a parent for emotional neglect causing psychiatric injury. In Israel, by contrast, the Supreme Court recently extended tortious liability by enforcing the parental duty of care to children through a claim for psychiatric injury. So far Israeli law is unique in this development. Variations in judicial policy concerning the recognition of claims by children for psychiatric injury are considered here, in the contexts of English tort law, and Israeli, US and European human rights law. 

1. Introduction 

English tort law allows claims for psychiatric injury in the case of any “primary victim” who is “within the foreseeable scope of physical injury”. Beyond that, however, recognition of tortious liability for personal injury, whether psychiatric or physical or both, is always overtly dependent on overriding considerations of public policy: A new duty of 

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care will not and may not be imposed unless the court finds that it would be “fair, just and reasonable” to do so.2

The issue of the recognition of tortious liability of parents in negligence for treatment of their children that causes psychiatric injury, is therefore an issue of public policy par excellence, raising as it does fundamental issues about the traditional immunity from action enjoyed by parents, as against a more modern approach which would recognise the role of the legal process in the protection of individuals within the family unit.3

This issue has not yet been judicially determined in England. However, in a series of recent obiter dicta, such a new “duty-situation” has been seriously doubted. Thus, Lord Hutton in the House of Lords in *Barrett v. London Borough of Enfield*⁴ said, obiter dicta: “It would be wholly inappropriate that a child should be permitted to sue his parents for decisions made by them in respect of his upbringing which could be shown to be wrong”. In contrast, at about the same time as *Barrett⁵* was decided, the Israeli Supreme Court held in *Amin v. Amin*,⁶ that a child may sue his parent in the tort of negligence for emotional and psychological damage caused to the child as a result of emotional neglect by his parent. This was a ground-breaking decision, for which no comparative precedent existed.

In England, the context for the obiter dicta in the House of Lords in *Barrett⁷* was an action in negligence for psychiatric injury brought against a local authority by a former child who had been placed by the local authority in foster-care. Lord Slynn of Hadley rejected any total “immunity” from action in negligence for local authorities, holding that social workers and others could “be negligent in an operational manner”, for example, by carelessness in looking after a child’s property, in failing

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2 This is the so-called “third test” in the leading case of *Caparo Industries plc v. Dickman* [1990] 2 AC 605, [1990] 2 WLR 358, [1990] 1 All ER 568, HL; and see infra, text at n. 60.

3 It was raised theoretically as long ago as 1983 by M.D.A. Freeman, *The Rights and Wrongs of Children* (Frances Pinter, 1983) 48.

4 [1999] 2 FLR 426 at 461, hereafter referred to as “Barrett”.

5 *Supra* n. 4.

6 May 16, 1999, Israel Supreme Court Judgments (in Hebrew) 99(3), Case. No 2034/98, hereafter referred to as “Amin”.

7 *Supra* n. 4, at 446.
to carry out instructions carefully in the way they report or fail to report what they have observed for the purposes of an assessment as to what should be done in relation to the child’s future, or “failing to detect or to take action when a child was clearly not doing as well as he could be doing”, or in the case of “a psychiatrist failing to detect and report on the child’s problem”. He made the distinction between the exercise of statutory powers which would be justiciable and the exercise of discretion which would not. He elaborated:

This means I accept that each case has to be looked at on its own facts and in the light of the statutory context. But this is so in many areas of the law and it is not in itself a reason for refusing to recognise a liability in negligence.

In the present case, the allegations which I have summarised are largely directed to the way in which the powers of the local authority were exercised. It is arguable ... that if some of the allegations are made out, a duty of care was owed and was broken. Others involve the exercise of a discretion which the court may consider to be not justiciable — e.g. whether it was right to arrange adoption at all, though the question of whether adoption was ever considered and if not, why not, may be a matter for investigation in a claim of negligence.

In contrast to local authorities, Lord Slynn of Hadley considered, obiter dictum, that, on the other hand, parents did have some “immunity”. He said:

So equally [with a local authority] a parent does not have a blanket immunity for whatever he does to his child; negligence in driving a car by a parent would still be actionable if the child was caused injury ... in respect of some matters, parents do have an actionable duty of care. [But] ... the court should be slow to hold that a child can sue its parents for negligent decisions in its upbringing. (emphasis added)

The aim of this paper is therefore to consider the Israeli approach, and the United States precedent whose minority opinion was clearly of great influence on the thinking of the Israeli courts, and then to consider how the Israeli approach has for the meantime been apparently rejected by the English courts, and whether a comparable development in the public policy of English tort law might be expected.
2. **Israeli Law: Amin v. Amin**

In contrast to the English position, the Israeli Supreme Court decision in *Amin*, which allowed a child's claim in tort for compensation against a parent for failure to fulfil the parental obligation to be concerned for his child’s needs, is a landmark decision – even in Israel “no other suit like it has been filed – before or since”.

**The facts**

Three children, who were all now adults, claimed damages for negligence against their father for emotional and psychological damage caused by him to them by his treatment of them after the death of their mother. The mother had died soon after giving birth to her youngest child. The two older children were a boy then aged 2, and a girl of 1. The father could not cope with the children and asked his mother to care for them. She in turn was unable to care for them and gave them into the care of the welfare authorities. Four years after the mother’s death, the father married a woman who was divorced with children of her own. The father and his second wife made a pact to begin a new life in which none of the children from their previous marriages would be included. The father thenceforth refused to allow his children to come to his new home, refused to visit them in their foster home or their children’s home, and refused to have anything to do with them. This was despite the expressed wishes and appeals of the children, and the attempts of various social workers to encourage him to take an interest in the children’s lives. In effect the father totally abandoned his children.

Each of the children suffered from psychiatric problems, leading to criminal activity. The daughter married a drug addict, gave birth to 5 children, all of whom were removed by the welfare authorities. Both sons had a record of violence, one lived on the streets, the other had no stable employment. In summary, each of the children suffered multiple social and psychological problems.

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8 *Supra* n. 6.
9 *Ha'aretz* Magazine (in English), February 8, 2002.
The District Court Decision

In the Tel Aviv District Court, Judge Stern said that the key question in the case was whether “the father had a legal obligation to bestow a paternal relationship beyond providing for [his children’s] material needs or whether, as he claimed, as far as bestowing warmth and love is concerned, we are talking about a moral obligation and one cannot impose feelings and demand money for the lack thereof.” She answered:

The responsibility for devoted parental care and nurture are not moral obligations only, and do not end with the provision of the dependent’s material needs. This obligation, which is a legal one, includes the necessity to display care and feeling for the children and to show at least a minimum of interest in them.

She found that the father’s neglect had been of the worst kind, not the behaviour of a reasonable man. Specifically, the father was found to be negligent in that (i) he had not taken care to prevent emotional injury to his children, and (ii) he was in breach of laws which govern the obligations of parents to their children. The judge considered at length the public policy arguments against imposing tort liability in the parent-child relationship. The Attorney-General’s opinion, which had been invited by the judge, was that there was no public policy against actions for damages by children where “the parents acted with malice and not for their welfare”.

The judge awarded damages of NIS 900,000 against the father. In doing so, she rejected the “parental immunity doctrine” in a context where the family unit was already broken. She also rejected the “flood-gates” argument; and she considered that the father should pay for the damage that he had caused, rather than the state paying to help the children to cope with their emotional injuries. She concluded:

10 Case no. 1016/98; Jerusalem Post (in English), March 20, 1998.
11 See infra for a full discussion text at n. 78.
12 The children’s lawyer reportedly considered that the relatively low award reflected the fact that the father was personally liable to pay, and obviously did not have the backing of insurance. To the father, however, the damages were heavy. And see discussion, infra, text at n. 79.
If injury was caused to the children as a result of the malicious conduct of their parents or as a result of deliberate neglect of their well-being, there is no reason to deny such children the remedy of compensation which is available to anyone who has suffered injury in accordance with the Damage Laws.

