



Monetary Remedies in Public Law

A Discussion Paper

**Public Law Team
Law Commission**

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This discussion paper has been prepared by the Public Law Team at the Law Commission. It does not represent the views of the Law Commission.

It will be considered at a seminar organised by the Public Law Team, to be held in November 2004. Issues raised and points made in discussion will be taken into account in any decision as to whether the Law Commission should include a proposal for a project in this area in its 9th Programme. An announcement on the outcome of this discussion will be made early in 2005.

This discussion document is also being published on the Law Commission's website: www.lawcom.gov.uk.

Any comments on the issues raised in the paper will be welcomed. They may be sent to:

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SUMMARY AND QUESTIONS FOR DISCUSSION

THE PURPOSE OF THIS PAPER

There have been several suggestions that the availability of monetary remedies against public bodies is a subject that could usefully be investigated by the Law Commission. Widespread dissatisfaction with the current law has led many commentators to advocate reform of one type or another. This paper, prepared by the Public Law Team at the Law Commission, takes a broad look at this area of law and asks whether there is indeed a case for reform.

THE CURRENT LAW (PART 2)

The paper begins by considering judicial review and the remedies available in JR proceedings. It is noted that the High Court cannot award monetary compensation unless the applicant makes out a private law cause of action.

We then examine the private law causes of action most frequently used by claimants against public bodies: misfeasance in public office, breach of statutory duty, and negligence. We discuss important recent developments in the tort of negligence, analysing several major House of Lords decisions. We conclude that policy factors against holding public bodies liable now tend to be invoked by the courts as a reason to lower the standard of care expected of a public body, rather than to deny that it owed a duty of care in the first place.

Finally, we consider the availability of extra-judicial monetary remedies, principally recommendations made by Ombudsmen. We suggest that extra-judicial modes of redress offer some advantages over judicial avenues, but also that they currently have certain important disadvantages, in particular the unenforceability of recommendations.

THE IMPACT OF THE HUMAN RIGHTS ACT 1998 (PART 3)

Section 6 of the Human Rights Act 1998 makes public authorities liable in damages if they are found to have committed breaches of individuals' human rights. We examine this cause of action and conclude that several important lessons can be learnt from this new form of liability.

We also assess the impact of human rights principles on domestic tort law, concluding that there may in the future be a greater focus on the claimant's rights rather than on the reasonableness of the defendant's conduct.

Key questions:

1) Does the Human Rights Act provide a useful model for the liability of public bodies outside of the human rights context?

2) Should the courts be encouraged to engage in an explicit balancing of the relevant public and private interests in deciding whether to award compensation?

3) What are the wider implications of the Human Rights Act for domestic tort law?

THE IMPACT OF EUROPEAN COMMUNITY LAW (PART 4)

The European Court of Justice has developed a sophisticated jurisprudence concerning the liability in damages of the Member States and of the Community. We describe the evolution of this area of EC law and the convergence of the two types of liability.

In both cases, where the act complained of did not involve the exercise of discretion, the mere fact of illegality, combined with causation and loss, is enough to found a claim for damages. However, as regards acts which involve the exercise of discretion, the breach must be “sufficiently serious”. We ask whether the sufficiently serious breach test could provide a degree of inspiration to English law.

Key questions:

1) Could the EC law on liability for unlawful acts provide a useful model for the domestic law liability of public bodies?

2) Does the “sufficiently serious breach” test provide a suitable mechanism for ensuring that the discretion of public bodies is duly respected while also enabling recovery of compensation where appropriate?

PUBLIC LAW UNLAWFULNESS AND LIABILITY IN DAMAGES (PART 5)

This key section of the paper examines the relationship between “public law unlawfulness”, that is, the species of illegality brought about by a public body breaching a ground of judicial review, and “liability in damages”, that is, the duty imposed by the courts upon a public body to pay compensation in respect of loss caused by its act or omission to act. At present, the concept of “liability in damages” exists solely in private law. We ask whether a distinct concept of “public law liability” could be created.

Key questions:

1) Was the removal of the public law hurdle from the tort of negligence a desirable development?

2) Should the question of whether an administrative act was unlawful in the public law sense be of any relevance in determining whether loss caused by that act should be compensated?

3) If so, what role should public law unlawfulness play in determining liability?

4) What role, if any, should “fault” play in determining the liability of public bodies? Is it ever appropriate to award compensation for loss caused by acts which cannot be said to involve “fault” on the part of the public body responsible?

5) Are there forms of maladministration which do not amount to public law unlawfulness which should nevertheless give rise to a right to compensation in individuals who suffer loss as a result?

6) Should this type of loss be addressed by judicial or extra-judicial means?

PROCEDURAL IMPLICATIONS (PART 6)

Here we discuss the procedural avenues used in order to obtain damages from public bodies. At present there are two options: to seek judicial review and supplement that action with a private law claim; or to bring a claim for damages through an ordinary private law action. We explain the principle of “procedural exclusivity” which sought to keep the two procedural routes separate and distinct, but whose application has become increasingly muddled.

We conclude any proposals for reform of the substantive law must be accompanied by a clear and adequate procedure based either on the existing procedures (either that in public law or that in private law) or some new procedure.

