§ Law in Context

Law and Administration

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‘Golden handshakes’: Liability and compensation

Contents

1. Liability or compensation?

In the last three chapters we have looked in some detail at judicial review, today the principal machinery through which courts exercise their function of controlling the executive and for many – especially red light theorists – the centrepiece of administrative law. Judicial review is not the only mechanism for the challenge of executive and administrative action; as we have seen, human rights claims may be raised in every form of judicial process, including criminal proceedings. Judicial review procedure is also subject to the substantial limitation that compensation, in practice sometimes the only suitable remedy, is not usually available. The reformed modern judicial review procedure (see Chapter 15) allows the Administrative Court to award damages

on an application for judicial review but *only* when 'the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages' (s. 31(4)(b) of the Supreme Court 1981). This has the effect of linking damages to the existing law of tort. It has to be said that the writ procedures of the High Court, with detailed pleadings and oral evidence, are in practice better suited for fact-finding in damages actions; these are therefore routinely transferred out of the Administrative Court after the court has determined the public law issues.[1] Cases where a claim for damages is joined to a judicial review application are, however, rare[2] and cases where compensation is actually ordered even rarer.

Judicial review has not always occupied its present paramount position in administrative law. Since time immemorial, wrongful and illegal action by public officials could be challenged by means of an action in tort, as in the famous 'General Warrant cases'.[3] Here warrants issued by the Home Secretary to search premises, seize property and arrest those engaged in the publication of *The North Briton*, a paper published by John Wilkes, a well-known radical deemed dangerous by the authorities, were successfully challenged on the ground that they did not, as they should have done, specifically name the premises to be searched, the owners, or the property to be seized. Wilkes and his printers and publishers sued successfully for trespass to goods, trespass to land and false imprisonment, and the judgments in which the officials were held liable still stand as landmarks in the vindication of civil liberties.[4] Other landmark tort actions should be mentioned. In *Cooper v Wandsworth Board of Works*,[5] C had built houses for which a licence from the Board of Works was necessary but had omitted to apply for the licence. As it was on the face of its statutory power entitled to do, the Board of Works demolished the building. However, in an action for trespass to land, the court found the Board liable in damages, ruling that a hearing ought to have been granted before the extreme course of demolition was taken. In the earlier case of *Ashby v White*,[6] decided at a time when suffrage was very limited, returning officers in a parliamentary election deliberately refused to allow two of the registered electors to vote. The judges were consulted by Parliament as to whether the common law could

[1] Lord Woolf, J. Jowell, A Le Sueur, *de Smith's Judicial Review*, 7th edn (2008) [19-006–009].

[2] But see *R v Deputy Governor of Parkhurst, ex p. Hague* [1991] 3 WLR 340.

[3] *Entick v Carrington* (1765) 2 Wils. KB 275; *Leach v Money* (1765) 19 St. Tr. 1001; *Wilkes v Wood* (1763) 2 Wils. KB 203. Dicey also lists *Mostyn v Fabrigas* (1774) 1 *Cowp*. 161; *Musgrave v Pulido* (1879) 5 App Cas 102; *Governor Wall's Case* (1802) 28 St Tr 51; and the notorious case of *Philips v Eyre* (1867) LR 4 QB 225. These cases are, however, somewhat exceptional in character.

[4] See J. Jowell, 'The rule of law today' in Jowell and Oliver (eds.), *The Changing Constitution*, 6th edn (Oxford University Press, 2007).

[5] *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

[6] *Ashby v White* (1703) 2 *Ld. Raym*. 938. A majority of the judges consulted were of the view that there was no remedy at common law but the dissenting opinion of Holt CJ was later reinstated.

provide a remedy for this 'excessive and insolent use of power'. As Holt CJ put it in his dissenting opinion, which came to be regarded as the law, 'where there is a right there must be a remedy'. The importance of the case is that it concerned intangible rights - though defined in the case as rights of property - which are not normally strongly protected by the common law. It also gave birth to the idea that some rights are constitutional in character or of such importance as to warrant protection by an action in damages. We shall later see *Ashby v White* unsuccessfully invoked in recent cases involving human rights, an outcome that reflects the current unwillingness of the superior courts to allow the ambit of tortious liability to be extended.

From civil actions like these, Dicey extracted the principle of personal responsibility of all public officials to the 'ordinary' courts of the land, on which his doctrine of equality before the law rests. In Dicey's own words:

> In England the idea of legal equality, or the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable, is under the same responsibility for every act done without legal justification as any other citizen.[7]

This bold assertion actually concealed a position of serious inequality. By virtue of the prerogative powers the Crown had acquired substantial immunity from liability in tort. This exception was to assume greater importance as tort law moved from a system of 'corrective justice' in which individuals sued individuals to a system where the objective was to fix vicarious liability on corporate entities able either to meet or insure against the substantial awards of damages made in personal injury actions. After a long and arduous struggle,[8] the position was righted by the Crown Proceedings Act 1947, which renders the Crown vicariously liable for the wrongful acts of its servants to the same extent as a 'person of full age and capacity'. Despite the ambiguity of this formula, the Act has been largely successful in bringing to an end Crown immunity in tort, subject to a few exclusions covering liability for the armed forces and judicial acts, which have come increasingly under attack in recent years.[9]

Symbolically, the Crown Proceedings Act represented the conclusion of a slow process of bringing the state in all its manifestations – central, local and regional government, agencies and other public bodies – under the

[7] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (MacMillan, 1959, 10th edn by E. C. S. Wade), p. 187.

[8] See J. Jacob, *The Republican Crown: Lawyers and the making of the state in twentieth century Britain* (Dartmouth, 1996). In other common law jurisdictions, notably Australia, the end to Crown immunity came much earlier; see M. Aronson and H. Whitmore, *Public Torts and Contracts* (Lawbook Co., 1978) and, e.g., the Queensland Claims against the Government Act 1866.

[9] The Crown Proceedings (Armed Forces) Act 1987 repeals s. 10 of the 1947 Act other than for cases which occurred prior to 1987 (see *Matthews v Ministry of Defence* (2003) UKHL 4) but allows it to be revived by ministerial certificate where necessary or expedient because of imminent national danger, etc.

jurisdiction of the 'ordinary courts of the land'.[10] This principle remains the constitutional underpinning for systems of government liability throughout the common law world. It is stoutly defended by Peter Hogg, a leading expert on Crown proceedings, who argues both that 'Dicey captured a fundamental attitude towards government' and that 'the application of the ordinary law by the ordinary courts to the activities of government conforms to a widely-held political ideal' and preserves us from many practical problems.' Hogg believes also that 'Dicey's idea of equality provides the basis for a rational, workable and acceptable theory of governmental liability' and finds least satisfactory 'those parts of the law where the courts have refused to apply the ordinary law to the Crown'.[11] In practice, however, the equality principle was always less clear cut than Dicey suggested. As Dicey's many critics are never tired of reiterating, public officials and public authorities are no longer – if they ever were – in a position of equality with ordinary citizens.[12] They come equipped with a battery of statutory powers to authorise their many incursions, which makes it hard to equate them with private actors who do not possess such powers. A law of torts developed largely to deal with the relationships of private individuals with one another must nowadays be applied to the conduct of public authorities exercising statutory powers and duties for which there is often no obvious private parallel.

The alignment of private and public liability typical of common law systems has advantages: it creates a culture of equality and feeling that public authorities are not above the law. Submitting public authorities to tort law brings its own problems, however. Tort law is a branch of the common law badly in need of reform. It has never been codified nor has the Law Commission ever conducted a consistent overall review of the subject. Left to the judges, progression has been slow and largely achieved through the incremental evolution of negligence into a general principle of liability. But tort law has never fully evolved from the collection of medieval writs or 'nominate torts', each with its own specific requirements, from which it is fabricated. Submitting public authorities to tort law means that problems within the private law of torts are replicated and sometimes magnified in the liability principles applicable to public authorities.[13] Modifications thought necessary by the courts often involve inconsistencies and sometimes result in manifest unfairness. Within this private framework of public liability, attempts to find a general, overall solution to the many problems have largely failed. Currently they are under consideration by the Law Commission, which is suggesting a package of major reforms.[14]

[10] The liability of public bodies other than the Crown had been long ago established by *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1HL 93.

[11] P. Hogg, *Liability of the Crown*, 2nd edn (Carswell, 1989), p. 2.

[12] See W. I. Jennings, *The Law and the Constitution* (Athlone Press, 1959), p. 312 and the discussion at pp. 16–18 above.

[13] Law Commission, *Administrative Redress: Public bodies and the citizen – a consultation paper*, CP No. 18 (2008) hereafter 'Law Com 187'.

[14] Ibid. And See T. Cornford, *Towards a Public Law of Tort* (Ashgate, 2008).

Perhaps fortunately, the courts are not and never have been the only source of compensation for citizens injured by state action. Before the Crown Proceedings Act the Crown routinely turned to *ex gratia* payments to fill the gap left by Crown immunity, making *ex gratia* settlements whenever Crown lawyers advised that legal liability would have accrued but for the immunity of the Crown. Regulated by the Treasury, this power is still in regular use (see p. 778 below). Recommendations for compensation made by the ombudsmen also rely on the power to make *ex gratia* payments. The *Barlow Clowes* and *Occupational Pensions* affairs described in Chapter 12 showed how in recent years ombudsmen have begun to afford a parallel route to courts for those seeking compensation. Section 5 of this chapter contains a further case study of this road to redress.

The principle that private property cannot be expropriated by the state without compensation is also very ancient, as Lord Moulton remarked in a case concerning wartime requisition of property:

> The feeling that it was equitable that burdens borne for the good of the nation should be distributed over the whole nation and should not be allowed to fall on particular individuals has grown to be a national sentiment. The effect of these changes is seen in the long series of statutes . . . [which] indicated unmistakeably that it is the intention of the nation that . . . the burden shall not fall on the individual but shall be borne by the community.[15]

The 'no taking' principle, strongly represented in American law, ultimately found its way into ECHR Art. 1 of Protocol 1, which provides that 'No one shall be deprived of his possessions except in the general interest and subject to the conditions provided for by law [or international law].'[16] Similar principles operated when, during the nineteenth century, roads and railways were constructed and when, at the end of the century, land was needed for slum clearance schemes or new towns. Statutory compensation was provided by Parliament for the 'taking' of property for such purposes.[17] Compensation for compulsory purchase today has general statutory authority from the Land Compensation Act 1973, probably the largest but by no means the only example of a statutory compensation scheme. The criminal injuries compensation scheme is today statutory, though it originated in the power to make *ex gratia* payments (see below, Section 6).

If the principle of compensation is often overlooked in studies of state liability, this is probably because lawyers are unwilling to recognise systems that

[15] *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508. And see *Burmah Oil Co Ltd v Lord Advocate* [1920] AC 50.

[16] See now *Marcic v Thames Water Utilities Ltd* [2003] 3 WLR 1603, see p. 315 above.

[17] See e.g., Lands Clauses Consolidation Act 1845 and Railways Clauses Consolidation Act 1845. And see *Hammersmith and City Railway v Brand* 1869 LR 4 HL 171. See also M. Taggart, 'Expropriation, public purpose and the constitution' in Forsyth and Hare (eds.), *The Golden Metwand and the Crooked Cord* (Clarendon Press, 1998).

largely exclude the courts. To put this differently, courts see the civil law system as the general or standard machinery for the allocation of compensation. We, however, see the search for a system of state liability capable of anticipating claims for redress and delivering appropriate compensation in all situations as illusory. Just as we argued in Chapter 10 for systems of proportionate dispute resolution capable of handling the many minor grievances thrown up by the modern administrative state, so here we stress the need for equitable principles of compensation.

The need is all the greater because, in parallel to the 'complaints culture' discussed in earlier chapters, recent years have allegedly seen the development of a 'compensation culture' or society in which there is an increased propensity to seek legal redress when things go wrong.[18] Whether willingness to sue is unreasonable or simply the result of a better-educated public with greater access to information remains an open question. In a variant of the arguments about the 'risk society' that we met in Chapter 2, Atiyah argues, however, that recent extensions of the liability system are partly responsible for 'helping to create a "blame culture" in which people have a strong financial incentive to blame others for loss or death or wrongful injury'. This renders Government:

> particularly vulnerable to litigation when the blame culture gets out of hand. If the public thinks – as some people seem to think – that ultimately the government is responsible for everything that happens in society, then the government (and other public bodies) are liable to get sued, whatever they do or fail to do.[19]

Another reason why the trend has a disproportionate impact on public authorities is that they are assumed to be insured (as local authorities actually are) or otherwise capable (like central government) of recouping their losses through the tax fund. Atiyah, who views the damages system as 'fundamentally an insurance system', sees state liability as 'in effect, an argument that the government should provide free insurance to protect the public against losses and injuries'.[20] This is leading to 'novel' liability actions against public authorities that 'have at least the potential to destabilise some public-sector budgets, such as education and social services, which cannot easily pass on these costs, except to taxpayers of one sort or another'.[21] There are, however, some signs in the case law cited later in this chapter that the response of at least the highest court has been to tighten the liability rules.

[18] See for discussion K. Williams, 'State of fear: Britain's "compensation culture" reviewed' (2005) 25 *Legal Studies* 499. For evidence of government concern, see Better Regulation Task Force, *Better Routes to Redress* (May 2004) and *Tackling the 'Compensation Culture': Government response to the Better Regulation Task Force Report: 'Better Routes to Redress'* (November 2004); Constitutional Committee, *Compensation Culture*, HC 754 (2005/6); Government response, Cm. 6784 (2005/6). And see Law Com. 187, p. 19.