The Jurisprudence in the United States

In the absence of any direct Israeli authority on the point, Judge Stern had looked to comparative legal sources for guidance. She noted that the US Supreme Court had, at the beginning of the twentieth century, established the principle of “parental immunity” in the treatment of children. Thus, in one of the leading cases, a daughter failed in her claim for damages after her father had raped her. Subsequently exceptions to the rule had however been allowed, and in 1963 the Wisconsin Supreme Court had rejected the rule by awarding damages to a child who was injured after his father allowed him to ride on the edge of a tractor.13 But the most important influence on her was the minority opinion in the 1978 Supreme Court of Oregon decision, Burnette v. Wahl,14 in which 2 out of 5 judges had ruled in favour of damages for children who sued their mother for having caused them emotional and psychological harm.

The Israel Supreme Court Decision15

The Supreme Court rejected the father’s appeal, upholding the lower judge’s decision and reasoning in full. Justice Englard in his judgment on behalf of the three-judge court added Biblical and Talmudic sources in establishing an enforceable legal duty on parents not to cause their children severe emotional harm. The Court rejected the father’s claim that beyond satisfying the material needs of his children, any duty he had could only be a moral duty. The Court held that the father had broken his “statutory duties towards his children, and therefore the

13 This is similar to the liability referred to by Lord Slynn of Hadley in Barrett, n. 4 above; it does not address the issue of psychiatric injury, however, but only physical injury. See discussion infra, text at n. 41.
14 [1978] 284 Ore.705; discussed more fully infra.
15 Supra n. 6.
duty of care" as set out sections 15 and 17 of the Capacity and Guardianship Law 1962, and sections of the criminal code. Justice Englard interpreted section 15 of the Capacity and Guardianship Law 1962 as being not limited to material needs only, and that education in its widest concept meant the totality of the influences on the child's personality. He ruled that all that the law demanded of parents was that they should behave for the welfare of the child according to the standard of normal conscientious parents. Section 22, providing that "parents will not be held responsible for harm caused to a minor in fulfilling his role of guardianship, unless they have acted not in good faith or not for the purpose of the welfare of the child", was interpreted to confer a limited statutory parental immunity, beyond which no general immunity was allowed by the law.

Justice Or agreed, though he expressed his concern at the possibility of opening the "floodgates". He warned courts to be very careful in weighing the boundaries of such claims, for only in cases of the most extreme severity (as the present case was adjudged to be) should tortious liability be imposed upon parents.

In dismissing the appeal, the Supreme Court found that the father had not only breached his statutory duties to his children as imposed by the Capacity and Guardianship Law, but that he was also in breach of his duty of care in negligence because of the unreasonableness of his behaviour and the foreseeability of the harm.

*Amin* does not raise the question of limitation of actions, which has given rise to difficult issues in English law as in the case of *S v. W (Child Abuse: Damages)*. Nor was the question of the purpose of damages in such cases discussed, nor the more difficult issue of what was the

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16 Capacity and Guardianship Law 1962 (16 L.S.I. 106) section 15: “The guardianship of the parents shall include the duty and the right to take care of the needs of the minor, including his education, studies, vocational and occupational training and work, and to preserve, manage and develop his property; it shall also include the right to the custody of the minor, to determine his place of residence and the authority to act on his behalf”; and section 17: “In the exercise of their guardianship, the parents shall act in the best interests of the minor in such manner as a devoted parent would act in the circumstances”.

17 Is this the test of the "reasonable parent"? See below text at n. 114 for further discussion.

18 *Supra* n. 6.

19 [1995] 1 FLR 862, [1995] 3 FCR 648, CA; and see text at n. 42.
purpose of such an action in the case of parent/defendants who did not have the resources to pay any damages awarded. Nor does it raise any distinction between actions brought by children who are now adults, as opposed to actions by children as children claiming by a next friend or legal guardian, which was the case in *Burnette v. Wahl*.

### 3. The United States Example: *Burnette v. Wahl*

In this 1978 decision, the majority in the Oregon Supreme Court dismissed actions brought by 5 children between the ages of 2 and 8, through their guardian, against their mothers for emotional and psychological injury caused by the mothers' failure to perform their parental duties. All the children were now in the care of the welfare authorities. The claims included neglect, abandonment, desertion, lack of support, and in one case "intentionally, wilfully, maliciously, and with cruel disregard of the consequences [failure] to provide care, custody, parental nurturance, affection, comfort, companionship, support, regular contact and visitation". One other claim of particular interest, related to contact: "Defendant has alienated the affections of the Plaintiff in that she has intentionally, wilfully, and maliciously abandoned, deserted, neglected and failed to maintain regular contact or visitation, or to provide for the Plaintiff and has deprived the Plaintiff of the love, care, affection and comfort to which the Plaintiff is entitled".

The basis for the claims was mainly derived from Oregon statutes which provided for a parental duty to support their children, and a criminal offence of non-support. Statutes also provided criminal offences of abandonment of a child, and child neglect; and reference was also made to laws providing protective services for children. The claims were therefore essentially based on breach of statutory duty, for injuries which were purely emotional and psychological.

The court pointed out that the claims were without precedent; tort law having so far only recognised claims for physical or emotional

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20 Supra n. 14.
21 Ibid.
22 There is also reference to common law abandonment and desertion, and the common law tort of alienation of affections which had recently been abolished by statute. Oregon Laws 1975, ch. 562, § 1.
injuries caused by their parents’ physical acts such as beating, rape, or from car accidents. A cause of action for damages for emotional injury to the child which may have been caused by a parent’s refusal to provide the child with proper nurturing, support and physical care had never been recognised.

The court considered at length the question of legislative intent: whether a civil action was intended based on a criminal or regulatory statute. The clear policy issue for the court in imposing a common law civil action on a statutory duty was faced, and concern expressed as to whether a civil cause of action based on a statute might interfere with the total legislative scheme. In the context of child protection, the majority was concerned that tort actions might well be destructive of the statutory policy of reuniting abandoned children with their parents if possible:

It would be exceedingly unwise for this court to step in and to initiate a new and heretofore unrecognised cause of action in a field of social planning to which the legislature has devoted a great deal of time and effort in evolving what appears to be an all-encompassing plan.

The court considered an academic article “The Rights of Children: A Trust Model” which argued for equitable principles of trust law as a model for defining the rights and duties between children, parents and the state. Although the authors raised “the possibility of a monetary recovery for lack of nurturing limited to adult plaintiffs”, they did not advocate damages actions for children:

Unlike the remedy of money damages sought as compensation for loss of parental care in actions for alienation of parental affections, remedies more appropriate to the character of this right could be fashioned in emotional nurturing actions, such as psychological care.

23 A very similar discussion took place in the House of Lords in Barrett, supra n. 4; and see discussion in text at n. 54.
25 These ideas have been explored in England also, and form the basis for the analysis of parental rights in Gillick v. West Norfolk and Wisbech Area Health Authority [1985] AC 112 at 185, [1985] 3 All ER 402 at 421; see discussion in text at n. 125.
and follow-up to overcome an inadequate capacity for emotional parenting. While the state cannot enforce love, it can reinforce it by providing social services which encourage formation or maintenance of parent-child ties.

The court’s conclusion was a clear policy decision, based on the following considerations:

(i) There is a limitation to the extent to which use may be made of tort actions for the purpose of accomplishing social aims ... There are certain kinds of relationships which are not proper fodder for tort litigation.

(ii) [Juries and general trial courts are] ill-equipped to do social engineering ... in the realm of the emotional relationship between mother and child.

(iii) There are probably as many children who have been damaged in some manner by their parents' failure to meet completely their physical, emotional and psychological needs as there are people.

As to (i) it may be commented that this reflects the purpose of the parental immunity doctrine to prevent undue state intervention in family life; as to (ii) that this reflects the view of the inappropriateness or ineffectiveness of the law in certain contexts; and as to (iii) that this is the floodgates argument.