Key questions:

- 1) What is the optimal procedural route for a compensation claim against a public body?**
- 2) Does the principle of “procedural exclusivity” still have a role to play?**

THE CONTOURS OF LIABILITY (PART 7)

In this section we highlight other difficult issues which would have to be considered in any enquiry into monetary remedies in public law. While not attempting to offer definitive answers to these questions, we sketch the issues in sufficient detail to illustrate how they would fit into the overall scheme of a future enquiry.

Key questions:

- 1) Can a single legal framework of liability cover all actions of all public bodies?**
- 2) What can we learn from the approach to liability taken in other legal systems?**
- 3) What are the economic and operational implications of any given approach to liability?**
- 4) Which bodies should be covered by any new framework?**

IS THERE A CASE FOR REFORM? (PART 8)

This section asks whether there is a case for reform. First, we address issues of principle. We outline concerns that it is inappropriate in constitutional terms both for the courts to be left to determine the principles governing public bodies’ liability for acts performed in the public sphere, and for private law to be used to determine the proper extent of that liability. Secondly, we highlight possible problems with the extent of liability under the current law. The purpose of this section is not to offer definitive conclusions but rather to highlight *perceived*

deficiencies to show that further consideration of this area of law might be needed.

Key questions:

- 1) Should the principles governing public bodies' liability be determined by Parliament or by the courts?**
- 2) Should those principles be the same as those governing private individuals' liability, that is, the law of tort?**
- 3) Are there cases under the current law in which individuals are unfairly precluded from recovering compensation?**
- 4) Are there cases under the current law in which individuals are compensated to an unjustifiably high level? Should the principles concerning the measure of damages used in relation to public bodies' liability be different from the ordinary tortious measure of damages?**
- 5) Are other criticisms of the current law convincing?**

THE NEXT STAGE (PART 9)

Having identified the main causes for concern about the current law, we ask whether the law should be reformed. Again, our aim at this stage is to stimulate informed debate on these issues which would assist in making the case for a Law Commission project on the issues raised.

Key questions:

- 1) Should we maintain the *status quo* and hope that the courts can correct, or at least minimise, problems which arise under the current approach?**
- 2) Alternatively, should there be legislative intervention?**
- 3) If so, what form should legislative intervention take:**
 - a statutory framework to govern public bodies' liability, entirely replacing private law liability; or**
 - a discretionary power for the courts to award damages in cases where no private law cause of action can be established; or**
 - an extension of private law liability as regards public bodies?**

PART 1

INTRODUCTION

THE STRUCTURE OF THIS PAPER

- 1.1 In this discussion paper, we begin by setting out in general terms the case for reform of the law concerning monetary remedies in public law. In Part 2 we examine the current law. We consider the nature of judicial review and the remedies available thereunder, observing that it provides no general remedy of damages for loss caused by unlawful administrative acts. We then describe the various private law causes of action and other extra-judicial avenues that may be used by claimants seeking damages. In Parts 3 and 4 we point to the influence, actual or potential, of the Human Rights Act 1998 and of EC law. In Parts 5 to 7 we discuss the key issues that would need to be addressed in any law reform project. We conclude in Parts 8 and 9 with a summary of the current law's alleged deficiencies and an initial evaluation of possible mechanisms of reform.

IS THERE A NEED FOR REFORM?

- 1.2 Although the precise nature of the relationship between the individual and the state is always changing, there is frequent interaction between individual citizens and officials of the state. Indeed, this has been a feature of life in the UK for a century and more. There will be occasions when acts or omissions by public bodies cause loss to the individual. The questions then arise: when can and should an individual recover monetary compensation in respect of loss caused by administrative action and on what basis should any such compensation be assessed? A mature legal system should be able to give a coherent answer to these questions. English law does not.
- 1.3 Although the courts have done much to develop public law principles, they have considered that it goes beyond their proper role to create a new right to compensation for maladministration. Attempts have been made to develop the law of negligence in an incremental fashion to include some such claims.
- 1.4 In some areas of law, the incremental approach of the common law works well. It may be that this is not true of monetary remedies in public law. The task of defining the proper extent of public bodies' monetary liability for acts performed in the public sphere raises issues of fundamental constitutional importance concerning the relationship between citizen and State and the correct balance of public and private interests. Parliament should be involved.
- 1.5 Moreover, the particular approach currently adopted by the courts, whereby the liability of public bodies is as far as possible based on the types of liability that attach to private individuals in private law, creates a risk that the courts will produce an unacceptable answer to the questions posed above. It is arguably wrong to try to resolve important constitutional issues concerning the relationship between the individual and the state within what is essentially a private law doctrine. In so doing, the law denies that there is a qualitative difference between a claim by one private individual against another and a claim by a private individual against a public body acting in the public sphere.

- 1.6 In short, there is cause for concern that failure both *precisely to articulate* and *carefully to evaluate* the considerations of principle and policy for and against liability in the public law arena may result in the scope of such liability being drawn either too widely or too narrowly. Furthermore, the dominance of the private law paradigm may lead to the adoption of rules which are entirely appropriate in private law but which may not be appropriate in the public law context, in particular those concerning the measure of damages.
- 1.7 Numerous judges and commentators have observed that the current law is deficient and that there is a pressing need for reform. Many view the results which the current law produces as unfair. It is widely believed that in some cases it denies compensation where it is deserved, while in others it provides more compensation than is appropriate. Other criticisms of the current law are that it is inconsistent, incoherent, lacking in transparency, and unnecessarily complex.
- 1.8 Were it to be agreed that the Law Commission should undertake further work in this area, it would seek to provide the precise articulation and careful evaluation of considerations of principle and policy which the law at present lacks. It must be emphasised that the aim of any such a project would not be either to extend or to restrict the liability of public bodies. Rather, its aim would be the provision of a theoretically and constitutionally sound legal framework to shape the contours of that liability. Arguably both central government, local government and other public bodies would benefit from this re-evaluation and clarification of the extent of their liabilities.