[19] P. Atiyah, *The Damages Lottery* (Hart Publishing, 1997), pp. 138–9.

[20] *Ibid*., p. 87.

[21] Williams, 'State of fear: Britain's "compensation culture" reviewed', p. 507.

A more logical deduction from Atiyah's argument is that government, if it is effectively to act as insurer, should have some say in the risks that it should underwrite. The courts did not, for example, impose liability on government to make reparation to the victims of criminal violence; they have on the contrary been remarkably protective of the police service in this respect (see p. 775 below). Government chose, as we shall see, to take on this responsibility by setting up a compensation scheme. Similarly, it was unlikely that liability would fall on public authorities if a child who was vaccinated against a serious infectious disease suffered damage from the vaccine administered. Government chose, in the interests of protecting the public, to accept responsibility to compensate the unfortunate few with adverse reactions.[22] These examples might suggest a rather different meaning for the term 'compensation culture'. Rather than designating a society in the grip of litigation mania, perhaps the term should refer to a society moving to a position where a right to compensation is becoming a principle of good administration or good governance principle.[23] Hogg has, for example, argued that it 'ought to be a routine part of the planning for a new government programme to undertake an analysis of the private losses that might be caused by the program . . . the predictable, undesired side effects of a program could and should be analyzed with a view to making legislative provision for private compensation'.[24] For this reason, the final sections of this chapter deal with administrative compensation, which we see as, potentially, a valid alternative to an expanded liability system in respect of the state.

2. Tort law, deterrence and accountability

The story of modern tort law is largely a history of the tort of negligence, the main vehicle for accident compensation. With the rise of negligence has come the view of tort law as compensatory. Lord Bingham quite recently asserted, for example, that 'the overall object of tort law is to define cases in which the law may justly hold one party liable to compensate another'.[25] Dicey, however, saw tort law as a vehicle for accountability, a view that reflects its ancient lineage as a remedy for abuse of power. Punitive and deterrent functions are inherent

[22] See the Vaccine Damages Payment Act 1979 and for criticism of the early operation of the scheme, G. Dworkin, 'Compensation and payments for vaccine damage', (1979) *Journal of Social Welfare Law* 330. In 2007, the original sum of £10,000 was uprated by the Statutory Sum Order, SI 2007/193, to £120,000. Since 1997, £3.5 million has been paid to parents under the scheme.

[23] See for discussion P. Cane, 'Damages in public law' (1999) 9 *University of Otago Law Rev.* 489; D Cohen and J. Smith, 'Entitlement and the body politic: Rethinking negligence in public law' (1986) 64 *Can. Bar Rev.* 1; D Cohen, 'Tort law and the crown: Administrative compensation and the modern state' in Cooper-Stephenson and Gibson (eds.), *Tort Theory* (Captus University Publications, 1993).

[24] P. Hogg, 'Compensation for damage caused by government' (1995) 6 *National Journal of Constitutional Law* 7, 12.

[25] *Fairchild v Newhaven Funeral Services Ltd* [2002] UKHL 22 [9].

in the trespass cases on which Dicey relied and have never entirely been discarded. They are apparent again in the practice of awarding exemplary and punitive damages, endorsed by the House of Lords as an appropriate way to 'vindicate the strength of the law' in cases of oppressive, arbitrary or unconstitutional action by public servants.[26] The constitutional significance of this practice was underlined in *Kuddus v Chief Constable of Leicestershire*,[27] where Lord Nicholls said:

> The availability of exemplary damages has played a significant role in buttressing civil liberties, in claims for false imprisonment and wrongful arrest. From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna.

The Law Commission, though it hoped to do so, has not felt able entirely to dispose of this practice, recommending in a full-scale survey of the subject a change in terminology to mark the true function of exemplary damages as 'punitive'. According to its final recommendation, a judge should be able to award punitive damages in addition to any other appropriate remedy where the defendant's conduct shows 'a deliberate and outrageous disregard of the plaintiff's rights' and the judge considers other remedies inadequate to punish the defendant's outrageous conduct.[28]

Because they are actionable without proof of damage, the intentional torts convey a powerful deterrent message: officials act at their peril if they misconstrue their powers. In the same way as the ultra vires principle forces a public body to point to the source of its powers, so the trespass action places the onus on the executive to show 'lawful excuse or justification' for its actions. In *R v Governor of Brockhill Prison, ex p. Evans*,[29] the House of Lords construed the defence of 'lawful excuse' very narrowly. A prison governor had miscalculated the length of a prisoner's sentence in reliance on a judicial interpretation of the relevant statutory provisions later held to have been incorrect. It was argued that the governor had had no choice in the matter; he was bound to obey the

[26] *Rookes v Barnard* [1964] AC 1129 (Lord Devlin).

[27] *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] 2 WLR 1789 [63]. And see *Bottrill v A* [2003] 1 AC 449.

[28] Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com. No. 247 (1997). And see M Tilbury, 'Reconstructing damages' (2003) *Melbourne University Law Review* 27. The report has not yet been implemented.

[29] *R v Governor of Brockhill Prison, ex p. Evans (No 2)* [2001] 2 AC 19. The illegality of the detention had already been established in an application for habeas corpus granted by the Divisional Court in *Evans No. 1* [1997] QB 443.

law 'as expounded by the court not just once but several times'. The House of Lords accepted Lord Hope's stern view that it was no answer that the governor took reasonable care or acted in good faith when he made the calculation:

> [F]or the governor to escape liability for any extended period of detention on the basis that he was acting honestly or on reasonable grounds analogous to those which apply to arresting police officers would reduce the protection currently provided by the tort of false imprisonment. I can see no justification for limiting the application of the tort in this way. The authorities are at one in treating it as a tort of strict liability. That strikes the right balance between the liberty of the subject and the public interest in the detection and punishment of crime. The defence of justification must be based upon a rigorous application of the principle that the liberty of the subject can be interfered with only upon grounds which a court will uphold as lawful. The Solicitor-General was unable to demonstrate that the respondent's detention was authorised or permitted by law after the date which was held by the Divisional Court to be her release date. I would hold that she is entitled to damages.

In *ID v Home Office*[30] the claimants were Roma asylum seekers who had spent periods of several months' detention in immigration detention centres. They challenged their detention as 'unlawful, unreasonable and disproportionate'. The Court of Appeal refused to strike out the claims and Brooke LJ cited Dicey to support the view that there was 'on the face of it nothing in the slightest bit peculiar about an individual bringing a private law claim for damages against an executive official who has unlawfully infringed his private rights'. He defended the use of the ancient tort of trespass in circumstances governed largely by statute (here the Immigration Act 1971), regulation and rules, asserting that 'the policy arguments for denying a right to damages for unlawful detention pale by comparison with the policy arguments for admitting such a right, because of the enormous damage that is caused, on occasion, by unlawful detention in terms of suffering and damage to physical and mental health':

> I know that the Home Office is concerned with the practical implications of a decision of this kind. The evidence of the interveners showed, however, that when the Home Office determined to embark on the policy of using powers of administrative detention on a far larger scale than hitherto, the practical implementation of that policy threw up very understandable concerns in individual cases. The transition from a world where decisions affecting personal liberty are made by officials of the executive who operate according to unpublished criteria, and where there is no way of compensating those who lose their liberty through administrative muddles and misfiling, to a world where the relevant criteria have to be published and where those officials are obliged to ensure that their decisions are proportionate and to justify them accordingly, is bound to be an uneasy one in the early years, and mistakes are bound to be made. But so long as detention, which may cause significant suffering, can be directed by executive decision and an order of a court (or

[30] *ID v Home Office* [2005] EWCA Civ 38.

> court-like body) is not required, the language and the philosophy of human rights law, and the common law's emphatic reassertion in recent years of the importance of constitutional rights, drive inexorably, in my judgment, to the conclusion I have reached.[31]

On other occasions, judges have been less stalwart. In *Holgate-Mohammed v Duke*,[32] a ruling that seriously undermines the strict liability of false imprisonment, a police officer detained the claimant at a police station without charging her in the hope of inducing a confession. Considering whether the detention was unlawful, the House of Lords held that the test must be the public law *Wednesbury* standard. This allowed the burden to be discharged by showing that the behaviour was 'common police practice'. It is hard to explain why a prison governor observing the law as the court has ruled it to be is guilty of unlawful detention when a police officer can get away with detaining someone because it is common police practice. Much common police practice is dubiously lawful and it is the duty of our courts to say when this is so.

There is however reluctance to extend the boundaries of strict liability torts. In *Wainwright v Home Office*,[33] a mother and son visiting a relative detained in prison under suspicion of being a drug dealer were subjected to a strip-search. They argued that this was assault and battery even if the prison officers honestly believed the rules authorised a strip search and had neither intended to cause distress nor realised they were acting unlawfully in terms of Rule 86(1) of the Prison Rules 1964. In the case of the son the House of Lords ruled that there could be liability; the search had involved touching his genitals, an improper physical contact of a kind not 'generally acceptable in the ordinary conduct of daily life'. In the mother's case, however, there had been no touching, hence technically no trespass. Unconvinced that strip-searching exceeded what was 'necessary and proportionate' to deal with the serious drug smuggling problem in prisons, the Law Lords, sweeping aside earlier precedents, refused to extend the boundaries of tort law to encompass strip-searching.

The case of *Watkins v Home Office*[34] was remarkable for Lord Bingham's attack on the historic case of *Ashby v White*. In *Watkins*, where prison officers in the course of a cell search had deliberately opened a prisoner's correspondence in violation of Rule 39 of the Prison Rules 1999, which protects the confidentiality of a prisoner's legal correspondence, no physical damage or financial loss had been suffered. The House of Lords refused to extend the scope of the specialised public law tort of misfeasance in public office to cover violations of constitutional or human rights on the ground that the claimant had suffered

[31] *Ibid*. [129].

[32] *Holgate-Mohammed v Duke* [1984] AC 437. See also *Paul v Chief Constable of Humberside* [2004] EWCA Civ 308.

[33] *Wainwright v Home Office* [2003] 3 WLR 1137.

[34] *Watkins v Home Office* [2006] UKHL 16 [24–6]. Cases cited by Lord Bingham include *R v Home Secretary, ex p. Leech* [1994] QB 198; *R v Home Secretary, ex p. Simms* [2000] 2 AC 115; *R(Daly) v Home Secretary* [2001] 2 AC 532. The human rights dimension of these cases is discussed at p. 118–19 above.

no damage, an element of the tort as recently defined by the House of Lords in *Three Rivers*,[35] where it was said:

- the defendant must be a public official
- the act complained of must be an exercise of public power
- the claimant must have suffered damage
- the official must have acted intentionally, maliciously *or recklessly*.

According to Lord Bingham in *Watkins*, the authorities were clear and remarkably consistent:

> The proving of special damage has either been expressly recognised as an essential ingredient, or it has been assumed. None of these cases (and no authority, judicial or academic, cited to the House) lends support to the proposition that the tort of misfeasance in public office is actionable per se. *Ashby v White,* as I have suggested, is not reliable authority for that proposition. I would be very reluctant to disturb a rule which has been understood to represent the law for over 300 years, and which has been adopted elsewhere, unless there were compelling grounds for doing so.
>
> The feature on which the Court of Appeal fastened was the breach in this case of the respondent's constitutional right to protection of the confidentiality of his legal correspondence. That was seen as providing an analogy with the breach of the plaintiff's constitutional right to vote in *Ashby v White.* The respondent relied on the authority of the Court of Appeal (per Steyn LJ) that the right of access to a court, closely linked with the right to obtain confidential legal advice, is a constitutional right. In a number of cases rights of this kind have been described as 'constitutional', 'basic' or 'fundamental' . . . In all these cases the importance of the right was directly relevant to the lawfulness of what had been done to interfere with its enjoyment.
>
> In the present context the unlawfulness of what was done to interfere with the respondent's enjoyment of his right to confidential legal correspondence is clear. I see scant warrant for importing this jurisprudence into the definition of the tort of misfeasance in public office. We would now, of course, regard the right to vote as basic, fundamental or constitutional. None of these expressions was used by Holt CJ in *Ashby v White*, and scarcely could have been given the very small number of adult citizens by whom the right was enjoyed at the time. There is thus an element of anachronism in relying on *Ashby v White* (itself a highly politicised decision) to support a proposition it would scarcely (despite the right to vote being 'a thing of the highest importance, and so great a privilege') have been thought to support at the time. It is, I think, entirely novel to treat the character of the right invaded as determinative, in the present context, of whether material damage need be proved.

Linden once famously described tort law as an 'ombudsman', capable of unlocking the filing cabinets of bureaucrats, bringing their wrongdoing into the open, and making them pay for their misdoings.[36] The civil law is often

[35] *Three Rivers District Council v Bank of England* [2000] 2 WLR 1220.

[36] A. Linden, 'Tort law as ombudsman' (1973) 51 *Can. Bar Rev.* 155 and 'Reconsidering tort law as ombudsman' in F. M. Steel and S. Rodgers-Magnet (eds.), *Issues in Tort Law* (Carswell, 1983).

the last resort of citizens wishing to bring to the attention of the public a serious grievance or wrongdoing, its great advantage being that the levers of the civil action are operated by the individual and not, as with inquests or criminal prosecutions, by public officials. In failing to recognise tort law's deterrent function, the courts may be overlooking its 'ombudsman function'.[37]

3. Duties, powers and omissions

Negligence is, however, the general principle of civil liability and the main vehicle for legal compensation. For central government in particular one case stands as a landmark in the law of liability. In the *Dorset Yacht* case,[38] the House of Lords held that the Home Office could owe a duty of care in respect of damage done when young prisoners camping in open-prison conditions on an island in Poole harbour 'borrowed' a yacht in an attempt to escape. A warning light flashed for public authorities when all but one of the Law Lords (Viscount Dilhorne) rejected the argument that, in the absence of any precedents for liability, no liability could exist. Shortly afterwards, the 'novelty' argument was disposed of in *Anns v Merton LBC*.[39] Here the House of Lords introduced a policy test whereby a court, in assessing whether to impose a duty of care, should ask itself whether any substantial policy reason existed against so doing. This cleared the way to 'novel actions' against public authorities.