The Minority Dissent

Two justices found for a civil cause of action. Justice Lent relied on statistics and research as to the financial cost to the state of children cared for by the welfare authorities, and as to the emotional cost to the child and the resulting indirect monetary costs to society, which financial burden the mother should bear as her resources permitted. “I would hold that the emotional harm which the [mother] admits plaintiff has suffered is such as the community should conclude is monetarily compensable”.

Justice Linde’s stronger dissenting judgment was the one which was adopted by the Israeli Supreme Court in Amin. He stated:

26 Supra n. 6.
Awarding civil damages for violations of prohibitory laws is not an uncommon or radical theory of recovery. ... The answer depends first on whether a legislative policy to allow or to deny a civil remedy can be discerned in the text or the legislative history of the statute. If neither can be discerned, then it depends on whether the plaintiff belongs to a class for whose special protection the statute was enacted and whether the civil remedy would contribute to or perhaps detract from achieving the object of the legislation.

On the specific facts of the case, he ruled:

It is incongruous to hold that the legislature provided for a felony prosecution of parents who egregiously violate a duty toward their children, but that it meant to exclude civil actions on behalf of the maliciously abandoned children for fear of impairing the family unit.

Further, he pointed to the inconsistency in approach to physical (for which liability is recognised) as opposed to psychological or emotional injury: “But if a civil remedy is denied on the majority’s premise that it is precluded by a state policy of preserving family unity, that premise would apply equally to bar recovery of damages by a child crippled by physical abuse”. He further criticises the reasoning of the majority, and concluded:

Although the majority does not say so, its premise is the equivalent of the doctrine of the intrafamily tort immunity which Oregon has abandoned at least with respect to intentional torts ... though attributed here to a supposed legislative policy subordinating legal claims of children against their parents to reliance on ‘protective social services’. I perceive no such prescribed reliance on social services when parents who have deliberately mistreated their children in a manner made criminal by statute have the assets to be responsible for the harm caused thereby.
4. The Legal Duties of Parents in English Law

The existence of a parent’s statutory duty to his child formed the basis for the discussion of claims made in negligence in both the Oregon case of Burnette v. Wahl\(^{27}\) and in Israeli case of Amin.\(^{28}\) English law on parental duties is complicated, and typically not codified, for example in the way that Israeli law is in the Capacity and Guardianship Law, section 15. But English law does provide for parental duties; the source of these derives mainly and more significantly from common law, but others are statutory. The inter-relationship of the sources of these duties is complex.

English statute law has created the concept of “parental responsibility”, but has chosen not to define it, rather referring back to the pre-existing common law. This technique, which creates uncertainty or at the least lack of precision and definition, is to be found in section 3(1) of the Children Act 1989: “In this Act ‘parental responsibility’ means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property”.

A discussion of these rights and duties, as derived from the common law, can be found in all the leading textbooks. Typically\(^{29}\) “the more important aspects”, “which include a number of ‘rights’ (which can also sometimes be construed as ‘duties’) and ‘duties’”, include: “Providing a home for the child; Having contact with the child; Protecting and maintaining the child; Disciplining the child; Determining and providing for the child’s education”. In particular

There is a duty to protect and maintain a child arising from the right to care and control ... set out in the Children and Young Persons Act 1933, Part I, which makes certain forms of behaviour criminal offences. The offences are dependent on the likelihood of the child being caused unnecessary suffering or injury.

A parent has no duty parallel with the statutory duty placed on a local authority having the care of a child, to promote its welfare. On

\(^{27}\) Supra n. 14.

\(^{28}\) Supra n. 6.

the other hand it has been said that there is a 'natural and moral duty of a parent to show affection, care and interest'.

Another textbook writes of the "duty to protect".30

The common law duty to protect does not depend on the child's age, but on the necessity for protection. It can extend to the duty of one parent, say the mother, to protect her child from violence or sexual abuse of the child by the father, and the child may sue his mother for breach of that duty. However, the common law duty has very largely been replaced by statutory duties. These are mainly to be found in the Children and Young Persons Act 1933 ..., and relate to various forms of neglect and ill-treatment of children and other aspects of protection from physical and moral harm.

In contrast (but also possibly by way of guidance for English law), Scottish law has adopted a far bolder statutory approach by spelling out a statutory definition of parental responsibility. The Children (Scotland) Act 1995, section 1(1), provides:

A parent has in relation to his child the responsibility –
(a) to safeguard and promote the child's health, development and welfare;
(b) to provide, in a manner appropriate to the stage of development of the child –
   i. direction
   ii. guidance
to the child;
(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; ...
but only in so far as compliance with this section is practicable and in the interests of the child.

English law does, however, also provide specific statutory duties of parents, firstly through the criminal offences provided in the Children and Young Persons Act 1933, section 1:

If any person [including a parent] wilfully assaults, ill-treats, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement) ....

A parent or other person legally liable to maintain a child or young person ... shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided ....

Nothing in this section shall be construed as affecting the right of any parent [or ... any other person] having the lawful control or charge of a child or young person to administer punishment to him.

Secondly, a comprehensive and codified statutory scheme for child protection was created by the Children Act 1989. The penalty for a parent who falls below acceptable standards of care and protection of his child is that under section 31 court-sanctioned restrictions on the parent’s right to exercise his parental responsibility for his child may be imposed, by conferring on the local authority parental responsibility which will be shared with the parent and override the parent’s parental responsibility. This is the effect of a “care order” made under section 33(3)(b):

(3) While a care order is in force with respect to a child, the local authority designated by the order shall
   (a) have parental responsibility for the child; and
   (b) have the power (subject to the following provisions of this section) to determine the extent to which a parent or guardian of the child may meet his parental responsibility for him.

But it is the grounds for making a care order which may indirectly be deemed to constitute the duties of parents, or standards of care with which failure to comply will justify legal state interference in the privacy of the family unit.

Section 31 of the Children Act 1989 sets out what are called the “threshold criteria” for the making of a child protection order; these may be likened to grounds for “jurisdiction” to make an order, while the
actual order which will be made will depend on the principle that “the welfare of the child shall be the court’s paramount consideration”. Section 31(2) sets out the “threshold criteria”:

A court may only make a care order or supervision order if it is satisfied —
(a) that the child concerned is suffering, or is likely to suffer, significant harm; and
(b) that the harm, or likelihood of harm, is attributable to —
   (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
   (ii) the child’s being beyond parental control.

Section 31 (10) provides some definitions:

“harm” means ill-treatment or the impairment of health or development;
“development” means physical, intellectual, emotional, social or behavioural development;
“health” means physical or mental health; and
“ill-treatment” includes sexual abuse and forms of ill-treatment which are not physical.

So, if a child suffers (or is likely to suffer) “harm” as defined, as a result of the care which his parent gives him, and that care is not considered by the court to be what a reasonable parent would give, then the “threshold criteria” are satisfied. To put it the other way round, a parent has a duty to provide the care that a reasonable parent would give so that harm does not result.

It is therefore possible to construct from English law the following principles: Parents have statutory and common law duties towards their children which may be enforced by the courts, either through the criminal law or by statutory child protection procedures. It was similar statutory provisions for child protection which formed the basis for the decision in Oregon in Burnette v. Wahl and in Israel in Amin. The
outstanding question is whether these same duties can be enforced by a child (whether as a child, or later as an adult) against his parent through claims in tort for damages.

5. Children as Claimants against Their Parents Other than in Tort

The possibility of claims by children against parents, other than in tort, arising from the upbringing given by the parent to the child is not without precedent. The possibility of applications under the Children Act 1989 by a child for a residence, contact, prohibited steps, or specific issue order (a “section 8 order”) is expressly provided for in section 10(8) which sets out the pre-condition of the court’s permission for such an application, and only in circumstances where the child has “sufficient understanding” to make the application. A substantial body of case law has clarified the principles upon which the court will exercise its discretion to allow a child to make a section 8 application, in particular the need for caution in allowing a child to become a party to proceedings between warring parents, where he will be exposed to hearing their evidence, and where he may have to be cross-examined.