PART 2

THE CURRENT LAW

INTRODUCTION

- 2.1 In this part we review the remedies that are currently available against public bodies. We consider, in turn: judicial review; private law actions against public bodies; and extra-judicial remedies.

JUDICIAL REVIEW

- 2.2 Judicial review is a process by which someone aggrieved by an administrative act can seek to challenge the legality of that act in court. It is traditionally viewed as the means by which courts control executive power and thereby uphold either the will of Parliament or independent common law values of legality.¹ Some commentators view judicial review as a more constructive, co-operative process which improves administrative decision-making by encouraging decision-makers to act in accordance with the principles of good administration.²
- 2.3 There is a number of ways in which proceedings for judicial review differ from actions in private law.
- 2.4 First, in order to seek judicial review, the applicant must show that he or she has a sufficient interest in the matter to which the application relates.³ Secondly, he or she must obtain permission (formerly known as “leave”) from the court in order to commence the action. Thirdly, proceedings must be commenced promptly, and in any event not more than three months after the grounds for the application first arose.⁴ The permission requirement and short time limit are both designed to protect public bodies from litigation which would unduly hamper performance of their public functions.
- 2.5 Once an applicant has crossed these hurdles, he or she must then establish that the act challenged is unlawful in the public law sense. The grounds on which an act may be found to be unlawful were famously summarised by Lord Diplock in

¹ Depending upon one’s position in the so-called *ultra vires* debate. Much of the literature on that knotty problem is collected in C Forsyth (ed), *Judicial Review and the Constitution* (2000). For the most recent refinements of the opposing positions, see P Craig and N Bamforth, “Constitutional Analysis, Constitutional Principle and Judicial Review” [2001] PL 763 and C Forsyth and M Elliott, “The Legitimacy of Judicial Review” [2003] PL 286. We prefer not to express a view on the merits of the debate. As a result, we use the neutral term “public law unlawfulness”, rather than “*ultra vires*”, to refer to the species of illegality which renders an administrative decision unlawful and void.

² Harlow and Rawlings aptly describe these contrasting, although not necessarily contradictory, conceptions of judicial review as, respectively, “red light” and “green light” theories: C Harlow and R Rawlings, *Law and Administration* (2nd ed, 1997), Ch 1.

³ Supreme Court Act 1981, s 31(3).

⁴ Supreme Court Act 1981, s 31(6); CPR r 54.5(1). Note the slight differences between those provisions, criticised by P Craig, *Administrative Law* (5th ed, 2003) at p 831.

the *GCHQ* case as “illegality, irrationality and procedural impropriety”.⁵ While the grounds for review have evolved considerably since that case was decided, these remain useful broad headings. Only if a ground of review has been made out can any question of a remedy arise.

Traditional remedies in judicial review

- 2.6 When the Court has found an administrative act to be unlawful in the public law sense, it has five principal remedial options at its disposal: the three “prerogative remedies”; and declaration and injunction.

The prerogative remedies

- 2.7 First, the court may quash (that is, retrospectively render null and void) a completed act by issuing a quashing order (formerly known as certiorari). Secondly, the court may prohibit a public body from carrying out a proposed act or require it to cease a continuing act by issuing a prohibitory order (formerly prohibition). Thirdly, the court may require a public body to exercise a public duty or power in favour of the applicant, which it has unlawfully declined to do, by issuing a mandatory order (formerly mandamus).⁶

Declaration and injunction

- 2.8 In addition to the prerogative remedies, the court may make a declaration or grant an injunction.⁷ In the public law context, the former remedy is used primarily to declare that an administrative act is unlawful or to determine the existence and scope of public law duties and powers. The latter remedy is used to restrain a public body from acting in a way that is unlawful or to compel the performance of a duty.

Comparisons with the remedies available in private law proceedings

- 2.9 These remedies which are available in judicial review proceedings differ from remedies available in private law actions in two key respects. First the prerogative remedies cannot be obtained in private law proceedings. Secondly, all remedies in judicial review proceedings are discretionary.⁸ The meaning of “discretionary” in this context has been explained extra-judicially by Sir Thomas Bingham.⁹ He identifies nine possible grounds on which a court might legitimately refuse a remedy despite the fact that the applicant established that the

⁵ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410.

⁶ Supreme Court Act 1981, s 31(1); CPR r 54.2.

⁷ Supreme Court Act 1981, s 31(2); CPR r 54.3(1).

⁸ One apparent exception is that the special remedy of habeas corpus can be claimed either in an application for judicial review or in a direct application for habeas corpus. In the latter case, the remedy is not discretionary. The relationship between the two forms of action is discussed by the Lord Chancellor’s Department (now the Department for Constitutional Affairs) in LCD Consultation Paper, *The Administrative Court: Proposed Changes to Primary Legislation following Sir Jeffrey Bowman’s Review of the Crown Office List* (2001), paras 2–10.