The *Dorset Yacht* ruling had a further impact, making it possible to push liability back from the actual wrongdoer (the escaping prisoners) or employees for whom a public authority is vicariously liable (the prison officers) to the public authority as itself in breach of duty. The public authority is a 'peripheral party', by which is meant that a chain of causation may be constructed, allowing liability to be traced back to the actor at the end of a potential liability chain.[40] Take the case of someone who becomes seriously ill with hepatitis after consuming oysters, given to him by a relative (uninsured), bought from a small commercial supplier (limited insurance). He chooses instead to sue peripheral parties: the local authority that owns the lake where the oysters grew, the food-safety authority with powers to regulate the industry and the environmental agency with responsibility for pollution.[41] Unsuccessful treatment in a hospital would add further possibilities! The trend to extend the chain of causation is undoubtedly accentuated by the rule that defendants in a tort action are 'jointly

[37] See C. Harlow, 'A punitive role for tort law?' in Pearson, Harlow and Taggart (eds.), *Law in a Changing State* (Hart Publishing, 2008).

[38] *Home Office v Dorset Yacht Co. Ltd.* [1970] 2 WLR 1140.

[39] *Anns v Merton LBC* [1978] AC 728. This so-called 'two-stage test' was subsequently modified in *Caparo Industries plc v Dickman* [1990] 1 All ER 568, the so-called 'three stage test'.

[40] See J. Stapleton, 'Duty of care: Peripheral parties and alternative opportunities for deterrence' (1995) 111 *LQR* 301.

[41] The facts of *Graham Barclay Oysters Pty ltd v Ryan; Ryan v Great Lakes Council; State of New South Wales v Ryan* [2002] HCA 54.

and severally' liable so that courts do not normally apportion the amount of damage that any defendant should incur.[42]

The rise of negligence as the standard vehicle for compensating victims of accidents had, through the 1970s and '80s, stimulated a 'victim oriented' tort law, by which is meant that courts, especially lower courts, had shown a greater willingness to open up tort law by imposing liability on defendants such as public authorities with 'deep pockets', or which the court assumed to be insured.[43] And as the state came to participate in more activities (education, public housing or social services) and undertook more regulatory functions, public authorities seemed more often to fit the role of guarantor. Just as the Parliamentary Ombudsman was invoked to push the government to make up for lost occupational pensions (see Chapter 12), so damages were sought from bodies exercising regulatory functions. In the *Three Rivers* case, litigants tried an action for misfeasance in public office against the Bank of England for its failure to oversee and prevent the collapse of the BCCI.[44] Again, in *Watson*,[45] liability was imposed on the British Boxing Board of Control (a non-statutory regulator) in respect of inadequate guidance issued to promoters. In *Trent Strategic Health Authority v Jain*,[46] however, the respondents were proprietors of care homes licensed under the Registered Homes Act 1984, whose licenses were withdrawn when the authority suddenly laid a complaint about them. Four months later, the respondents were wholly vindicated in proceedings before the magistrates, who had no compensation powers. As their business had suffered irremediably, the proprietors sought damages for negligence in the exercise of statutory powers and for procedural defects in the conduct of the legal proceedings. Unanimously the House of Lords ruled against them, confirming both that action taken by a public authority under statutory powers designed for the benefit or protection of a particular class of persons (residents) cannot give rise to a tortious duty of care to third parties (the proprietors) and that damage caused through preparation or conduct of court or tribunal proceedings cannot be redressed by means of an action in damages.

Statutory duties are, in principle, mandatory; in other words, they leave the public authority without any power of choice. It might therefore be supposed that omissions to carry out a statutory duty would automatically give rise to a

[42] See J. Stapleton, 'Lords a'leaping evidentiary gaps' (2002) 10 *Torts Law Journal* 376 discussing asbestosis litigation in *Glenhaven Funeral Services* [2002] UKHL 22. Law Com. 187 contains the first serious proposals to tackle this problem: see [4.64–71].

[43] See G. Schwartz, 'The Beginning and the Possible End of the Rise of Modern American Tort Law' 26 *Georgia Law Rev.* 601 (1992); Hon. JJ Spigelman 'Negligence: the Last Outpost of the Welfare State' (2005) available online.

[44] *Three Rivers District Council v Bank of England* [2001] UKHL 6. The choice of misfeasance was dictated by the need to circumvent a 'bad faith only' immunity conferred by section 1(4) of the Banking Act 1987, which restricted liability to cases of bad faith.

[45] *Watson v British Boxing Board of Control* [2001] 2 WLR 1256.

[46] [2009] UKHL 4 [28] [35] (Lord Scott).

right to damages for loss suffered. In practice, however, the courts have shown themselves unwilling to adopt such a stringent approach and the action for breach of statutory duty is a weak one. As the Law Commission complains, the courts have failed to enunciate clear principles and apply them consistently. Their method is to 'look to the construction of the statute, relying upon a number of "presumptions" for guidance, but in practice there are so many conflicting presumptions, with variable weightings, that it can be extremely difficult to predict how the courts will respond to a particular statute'.[47] A statutory power, on the other hand, contains discretion, defined in Chapter 5 as a power of choice; the authority can choose whether to act or not to act; it can also choose how to act. The apparent dichotomy between powers and duties has given rise in tort law to the fallacious argument that bolting a common law duty of care onto a statutory power deprives the public body of its power of choice and transmutes the power into a duty.[48]

If a public body decides not to take action or otherwise fails to act, the presumption against liability is strengthened by the entrenched common law distinction between acts and omissions, where courts are traditionally wary of imposing liability. When, in the seminal case of *Donoghue v Stevenson*,[49] Lord Atkin enunciated his famous neighbour principle that was to form the basis of liability for negligence, he did not confine the circumstances in which a duty of care could exist to positive actions; in fact he said: 'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'. Despite this robust affirmation of liability for omissions, the unwillingness of the common law to impose liability for omissions to act remained. The prejudice was reinforced by an old common law exemption from liability for highway authorities (now repealed) for failure to maintain the highway (nonfeasance). In *East Suffolk Catchment Board v Kent*,[50] where the Board had undertaken to drain the claimant's flooded land but failed to do so, Lord Atkin carefully distinguished the two different categories of duty: statutory duties and the common law duty of care. Despite his vigorous protests, however, the House of Lords declined to find the Board liable, arguing that imposing a duty of care would effectively transform a statutory power into a statutory duty.

Similar confusion is visible in *Stovin v Wise*,[51] where S had been injured in a collision with a driver who negligently turned out of a blind junction. The highway authority had failed to remove a bank that obscured visibility at the junction, previously identified as an accident black spot. It had earlier contacted British Rail, the landowner, for permission to carry out modifications

[47] Law Com. 18 [4.73–4] citing *Clerk and Lindsell on Torts*, 19th edn (2006) [9.02].
[48] On the line between omission and affirmative right see s. 5(a).
[49] *Donoghue v Stevenson* [1932] AC 562. Lord Atkin's position was affirmed in *Anns v Merton LBC* [1978] AC 728.
[50] *East Suffolk Catchment Board v Kent* [1941] AC 74.
[51] *Stovin v Wise* [1996] AC 923, 951 (Lord Hoffman for the majority).

but failed to notice that no reply had been received and to follow the matter up. Essentially, Lord Hoffmann based his refusal to impose liability on the distinction between the two forms of duty:

> One must have regard to the purpose of the distinction as it is used in the law of negligence, which is to distinguish between regulating the way in which an activity may be conducted and imposing a duty to act upon a person who is not carrying on any relevant activity.

He deduced that 'arguments peculiar to public bodies' could and should *negative* the existence of a duty of care, discarding as 'simply unworkable' a more modern distinction made between the 'policy' area of decision-making, to be protected from liability, and the 'operational' acts by which policies and decisions are executed for which liability can accrue.[52] Lord Nicholls on the other hand concluded that the public law elements and 'typical statutory framework' of the decision helped to *create* a duty of care and a 'proximity which would not otherwise exist'.[53] The highway authority had 'failed to fulfil its public law obligations just as much as if it were in breach of a statutory duty'.

In *Gorringe v Calderdale MBC*,[54] the House returned to the problem. A mother had driven over the crest of a hill into an oncoming bus, killing her daughter and two young friends. An action was brought against the highway authority for failing to erect a sign warning of the deep dip in the road. Lord Hoffmann simply said that he found 'it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide'. Lord Scott on the other hand returned to the conceptual landmine of statutory duty, reasoning opaquely that:

> if a statutory duty does not give rise to a private right to sue for breach, the duty cannot create a duty of care that would not have been owed at common law if the statute were not there. If the policy of the statute is not consistent with the creation of a statutory liability to pay compensation for damage caused by a breach of the statutory duty, the same policy would, in my opinion, exclude the use of the statutory duty in order to create a common law duty of care that would be broken by a failure to perform the statutory duty.[55]

Public finance does not figure largely in the speeches in these two cases, which focus on the distinction between acts and omissions, statutory and common law duties and the difference between public and private law. Yet the idea of transferring liability from the field of compulsory road-traffic insurance to

[52] See *Anns v Merton London Borough Council* [1978] AC 728.

[53] [1996] AC 938, Lord Nicholls dissenting.

[54] *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 WLR 1057. There was no possibility of recovery from the bus driver, who was in no way negligent, though an action by the passengers against the negligent driver could succeed. The issues are re-examined in *Mitchell v Glasgow City Council* [2009] UKHL 11.

[55] [2004] UKHL [71].

public funds clearly troubled the House of Lords. In *O'Rourke v Camden LBC*, Lord Hoffmann raised the funding issue more clearly. The claimant had been placed in temporary accommodation pending a final decision on his entitlement to public housing. He was later evicted and claimed compensation for 'sleeping rough'. Lord Hoffmann explained that:

> Public money is spent on housing the homeless not merely for the private benefit of people who find themselves homeless but on grounds of general public interest: because, for example, proper housing means that people will be less likely to suffer illness, turn to crime or require the attention of other social services. The expenditure interacts with expenditure on other public services such as education, the National Health Service and even the police. It is not simply a private matter between the claimant and the housing authority. Accordingly, the fact that Parliament has provided for the expenditure of public money on benefits in kind such as housing the homeless does not necessarily mean that it intended cash payments to be made by way of damages to persons who, in breach of the housing authority's statutory duty, have unfortunately not received the benefits which they should have done.[56]

In an attempt to resolve some of these hard cases, the Law Commission in its 2008 consultation paper suggests radical reform. It asks for special protection for all 'truly public' activities, defining this term to cover any act or omission where:

- The body exercised or failed to exercise, a special statutory power or
- The body breached a special statutory duty; or
- the body exercised or failed to exercise, a prerogative power.

A 'special statutory power' was defined as a power that allows the public body to act in a way not open to private individuals and 'special statutory duty' as a statutory duty placed on the public body that is specific to it and is not placed on private individuals.[57]

4. Defensive administration, 'decision traps' and immunity

Resource allocation is undoubtedly an important dimension of state liability. The decision requiring a retirement home to be kept open (*ex p. Coughlan*, see p. 227 above) may require a wider change of policy, the input of substantial new resources and may even result in worsening the conditions of elderly people in other homes. Tort actions may have similar consequences. Since tortious liability is a blunt instrument, it may, as the House of Lords indicated in the *Marcic* case (see p. 315 above) have the effect of distorting a more appropriate statutory scheme or administrative procedures. Liability may have unforeseen

[56] *O'Rourke v Camden LBC* [1997] 3 WLR 86, 94.
[57] Law Com. 187 [4.131]. And see [4.110–32] and the list of questions at pp. 132–3.

consequences: liability for a playground accident may result, for example, in local authority playgrounds being closed. The impact of imposing a duty of care on a hard-pressed public service may be very similar to that of a judicial review decision that certain drugs are to be made generally available on the NHS, which as we saw with Herceptin in Chapter 3 could cost the NHS millions of pounds annually and result in less treatment for other, less seriously ill, patients. In addition, many tort actions conceal potential claims from groups of people in similar situations. Treasury guidance advises departments in such circumstances:

> to consider whether they should offer compensation . . . in discovered cases of official failure where there has been no complaint. Where, following a particular complaint or the discovery of a particular case, departments discover that other individuals or bodies have suffered in the same way, they should consider whether, in the interests of equity, they should offer compensation to others.[58]

All this leads Cohen to argue for a 'no liability' rule on the ground that government and private employers alike undercut any deterrent effects of liability by failing to enforce liability against employees;[59] indeed, given the trend of modern tort law to vicarious and institutional liability,[60] it would be virtually impossible to do so. Even Schuck, who favours the deterrent use of tort law, has to admit that its deterrent function may be marginal since 'most tort law standards are radically indeterminate; they define legal duties in terms of reasonableness, foreseeability and other similarly ambiguous concepts. Few brightline rules exist; even when they are available, the courts often reject them.' Schuck has also to concede that little is known about impact; 'which remedies deter particular behaviour . . . is ultimately an empirical question, but one that is so elusive that the inquiry must be informed largely by theoretical speculation'.[61] And the deterrence argument should not inhibit us from asking whether some decisions are of such a delicate nature that they should be protected from tortious liability altogether. A common argument against extensions of the liability of public authorities concerns the possible distortion of the decision-making process by introducing into already complex decisions the threat of tortious liability. Arguably, this leads to defensive administration creating 'decision traps' that, by submitting decision-makers to competing pressures, produce a serious freezing effect on administrative action.[62]

[58] Treasury, 'Dear Accounting Officer' (DAO (GEN) 15/92), available online.