But the possibility of a claim by a child against both his parents raises other spectres. It has been reported that a law to permit abused and unwanted children to seek a “divorce” from their parents was being prepared by the justice committee of the Philippine House of Representatives, because severing the ties between abused children and their parents would “help the victims to ‘play a vital role’ in improving their own welfare”.

In 1992 the “Gregory K” case in Florida received much media publicity. Gregory, an 11-year-old, sued to “divorce” his parents so that he could stay with his foster-parents. Legally speaking, he petitioned for the termination of the parental rights of his natural parents. The Florida Court of Appeals, reported as Kingsley v. Kingsley, rejected

34 The procedural requirements are set out fully in the Family Proceedings Rules, Rules 4.16, 9.2 and 9.2A.
35 E.g. Re C (Residence: Child’s Application for Leave) [1995] 1 FLR 927, FD.
36 The Times, 21 December 1999 (news item).
37 623 So. 2d 780; 1993 Fla. App; see also Time Magazine 1 May 2000.
Gregory's argument that he had a procedural right to sue his own parents. He was held not to have legal capacity to make such a claim by reason of his age. But the Court in fact ruled that his mother had abandoned and neglected him, and terminated her parental rights on the basis of four other petitions which had been brought on Gregory's behalf.

The validity of claims brought by children was raised again in the case of Elian Gonzalez, the 6-year-old Cuban boy rescued from the sea and brought to safety in Miami. The issue was raised by an application for asylum purportedly made by Elian himself. The US Immigration and Naturalization Service took the view that a boy of 6 could not understand the meaning of an asylum request and therefore only his legal parent (in this case his Cuban father, since his mother had died at sea) had the legal right to speak on his behalf. However, at one stage of this long politically-charged drama, the 11th Circuit Court of Appeals in Atlanta, Georgia held that the asylum law, providing that “anyone” could make an application, did not exclude children, of whatever age. Eventually, though, the right of a child to make such a claim was judicially rejected.

The view of the 11th Circuit Court is out of line with the general trend of decisions in the U.S., contrary to the reasoning in Kingsley v. Kingsley, and certainly contrary to English case law on this point. However when, as in Burnette v. Wahl in Oregon, the claim for damages is brought by a guardian (in English law called a “next friend”) on behalf of young children, then the age of the children is not an issue.

6. Claims under English Law for Damages for Breach of Parental Duty with Respect to Physical Injury

In the case of physical (as opposed to psychological or psychiatric) injury, the English common law duty of protection has formed the basis for claims for damages. A child who has been physically or sexually abused does have a right of action against the abuser, and that includes against a parent who is the abuser, and the damage to the child may include

38 Time Magazine, ibid.
39 Supra n. 37.
40 Supra n. 14.
psychological harm in addition to the physical injury. Such was the case in *Pereiera v. Kelman*\(^{41}\) in which claims for damages were brought by three children, now all adults, against their father for physical and indecent assault inflicted upon them during their respective childhood and adolescence. But the case report does not address the issue of liability, only the question of the type of damages. General damages were awarded for “pain, suffering, distress, physical and mental injuries resulting from the defendant’s wrongful behaviour, but also for the cost of therapeutic treatment which the plaintiffs may be advised to undertake”.

The common law duty of protection also formed the basis for a claim by a child to sue for breach of the duty of one parent (for example, the mother) to protect the child from physical or sexual abuse by the other (for example, the father). In *S v. W (Child Abuse: Damages)*\(^{42}\) a child – at the time proceedings were issued, an adult aged 27 – brought a claim for damages against both her mother and her father. The father had subjected her to repeated sexual abuse up to the age of 18, for which he received a prison sentence. The mother had notice of the father’s abuse at an early stage. The claim against her mother alleged breach of duty, as a parent, to protect her child.

The case was reported because of the issue of limitation periods. Under the Limitation Act 1980, section 11, the period is 3 years for actions for personal injury arising out of negligence, nuisance or breach of duty, to run from the date the action accrues or the date of majority, with possibilities of extension under section 14 (date of knowledge for purposes of section 11) and section 33 (extension if equitable to do so). Under section 4, for a tort such as a deliberate assault or trespass, the period is 6 years from the cause of action or the claimant’s majority, with no provision for extension. As the Court of Appeal said, the facts of the case therefore give rise to an anomaly that an action in trespass against the father could be statute-barred, but an action in negligence against the mother, who stood by, might not. The court decided that the action against the father had to be struck out, while the action against the mother was not.

The House of Lords, reported as *Stubbings v. Webb*,\(^{43}\) upheld the decision on the limitation point, that in the cause of action for trespass

\(^{41}\) [1994] 2 FCR 634.

\(^{42}\) *Supra* n. 19.

\(^{43}\) [1993] AC 498.
to the person for sexual abuse within the family, the claim of the adult child was statute-barred. This decision was held by the European Court of Human Rights in *Stubbings v. United Kingdom*\(^{44}\) to be not in breach of articles 6, 8 or 14 of the Convention. The interesting aspect of *Stubbings v. Webb*\(^{45}\) is the nature of the claims: they were for damages for personal injuries, including psychological injury. The claim against the father was for trespass to the person for physical assaults. The claim against the mother was for breach of the duty, as a parent, to protect her child in the circumstances, from what was said to be a foreseeable risk of injury. Specifically, this claim stated: “In breach of the said duty of care, the defendant failed to procure the removal of the plaintiff from the home and/or failed to report the activities of the father to the police and/or social services and/or failed to take any step whatsoever to prevent the abuse of the plaintiff by the father”.

Lord Justice Russell described the cause of action against the mother as follows:

> It was a claim against the mother for an entirely independent tort involving acts of omission by her, such as constituted on her part a breach of her common law duty to take care of her child and not to expose that child to the unnecessary risk of injury or further injury.

Both *Pereira*\(^{46}\) and *Stubbings v. Webb*\(^{47}\) were cases of claims for damages for psychological injury arising out of physical abuse. No issue seems to have been raised by either court as to tortious liability in such circumstances where physical injury was established. And in both cases the liability arose from breach by a parent of the common law duty of care to, or to protect, a child. However, in the Court of Appeal in *Barrett v. London Borough of Enfield*\(^{48}\) Lord Woolf MR cast serious doubt on the legal basis for the claim, warning that in *Stubbings v. Webb*\(^{49}\) the point as to the tortious liability of parents to their children was not argued, and that the court had been “solely concerned with the limitation point”.

\(^{44}\) [1997] 1 FLR 105, ECtHR.
\(^{45}\) *Supra* n. 43.
\(^{46}\) *Supra* n. 41.
\(^{47}\) *Supra* n. 43.
\(^{49}\) *Supra* n. 43.
The important point that emerges is that there does not appear to be any reported English case in which the claim for damages for psychological injury arose not from a physical act but from purely emotional abuse, neglect or abandonment, as in the Israeli case of Amin.

7. Tortious Liability of Parents in English Law for Breach of Parental Duty Causing Purely Psychiatric Injury?

First, there is no statutory tort in English law expressly creating civil liability for parents who fail to fulfil their legal parental responsibility towards their children. Nor have the courts ruled that such a statutory tort action exists by implication or statutory interpretation, nor is such a prospect likely. Echoing the majority in Burnette v. Wahl, Lord Slynn of Hadley in the House of Lords in X (Minors) v. Bedfordshire County Council quoted Lord Hoffman in Stovin v. Wise:

Whether a statutory duty gives rise to a private cause of action is a question of construction ... if the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.