⁹ “Should Public Law Remedies be Discretionary?” [1991] PL 64.

administrative act complained of is unlawful.¹⁰ His general conclusion is that any discretion ought to be tightly controlled and carefully exercised, with compelling reasons required before a remedy will be refused. Nonetheless, the fact remains that remedies sought in judicial review actions are not available as of right.

Monetary remedies?

- 2.10 The traditional judicial review remedies are of great importance. In many cases they will provide complete satisfaction to the successful applicant. But, as will have been noted, these traditional remedies do not include a power to award damages. In some cases, the application may have suffered financial loss as a result of an unlawful administrative act. In such cases, the traditional remedies may not offer adequate redress.
- 2.11 For example, an applicant may successfully argue that he or she was unlawfully refused a licence to engage in a commercial activity. A quashing order will erase that erroneous decision. The reviewing court can also remit the case to the original decision-maker with a direction to reconsider the matter and reach a decision in accord with the court's judgment.¹¹ The decision-maker may then retake the decision and decide that the applicant should receive the licence.¹²
- 2.12 On one view, the applicant has obtained what he or she wanted and will thus be content. On another view, the applicant will have been unable to pursue the commercial activity from the time of the original decision until the time of the later decision. That period may have been several weeks or months. The profits which the applicant could have made in that period had he or she not wrongfully been refused the licence might be significant. The question which then arises is whether he or she should be able to claim compensation for the resultant loss of profit.
- 2.13 At present in English law there is no general right to recover damages in respect of loss caused by an administrative act, even where that act is unlawful according to public law principles. An individual who wishes to recover damages must also establish the existence of a cause of action in private law.¹³

¹⁰ These grounds are: delay in bringing the case; inadequacy of the applicant's standing; acquiescence of the applicant in the decision challenged; the conduct and motives of the applicant; failure to exhaust other remedies; inevitability of outcome; the fact that the remedy sought would serve no useful purpose; the fact that adverse public consequences would ensue from the grant of the remedy; and the fact that the sphere of activity in which the challenged administrative decision was made is one in which the courts are reluctant to intrude.

¹¹ Supreme Court Act 1981, s 31(5); CPR r 54.19(2).

¹² This is by no means inevitable. For example, the original decision may have been unlawful because of a breach of procedural fairness. Even if the decision-maker follows the lawful procedure when retaking the decision, it may still ultimately decide against the applicant. This illustrates one of the central tenets of judicial review, namely that it is a process of review and not one of appeal. The court will not consider the merits of the application for a licence; it is solely concerned with the lawfulness of the decision not to grant a licence.

¹³ An individual may only recover damages in an application for judicial review if he or she also seeks other remedies (CPR r 54.3(2)) and would have recovered damages if the claim

PRIVATE LAW ACTIONS AGAINST PUBLIC BODIES

- 2.14 In theory, any private law cause of action can be used by claimants attempting to recover compensation from a public body in respect of loss caused by an administrative act. Fordham cites examples of claims in nuisance, false imprisonment, deceit, malicious prosecution, occupier's liability, unlawful interference with property, defamation, maliciously procuring the issue and execution of a search warrant, conspiracy to injure, and interference with contractual relations.¹⁴
- 2.15 In practice, three private law actions are principally used by individuals seeking damages from public bodies: misfeasance in public office, breach of statutory duty and negligence. These will be considered in turn. The first two are of limited use to claimants; thus the primary focus will be on negligence.

Misfeasance in public office

- 2.16 The only tort which specifically deals with loss caused by administrative acts is misfeasance in public office. The precise ambit of this tort was until recently somewhat uncertain, though the House of Lords' decisions in *Three Rivers District Council v Bank of England (No 3)* provide a degree of clarity.¹⁵
- 2.17 The tort has two limbs, or alternative bases for establishing liability. First, public officers will be liable where they perform or omit to perform an act with the object of injuring the claimant (this is known as "targeted malice") and do so injure the claimant. Secondly, public officers will be liable where they perform an act which they know they have no power to perform and which they know will probably injure the claimant, and do so injure the claimant.
- 2.18 Liability under the first limb will be rare, as public officers rarely act in a deliberately malicious way. Claimants have therefore focused on the second limb. Although the second limb does not involve quite such egregious fault as the first, Lord Steyn pointed out in the first *Three Rivers* decision that it "involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful."¹⁶
- 2.19 In the *Three Rivers* case, counsel for the claimants sought to make the test as close as possible to "illegality equals liability": an objective error leading to an excess of power, which caused an objectively foreseeable loss, should suffice. Counsel for the defendants argued the opposite, advocating a test of subjective knowledge of illegality and of foreseeability of the type of loss. The House of Lords took a *via media* between these extremes. It held that the public officer

had been made in an ordinary private law action (Supreme Court Act 1981, s 31(4)). Part 6 examines the circumstances in which the two alternative procedural routes – judicial review or ordinary private law action – are appropriate.

¹⁴ M Fordham, "Reparation for Maladministration: Public Law's Final Frontier" [2003] JR 104 at 104–105.

¹⁵ The two decisions, reported together at [2003] 2 AC 1, were decided on 18 May 2000 and 22 March 2001.