[59] D. Cohen, 'Regulating Regulators: The Legal Environment of the State' (1990) 40 *University of Toronto Law Journal* 213, 258.

[60] See *Lister and others v Hesley Hall Ltd* [2001] UKHL 22 (vicarious liability of employers for warden's abuse of pupils in a children's home); *Kuddus v CC of Leicestershire Constabulary* [2001] UKHL 29 (vicarious liability of police authority for misfeasance in public office).

[61] P. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, 1983), pp. 16 and 484.

[62] Further discussed in C. Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004), pp. 24–30.

(a) Social work and liability

The case of *X (Minors) v Bedfordshire*[63] was a test case designed to dispose once and for all of the confusion obscuring negligence actions founded on statutory powers and duties. In two sets of joined cases, the liability in negligence of local education authorities for systemic failures to diagnose and deal with the special educational needs of children and of social workers deciding care cases under the Children Acts was tested. The unanimous opinion of the House was voiced by Lord Browne-Wilkinson, who concluded that liability was possible in the educational cases since the duty of care was well established and did not derive from statute. There was no overriding reason why someone employed by a local education authority to carry out professional services should not in principle owe a duty of care to particular pupils; medical personnel are, after all, liable for their negligence and this liability should therefore extend to psychiatrists whether they work in the private sector or for a public education authority. In the social-work cases, where no private law analogy existed, the House found against the possibility of liability:

> *Lord Browne-Wilkinson:* First, in my judgment a common law duty of care would cut across the whole statutory system set up for the protection of children at risk. As a result of the ministerial directions contained in 'Working Together' the protection of such children is not the exclusive territory of the local authority's social services. The system is inter-disciplinary, involving the participation of the police, educational bodies, doctors and others. At all stages the system involves joint discussions, joint recommendations and joint decisions. The key organisation is the Child Protection Conference, a multi-disciplinary body which decides whether to place the child on the Child Protection Register. This procedure by way of joint action takes place, not merely because it is good practice, but because it is required by guidance having statutory force binding on the local authority. The guidance is extremely detailed and extensive: the current edition of 'Working Together' runs to 126 pages. To introduce into such a system a common law duty of care enforceable against only one of the participant bodies would be manifestly unfair. To impose such liability on all the participant bodies would lead to almost impossible problems of disentangling as between the respective bodies the liability, both primary and by way of contribution, of each for reaching a decision found to be negligent.
>
> Secondly, the task of the local authority and its servants in dealing with children at risk is extraordinarily delicate. Legislation requires the local authority to have regard not only to the physical wellbeing of the child but also to the advantages of not disrupting the child's family environment: see, for example, section 17 of the Act of 1989. In one of the child abuse cases, the local authority is blamed for removing the child precipitately; in the other, for failing to remove the children from their mother. As the Report of the Inquiry into Child Abuse in Cleveland 1987 (Cm. 412) said, at p. 244:

[63] *X (Minors) v Bedfordshire County Council; M v Newham London Borough Council* [1995] 2 AC 633. The cases proceeded on a preliminary point and never came to trial.

> 'It is a delicate and difficult line to tread between taking action too soon and not taking it soon enough. Social services whilst putting the needs of the child first must respect the rights of the parents; they also must work if possible with the parents for the benefit of the children. These parents themselves are often in need of help. Inevitably a degree of conflict develops between those objectives.'
>
> Next, if a 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. For example, as the Cleveland Report makes clear, on occasions the speedy decision to remove the child is sometimes vital. If the authority is to be made liable in damages for a negligent decision to remove a child (such negligence lying in the failure properly first to investigate the allegations) there would be a substantial temptation to postpone making such a decision until further inquiries have been made in the hope of getting more concrete facts. Not only would the child in fact being abused be prejudiced by such delay; the increased workload inherent in making such investigations would reduce the time available to deal with other cases and other children.

There is much good sense here. But the floodgates once prised open, further cases naturally followed in which the courts began to look more sceptically at the 'defensive-administration' or 'decision-trap' argument. A cluster of child abuse actions reached the courts, some brought by children taken into care, some by parents wrongly accused of child abuse, whose interests could conceivably conflict.[64] In parallel, the ECtHR had intervened, ruling that the decision in *X v Bedfordshire* violated ECHR Art. 13 since no effective remedy had been available for a grave violation of ECHR Art. 3.[65] The ECtHR did not go so far as to say that *only* a judicial remedy was adequate to furnish effective redress but it certainly hinted as much; the judgment points to the advantages of *judicial* proceedings in affording 'strong guarantees of independence, access for the victim and family and enforceability of awards'.[66] Moreover, the Court laid great emphasis on the importance of monetary compensation as a remedy for violation of individual rights, at least where the right violated was as fundamental as the right to life or the prohibition against torture, inhuman and degrading treatment here in issue. And the damages it awarded in 'just satisfaction' under ECHR Art. 41 were far from negligible: in respect of what was described as 'very serious abuse and neglect over a period of more than four years', the three applicants gained a total of £112,000 for pecuniary damage, with £32,000 per child for non-pecuniary damage, much more than they had been awarded under the criminal injuries compensation scheme (see p. XXX below). It should also be noted, in view of what has been said earlier, that in this case the primary

[64] Notably *Phelps v Hillingdon BC* [2000] 3 WLR 766 and *Barrett v Enfield London Borough Council* [2001] 2 AC 550, where Lords Slynn, Nolan and Steyn dismissed the argument. And see S. Bailey and M. Bowman, 'Public authority negligence revisited' (2000) 59 *CLJ* 85.

[65] *Z v United Kingdom* (2001) 34 EHRR 97, noted by Gearty, 'Oman unravels' (2002) 65 *MLR* 87.

[66] *Z v United Kingdom* [109].

wrongdoers were the parents neither the state nor its officials were actively guilty of abuse, though they were hardly peripheral parties. The state was, in short, being held responsible for a regulatory function and for failure by a public service to react to an allegedly grave and distressing situation – a major extension of liability from misfeasance to nonfeasance.

By the time that the *East Berkshire* case[67] reached the House of Lords, the context had changed again through the introduction of the HRA, making the jurisprudence of the ECtHR a matter to be taken directly into consideration (see below). The question it posed was whether the *parent* of a minor child falsely accused of child abuse could recover common law damages for psychiatric injury in negligence. By a four to one majority, the House of Lords upheld the Court of Appeal's decision that the duty of care was restricted to the children, whose welfare was paramount; for parents, a finding of bad faith might be necessary for liability. The speeches in the House of Lords contain considerable analysis of the process of decision-making in child-care cases, the difficulties of which we explored in the context of child abuse inquiries (see Chapter 13 above). The dangers of skewing the decision-making process were once more emphasised, this time by Lord Nicholls:

> the seriousness of child abuse as a social problem demands that health professionals, acting in good faith in what they believe are the best interests of the child, should not be subject to potentially conflicting duties when deciding whether a child may have been abused, or when deciding whether their doubts should be communicated to others, or when deciding what further investigatory or protective steps should be taken. The duty they owe to the child in making these decisions should not be clouded by imposing a conflicting duty in favour of parents or others suspected of having abused the child.[68]

Lord Bingham, however, was dismissive of this line of reasoning.[69] 'To describe awareness of a legal duty as having an "insidious effect" on the mind of a potential defendant is to undermine the foundation of the law of professional negligence.' Equally, it was out of line with the relevant ministerial guidance, which stressed the need to co-operate closely with parents. He was equally dismissive of the dangers of creating conflicts of interest: 'it was hard to see how imposition of a duty of care towards parents could encourage healthcare professionals either to overlook signs of abuse which they should recognise or to draw inferences of abuse which the evidence did not justify'. On the contrary, tort law 'could help to instil a due sense of professional responsibility, and I see no reason for distinguishing between the child and the parent'. He preferred (on this occasion) to see tort law as evolutionary; it should 'evolve, analogically

[67] *JD and Others v East Berkshire Community Health Trust and Others* [2003] EWCA Civ 1151 (CA); [2005] UKHL 23 (HL). See also *W v Essex County Council* [2001] 2 AC 592.

[68] [2005] UKHL [86].

[69] [2005] UKHL [42] [50]. And see Department for Children, Schools and Families, *Working Together to Safeguard Children* (1999) now (2006), available online.

and incrementally, so as to fashion appropriate remedies to contemporary problems'. He would therefore have preferred to allow the appeals, sending the cases back for trial.

In an age of accountability and human rights this is unlikely to mark the end of the story.[70] Consider the case of Angela Cannings, convicted of murdering her child on flawed medical evidence and sentenced to life. Had Mrs Cannings served her sentence, compensation for wrongful conviction under s. 133 of the Criminal Justice Act 1988 would have been available but the fact that her appeal against conviction succeeded excluded her from the statutory compensation scheme.[71] Can it really be 'fair, just and reasonable' to insist that no duty of care is owed in such circumstances? Would the ECtHR accept that compensation under Art. 5 was not due or that a mother injured in this way was not entitled to 'just satisfaction'?

(b) Policing and the duty of care

There is no immunity from liability for the police force, which is strictly answerable, as we have seen, for the legality of its actions. The imposition of a duty of care in the course of a criminal investigation is, however, another matter. In *Hill v Chief Constable of West Yorkshire*,[72] it was argued that the claimant's daughter would not have been murdered by the 'Yorkshire Ripper' had it not been for the negligence of the police. The House of Lords held that there was insufficient proximity for a duty of care to be owed to the mother, commenting on the inappropriate nature of the tort action for the investigation of such decisions. Lord Keith referred to the waste of police time and trouble and the expense of such proceedings. 'The result would be a significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened . . . not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted.' With a hint of exaggeration, Lord Templeman thought that the way would be opened for every citizen:

> to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties.

[70] See *Lawrence v Pembrokeshire County Council* [2007] EWCA Civ 446 (liability for placing persons on risk register).

[71] The *Independent*, 12 Jan. 2005 and 20 Apr. 2006; *R v Cannings* [2004] EWCA Crim 1. A cluster of these cases led to an inquiry by the Attorney-General and subsequently to proceedings against the doctor by the General Medical Council.

[72] *Hill v Chief Constable of West Yorkshire* [1989] AC 42.

The decision was to rebound on the House of Lords in the unfortunate *Osman* case, where failure by the police to protect a pupil from the attentions of a psychiatrically disturbed teacher led to a death by shooting. This action was struck out by the domestic courts on the ground that the police owed no duty of care, causing the victims to turn to Strasbourg for redress.[73] The ECtHR treated the case as a violation of the Art. 6(1) right of access to the court ruling that, by treating the public-policy immunity as absolute, the domestic courts had ruled out adequate consideration of other public-interest considerations. It then applied Art. 41 to award 'on an equitable basis' a sum of £10,000 to each of the applicants, essentially for loss of a chance fully to present their case.[74]

Undeterred by this warning, the House of Lords went on to apply the *Hill* principle in *Brooks v Metropolitan Police Commissioner*.[75] The claimant, Duwayne Brooks, was a friend of Stephen Lawrence, and a participant in the subsequent inquiry, conducted by Sir William Macpherson,[76] which described the police as 'institutionally racist'. It also found that the investigation had been badly conducted and that the respondent had not been treated appropriately. Yet in a subsequent action for damages for psychiatric injury, the House of Lords nonetheless found that the police force owed no duty of care to accord the claimant reasonably appropriate protection, support, assistance and treatment.

The issue of possible duties of care owed by the police in the course of investigating crime was reopened in *van Colle and Smith*,[77] providing an opportunity for the House of Lords to reconcile two apparently conflicting lines of cases. On the one hand, it confirmed the jurisprudence of the ECtHR in *Osman* to the effect that failure to take measures within the scope of its powers to protect an individual from 'a real and immediate risk to life' would amount to a violation of ECHR Art. 2 (right to life) by a public body. On the other, it affirmed the *Hill* principle that no duty of care was owed; any such duty would cause 'defensive policing' and divert police resources away from combating crime in order to deal with civil litigation. Applying these principles to the fact situations of (i) a vulnerable witness in a criminal case who had been murdered by the suspect and (ii) a young man injured in a series of attacks by his partner after threats of violence had been reported to the police, only Lord Bingham was prepared to consider liability in (ii) on the basis of the Strasbourg principle of 'imminent risk'.

[73] See L. Hoyano, 'Policing flawed police investigations: Unravelling the blanket' (1999) 62 *MLR* 912. And see *Osman v Ferguson* [1993] 4 All ER 344.

[74] *Osman v United Kingdom* (1998) 29 EHRR 245 noted by Gearty 'Unravelling Osman' (2001) 64 *MLR* 159 in a note on *Z v UK* (above), which can be read as a retraction by the ECtHR of *Osman*.

[75] *Brooks v Commissioner of Police for the Metropolis* [2005] UKHL 24.

[76] *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny*, Cm. 4262-I (1999).

[77] *van Colle v Chief Constable of Hertfordshire; Smith v Chief Constable of Sussex* [2007] EWCA Civ 325 (CA); [2008] UKHL 50 (HL). And see And see *Mitchell v Glasgow City Council* [2009] UKHL 11 [28–9] (Lord Hope).