Secondly, English law does recognise a common law tort of breach of statutory duty but only in very limited circumstances. Thirdly, however, a statutory duty may instead, and commonly does, form the basis for finding a duty of care in the “catch-all” common law claim of negligence, thus creating a common law liability for negligence in the per-

50 The same issue was addressed in (2000) 20 Legal Studies, no. 1, pointing out that English law has generally only recognised damages for mental distress (as opposed to “nervous shock/psychiatric harm”) consequential to physical injury.
51 Supra n. 6.
52 Supra n. 14.
55 See, e.g., Street on Torts, 10th ed. (Butterworths, 1999).
formance of a statutory duty. So, for example, while local authorities, which owe their existence to statute, are obviously exercising their statutory powers under the Children Act 1989 when making decisions as to children in need of care, despite this, in Barrett the claim made was not for breach of statutory duty, but rather for breach of the common law duty of care in the law of negligence. Specifically the claim for negligence had been brought against the local authority by an adult who had been a child “in care”, alleging psychiatric injury resulting from a breach of duty to act “as a parent” and to show the standard of care which was expected of a responsible parent. And in Barrett Lord Slynn of Hadley quoted from Lord Browne-Wilkinson’s judgment in X (Minors) v. Bedfordshire County Council, that the common law claim in these cases was “based on a common law duty of care arising either from the imposition of a statutory duty or from the performance of it”.

In the case of parents also, traditionally there has never been any discussion of their potential liability for breach of statutory duty. But the statutory duties of parents are nevertheless central to the question of their potential liability in negligence.

It is now well-established in English negligence law, that the existence of a duty of care depends on the application of the three-stage test in Caparo Industries plc v. Dickman – “foreseeability”, “proximity”, and whether it was “fair, just and reasonable” to impose a duty of care in the circumstances. In Barrett, as in X before it, the first two tests were clearly satisfied in each case. Both cases turned on the last requirement, the issue of public policy.

The issue of policy in X was whether a local authority owed a common law duty of care in the taking of decisions in the exercise its statutory discretion, as to whether to take proceedings to take children into care or not. The issue of policy in Barrett was whether a local authority owed a common law duty of care to children who were already in care,

56 Supra n. 4.
57 Ibid.
58 Supra n. 53.
59 This may be because parents are not statutory bodies created by statute, as are local authorities.
60 [1990] 2 AC 605; [1990] 2 WLR 358, [1990] 1 All ER 568, HL.
61 Supra n. 4.
62 Supra n. 53.
63 Supra n. 4.
for decisions taken in the lawful exercise of its statutory discretion, as to the way they were treated by the local authority in the exercise of its statutory powers to look after children in care. Both these cases illustrate the distinction between the “exercise of discretion” (or “policy”) as opposed to the “exercise of statutory powers” (or “operational acts”).

Save that the question concerned the liability of a local authority, rather than a parent, the issue before the court in Barrett, of a common law tortious liability based on a statutory duty, was similar to that in Burnette v. Wahl and a similar discussion took place, with a similar judicial rejection of such liability. The decision in Barrett established that the potential tortious liability of local authorities when exercising its statutory discretionary powers in relation to children in care was a justiciable matter. The question of the tortious liability of parents to their children was not specifically before the court, but because the claims in essence were that local authorities and foster parents were in loco parentis, for the purpose of analogy there was discussion of the legal position of parents. The analogy with parents thus became a central motif, though by way of obiter dictum.

Lord Woolf MR in the Court of Appeal in Barrett, for the first time addressed the question of the liability of local authorities by analogy with parents. He rejected a duty of care on policy grounds, refusing to recognise a duty-situation for local authorities for decisions taken “when in the position of a parent as to the care of a child”. He said:

It would be contrary to the public interest and therefore not just or reasonable to impose a duty of care. The very fact that the defendants are stated to have been in the position of a parent to the plaintiff ... brings home the public policy aspects of the situation. Decisions of this nature often require a difficult and delicate balancing of conflicting interests ...

If a parent when driving a car injures his child who is a passenger, then of course as is the case with any other driver there is no reason

64 Supra n. 14.
65 Supra n. 48.
66 [1997] 2 FLR 167 at 174-75; cited with approval by Judge LJ in W v. Essex County Council [1998] 2 FCR 269 (a claim by children of foster-parents against the local authority for having placed foster-children where there was a history of sexual abuse); and by Lord Slynn of Hadley in the House of Lords in Barrett, supra n. 4.
why he should not be liable for damages. *However, parents are daily making decisions with regard to their child’s future and it seems to me that it would be wholly inappropriate that those decisions even if they could be shown to be wrong should be ones which give rise to a liability in damages. ...* If the decisions are taken by the local authority in place of the parents the position should be the same. However I am not suggesting a blanket immunity but an immunity in relation to the making of decisions as to the future of a child which are normally made by a parent. (emphasis added)

All three appeal judges also explained their decision as being based on the fact that the decisions under attack were discretionary decisions on the part of the local authority which could not easily be subjected to the test in tort of the “reasonable man”. 67

The House of Lords in *Barrett* 68 reversed the Court of Appeal, and held that local authorities could be held generally liable in tort. Lord Browne-Wilkinson accepted that there might be some “operational” (as opposed to “policy”) decisions of a local authority which might be action-able. He did not address Lord Woolf’s analogy with the duties of parents. Although this article is not centrally concerned with the tortious liability of local authorities, it is important to note why the House of Lords made this decision. There seems to be little doubt that the House of Lords’ change of view was the result of the decision of the European Court of Human Rights in *Osman v. UK*, 69 which had ruled that the blanket exclusionary rule based on public policy in English law preventing actions in negligence against the police for failing to investigate or protect from crime was in breach of article 6 of the Convention as constituting a breach of the right of access to the court. Lord Browne-Wilkinson in *Barrett* 70 confessed that “I find the decision of the Strasbourg Court extremely difficult to understand”, and argued forcibly that, rather than creating “immunities”, English law does not recognise liability in negligence in certain situations on public policy grounds,

67 The same approach was taken by the Court of Appeal in the very similar case of *H v. Norfolk County Council* [1997] 1 FLR 384, [1997] 2 FCR 334.
68 Supra n. 4.
69 [1999] 1 FLR 193, ECHR.
70 Supra n. 4.
therefore to say that that constitutes a breach of the right of access to a court is confusing procedural rights with rights in substantive law.\footnote{He was later vindicated when his approach was accepted as legitimate by the ECtHR in \textit{Z v. United Kingdom} [2001] 2 FLR 246, ECHR.}

In making its decision, the House of Lords rejected Lord Woolf's analogy between local authorities and parents, which in his view had operated in favour of extending the parental immunity to local authorities: that, because parents may have 'immunity' from action, therefore so should a local authority when acting \textit{in loco parentis}. But in removing immunity from local authorities, the House of Lords did not intend to interfere with the continuing parental immunity. Lord Hutton reflected the general view of the court when he said decisively:\footnote{\textit{Supra} n. 4, at 446.}

\textit{It would be wholly inappropriate that a child should be permitted to sue his parents for decisions made by them in respect of his upbringing which could be shown to be wrong}. . . There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships... . . . I do not agree . . . that because \textit{the law should not permit a child to sue his parents}, the law should not permit a child to sue a local authority which is under a duty by statute to take him into care and to make arrangements for his future\footnote{\textit{Supra} n. 4, at 461-62.} . . . I consider that the comparison between a parent and a local authority is not an apt one in the present case because the local authority has to make decisions of a nature which a parent with whom a child is living in a normal family\footnote{The problem this article deals with is, of course, exactly the opposite – that is, a family which has broken down because of the parent’s conduct.} does not have to make, viz. whether a child should be placed for adoption or placed with foster-parents, or whether a child should remain with foster-parents or be placed in a residential home. I think it is erroneous to hold that because a child should not be permitted to sue his parents he should not be permitted to sue a local authority in respect of decisions which a parent never has to take.\footnote{\textit{Supra} n. 4, at 461.} (emphasis added)
Lord Slynn of Hadley said similarly:76

Nor do I accept that because the court should be slow to hold that a child can sue its parents for negligent decisions in its upbringing that the same should apply necessarily to all acts of a local authority. The latter has to take decisions which parents never or rarely have to take (e.g. as to adoption or as to an appropriate foster parent or institution). In any case, in respect of some matters, parents do have an actionable duty of care. (emphasis added)

“A parent does not have a blanket immunity” Lord Slynn of Hadley added; so, for example, “negligence in driving a car by a parent would still be actionable if the child was caused injury”.77 What he cautioned against was the possibility of a cause of action for a parent’s “negligent decisions in the child’s upbringing”.