¹⁶ [2003] 2 AC 1 at 191.

must know of, or be subjectively reckless with regard to, the illegality of his or her proposed course of action and that he or she must know of, or be subjectively reckless with regard to, the probability that the course of action will cause loss to the claimant.¹⁷

- 2.20 As suing an individual public officer will often not be particularly attractive, in that he or she may not have sufficient resources to satisfy any judgment for damages, the further question arises whether the public body for which he or she works can be vicariously liable for his or her tortious acts. *Racz v Home Office* established that vicarious liability is possible.¹⁸ The modern test for vicarious liability is found in *Lister v Hesley Hall Ltd*.¹⁹
- 2.21 In practice, the fault element in either limb of the tort is very difficult to prove. As such, the tort of misfeasance in public office is of limited utility to those aggrieved by administrative action. Nevertheless, it does offer certain advantages as compared to other causes of action. First, the notion of proximity, a prerequisite of liability in negligence,²⁰ seems to have no role to play.²¹ Secondly, it seems to be easier to recover damages in respect of pure economic loss through an action for misfeasance than in a negligence claim.²²

Breach of statutory duty

- 2.22 A second possible cause of action is found in the tort of breach of statutory duty. It is well established that breach of a statutory duty is not in itself sufficient for the recovery of damages. The mere fact that a public body has breached a statutory duty and that the breach has caused loss to the claimant does not enable the claimant to recover compensation in respect of that loss. As Lord Browne-Wilkinson was at pains to stress in the seminal decision of *X (Minors) v Bedfordshire County Council*:

It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives rise to no claim for damages. A claim for damages must be based on a private law cause of action.²³

- 2.23 To determine which breaches are actionable, the court must interpret the relevant statute to determine whether Parliament intended it to give rise to a cause of

¹⁷ This is most clearly articulated by Lord Hope in the second judgment, at [44].

¹⁸ [1994] 2 AC 45.

¹⁹ [2001] UKHL 22, [2002] 1 AC 215.

²⁰ Below, para 2.38.

²¹ [2003] 2 AC 1 at 193 *per* Lord Steyn and at 228 *per* Lord Hutton.

²² See D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) at p 94.

²³ [1995] 2 AC 633 at 730.

action in damages and whether the claimant is within the range of individuals whom Parliament intended it to protect.²⁴

2.24 As Lord Browne-Wilkinson observed in *X (Minors)*, “There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators.”²⁵ One such indicator is the availability of an alternative remedy. Where there is already an adequate remedy, either under the existing law of tort or under the relevant statute itself, it is unlikely that a cause of action for breach of statutory duty will be found.²⁶

2.25 The courts have taken a very restrictive approach to the imposition of private law liability for breach of statutory duty. As Scott Baker J observed in *T v Surrey County Council*, there has been “a considerable reluctance on the part of the courts to impose upon local authorities any liability for breach of statutory duty other than that expressly imposed in the statute”.²⁷

2.26 Stanton observes that the courts’ requirement that Parliament must be shown to have intended the statute to confer an enforceable right of action in damages on those injured by breach has “irretrievably stacked the scales against the tort”, adding:

If Parliament had intended such a right to exist, it is difficult to see why it did not use familiar mechanisms to create it expressly. If it did not make recourse to such mechanisms, it is difficult to resist the implication that actionability was not intended.²⁸

2.27 Leading recent cases show that the courts are particularly reluctant to impose liability where the state is performing welfare or regulatory roles. In *X (Minors)*, the House of Lords held that general social legislation of the type in question, although passed for the protection of those affected by it, was in fact enacted for the benefit of society as a whole.²⁹ In *O’Rourke v Camden London Borough Council*, the House of Lords held that no private law cause of action was created by section 63 of the Housing Act 1985, which imposes a duty upon local housing authorities to provide accommodation to applicants whom they have reason to believe may be homeless and in priority need.³⁰

²⁴ It would seem that a further requirement is that breach of the duty must be “calculated to occasion loss of a kind for which the law normally awards damages”: *Cullen v Chief Constable of the RUC* [2003] UKHL 39, [2003] 1 WLR 1763 at [66], *per* Lord Millett.

²⁵ [1995] 2 AC 633 at 731.

²⁶ *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832; *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173.

²⁷ [1994] 4 All ER 577 at 597.

²⁸ K M Stanton, “New Forms of the Tort of Breach of Statutory Duty” (2004) 120 LQR 324 at 325.

²⁹ [1995] 2 AC 633 at 731–732.

³⁰ For a summary of the case-law leading to the decision in *O’Rourke*, see R Carnwath, “The *Thornton* Heresy Exposed: Financial Remedies for Breach of Public Duties” [1998] PL 407.

- 2.28 One reason for this reluctance may be that, if it is accepted that the statutory duty gives rise to a private law cause of action, liability is strict – the mere fact that the duty was breached suffices for liability, with no need for the claimant to prove any fault on the part of the public body.³¹ This could lead to very serious financial consequences for public bodies were they to be found legally liable under this head.