What are we to make of this tangled and confusing case law, which imposes a duty of care on the education services and, on a more limited basis, on social workers but not on the police? Are we to conclude that the investigation of crime is more difficult or a matter of greater public interest than decisions to take or not to take a child into care? And what of the tangled jurisprudence of the ECtHR, which in case of apparent violations of ECHR Art. 2 requires both a public inquiry and compensation, and is extending this principle to other cases of human rights violation? There is a danger here of producing a set of parallel, overlapping remedies – some, such as criminal injuries compensation, capable of providing 'just satisfaction, others, such as public inquiries, not.

5. The shadow of Europe

(a) Human rights and 'just satisfaction'

One possible explanation for the negative approach of the Law Lords in these perplexing cases, many of which raise the use of tort law for purposes other than recovery of compensation, is the advent of the Human Rights Act (HRA). The HRA does not preclude the award of damages for violation of a human right but it does make recovery difficult. Section 8(2) restricts the courts able to award damages to those competent 'to award damages, or to order the payment of compensation, in civil proceedings'. Section 8(3) provides that no award of damages is to be made unless, taking account of all the circumstances of the case including alternative remedies, 'the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made'. Section 8(4) obliges the court to 'take into account the principles applied by the [ECtHR] in relation to the award of compensation under Article 41 of the Convention'.

Strasbourg principles are hard to interpret and Strasbourg awards are relatively ungenerous.[78] This is an open invitation to practitioners to try to bring human rights claims within the compass of domestic tort law. In *Wainwright*, W suffered shame, outrage and a loss of dignity, values discounted by Lord Hoffmann as comparable to the 'lack of consideration and appalling manners' used in institutions and workplaces all over the country, where 'people constantly do and say things with the intention of causing distress and humiliation to others'. Yet the ECtHR subsequently found that the manner in which these searches were carried out was disproportionate to the legitimate objective of fighting the drugs problem in the prison and amounted to a violation of ECHR Art. 8. It also found that the absence of any cause of action in tort, more especially for invasion of privacy, amounted to a breach of Art. 13. Compensation of €6,000 for non-pecuniary damage plus costs was awarded

[78] R. Clayton, 'Damage limitation: The courts and Human Rights Act damages' [2005] *PL* 429, 431.

in 'just satisfaction'.[79] In *Watkins*, the Art. 6(1) right of access to the court and perhaps a right of privacy (ECHR Art. 8) had been violated, so by refusing to extend the tort of misfeasance beyond material damage to cover rights violations, the courts laid themselves open to a finding, under ECHR Art. 13, that no remedy had been provided. In *Z v UK* (see p. 766 above) and *Osman*, this finding materialised.

If the scheme of the HRA is ambiguous, then so is the ECtHR's jurisprudence on 'just satisfaction'. Occasionally, as in Art. 5(5), compensation is prescribed. Sometimes, as with the Art. 2 cases discussed below, jurisprudence makes it virtually axiomatic. Exceptionally, as in *Z v UK* sums awarded in just satisfaction may be very considerable even in cases where the state is not the immediate wrongdoer. The sum awarded in *Watkins* is, however, more typical of the generally insubstantial awards.

Our courts have made three main attempts to deal with the problem of damages in human rights cases. In the first, the claimant, severely disabled and with a large family, had asked the council for housing appropriate to her condition. The council properly took responsibility but through 'operational negligence' left the claimant and her family to suffer conditions of squalor while nearly two years of litigation, delay, failure to carry out statutory duties, and distressing administrative incompetence elapsed.[80] Finally, the claimant's solicitors lost patience and asked for damages under the HRA, claiming in addition to the obvious breach of the right to private and family life (ECHR Art. 8) that the conditions suffered had been degrading (Art. 3).[81] In view of the long period spent by the family in 'deplorable conditions, wholly inimical to any normal family life' and taking into consideration also the absence of explanation or apology, merely to rehouse the family seemed unsatisfactory; Sullivan J insisted on an award of damages. Imaginatively, he fed back into the case law the guidance and practice of the Local Government Ombudsman (below), awarding £10,000 – aptly in the circumstances termed a 'botheration payment'.

In *Anufrijeva*,[82] the second attempt, three claims for damages under ECHR Art. 8 (right to private and family life) were blocked up, respectively based on delay and general maladministration in the handling of asylum applications and on failure to supply accommodation adequate for the infirm and elderly relative of an asylum seeker. In a single judgment delivered for the court by

[79] *Wainwright v United Kingdom*, App. No. 12350/04 (Judgment of 26 Sep. 2006). And see above p. 758. For privacy see J. Morgan, 'Privacy torts: Out with the old, out with the new' (2004) 120 *LQR* 395; *Mosley v News Group Newspapers Ltd* [2008] EWHC 687.

[80] *R (Bernard) v Enfield LBC* [2002] EWHC 2282. The case had been preceded by an unsuccessful application for judicial review of the Council's decision that the applicants had rendered themselves 'intentionally homeless': see *Bernard v Enfield LBC* [2001] EWCA Civ 2717.

[81] The Art. 3 claim was dismissed, as the judge ruled that the 'minimum threshold of severity' had not been crossed: see [26–31]. The case therefore proceeded as a violation of Art. 8.

[82] *Anufrijeva v Southwark LBC* [2003] EWCA Civ 406 (Lord Woolf LCJ, Lord Phillips MR and Auld LJ).

Lord Woolf CJ, a strong Court of Appeal disallowed the claims, ruling that save in exceptional circumstances, ECHR Art. 8 creates no general obligation to provide financial assistance. Its positive obligations stop short at requiring (i) that an appropriate statutory or administrative scheme is in place to ensure that private and family life is protected and (ii) that the scheme is operated with sufficient competence for it to achieve its aim. Thus while error of judgement, inefficiency, or maladministration occurring in the purported performance of a statutory duty could amount in principle to a breach of Art. 8, it would be rare in practice for maladministration to be regarded as a violation. There must, in Lord Woolf's view, be 'an element of culpability. At the very least, there must be knowledge that the claimant's private and family life were at risk.'[83]

The Court of Appeal also chose to highlight 'the different role played by damages in human rights litigation to the award of damages in a private law contract or tort action'. A tentative bright line was drawn between 'liability', resulting in an automatic entitlement to damages, and 'compensation' under the HRA, which was *discretionary*. In considering whether it was just and appropriate to award compensation, courts were therefore entitled to consider not only the circumstances of the individual victim but also what would serve the interests of the 'wider public who have an interest in the continued funding of a public service'. In a human rights application, according to Lord Woolf, the applicant seeks primarily:

> to bring the infringement to an end and any question of compensation will be of secondary, if any, importance. This is reflected in the fact that, when it is necessary to resort to the courts to uphold and protect human rights, the remedies that are most frequently sought are the orders which are the descendants of the historic prerogative orders or declaratory judgments. The orders enable the court to order a public body to refrain from or to take action, or to quash an offending administrative decision of a public body. Declaratory judgments usually resolve disputes as to what is the correct answer in law to a dispute. This means that it is often procedurally convenient for actions concerning human rights to be heard on an application for judicial review in the Administrative Court. That court does not normally concern itself with issues of disputed fact or with issues as to damages. However, it is well placed to take action expeditiously when this is appropriate.[84]

Judges considering human rights claims were reminded to look first to alternative remedies, in particular to investigation by an ombudsman or mediator. In this way, the traditional common law 'pecking order' of public law remedies had been confirmed.

The case of *Greenfield*[85] gave the House of Lords an opportunity to consider the matter. The claimant was a prisoner who had served a disciplinary sentence

[83] [2003] EWCA Civ [45].
[84] [2003] EWCA Civ [52–3].
[85] *R v Home Secretary, ex p. Greenfield* [2005] UKHL 14 [19].

imposed in breach of his procedural rights under ECHR Art. 6(1) and later demanded compensation. Disallowing the claim, Lord Bingham firmly disapproved the idea that compensation under the HRA should approximate to tort law damages:

> First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. Secondly, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg. This intention was clearly expressed in the White Paper 'Rights Brought Home: The Human Rights Bill' (Cm 3782, 1 October 1997), para 2.6:
>
> > 'The Bill provides that, in considering an award of damages on Convention grounds, the courts are to take into account the principles applied by the European Court of Human Rights in awarding compensation, so that people will be able to receive compensation from a domestic court equivalent to what they would have received in Strasbourg.'
>
> Thirdly, section 8(4) requires a domestic court to take into account the principles applied by the European Court under article 41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents . . . Judges . . . are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the Court might be expected to be, in a case where it was willing to make an award at all.

Unless and until Strasbourg again takes a hand in the matter, the law seems to be settled.

(b) The European Union and state liability

In the seminal case of *Francovich*,[86] the ECJ imposed liability on Italy for failure to transpose a European directive. Liability would accrue where:

- a directive was intended to confer rights on individuals
- the content of the rights was clearly spelt out in the directive
- there was a causal link between the failure to implement the directive and the loss suffered, the national court to decide whether a causal link existed.

[86] Joined Cases 6, 9/90 *Francovich and Bonafaci v Italy* [1991] ECR I-5357.

English law collided directly with this European jurisprudence in the *Factortame* case (see p. 180 above), when the 'Spanish fishermen' who had been unlawfully deprived of their right to fish in UK waters sued for damages.[87] On a preliminary reference, the ECJ refined the liability conditions: for liability to accrue, the breach must be 'sufficiently serious'. Today the question normally asked is whether the Member State 'manifestly and gravely' disregarded the limits on its discretion. In *British Telecom*,[88] where BT claimed damages for loss consequential on imperfect transposition of a directive, the ECJ took the opportunity to demarcate the boundaries. Council Directive 90/531 on the co-ordination of national public procurement procedures was notably loosely worded and difficult to transpose; the UK had acted in good faith though making an error in transposition; it had not committed a 'manifestly serious' breach of EC law. In *Factortame (No. 5)*, on the other hand, the English courts ruled that the violation of EC law was 'sufficiently serious' to merit compensation and the action was subsequently settled, allegedly for a sum in the region of £55 million.[89]

No principle of administrative compensation comparable to the *Francovich* principle exists in the English system, where public authorities are subject to the ordinary principles of civil liability, as it does in some continental systems. How to slot the principle of state liability under EC law into the common law was therefore a matter of debate. To treat violations of EU law as a breach of statutory duty is the obvious solution.[90] Misfeasance can also be useful where breaches of EC law are alleged,[91] as the corporate officer of the House of Commons discovered when he turned a blind eye to EC public-procurement law when allotting a contract for the new Parliament building.[92]

The case of *Factortame* is not the only occasion on which the impact of EC law has been felt; in other areas too the 'spill-over' from EC law has been considerable. In *Marshall (No. 2)*, for example,[93] the ECJ considered the statutory tort of race and gender discrimination and ruled the existing statutory cap on damages unlawful under EC law.

[87] Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur SA v Germany, R v Transport Secretary, ex p. Factortame (No. 4)* [1996] ECR I-1029.

[88] C-392/93 *R v HM Treasury, ex p. British Telecommunications plc* [1996] 3 WLR 203.

[89] *R v Transport Secretary, ex p. Factortame (No. 5)* [1997] EuLR 475 (Div Court) confirmed by the House of Lords at [1999] 3 WLR 1062.

[90] *Garden Cottage Foods v Milk Marketing Board* [1984] 1 AC 130 (Lord Diplock). And see P. Craig, 'The domestic liability of public authorities in damages: Lessons from the European Community' and M. Hoskins, 'Rebirth of the innominate tort?', in J. Beatson and T. Tridimas (eds.), *New Directions in European Public Law* (Oxford: Hart Publishing) 1998. In *Factortame*, the House of Lords did not address the question.

[91] The ruling in *Three Rivers* that there was no liability under EC law is regarded as controversial by M. Andenas and D.Fairgrieve, 'Misfeasance in public office, governmental liability, and European Influences' (2002) 51 ICLQ 757.

[92] *Harmon Facades v Corporate Officer of the House of Commons* (1999) EWHC Technology 199; *Harman No. 2* (2000) EWHC Technology 84.

[93] Case C-271/91 *Marshall v Southampton and South-West Hampshire Health Authority* (*Marshall (No. 2)* [1993] ECR I-4367.

(c) Unjust enrichment and restitution

The *Woolwich* case[94] involved a significant change in the law of restitution, a deeply unsatisfactory area of English law, at the time of the decision under review by the Law Commission.[95] Before the Commission reported, however, the House of Lords was faced with an action for recovery of sums paid by Woolwich to meet tax demands from the IRC that subsequently turned out to have been unlawful. Could the money be reclaimed? Under existing law, money paid to a public authority under a mistake of law in the form of taxes or other levies was not recoverable – 'a shabby rule'![96] In the *Woolwich* case, the House of Lords, in Lord Goff's discreet phrase, 'reformulated the law' to provide a right to restitution in such cases. The House of Lords set out a new principle: that 'money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right'.[97] This conspicuous piece of judicial lawmaking, acceptable to leading commentators and the Law Commission, provoked strong dissents from Lords Keith and Jauncey, concerned that a wide restitution principle could cause 'very serious practical difficulties of administration and specifying appropriate limitations presents equal difficulties'. On the other hand, a factor pointing strongly to the change made in *Woolwich* was that it was required by the jurisprudence of the ECJ, which had already recognised an entitlement to repayment of charges levied contrary to EC law.[98]

The impact of the ECJ was felt again in a later set of claims concerning compensation and restitution for taxes unlawfully demanded. Under the Income and Corporation Taxes Act 1988, corporation tax was payable quarterly in advance on certain distributions made within the UK. In 2001, this provision was ruled by the ECJ to be incompatible with EC law; a right of restitution or compensation must be available.[99] Faced with claims counted in billions, the IR

[94] *Woolwich Equitable Building Society v Commissioners of Inland Revenue* [1993] AC 70.