All these obiter dicta are consistently supportive of the immunity of parents from actions for negligence in the upbringing of their children. It is remarkable, and gives cause for thought, that so many senior English judges have agreed that the public policy considerations in allowing claims in negligence by children against parents for their upbringing are problematic.

8. The Public Policy Arguments

The public policy arguments against allowing a duty of care against parents were set out by the Israeli District Court Judge Stern in Amin.78 They were that awarding damages could:

i. lead to excessive state intervention in the private lives of families;
ii. destroy any hope of rehabilitating the family;
iii. undermine parental authority;
iv. lead to family “scams” or a conspiracy between one parent and the child against the other parent;

76 Supra n. 4, at 446.
77 As in Carmarthenshire County Council v. Lewis [1955] AC549 at 561, which established the liability of parents and others having charge of a child for allowing the child on a busy road unaccompanied.
78 Supra n. 6.
v. lead to a “slippery slope” or open the “floodgates” to actions in cases less severe than the facts of the present case.

She rejected each of these arguments in circumstances where the parent had acted with malice and not for the child’s welfare. As to (i), (ii) and (iii), she considered that the family had already been broken by the parent’s actions; as to (iv), the judges were well able to detect cases of family “scams”; and as to (v) the judges were well able to use their discretion to only allow damages in cases of sufficient severity, and the floodgates argument was not considered to be relevant where the issue was whether to provide a remedy for a wrong.

A further argument that has been made against liability is that most parents likely to be sued would probably be lacking in the financial means to pay any damages awarded. Therefore:

What would be accomplished by children suing their indigent parents? It seems likely that the only purpose that would be served would be to further punish the parents for abandoning their children. Since this is [a criminal offence] it’s hard to see what additional punitive benefit is served through a lawsuit.79

Public Policy in English law

While there is currently no direct English case law on the point of whether a parent can be sued by his child for psychological damage resulting from a breach of the parent’s common duty of care in his upbringing of the child, all the recent *obiter dicta* of the Court of Appeal and House of Lords in *Barrett*80 lead to the conclusion that such actions are at present against public policy.

English negligence law operates openly on the principle that the court must move “cautiously”, “incrementally and by analogy” in creating new duty-situations (or “novel categories” of negligence),81 and is quite transparent about the operation of public policy. In English law, as already discussed above, there are two hurdles for a claimant to cross

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80 *Supra* n. 4.
in seeking to persuade a court to impose a new duty-situation. Both hurdles involve policy decisions. The first, in the circumstances of this discussion, is whether the court will find the basis for a common law duty of care in a statutory duty. The second is whether, in the law of negligence under the third stage of the *Caparo v. Dickman* test (which requires it to decide whether it is just, fair and reasonable to impose liability in new situations) it is just, fair and reasonable to impose a common law duty of care on a parent for the way he has brought up his child.

But the English courts have not yet really stringently examined the public policy arguments, since the point has not directly presented itself for decision. Only Lord Hutton in *Barrett* raised the point which is central to the issue, that “There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships”. But, there is a contrary norm that also needs to be properly weighed in the balance, that: “… the public policy consideration, which has first claim on the loyalty of the law, is that wrongs should be remedied and that very potent counter-considerations are required to override that policy”. In *X*, although Lord Browne-Wilkinson concluded that a common law duty of care should not be recognised in the case of a local authority’s exercise of its statutory discretion whether to take or not take a child into care for its protection, he went to great lengths to clearly address the public policy arguments which in his judgment led to his conclusion. These were that:

i. a common law duty of care would cut across the whole statutory system set up for the protection of children at risk, which is a multidisciplinary process so that it would be unfair to single out one participatory body on whom to impose a duty of care;

ii. the task of the local authority … in dealing with children in care is extraordinarily delicate;

82 *Supra* n. 60.
83 *Supra* n. 4.
85 Expressed by Lord Browne-Wilkinson in *X*, *supra* n. 53.
iii. if liability in damages were to be imposed, it might well be that local authorities would adopt a more cautious and defensive approach to their duties;

iv. the relationship between social worker and the child's parents is frequently one of conflict ... This is fertile ground in which to breed ill feeling and litigation ... The spectre of vexatious and costly litigation is often urged as a reason for not imposing a legal duty;

v. if there were no other remedy for maladministration of the statutory system for the protection of children, it would provide substantial argument for imposing a duty of care. But [there are] statutory complaints procedures ...;

vi. we were not referred to any category of case in which a duty of care has been held to exist which is in any way analogous to the present cases. Here for the first time, the plaintiffs are seeking to erect a common law duty of care in relation to the administration of a statutory social welfare scheme ... In my judgment, the courts should proceed with great care before holding liable in negligence those who have been charged by Parliament with the task of protecting society from the wrongdoing of others.

Points (i), (ii) and (iii) are not directly relevant to the question of imposing a duty of care on parents. Point (iv) is similar to the fourth and fifth points in Amin.\textsuperscript{87} Point (v) is relevant if there is no other remedy for the child in civil law, which may become a future issue in the light of the decision of the European Court of Human Rights in Z v. United Kingdom, as discussed below.\textsuperscript{88} And point (vi) involves a value-judgment par excellence. Notably in Barrett in the House of Lords\textsuperscript{89} all of Lord Browne-Wilkinson's arguments were rejected, thus illustrating the changeable nature of public policy considerations even at this court level.

\textsuperscript{87} Supra n. 6.

\textsuperscript{88} Z v. United Kingdom [2001] 2 FCR 246, ECtHR; and see discussion in text, supra at n. 71.

\textsuperscript{89} Supra n. 4; see, e.g., Lord Hutton, at 463.

The European Convention on Human Rights is now applicable in English law under the Human Rights Act 1998. Children are the subjects of these rights, as much as adults. Four particular articles are relevant to this discussion.

Article 3 – Prohibition of Torture: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

This article is an absolute prohibition and a fundamental value of a democratic society. The right includes not being subjected to “degrading treatment” which includes physical punishment. The European Court of Human Rights in A v. United Kingdom, held that the infliction of considerable force with a garden cane by a step-father on A, a boy aged 9, causing injuries by bruising, reached “a minimum level of severity” sufficient to constitute “ill-treatment” for the purposes of article 3. The assessment of the “minimum level of severity”

is relative: it depends on the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim ....

Article 3 requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment of punishment, including such ill-treatment administered by private individuals ....

Children and other vulnerable individuals, in particular, are entitled to state protection, in the form of effective deterrence, against such serious breaches of personal integrity.

90 In force October 2, 2000.
91 E.g. Johnston v. Ireland (1986) 9 EHRR 203: The child of an unmarried couple could not be legitimated because of the absence of divorce (then) under Irish law so that a child’s parents could not marry; the child’s position was held to be in breach of article 8 – respect for family life. See Costello-Roberts v. United Kingdom (1993) 19 EHRR 112, [1994] 1 FCR 65; A v. United Kingdom (1998) 27 EHRR 611, [1998] 2 FCR 596.
92 Supra n. 88.
In *Costello-Roberts v. United Kingdom*\(^94\) it was held that the corporal punishment inflicted on the applicant, a boy aged 7, by being “whacked” three times with a slipper by his school headmaster did *not* constitute “degrading punishment” in all the circumstances of the case as it did not reach the required minimum threshold of severity. The court held that in order for punishment to be degrading, “the humiliation or debasement involved must attain a particular level of severity and must in any event be other than that usual element of humiliation inherent in any punishment”.

The issue here is not of degrading punishment, but of degrading treatment by a parent of a child. In reality, such treatment may be physical or psychological, the treatment may be by commission or omission, and the treatment may be degrading by causing humiliation to a child. In *Amin*\(^95\) the children (and the social workers) had pleaded with their father to maintain a relationship with his children. The rejection by their father is certainly capable of being described as humiliating or debasing.

Most recently in *Z v. United Kingdom*\(^96\) (challenging in the European Court of Human Rights the House of Lords decision in *X*\(^97\) rejecting local authority liability), the Court ruled unanimously that, on the facts, the local authority’s failure to protect the children from long-term neglect and abuse by their parents, by not exercising its statutory powers for the protection of children, was a breach of article 3 of the Convention.