Negligence

- 2.29 There is no cause of action in tort based on mere careless performance of or failure to perform a statutory duty or power in the absence of a breach of a free-standing common law duty of care.³² Where a claim for breach of statutory duty has failed, or where the act complained of was not carried out in the exercise of a statutory duty, the obvious alternative claim in private law is in the tort of negligence.
- 2.30 Ordinary principles of negligence apply to determine whether a claim against a public body acting in performance or non-performance of its public law duties and powers can succeed. The claimant must establish three things: that the public body owed him or her a duty to take care not to cause him or her the loss suffered, that the public body breached that duty by failing to take reasonable care, and that the breach caused the loss. Notwithstanding the apparent straightforwardness of these principles, their application in practice is a matter of great complexity.³³

Duty of care

A PRELIMINARY TEST OF JUSTICIABILITY

- 2.31 The factors which determine the existence of a duty of care were set out by the House of Lords in *Caparo Industries v Dickman*.³⁴ In the context of claims against public bodies in respect of their performance of public functions, a preliminary test of justiciability must also be satisfied. If the assessment by the court of the allegations on which the claimant bases his or her claim requires the court to consider policy matters which are not justiciable, the claim will fail without more.³⁵

³¹ Although some statutory duties have a built-in fault element, for example if they require a public body to take reasonable care to produce or avoid some end. See D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) at pp 39–40 and K M Stanton, “New Forms of the Tort of Breach of Statutory Duty” (2004) 120 LQR 324 at 331–332.

³² *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 732–735.

³³ Recently recognised as such by the House of Lords in *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004]1 WLR 1057.

³⁴ [1990] 2 AC 605; discussed below, paras 2.38 ff.

³⁵ This test of justiciability emerged from a blunter tool formerly used to filter out claims which ought not to proceed to trial. In *Anns v Merton London Borough Council* [1978] AC 728, the House of Lords drew a distinction between policy matters and operational matters, stating that a public body might be liable in negligence in respect of the latter but not the former. The inadequacy of this test was highlighted in *Rowling v Takaro Properties Ltd* [1988] AC 473. As the Privy Council observed at p 501, “this distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those

A SECOND PRELIMINARY TEST?

2.32 There has been some confusion in the case-law as to whether a second preliminary test applies in cases involving public bodies, which would require a claimant to show that the act complained of was unlawful in the public law sense before the public body could be found liable in negligence in respect of that act. In the leading case of *X (Minors) v Bedfordshire County Council*, Lord Browne-Wilkinson stated that an administrative act carried out in the exercise of a statutory discretion can only be actionable in negligence if the act is so unreasonable that it falls outside the proper ambit of that discretion.³⁶ In effect, this would require that the act be unlawful in the public law sense under the *Wednesbury* principle.³⁷ However, he denied the existence of a public law hurdle *as such*.³⁸ The requirement is instead based on the principle that nothing authorised by Parliament can be an actionable wrong.

2.33 Fairgrieve highlights the problems associated with such a ruling:

This resulted in a paradox. While doubting the existence of any public law notions of invalidity in the tort of negligence, Lord Browne-Wilkinson nonetheless ushered in a specific head of unlawfulness to play an important role in negligence actions against public authorities. The introduction of the *Wednesbury* principle into negligence actions was controversial. It was *unfair* because it was a very high standard of unreasonableness to require, and it was *inflexible* in the sense that it focused on the substance of the decision taken, neglecting actions concerning procedural violations or the failure to take into account relevant considerations.³⁹

2.34 The House of Lords has subsequently removed any trace of the public law hurdle. In *Barrett v Enfield London Borough Council*, Lord Hutton stated:

cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution of risks”.

³⁶ [1995] 2 AC 633 at p 736: “It is clear both in principle and from the decided cases that the local authority cannot be liable in damages for doing that which Parliament has authorised. Therefore if the decisions complained of fall within the ambit of such statutory discretion they cannot be actionable in common law. However if the decision complained of is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority, there is no a priori reason for excluding all common law liability.”

³⁷ The principle, laid down in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, that an administrative decision will only be considered to be irrational in substance if it is so unreasonable that no reasonable decision-maker could have reached it.

³⁸ [1995] 2 AC 633 at p 736: “For myself, I do not believe that it is either helpful or necessary to introduce public law concepts as to the validity of a decision into the question of liability at common law for negligence. In public law a decision can be ultra vires for reasons other than *Wednesbury* unreasonableness ... (eg breach of the rules of natural justice) which have no relevance to the question of negligence. ... I consider that the public law doctrine of ultra vires has, as such, no role to play in the subject under discussion.”

³⁹ D Fairgrieve, “Pushing back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom” [2002] PL 288 at 298 (emphasis in original).

I consider that where a plaintiff claims damages for personal injuries which he alleges have been caused by decisions negligently taken in the exercise of a statutory discretion, and provided that the decisions do not involve issues of policy which the courts are ill-equipped to adjudicate upon, it is preferable for the courts to decide the validity of the plaintiff's claim by applying directly the common law concept of negligence than by applying as a preliminary test the public law concept of *Wednesbury* unreasonableness ... to determine if the decision fell outside the ambit of the statutory discretion.⁴⁰

- 2.35 In the other main speech in *Barrett*, Lord Slynn seemed less sure that the public law hurdle could be jettisoned.⁴¹ However, in the later case of *Phelps v Hillingdon London Borough Council*, he clarified his position in a speech with which all other members of the House agreed, stating:

This House decided in *Barrett v Enfield London Borough Council* that the fact that acts which are claimed to be negligent are carried out within the ambit of a statutory discretion is not in itself a reason why it should be held that no claim for negligence can be brought in respect of them. It is only where what is done has involved the weighing of competing public interests or has been dictated by considerations on which Parliament could not have intended that the courts would substitute their views for the views of ministers or officials that the courts will hold that the issue is non-justiciable on the ground that the decision was made in the exercise of a statutory discretion.⁴²

- 2.36 It may be noted that both *Barrett* and *Phelps* were principally concerned with establishing that a public body may be liable for acts done which fell within its 'ambit of discretion' without the claimant also having to show that the act done was unlawful in the public law sense, so long as the decision taken or act done was justiciable. These judgements are aimed at cases where public law unlawfulness could *not* have been shown.⁴³ These decisions do not really address the issue raised in the hypothetical situation presented above in para 2.11, as to whether there is or should be a remedy in damages for negligence when the decision being challenged was unlawful in the public law sense.

⁴⁰ [2001] 2 AC 550 at 586.

⁴¹ At p 571 he stated, "if an authority acts wholly within its discretion – ie it is doing what Parliament has said it can do, even if it has to choose between several alternatives open to it, then there can be no liability in negligence. It is only if a plaintiff can show that what has been done is outside the discretion and the power, then he can go on to show the authority was negligent. But if that stage is reached, the authority is not exercising a statutory power, but purporting to do so and the statute is no defence." He later continued: "I share Lord Browne-Wilkinson's reluctance to introduce the concepts of administrative law into the law of negligence, as Lord Diplock appears to have done. ... [A]cts done pursuant to the lawful exercise of the discretion can, however, in my view be subject to a duty of care, even if some element of discretion is involved."

⁴² [2001] 2 AC 619 at 653.

⁴³ This of course raises a further question of whether it can be argued that the courts have gone too far towards giving a remedy in such cases.

2.37 It seems clear that, in considering private law proceedings against a public law body, the only preliminary test is that of justiciability though that is itself a somewhat elusive concept.⁴⁴ If that test is satisfied, the claimant may attempt to establish a duty of care on ordinary negligence principles. However it would be wrong, in the present state of the law, to regard the issues relating to justiciability and duty of care as always being entirely distinct and self-contained. Arguments which are sometimes advanced as going to justiciability are, in other cases, put as going to whether it is fair, just and reasonable to impose a duty of care in private law (see following paragraph).⁴⁵

ESTABLISHING A DUTY OF CARE: THE *CAPARO* TEST

2.38 In *Caparo Industries v Dickman* the House of Lords laid down a three-stage test for determining the existence of a duty of care. First, the harm suffered by the claimant must have been a foreseeable consequence of the act complained of. Secondly, there must have been sufficient proximity between the parties. Thirdly, it must have been fair, just and reasonable to impose a duty of care in the circumstances of the case.⁴⁶

2.39 The House of Lords stressed that these factors should not be applied in isolation from existing case-law. Rather, “the law should develop novel categories of negligence incrementally and by analogy with established categories”.⁴⁷ Nonetheless, it is undeniable that the courts have a high degree of flexibility in applying the three factors to decide whether a duty of care is owed in any given case.

2.40 In the context of negligence claims against public bodies in respect of the performance of public law duties and powers, it has long been acknowledged that each of the three *Caparo* factors, but in particular the third, must take account of the special nature of such claims. There are numerous policy arguments which militate against imposing a duty of care upon public bodies. Markesinis and others have identified four broad groups of arguments. They suggest that the courts feel, first, that imposing liability on the public bodies in question would make bad economic sense; secondly, that liability would inhibit the freedom of action of these bodies; thirdly, that it would be inappropriate for the courts to control elected bodies and tell them how to exercise their discretionary powers;

⁴⁴ Note, however, the reluctance of courts below the House of Lords to abandon the formula that nothing done by a public body within its area of discretion can give rise to liability in negligence. See for example *A v Essex County Council* [2003] EWCA Civ 1848, [2004] 1 WLR 1881 at [33].

⁴⁵ See also the discussion of *Stovin v Wise* at paras 2.74-2.80 below.

⁴⁶ [1990] 2 AC 605.

⁴⁷ Here the House of Lords was adopting the position taken by Brennan J in the High Court of Australia in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 43–44. The full passage is quoted by Lord Bridge at p 618 and by Lord Oliver at p 634.

and finally, that the victims often have alternative remedies which make a tort remedy not only dangerous but also superfluous.⁴⁸

- 2.41 Markesinis and others are critical of the courts' routine invocation of the factors they identify. They suggest that the economic arguments are merely judicial hunches which are not supported by any empirical research; that the inhibition argument is similarly unsupported by tangible evidence and, on the contrary, that in other legal systems the potential of civil liability has not made public bodies less prompt, efficient or effective; that constitutional considerations regarding the division of powers between the courts and the executive may be going too far in the direction of stating that the only real control is political and not legal; and that cases where there is a truly effective alternative remedy are the exception rather than the rule.⁴⁹
- 2.42 It is perhaps under the influence of such academic arguments that the courts have begun to show an increasing willingness to acknowledge the existence of a private law duty of care in the exercise of public functions. However, it seems likely that a more compelling influence was that of the case-law of the European Court of Human Rights.
- 2.43 A crucial case was *Osman v United Kingdom*.⁵⁰ The claimants sought to sue the police in negligence for loss caused by its failure to prevent a crime. The English Court of Appeal struck out the claimants' action.⁵¹ The court applied *Hill v Chief Constable of West Yorkshire*, in which the House of Lords held that it could never be "fair, just and reasonable" to impose a duty of care upon the police in respect of its activities in the investigation and suppression of crime, since potential negligence liability might lead to defensive practices among police officers and to a diversion of the police's resources in order to contest actions.⁵²
- 2.44 The claimants successfully argued before the European Court of Human Rights that this decision breached Article 6 of the European Convention on Human Rights. Article 6 guarantees access to the courts for the determination of civil rights and obligations. It is therefore hostile to immunities, that is, ostensibly procedural rules which automatically exclude the possibility of proving liability which otherwise might exist. The Court treated the outcome of the *Osman* litigation as tantamount to granting the police an immunity from liability for operational errors. It held that a claimant should be given the opportunity in a full trial to argue on the merits that other policy considerations, such as the gravity of