[95] Law Com. No. 227, *Restitution: Mistakes of law and ultra vires public authority receipts and payments*, Cm. 2731 (1994). At the time the question was out to consultation with Law Com. No. 120 (1991).

[96] S. Arrowsmith, 'An assessment of the legal techniques for implementing the procurement directives' in P. Craig and C. Harlow (eds.), *Lawmaking in the European Union* (Sweet & Maxwell) 1997.

[97] [1992] 2 All ER pp. 756, 764 (Lord Goff), approved by Lords Slynn and Browne-Wilkinson. The principle was applied to the situation of an ultra vires contract in *Kleinwert Benson v Lincoln City Council* [1999] 2 AC 349.

[98] See Case 199/82 *Amministrazione delle Finanze dello Stato v San Giorgio* [1983] ECR 3595, cited by Lord Goff in *Woolwich* [1993] AC 70, 177. And see Case C-192/95 *Comatch v Directeur Général des Douanes et Droits Indirects* [1997] ECR I-165; M. Dougan, 'Cutting your losses in the enforcement deficit: A Community right to recovery of unlawfully levied charges' (1998) 1 *Cambridge Yearbook of European Legal Studies* 233.

[99] Joined cases C-397 and C-410/98 *Metallgesellschaft and Hoechst v Inland Revenue Commissioners* [2001] ECR I-1727. The British government legislated to limit the effect of these judgments in s. 320 of the Finance Act 2003, which takes effect retrospectively to September 2003.

countered with the argument that claims to compensation were time-barred by s. 32(1)(c) of the Limitation Act 1980. The claimants responded that, in respect of claims to restitution, time ran from the date the mistake of law was discovered, namely the date of the ECJ judgment. The House of Lords dismissed this argument, ruling that taxes paid under a mistake of law were reclaimable in restitution, with time running from the point when the mistake was discovered.[100] Whether this is (or should be) purely a public law principle or one generally applicable in private law situations remains undecided, leaving the law of unjust enrichment in an uncertain state.[101]

6. Alternatives to tort law

If, as we are suggesting, the legal system can provide only sporadic and uncertain awards of pecuniary compensation, are more proportionate alternatives available? NHS managers certainly think so. Faced with a fifteen-fold rise in claims for medical negligence between the years 1995–6 and 2002–3, they moved to reform the arrangements for complaints-handling and settlement. The NHS Redress Act 2006 authorises the minister to 'establish a scheme for the purpose of enabling redress to be provided without recourse to civil proceedings'. Such a scheme must provide remedies ranging from an offer of compensation in satisfaction of any right to bring civil proceedings in respect of the liability concerned to the giving of an explanation, an apology or a report on the action which has been, or will be, taken to prevent similar cases arising.[102]

This scheme is not without its problems, as the House of Commons Constitutional Affairs Committee observed when examining the draft Bill. In particular, it does not apply to those with claims over £20,000, which will actually be rejected if they turn out on inquiry to exceed that sum. Questioned by a Select Committee about this negative aspect of the scheme, which the Committee felt would deprive it of much of its usefulness, the minister cheerfully (if ungrammatically) admitted:

> doing regulation by secondary level legislation which we do in Parliament – which when you are in government you love, when you are not in government, you get very frustrated by – is that you can quickly and relatively easily make amendments of that kind to legislation of this nature, so we think that we will be able to do that because of the way we set up the legislation.[103]

[100] *Deutsche Morgan Grenfell Group plc v IRC* [2006] 3 WLR 781.

[101] J. Alder, 'Restitution in public law: Bearing the cost of unlawful state action' (2002) 22 *Legal Studies* 165, argues for a public law principle; G. Virgo, 'Restitution from public authorities: Past, present and future' [2006] *Judicial Review* 370 prefers a general principle. And see generally P. Birks, *Unjust Enrichment*, 2nd edn (Oxford University Press, 2005).

[102] See DoH, *Making Amends. A consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS* (2003) [31] [35]. And see now the NHS Redress Act 2006.

[103] See Constitutional Affairs Committee, *Compensation Culture*, HC 754 (2005/6) [96].

Somewhat sourly, the Committee responded that this 'flexibility' was unlikely to promote confidence in the scheme. The cap is certainly open to the criticism that it leaves the most vulnerable claimants to the forensic lottery of litigation.

It is too early to evaluate this new form of proportionate dispute resolution, which has only just come into operation. In the next sections, however, we shall look more closely at two established models of administrative compensation, asking whether they can provide a viable alternative to courts.

(a) *Ex gratia* payments

Reference has already been made to the Crown prerogative power to make *ex gratia* payments. These powers are routinely used to settle cases of legal liability. The precise nature of the prerogative powers is debatable. The House of Lords has ruled, however, that the powers are discretionary and that, although the discretion is not unlimited, the practice of making *ex gratia* payments does not require parliamentary authorisation.[104] They do, however, need Treasury approval, subject to general authority to make payments up to £250,000, and the conditions for payment are set out and published in the manual of government accounting:

> *Ex gratia* payments other than to contractors are payments which go beyond administrative rules or for which there is no statutory cover or legal liability. Reasons for the payments vary widely; they include, for example, payments made to meet hardship caused by official failure or delay, or special payments to avoid legal proceedings against the government on grounds of official inadequacy.
>
> Extra-statutory and extra-regulatory payments are payments considered to be within the broad intention of the statute or statutory regulation, respectively, but which go beyond a strict interpretation of its terms. Where a payment is of a continuing nature but does not form part of a general concession of sufficient importance to justify separate provision in Estimates, the payment should be noted in the accounts for all years in which it falls. The need for amending legislation should be considered in all cases that arise.[105]

A reorganisation to centralise the disparate practices of *ex gratia* compensation in different departments would have some advantages. It would be less flexible but it would provide greater consistency and transparency, important good-governance values. Just such a scheme is the Australian Compensation for Detriment caused by Defective Administration (CDDA) scheme set up to deal with claims in respect of maladministration.[106] The CDDA scheme

[104] *R v Secretary of State for Work and Pensions, ex p. Hooper* [2005] UKHL 29; *R v IRC, ex p. Wilkinson* [2005] UKHL 30. Both involved the legality of extra-statutory payments to implement ECtHR judgments concerning the compatibility of the British system for widows' pensions with the ECHR.

[105] *Government Accounting* 2000, available online [18.6.5] [18.6.8].

[106] Commonwealth of Australia, *Compensation for Detriment Caused by Defective Administration* (CDDA); *Guidelines for Agencies* (Finance Circular 2001/01/01 Attachment B).

is discretionary but, like the British criminal injuries compensation scheme, is governed by published administrative guidelines. An important difference between it and traditional *ex gratia* payments is the emphasis on consistency and fairness: decisions made under the CDDA scheme must be 'publicly defensible, having regard to all the circumstances of the case'. Only in special circumstances can payments that fall outside the scheme be made and only with the approval of the finance minister.[107]

(b) Criminal injuries compensation

The Criminal Injuries Compensation Scheme (CICS) was first set up and administered under the prerogative powers, though it has since been put on a statutory basis. Use of the prerogative was perhaps justifiable so long as numbers remained small: in its first year of operation, only 554 applications were received and £33,430 paid out in compensation. Thereafter claims increased rapidly: by 1988–9, when legislation was introduced to put the scheme on a statutory basis, there were 43,385 claims and awards of £431,532,702; in 1992–3, when the Government moved to amend the scheme on the ground of cost, claims had risen to 65,977 and compensation totalled £909,446,123. These are considerable amounts of public money to be spent without parliamentary authorisation, especially as questions arise concerning the basis for criminal injuries compensation. Unlike most *ex gratia* payments, criminal injuries compensation is not made in settlement of legal liability nor is it a claim in respect of maladministration. The only explanation afforded by the Home Office working party that advised on the setting up of the plan was that 'although the welfare state helps the victims of many kinds of misfortune, it does nothing for the victims of crimes of violence, as such'.[108] This notably sidestepped the question why anything should be done 'as such' and the equally important question why it should be done without the formal approval of Parliament.

Discussing rules and discretion in Chapter 6, we saw flexibility as an important reason both for discretion and for the choice of soft law. The case put for discretion here was that the CICS was the first scheme of its kind in the world. The Government wished to see how it worked out and retain the ability to make adjustments; moreover, the cost was uncertain. That the organisation and ambit of the scheme was governed by published rules suggested something rather different however. Atiyah[109] was quick to notice the contradiction, calling the denial of a 'right' to compensation 'quite meaningless, because the board administering the scheme has no discretion to refuse claims except within the terms of the scheme itself; and the payment of compensation – though not legally enforceable – follows automatically once

[107] S. 33 of the Financial Management and Accountability Act 1997 (Aus).

[108] *Compensation for Victims of Crimes of Violence*, Cmnd 1406 (1961) [18]. And see A. Ashworth, 'Punishment and compensation: Victims, offenders and the state' (1986) 6 *OJLS* 86.

[109] *Accidents, Compensation and the Law* XXX edn p. 296

the board has determined that it should be awarded'. The Board (now the CICA) set up to administer the scheme also accepted that its discretion was not unfettered:

> The use of the words *ex gratia* means that an applicant has no right to sue either the Crown or the Board for non-payment of compensation. But, in practice, the position is exactly the same as it would be if the Scheme was embodied in a statute with the words *ex gratia* omitted. The Board's view of its legal obligation and duty under the Scheme is that, if an applicant's entitlement to compensation is established there is no power to withhold compensation.[110]

Here the CICA seems to be suggesting that, although the scheme is not justiciable, it is somehow enforceable: the rules of the scheme are sufficiently strict to 'structure' the discretion. Yet a cursory look at the text[111] confirms the rules as 'soft law'. The scheme has two parts: the rules of operation and a 'Guide' or 'Statement' designed to inform applicants and their advisers how applications are likely to be determined. In comparison to statute or the complex regulations on which courts and tribunals typically have to adjudicate, the text is simple to construe and self-explanatory: guidelines or a code of practice aimed at the public and not designed to provide work for lawyers. Indeed, one judge has said that the scheme is unsuited to judicial interpretation:

> The scheme, as the document is entitled which enshrines the rules for the board's conduct, is not recognisable as any kind of legislative document with which the court is familiar. It is not expressed in the kind of language one expects from a parliamentary draftsman, whether of statutes or statutory instruments. It bears all the hallmarks of a document which lays down the broad guidelines of policy.[112]

The Government, while favouring formal adjudicatory methods, originally intended to avoid the courts. The Board would be autonomous, its decisions not being subject to ministerial review or appeal. Claims were submitted and processed on the papers by a single member of the Board; appeal lay to a panel of lawyers, with the possibility of an oral hearing. The only external accountability would be through annual reports submitted to the Home Secretary and laid before Parliament. There were therefore tremors when, in *R v Criminal Injuries Compensation Board, ex p. Lain*,[113] the Divisional Court held that the Board, as 'a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the bounty of the Crown . . . came fairly and squarely within the jurisdiction of this Court'. Inroads had been made not

[110] Cmnd 7752 (1979) [15].
[111] Available online at the CICA website.
[112] *R v Criminal Injuries Compensation Board, ex p. Schofield* [1971] 1 WLR 926 (Bridge LJ dissenting).
[113] *R v Criminal Injuries Compensation Board, ex p. Lain* [1967] 2 QB 864.

only on the ambit of prerogative power but also on the scheme's discretionary nature. Discretionary decisions structured by informal rules were now subject to review and interpretation by the courts. Following *Schofield*,[114] where the Board had interpreted the rules to exclude compensation for a bystander knocked down accidentally during a struggle to arrest a shoplifter but the Court of Appeal ruled that the case fell within the rules, the scheme gave rise to legally enforceable entitlements.

But the argument for formalisation through statute would not go away. In 1980, introducing a Private Member's Bill which he later withdrew, Lord Longford argued that 'the establishment of a statutory system would command much more confidence among victims, and certainly could be used to promote much more effective publicity'.[115] He was making the important point that statute is more legitimate, more transparent and more certain than informal rules, which can be – and in the event were – amended from time to time without too much publicity. With the help of the Lords but against the wishes of the Government the scheme finally reached the statute book.[116] It was stated to come into force 'on such day as the Secretary of State may appoint'.

The Act was never activated. An accumulated backlog, long delays and high operating costs of £14.25 million (9 per cent of total expenditure) led the Government to conclude that a scheme based on common law damages was 'inherently incapable of delivering the standard of service claimants should now reasonably expect'. A White Paper proposing drastic change was published.[117] The Government wanted a 'banded tariff' scheme, calculated by averaging past awards. The lawyer-dominated Board would be wound up and replaced by a simple administrative process coupled with two-stage internal review: first, review by a more senior administrator, secondly, an external appeals panel appointed by the minister using documentary procedure. The Home Secretary introduced legislation to replace the 1988 Act but it failed to pass the House of Lords. Hoping to delay implementation indefinitely, he replaced the existing prerogative scheme with a new, less generous, 'tariff' scheme, effectively bypassing the 1988 Act. The legality of this substitution was immediately challenged by a group of unions whose members were likely to be affected.[118] As we saw in Chapter 4, the case, which raised points of great constitutional significance, was decided by a majority of the House of Lords against the Government.

[114] *R v Criminal Injuries Compensation Board, ex p. Schofield* [1971] 1 WLR 926.