Though not yet litigated, it must be strongly arguable that, in the light of the above case law, the European Court of Human Rights would uphold a claim of a breach of article 3, in the event of degrading psychological damage caused by the omission of a parent to fulfil his common law and statutory duties to his child comprised in his parental responsibility.

**Article 8 – Right to Respect for Private and Family Life.**

A child, no less than an adult, has “the right to respect for his private and family life, his home”. The considerable case law\(^98\) of the European

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95 Supra n. 6.
96 Supra n. 88; see also *TP and KM v. United Kingdom* [2001] 2 FCR 289, ECtHR.
97 Supra n. 53.
Court of Human Rights on this article has arisen in a wide range of contexts, and in essence has been used to protect individuals against arbitrary action by public authorities. However, the right to respect for private life has been held to contain both positive and negative aspects, so that the state has an obligation to “provide for an effective respect for private life”. In Niemetz v. Germany\textsuperscript{99} the concept of private life was held to cover the right to develop one's own personality as well as one's right to create relationships with others. In X v. Netherlands\textsuperscript{100} sexual assault of a young mentally handicapped woman was held to offend the concept of private life. The right to respect for family life likewise covers more than negative obligations of non-interference by the state. In Kroon v. Netherlands\textsuperscript{101} the Court held that there are “positive obligations inherent in the 'effective' respect for family life”. In Airey v. Ireland\textsuperscript{102} the Court held that Irish law which prohibited a woman from separating from an abusive spouse to be in breach of article 8. But in Costello-Roberts v. United Kingdom\textsuperscript{103} it was held on the facts that the boy’s complaint “did not entail adverse effects for his physical or moral integrity sufficient to bring it within the scope of the prohibition” in article 8, though importantly the article was interpreted to include non-physical “moral integrity”.

Most recently, in Z v. United Kingdom,\textsuperscript{104} the Court held that in view of its finding of a breach of article 3, no separate issue arose under article 8. It may well be therefore that claims under article 8 will not be allowed in cases of degrading psychological damage caused by the omission of a parent to fulfil his common law and statutory duties to his child, even though it is arguable that the child’s right to respect for his family life has not in fact been protected and that failure by the state to provide a legal remedy for actions which interfere with his family life should be actionable in European human rights law.

\textsuperscript{99} (1992) 16 EHRR 97; see Wadham and Mountfield, \textit{supra} n. 98, at 92.
\textsuperscript{100} (1985) 8 EHRR 235; see Wadham and Mountfield, \textit{ibid.}.
\textsuperscript{101} (1994) 19 EHRR 263.
\textsuperscript{102} (1979) 2 EHRR 305.
\textsuperscript{103} \textit{Supra} n. 94.
\textsuperscript{104} \textit{Supra} n. 88.
Article 6 – Right to a Fair Trial: “Everyone is entitled to a fair and public hearing”

Judging by the reaction of Lord Browne-Wilkinson in Barrett\textsuperscript{105} to the European Court of Human Right’s decision in Osman v. UK\textsuperscript{106} on the right of access to the courts, a considerable impact was expected on English tort law as a result of the ECtHR’s interpretation of article 6. Logically this should have required serious judicial consideration being given to the possibility of children being allowed a cause of action against their parents for damages for psychological injury caused by the treatment they received from their parents during their upbringing. With the blanket immunity from action in tort being withdrawn from local authorities in Barrett,\textsuperscript{107} it seemed strongly arguable that any immunity of parents from action should fall away under the same arguments.

However, it seems that Z v. United Kingdom\textsuperscript{108} has now to a large extent reversed the impact of the Osman\textsuperscript{109} decision. By a majority of 12 to 5, the ECtHR accepted that in Osman it had misunderstood English tort law as giving an “immunity” from actions in tort in certain circumstances,\textsuperscript{110} and so breaching the article 6 right of access to the courts. It held in Z v. United Kingdom\textsuperscript{111} that article 6 “only applied to disputes which were recognizable under domestic law on arguable grounds and did not in itself guarantee any particular content for civil rights and obligations in domestic law”. Therefore it accepted that any English rule (excluding liability in tort on grounds of public policy) could not be characterized as an exclusionary rule or an immunity which denied the applicants access to court but rather it ascertained whether a novel category of negligence should be developed by the courts. Further, that decision was based upon carefully balanced

\textsuperscript{105} Supra nn. 4 and 70.
\textsuperscript{106} Supra n. 69.
\textsuperscript{107} Supra n. 4.
\textsuperscript{108} Supra n. 88.
\textsuperscript{109} Supra n. 69.
\textsuperscript{110} In Osman immunity was given to the police in the conduct of their statutory duty of investigating crime.
\textsuperscript{111} Supra n. 88.
policy reasons for and against the imposition of liability on the local authority in the particular circumstances of the applicants’ case.

It accepted that rather than English law providing an “immunity”, the “fair, just and reasonable test” was an “intrinsic element of the tort”. It seems therefore that the ECtHR has now clearly accepted the legitimacy (and compatibility) under the Convention of the English law of negligence in which public policy determines whether a new duty-situation in tort may be created. Moreover, it has accepted that it is the court which has the right to determine what that public policy is. Public policy considerations in the creation of new duty-situations have therefore survived what had been thought to be their demise.

Article 13 – Right to an Effective Remedy

However, the ECtHR in Z v. United Kingdom\textsuperscript{112} ruled further, by a majority of 15 to 2, that, even though a remedy in tort need not be available as a matter of public policy under domestic law, there had been a breach of article 13 of the Convention which guarantees the availability at the national level of an [effective] remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order ...

The Court has previously held that where a right with as fundamental an importance as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, art. 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure. Where alleged failure by the authorities to protect persons from the acts of others is concerned, art. 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should however be available to the victim or the victim’s family a mechanism for establishing any liability of state officials or bodies for acts or omissions involving the breach of their rights under the Convention ...

\textsuperscript{112} Ibid.
It was fundamental to the machinery of protection established by the Convention that domestic systems provided redress for breaches of its provisions. Those remedies were required to be effective in practice as well as in law. In the present case, the outcome of the domestic proceedings was that the applicants, and children with similar complaints, could not sue the local authority for damages in negligence despite the fact that they were victims of a violation of art. 3 of the Convention. [The existing remedies for voluntary compensation and internal complaints were not sufficient]. Accordingly, as the applicants were not afforded an effective remedy in respect of the breach of art. 3, there was a violation of art. 13 of the Convention.

Since October 2000, it is argued that the UK is now able to claim successfully that even though claims in negligence may not be, as a matter of public policy, available in cases such as this, nevertheless under the Human Rights Act 1998 (by which European human rights may now be enforced and compensation ordered for breach of a human right in the English courts) an effective remedy has been provided, though outside of tort law.

For the present, it seems that the ECtHR has now decided that questions of public policy in the tort of negligence should be left to the English courts to decide. Therefore it would appear that the possibility of recognition of a new duty-situation (or novel category of negligence) through claims by children against their parents for psychiatric injury caused by their parental upbringing will be directly in the hands of the English judges, exercising their discretion on the matter of public policy, rather than being imposed by European human rights jurisprudence. So far, as has been seen, though as yet no direct claim of this nature has been brought to them for determination, the senior judiciary has shown no willingness to entertain such claims in tort. However, the future potential impact of the finding against the United Kingdom in Z v. United Kingdom under article 3 for “degrading treatment” may be considerable in the context of the public policy considerations in the law of negligence.

Even more so, whether such a claim would be any more successful under the Human Rights Act 1998 remains to be seen, though the finding of a breach of article 3 makes it highly possible. Clearly this is

113 Ibid.
an area of law which invites and awaits judicial creativity and development.

10. Toward a New Public Policy?

In a remarkably transparent judgment in the Court of Appeal,114 Lord Justice Thorpe recently expounded on the concept of the “reasonable parent”:

The “reasonable parent” shared with the “reasonable man” the quality of being an “anthropomorphic conception of justice” and was only a piece of machinery to provide the answer to a question that might be raised in a demythologised form by a judge asking himself ... having regard to the evidence and applying the current values of society... .