[115] HL Deb., vol. 401, cols. 233–5

[116] Ss. 108–77 and Schs. 6 and 7 of the Criminal Justice Act 1988. See P. Duff, 'Criminal injuries compensation: The scope of the new scheme' (1989) 52 *MLR* 518. The Act followed a Report from the Home Affairs Select Committee, *Compensation and Support for Victims of Crime*, HC 43 (1984/5).

[117] *Compensating Victims of Violent Crime: Changes to the criminal injuries compensation scheme,* Cm. 2434 (1993). See P. Duff, 'The measure of criminal injuries compensation: Political pragmatism or dog's dinner?' (1998) *OJLS* 105.

[118] *R v Home Secretary, ex p. Fire Brigades Union* [1995] 2 WLR 464 (see p. 145 above).

Table 17.1 Awards by tariff level 2004–5 (adapted from Annual Report 2004–5 Table 1)

Level	Tariff in £	Total no. of awards on assessment	Gross value in £
1	1,000	6,735	6,735,000
5	2,000	3,724	7,448,000
10	5,000	198	990,000
15	15,000	45	675,000
20	40,000	34	1,360,000
25	250,000	6	1,500,000

Table 17.2 CIC awards disposed of by level

Year	Disallowed	First level	Review	Appeal	Total awards	Gross value in £
1999–2000	38,157	31,861	5,692	2,147	39,700	108,580,500
2004–5	33,847	27,994	5,352	2,100	35,446	120,845,650

Immediately, a Bill that became the Criminal Injuries Compensation Act 1995 was introduced into the Commons to validate the tariff scheme. It standardised the amounts of compensation. There are today twenty-five bands covering payments between £1,000 and £250,000 in respect of 400 listed injuries. The Act gave the minister wide discretionary powers to 'make arrangements for the payment of compensation' and to appoint an adjudicator; otherwise the scheme had apparently lost both its informal *ex gratia* character and its formal legalistic procedures. Since 2008 appeal lies to the First-tier Tribunal (Criminal Injuries Compensation) under the Tribunals, Courts and Enforcement Act 2006.

As Table 17.1 indicates, the changes have to a certain extent served their purpose. There has been a substantial fall in sums expended in compensation: from a peak of £210 million in 1996–7 and £214 million in 1997–8 (as the changeover was taking place) to average sums of just over £1 million. Note that by far the greatest number of awards comes at the bottom levels of the tariff.

Under the influence of new public management methodology, target-setting is very gradually making an impression on the accumulated backlog, which has moved from a peak of 97,236 cases in 1999 down to 84,581 in 2004–5 (in the last three reported years the backlog has fallen from 91,447 to 84,990 to 84,581). The number of awards contested is dropping slightly, though appeal figures remain fairly constant. The average time to process claims has, however, hardly changed: from around six to eight months, with more than 26 per cent taking more than one year to resolve.

We should not read too much into this brief and selective account of a single statutory scheme but a few general observations are in order. First, time is saved; throughput time compares well with appeals to tribunals or judicial

review (see pp. 502 and 685 above). But statutory compensation does not come cheap. The resources required escalate with the number of claims, which in the case of criminal injuries compensation have increased exponentially since inauguration of the scheme. This fact alone may be thought sufficient justification for government insistence on keeping control of resources and ultimately for the fixed-tariff scheme. Compensation cannot be demand-led but it is questionable whether a scheme capped at £250,000, as the criminal injuries compensation scheme currently is, really provides adequately for victims of serious violence. One day the cap may be challenged.

7. Ombudsmen and redress

Over the years, the ombudsmen have handled a good many complaints over compensation, some concerning *ex gratia* payments, others involving the ambit and operation of statutory compensation schemes. *Sachsenhausen* (1967) involved just such an inquiry, as did the *Court Line* affair (1975), the *Channel Tunnel* affair (1995), *Barlow Clowes* (1989), the *Occupational Pensions* affair (2006) considered in Chapter 13 and the *Debt of Honour* affair discussed in this chapter .

Shortly after publication of the Citizen's Charter (see p. 450 above) with its promise of 'better redress for the citizen when things go wrong', the Select Committee on the Parliamentary Commissioner for Administration (PCA), dissatisfied with the haphazard way in which compensation was administered, invited the then PCA (William Reid) to undertake a 'thematic inquiry' into redress.[119] Substantial departmental discrepancies in the practice of *ex gratia* payment were revealed: some departments, like the Home Office, possessed unlimited authority; others needed Treasury authority for all but the most trivial payments. The review also revealed a hotchpotch of compensation schemes, varying in size and scale – some statutory, others *ex gratia*; some, like the CICS, relatively well-known, others entirely unpublicised. There were many anomalies, often creating a strong sense of injustice amongst those left just outside the boundaries, and substantial differences of practice. The Treasury warned departments that 'an unduly liberal regime of compensation would impose an administrative burden on departments . . . Departments needing to distribute codified internal guidance on *ex gratia* payments, in order to permit a measure of delegated authority to local staff, should design it to be exclusive to closely defined cases.' [120]

Rejecting Treasury Guidelines as 'frequently inappropriate' and its advice as 'outdated, restrictive and doctrinaire', the Committee expressed its displeasure at 'the inadequacy of much of the redress offered by departments and agencies, [their] unwillingness to admit fault, refusal to identify and gracefully

[119] PCA, *Maladministration and Redress*, HC 112 (1994/5).
[120] See 'Dear Accounting Officer', DAO (Gen) 15/92.

compensate those affected by acts of maladministration'.[121] William Reid took the view that compensation should be made in all cases of 'abnormal hardship' caused by maladministration. The Committee wished to see established a principle of full restitution: that 'a person who has suffered injury as a result of maladministration should be put back in the same position as he or she would have been in had things gone right in the first place'.[122] A somewhat similar line was taken by the present PCA, Ann Abraham, in a document advising on principles for redress that focuses on 'putting things right':

> Where maladministration or poor service has led to injustice or hardship, public bodies should try to offer a remedy that returns the complainant to the position they would have been in otherwise. If that is not possible, the remedy should compensate them appropriately. Remedies should also be offered, where appropriate, to others who have suffered injustice or hardship as a result of the same maladministration or poor service.
>
> There are no automatic or routine remedies for injustice or hardship resulting from maladministration or poor service. Remedies may be financial or non-financial.[123]

Local authorities have power under s. 92 of the Local Government Act 2000 to make payments to any person who has or may have been affected by maladministration. Guidance covering the way s. 92 powers should be used is published by the Commission for Local Administration.[124] Financial compensation may be appropriate if:

- the authority has taken the appropriate action but has delayed in doing so and the delay has caused injustice
- there is no practical action which would provide a full and appropriate remedy or
- the complainant has sustained financial loss or has suffered stress and anxiety.

The Guidance, which covers quantifiable loss, loss of non-monetary benefits (such as quiet enjoyment of local authority housing), loss of a chance and distress, states that the underlying aim of all such payments must be to put the complainant as far as possible back into the position he or she would have been in but for the fault. Costs and professional fees can be claimed in exceptional circumstances. In general awards are moderate: for example, payments for lost opportunity (such as the right to appeal a council decision) are restricted to around £100, while time-and-trouble payments will normally amount to no more than £50. In respect of distress, the Guidance warns that:

[121] Third Report of the Select Committee on the PCA, HC 345 (1993/4).
[122] *Ibid*.
[123] PCA, *Principles for Remedy* (2007) principle 5, available online.
[124] CLA, *Remedies: Good practice*, available online. These principles were applied in *R (Bernard) v Enfield LBC* [2002] EWHC 2282.

> The level of compensation for distress needs to be carefully assessed in the light of all the circumstances of the individual case. Because these do vary significantly, the guideline has to be broad, but generally it is likely that the appropriate sum would be in the range of £500 to £2,000 for a year, with broadly *pro rata* sums for shorter or longer periods. But a careful assessment of the facts may, on some occasions, point to sums above or below that range.

This fleshes out the PCA's advice to the Select Committee that 'botheration payments' be routinely awarded to cover cases of grave maladministration, where excessive rudeness and malice are involved or exceptional worry and distress caused.

The group dimension of compensation claims means that compensation flowing from a decided case or ombudsman inquiry may be very considerable. In the *Slaughtered Poultry* affair,[125] where the PCA discovered that claims for statutory compensation had been handled by the Ministry deliberately and with the knowledge of the minister so as to minimise the amount of compensation payable, his very negative report resulted in recalculation of sums due to other farmers involving more than £600,000. This did not include the costs in time and labour of identifying those likely to be affected by a ruling. The sheer size of the sums paid out by government in compensation and settlement of legal liability should be – and is no doubt to the Treasury and National Audit Office (NAO) responsible for monitoring payments on behalf of the Public Accounts Committee – a matter of concern. The NAO recently published its 'best estimate' of total compensatory payments across a handful of central government bodies, excluding the very costly NHS, as in the region of £12,448,000, made up of 46,002 individual payments.[126] The Department for Work and Pensions heads the table and makes more than one-third of the total payments. In the single year 2002–3, it made 31,051 payments amounting to £9,047,000 in compensation, of which 10,955 payments (£2,575,000) were in respect of delay.[127] These figures which, it should be noted, cover only central-government departments, may be read in two ways: on the one hand, they can be seen as justifying the courts' cautious approach to extensions of government liability; on the other hand, it could be argued that compensation on such a scale demonstrates society's acceptance of a compensation principle and consequently of a generous and victim-oriented attitude by courts in liability cases.

(a) A debt of honour

An objection often made about ombudsman recommendations is that they are unenforceable (for which reason the ECtHR deems them not to satisfy the

[125] *Compensation to Farmers for Slaughtered Poultry* HC 519 (1992/3), *Annual Report 1993*, HC 290 (1994/5), p. 27.

[126] NAO, *Citizen Redress: What citizens can do if things go wrong with public services*, HC 21 (2004/5), p. 42 and Table 18.

[127] HC Deb., col. 12W (7 Jun 2004) (Mr Willetts).

requirements of an 'effective remedy' under ECHR Art. 13).[128] There is some justification for this attitude in the Government response to the findings of the PCA in the *Occupational Pensions* case (see p. 554 above). The following case study suggests, however, that this reasoning may be fallacious; ombudsmen may sometimes reach the parts that the judicial process cannot reach.

On 7 November 2000, the Parliamentary Under-Secretary for Defence stood up in the House of Commons to make a gratifying announcement:

> I am very pleased to inform the House that . . . the Government have decided to make a single *ex gratia* payment of £10,000 to each of the surviving members of the British groups who were held prisoner by the Japanese during the Second World War, in recognition of the unique circumstances of their captivity . . .
>
> The unique nature of Japanese captivity in the far east was recognised in the 1950s, when those who had been held became eligible for modest payments from Japanese assets[129] . . . In the intervening years, the former far east prisoners pursued the issue of additional compensation with Japan. More recently, they have also campaigned for the British Government to make a payment. However . . . it has been the policy of successive Governments over many years not to make payments in such cases.
>
> We are now making an exception of the British groups that were held prisoner by the Japanese during the Second World War in recognition of the unique circumstances of their collective captivity . . . We estimate that up to 16,700 people may be eligible for the *ex gratia* payments, which will accordingly cost up to £167 million to make.[130]

The House was told that the beneficiaries would be 'former members of the armed forces and Merchant Navy and British civilians who were interned'. No further details were given because, as the public would learn later, they had not yet been agreed. Notes for Guidance published on the same day indicated that 'surviving British civilians who were interned by the Japanese in the Far East during the Second World War' would be eligible.

In July 2001, the minister stated in reply to a parliamentary question that the eligibility criterion for civilian claimants had been clarified: British subjects whom the Japanese interned and who were born in the United Kingdom or had a parent or grandparent born here would be eligible. Intended to be inclusive, these 'birth-link' and 'blood-link' definitions had the unintended effect of excluding some British subjects living overseas who would otherwise have been eligible. ABCIFER, an action group representing British civilians in the Far East, applied for judicial review.[131] It challenged the criteria for the scheme as unlawful, disproportionate and irrational, also arguing that the first announce-

[128] *TP and KM v UK*, App. 2894/95 (10 May 2000).

[129] In practice, around £76.00 for servicemen and £48.00 for civilians.

[130] HC Deb., col. 159 (7 November 2000) (Dr Lewis Moonie). There had been adjournment debates in the House on 10 May 1995, 4 December 1996, 29 April 1998, 9 March 2000 and 6 June 2000.

[131] *Abcifer v Defence Secretary* [2003] EWCA Civ 473 [87].

ment had created a legitimate expectation. But stating that 'anyone who seeks to challenge as unlawful the content of a non-statutory *ex-gratia* compensation scheme faces an uphill struggle', the Court of Appeal dismissed every argument: the statement did not contain a sufficiently clear and unequivocal representation to found a legitimate expectation nor, provided that the criteria were rationally connected with the scheme's objective, was it irrational to exclude certain categories from the class of beneficiaries. 'We do not think that the introduction of this scheme was well handled by the Government. But for the reasons that we have given, the appellant has failed to satisfy us that the scheme was unlawful.'

A second legal challenge to the birth-link criteria was under way, made by a British subject born and resident in Hong Kong. Building on a successful challenge on behalf of the Gurkhas to a recently introduced war-pensions scheme,[132] Mrs Elias pleaded discrimination in terms of the Race Relations Acts 1976 and 2000. Elias J upheld the application, ruling that the scheme adopted was unlawful and indirectly discriminated against those of non-British national origin. The Court of Appeal also thought the chosen criteria discriminatory, despite a wide margin of ministerial discretion in setting the terms of the scheme:

> *Mummery LJ:* Even though UK national origins are not formally specified in the birth link criteria, Mrs Elias' exclusion from the Compensation Scheme is in substance very closely related to her non-UK national origins. It is that exclusion that has to be objectively justified. A stringent standard of scrutiny of the claimed justification is appropriate because the discrimination, though indirect in form, is so closely related in substance to the direct form of discrimination on grounds of national origins, which can never be justified.[133]

After prolonged consideration of the compensation question, the Court of Appeal awarded £10,000 (the statutory sum) in compensation together with £3,000 for hurt feelings in respect of the indirect discrimination.

Alongside, the birth-link criteria had been referred to the PCA by Austin Mitchell MP on behalf of Professor Hayward, a British subject born in Shanghai to British subjects both born outside the United Kingdom. Professor Hayward's education and whole career had been in England where he now lived.[134] Two preliminary points of jurisdiction were raised. First, was the PCA inquiry barred by the possibility of a legal remedy? Secondly, could it be said that maladministration was in issue? Exercising her discretion under s. 5(2) of the Parliamentary Commissioner Act 1967, the PCA ruled that she could investigate; Professor Hayward had not participated in the ABCIFER case nor was it in the circumstances reasonable to ask him to take legal action.

On the second, maladministration, point, the PCA felt that the haste with

[132] *R (Phalam Gurung) v Ministry of Defence* [2002] EWHC 2463 (Admin). But see now *R (Gurung and Others) v Defence Secretary* [2008] EWHC 1496 (Admin).

[133] *R (Elias) v Defence Secretary* [2005] EWHC 1435 Admin; [2006] EWCA Civ 1293 [161].

[134] PCA, *A Debt of Honour*, HC 324 (2005/6).

which the scheme was drawn up was unnecessary. Compensation had been on the agenda for at least five years yet officials were only asked to draw up options two weeks prior to the eventual announcement of the scheme. 'It should have been apparent that drawing up an *ex gratia* scheme in such a short space of time gave no opportunity for the details to be worked out properly and that this inevitably would lead to a lack of clarity.' There had also been misleading press releases, raising expectations that proved illusory. 'Good administration of extra-statutory schemes requires clearly articulated entitlement criteria to ensure that those potentially covered by the scheme are not put to unnecessary distress or inconvenience by uncertainty or conflicting information. Such a need is all the more essential when the relevant issues are sensitive, as is clearly the case here.' This was maladministration, compounded by interdepartmental disagreement and debate over the meaning of the term 'British' for purposes of war-pensions legislation. The PCA also felt concern over equality of treatment. The Government had not been able to reassure her that applications from people in the same situation for the purposes of the scheme's eligibility criteria were not decided differently nor was she satisfied that Professor Hayward and those whose applications were determined after the introduction of the new criterion were afforded treatment equal to those whose applications were determined prior to the introduction of the blood-link criterion.

The PCA made four findings of maladministration, adding two riders:

> (i) that the way in which the scheme was devised constituted maladministration in that it was done overly quickly and in such a manner as to lead to a lack of clarity about eligibility for payments under the scheme;
> (ii) that the way in which the scheme was announced constituted maladministration in that the Ministerial statement was so unclear and imprecise as to give rise to confusion and misunderstanding;
> (iii) that, at the time when the blood link criterion was introduced, the failure to review the impact of that introduction to ensure that it did not lead to unequal treatment constituted maladministration; and
> (iv) that the failure to inform applicants that the criteria had been clarified when they were sent a questionnaire to establish their eligibility constituted maladministration.
>
> In addition, I am also concerned about the following two aspects of the operation of the scheme:
>
> (v) that the Government has been unable to provide evidence of the basis on which the early payments under the scheme were made and that thus I have been unable to determine whether the scheme was operated properly; and
> vi) that no review of the scheme was undertaken in the light of criticisms of it by the courts, in Parliament, and elsewhere.

Finding that the maladministration had caused injustice, the PCA recommended first that the MOD should review the operation of the *ex gratia*

scheme and, secondly, that it should 'fully reconsider' the position of Professor Hayward and those in a similar position. She would expect to monitor the review closely. As to redress, an immediate apology was in order but this was clearly not enough: the MOD should also consider whether they should 'express that regret tangibly'.

In its response, the Government picked up on the variance between the two court decisions and the far more informative PCA inquiry. It refused to accept that a thorough review of the scheme was warranted.

> The Government accepts in full your findings of maladministration in relation to the origination and announcement of the scheme and will apologise for the distress which this maladministration caused to Professor Hayward and others in a similar position.
>
> The Government will also consider expressing its regret tangibly. But we do not consider that these findings warrant a thorough review of the scheme.
>
> The bloodlink criterion does, as both you and the courts have pointed out, create some apparent anomalies.
>
> But, as the courts have recognised, such anomalies are inevitable when devising eligibility criteria for a scheme such as this. They do not make the scheme as a whole irrational or unfair.
>
> Nor is the fact that some payments were made in error to people who are not eligible under the scheme a reason why others in whose cases the same error was not made should now be paid.

The PCA expressed her disappointment; the minister apologised and offered *ex gratia* payments of £500 to Professor Hayward and others affected. But the affair rumbled on. Expressing complete confidence in its officer's decision to investigate and regret that her recommendations had not been fully implemented, the Public Administration Select Committee (PASC) emphasised the difference between judicial review and an ombudsman inquiry:

> In our view, the Ombudsman acted appropriately in investigating this case. The entire basis of the 1967 Parliamentary Commissioner for Administration Act is that it is possible for a measure to be legal, and yet to be maladministered. The fact that legality has been established through Judicial Review may be irrelevant to maladministration. There may even be circumstances where the Ombudsman feels it is appropriate to conduct an investigation while Judicial Review proceedings are taking place, so that she can subsequently report without delay. We would, in principle, support this.[135]

PASC initiated a further inquiry, calling the minister (Don Touhig MP) to give evidence. It now emerged that the criteria might not have been applied consistently. Mr Touhig announced an internal inquiry, requiring a check of nearly 30,000 claim and policy files. The PCA's suspicions were shown to be justified;

[135] PASC, *A Debt of Honour*, HC 375 (2005/6).

for the first time, serious inconsistencies were revealed. After meeting MPs and ABCIFER, the minister decided to modify the scheme once more: anyone who had lived in the United Kingdom for at least twenty years since World War II would now be covered.[136]

The 'Debt of Honour' affair permits us to evaluate the strengths and weaknesses of judicial review and an ombudsman investigation. The first unsuccessful review of legality turned essentially on a distinction between policy and operation; wide discretion was conceded to the Government in setting the parameters of the scheme. It was the Race Relations Acts rather than the HRA that allowed the courts to go further in the second review. The court was then able (albeit unwillingly) to make reparation over and above the lump sum provided by the scheme. The PCA was theoretically hampered by being restricted to maladministration but the flexible, non-legalistic definition allowed her to overcome this obstacle. Under the rubric of operational failure, she was able to attack the scheme's inherent inequalities. The documentary and inquisitorial ombudsman methodology produced a much greater depth of information, used to good effect by PASC, which stood strongly behind its officer when her recommendations were partly rejected. Despite this setback, the inquiry was in the end more successful. On the one hand PASC forced the minister into an internal investigation; on the other, the political solution allowed the Government to climb down gracefully. The unwillingness of the Government to accept her recommendations was reminiscent of its attitude in the *Occupational Pensions* affair but was on this occasion overcome.

The affair also tells us something about the dangers of compensation schemes. Designed to be selective, they create dissatisfaction amongst those who fall just outside the boundaries. This fuels the 'compensation culture', typically stimulating a political battle for inclusion. Also typically the scheme ended up costing much more than had been estimated: costs rose dramatically from the original estimate in 2000 of £167 million; by 2006, around 25,000 claimants had received over £250 million.

(b) Cod wars

The PCA had occasion to return to the *Debt of Honour* affair in considering an *ex gratia* compensation scheme devised by the Department of Trade and Industry (DTI) for Icelandic-water trawlermen made redundant through the 'Cod war' which ran between October 2000 and October 2002.[137]Once again she had to report that maladministration had caused injustice. Reflecting on the experience, Ann Abraham had this to say:

[136] HC Deb., vol. 444, col. 681 (28 Mar. 2006).

[137] PCA, *Put Together in Haste: 'Cod Wars' trawlermen's compensation scheme*, HC 313 (2006/7).

The reader of this report will see that many of the issues I identified in relation to the scheme covered by *A Debt of Honour* arose similarly in relation to the scheme covered by this report. An effective *ex gratia* compensation scheme that accords with principles of good administration would have:

- scheme rules that are clearly articulated and which directly reflect the policy intention behind the scheme;
- systems and procedures in place to deliver the scheme which have been properly planned and tested;
- sufficient flexibility built in to the rules and procedures to recognise the level of complexity in the subject matter covered by the scheme; and
- mechanisms which enable the success of the scheme in delivering its objectives to be kept under review.

That did not happen in either case.

In addition to making recommendations to remedy the injustice I have determined was caused to the representative complainant in this investigation and to others in a similar position to her, I have therefore also recommended that central guidance for public bodies should be developed that specifically relates to the development and operation of *ex gratia* compensation schemes.

The Government have accepted the need for such guidance. The Permanent Secretary at HM Treasury has told me that HM Treasury is planning to take forward my recommendation for specific guidance on the development and operation of *ex gratia* compensation schemes and that this work will be incorporated into the revision of 'Government Accounting', which I understand is due for publication later this year.[138] I welcome this commitment and hope that, through this guidance which should be of considerable assistance to those tasked with the administration of *ex gratia* compensation schemes, this report will make a lasting contribution to the improvement of the delivery of public services.[139]

8. Towards a compensation culture?

Statistical evidence for a compensation culture in the sense of the idea that society is in the grip of litigation fever is thin, ambiguous and easily explained away,[140] but this short survey does suggest increasing willingness to resort to courts. The state's deep pockets make public bodies a magnet for litigants so that 'novel' tort claims are reaching the courts. In parallel, the PCA has been asked to handle a number of highly political compensation claims. The trend has been accentuated by the growing importance of 'affirmative rights' in human rights jurisprudence, which cast obligations of protection on the state,

[138] See HM Treasury, *Managing Public Money* (2008) Annex 4, p. 124.

[139] *Put Together in Haste.*

[140] Williams, 'State of fear: Britain's "compensation culture" reviewed'; Report of a Working Party of the Institute of Actuaries, *The Cost of Compensation Culture* (December 2002); A. Morris, 'Spiralling or stabilising? The compensation culture and our propensity to claim damages for personal injury' (2007) 70 *MLR* 349.

as in *Z v United Kingdom*, where the state signally failed to provide the children with the security underwritten by the Convention on the Rights of the Child. Significantly, the ECtHR saw compensation as axiomatic. The fact that the HRA provides no remedy other than a declaration of incompatibility when statute violates the Convention is a source of grievance mentioned specifically in a Law Commission Scoping Paper as a reason for reconsideration of the law concerning government liability.[141] The courts have so far declined, however, to initiate any serious expansion of legal liability, treating the ECtHR as a ceiling rather than a floor.

Reviewing the evidence, the Commons Constitutional Affairs Committee deduced that the UK was not experiencing a significant increase in litigation. There was, however, 'ample evidence that risk aversion is becoming an insidious problem which the Government and the Health and Safety Executive (HSE) must attempt to address.' This was attributable to a 'grapevine' effect, which spread the popularly held notion that it is easy to obtain compensation and led people to believe that all risk must be avoided. But the Committee did not believe that statutory restatement of the common law would have any useful effect: 'The phenomenon of risk aversion which we have described does not arise primary from the wording of the law or from litigation and will need to be addressed by changing practices and perceptions in the fields of health and safety and risk management.'[142] Thus statutory restrictions on negligence claims, including increased protection for public authorities, have not so far been thought necessary by government. It is the Law Commission that is considering proposals for further protection of 'truly public' activity together with a new test of 'serious fault' for government liability in many cases.

We are perhaps not yet ready to exchange sporadic instances of liability for a general principle of compensation but, in line with the argument in the first section of this chapter, we would interpret the phrase 'compensation culture' positively, to embrace recognition of circumstances where it is morally right that the state should compensate members of the public for loss. This is more a welfare than a liability principle. In this context, a scheme for administrative compensation could be initiated and endorsed by Parliament, giving the present arrangements for *ex gratia* payments greater legitimacy. Such a step is not, however, without its dangers. Greater public awareness of the availability of compensation promoted by the information and guidance increasingly made publicly available by government departments is clearly an element in promoting a compensation culture in the negative sense. The substantial number of statutory schemes already in place must surely also stimulate claims; as we saw in the *Debt of Honour* case

[141] Law Commission, *Monetary Remedies in Public Law: A discussion paper* (11 October 2004); Law Commission, *Remedies against Public Bodies: A scoping report* (10 October 2006).

[142] Constitutional Committee, *Compensation Culture*, HC 754 (2005/6) [112].

study, those on the margins of compensation schemes tend to complain of unfair treatment.

We do not ourselves see a 'compensation culture' as synonymous with a 'blame culture' but rather equate it with a desire for accountability. As Ripstein has observed, 'when injured people clamour for recourse against their injurers, their concern is not just with compensation, but with justice'. Perhaps then it is the courts that need liability most! The ability to award damages against government is a crucial tool in the judicial toolkit and a symbol of subjection of the state to the rule of law. Instances do exist, as this chapter reminds us, where the state or its officials have behaved badly enough to merit public sanction, if appropriate through an award of punitive damages. Before we entirely jettison Dicey's theory of liability, we need to reflect on this.

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