The open recognition that judges must apply the “current values of society” is critically relevant also to the making of policy decisions which “develop novel categories of negligence”. Applying the “current values of society” it may be concluded that the reasonable parent would not treat his child in the way that Mr. Amin did. But the question here goes further: it is whether the “current values of society” would also require that children so treated should have some legal remedy.

English law already recognises that there is no absolute parental immunity. There is no question that parents are subject to criminal liability for the way they treat their children. In cases of physical injury, children may sue their parents in tort for trespass and assault. Such claims may be brought by the child as a child (by his next friend); or by the child when he becomes adult (subject to limitation periods). The simple policy or value question therefore is why should parents not be liable in civil law for negligence for psychological injury. No such claim has yet been brought, nor therefore ruled upon by the English courts. But no doubt such a claim will be made in future. The English courts will have to confront directly the policy issues involved, at the very least

114 Re F (Children) (Adoption: Freeing Order) [2000] 3 FCR 337 – a case concerning the test of the “reasonable parent” for purposes of dispensing with parental agreement in adoption applications.
In terms of the European human rights issues\(^ {115} \) and the effect of article 3.\(^ {116} \)

In view of the widespread incidence of divorce, it could well be that claims by children against their parents for psychiatric damage caused by reason of their parents’ divorce would likely be rejected on “floodgates” grounds; although a fear of “floodgates” did not prevent the Texas Supreme Court holding that under the tort of intentional infliction of emotional distress “one spouse can sue the other spouse in a divorce proceeding for intentionally or recklessly causing severe emotional distress by extreme or outrageous conduct”.\(^ {117} \)

The prospect of claims by children against a parent for failure to honour the duty to keep contact with the child seems altogether more plausible, especially in the context of texts such as the United Nations Convention on the Rights of the Child,\(^ {118} \) and legislation of the type of the Children (Scotland) Act 1995.\(^ {119} \) In Texas former spouses have been allowed to sue each other for “extreme or outrageous conduct” for, among other examples, alienation of the child so that he refused to visit his father, but were not so allowed in Missouri and Wisconsin.\(^ {120} \)

The English courts have traditionally asked, negatively, whether “a common law duty of care would cut across the whole statutory system”,\(^ {121} \) and writers have adverted to the difficulties involved in recognizing such “autonomy rights” for children (meaning here the right of

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\(^ {115} \) Under section 6(1) of the Human Rights Act 1998, English courts are now required to apply European human rights in all cases, whether between the state and the individual, or between individuals.

\(^ {116} \) As interpreted in Z v. United Kingdom, see supra n. 88.

\(^ {117} \) Twyman v. Twyman 855 S.W. 2d 619 (Tex. 1993); discussed in R. Orsinger, “Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection with Divorce” (1994) 25 St. Mary’s L. J. 1254.

\(^ {118} \) 12 December 1989; for example Article 9 (3): “States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests”.

\(^ {119} \) See text at n. 30.

\(^ {120} \) See R. Orsinger, “Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress in Connection with Divorce” (1994) 25 St. Mary’s L. J. 1254; but the intentional tort of alienation of affection was abolished by the legislature in 1987. Apparently in Missouri such a claim of intentional infliction of emotional distress by alienation of the affections of a child was rejected.

the child to “attack” the family unit by asserting his individual rights against his parent). Freeman\textsuperscript{122} well describes these difficulties, as being:

(i) whether the child can make such decisions adequately; (ii) if not, whether other decision-makers, or decision-making processes, are likely to arrive at better decisions than the parents; (iii) whether the state can really remove the decision-making power from the parents; (iv) the costs of removing the decision from the parents in terms of family autonomy and family privacy (which he says, and we must agree, are cherished values in our society); and (v) the costs of not giving the decision to the child. It is ... unrealistic to treat certain of the rights that tend to be claimed as legally enforceable rights. Children in families can no more enjoy total autonomy over their lives than their parents or adult siblings can. It would be alien to family living to suppose otherwise ... .

Freeman's view\textsuperscript{123} is that the parents' role is one of “representing their children's interests”, so that, so to speak, children's rights against their parents start “at the point where the parental decision-making is not geared towards a maximisation of ... the primary social goods ...”\textsuperscript{124} This approach now represents mainstream thinking in English law, having subsequently found full expression in the famous quote from the House of Lords decision in \textit{Gillick v. West Norfolk and Wisbech Area Health Authority}:\textsuperscript{125} “... parental rights to control a child do not exist for the benefit of the parent. They exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child ...”.

The child's right to interfere with the family unit where the parent has forfeited his right “to control his child” is therefore only a logical

\textsuperscript{122} M.D.A. Freeman, \textit{The Rights and Wrongs of Children} (Frances Pinter, 1983) 49. The debate there is rather about the child's (as opposed to the parents') right to seek contraception and abortion, but the points are equally valid to the subject under consideration here.

\textsuperscript{123} Ibid., at 51-52.

\textsuperscript{124} Of "liberty, health and opportunity".

\textsuperscript{125} [1986] AC 112, [1985] 3 All ER 402, HL per Lord Fraser of Tullybelton; and see C. Barton and G. Douglas, \textit{Law and Parenthood} (Butterworths, 1995) 22-28, for discussion of the concept of parents as "trustees", i.e., parent's rights as being held on trust for the welfare of their children.
extension of this existing line of thinking. It could logically lead to the recognition that there are good policy reasons for recognising that a parent has a duty of care for psychiatric damage caused, at the least, in circumstances where the family unit has broken down. This approach would be strengthened by the argument that a common law duty of care on parents would be an additional positive weapon in the hands of the state (through its judicial system) to enforce the statutory parental responsibility which the law imposes upon parents. As Sir Thomas Bingham MR said in his dissenting judgment in the Court of Appeal in X v. Bedfordshire County Council: I cannot accept, as a general proposition, that the imposition of a duty of care makes no contribution to the maintenance of high standards.”

On the one hand, official sanction of the right of a child to invoke state interference in family life is seen by many as damaging to family life. This was expressed by Lord Hutton in Barrett: “There are very real public policy considerations to be taken into account if the conflicts inherent in legal proceedings are to be brought into family relationships.” On the other hand, there is an equally valuable norm deserving of recognition, as expressed by Lord Browne-Wilkinson in X: “... the public policy consideration, which has first claim on the loyalty of the law, is that wrongs should be remedied and that very potent counter-considerations are required to override that policy”.

In formulating new legal policy, judges must balance, among other things, the values of providing effective remedies for children (and as now required by the Human Rights Act 1998), as against the fragmentation of family life, as against opening the floodgates which in tort law has so often been used to justify control mechanisms limiting liability. Balancing all these “current values of society” requires a sensitive exercise of discretion.

The Israeli Supreme Court decision in Amin is so far unique in its enforcement in the law of tort of the legal obligations of parenthood. The

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126 Children Act 1989, section 2(1).
127 [1955] 2 AC 633; and approved by Lord Slynn of Hadley in Barrett, supra n. 4.
128 Supra n. 4.
130 Supra n. 53.
131 Supra n. 6.
majority of the Supreme Court of Oregon in *Burnette v. Wahl* \(^{132}\) did not recognize the claim; nor has, so far as is known, any other United States court. The English courts have given plenty of indication that they do not support such claims in tort as a matter of public policy; and the European Court of Human Rights has finally accepted the position that the English judges have the right to exercise their discretion on matters of public policy in the tort of negligence, though at the same time indicating that some “effective remedy” for a breach of article 3 must be provided. In the current English context that is now considered to be satisfied by the possibility of claims under the Human Rights Act 1998.

Will courts in the future rule that public policy and “the current values of society” demand a similar development in tort law to that of the Israeli Supreme Court?

\(^{132}\) *Supra* n. 14.