⁴⁸ B Markesinis, J-P Auby, D Coester-Waltjen and S Deakin, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (1999) at p 46. These factors are not exhaustive. Many forms of 'loss' from administrative action are pure economic loss. The law of negligence looks for a special relationship before imposing a duty of care not to cause purely economic loss. Many duties of public bodies do not involve such special relationships, but require the authority to balance the wishes and needs of a particular individual against those of others and of the interests of the community at large.

⁴⁹ *Ibid*, at pp 76–90.

⁵⁰ (2000) 29 EHRR 245.

⁵¹ *Osman and another v Ferguson and another* [1993] 4 All ER 344.

⁵² [1989] AC 53 at 63.

the defendant's fault and the magnitude of the claimant's loss, should prevail over the policy which the English law rule was designed to protect, namely maintaining the effectiveness of the police.

- 2.45 The European Court effectively recanted from this position in *Z v United Kingdom*.⁵³ There it acknowledged that the English courts' decision in *X (Minors) v Bedfordshire County Council*⁵⁴ that it could never be "fair, just and reasonable" to impose a duty of care upon local authorities when deciding whether to take children into care was not contrary to Article 6. Such a decision could not be regarded as imposing an immunity or "exclusionary rule": "the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law".⁵⁵
- 2.46 The Court returned to the orthodox position that Article 6 merely protects the right of an individual to a determination in court of any civil rights and obligations which happen to be conferred or imposed by domestic law; it does *not* require domestic law to confer or impose any particular civil rights or obligations. Since the claimants had failed to establish an essential ingredient of the duty of care under domestic law, namely that it be "fair, just and reasonable" to impose such a duty, they did not have any substantive right to which Article 6 could apply. The rule in English law that no duty of care could ever be owed in certain circumstances resulted in there being no civil right or obligation to be determined.
- 2.47 The decision in *Z* is correct as a matter of logic.⁵⁶ However, it was probably not logic that prompted the European Court's *volte-face*. More significant was the Court's realisation that all of the policy factors for and against liability, which the Court thought in *Osman* are ignored by not allowing the action to proceed to trial, are in fact considered at the strike out stage. At that stage, the court considers whether, even if the claimant can prove all the facts alleged, and assuming that he or she would succeed on the issues of breach of duty and causation, there could ever be a duty of care in the first place. If there could never, as a matter of English law as informed by policy considerations, be a duty of care, it would be pointless to allow the action to proceed to trial.
- 2.48 However, *Osman* remains a significant decision. Before *Z* was decided, *Osman* seems to have encouraged the English courts to be more willing to admit that a

⁵³ (2002) 34 EHRR 3.

⁵⁴ [1995] 2 AC 633.

⁵⁵ (2002) 34 EHRR 3 at para 100.

⁵⁶ A particularly clear analysis of the European Court of Human Rights' error in *Osman* is provided by Lord Browne-Wilkinson in *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 559–560. See also Lord Hoffmann, "Human Rights and the House of Lords" (1999) 62 MLR 159 at 164; P Craig and D Fairgrieve, "*Barrett*, Negligence and Discretionary Powers" [1999] PL 626 at 630–631; C Gearty, "Unravelling *Osman*" (2001) 64 MLR 159. For a contrary view, see L Hoyano, "Policing Flawed Police Investigations: Unravelling the Blanket" (1999) 62 MLR 912 and J Wright, "The Retreat from *Osman*: *Z v United Kingdom* in the European Court of Human Rights and Beyond" in D Fairgrieve, M Andenas and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002).

duty of care might be made out on the facts of the case. The clearest example is *Barrett v Enfield London Borough Council*, discussed below,⁵⁷ in which Lord Browne-Wilkinson acknowledged that were the House of Lords to uphold the striking out order, the claimants would probably take the case to Strasbourg.⁵⁸ This consideration may have prompted the House of Lords to decide that a duty of care can, in principle, exist. As Hale LJ observed in *A v Essex County Council*, “if nothing else [*Osman*] engendered great caution in the use of striking out”.⁵⁹

- 2.49 Whether the reason for the shift in mindset is academic persuasion or the influence of the European Court of Human Rights, it is clear that the English courts are now increasingly willing to hold that a duty of care may, on the facts of a given case, be established under the *Caparo* test, rather than striking out the action on the basis that a duty of care could not possibly be established. The important cases which have established this trend are *Barrett v Enfield London Borough Council*⁶⁰ and *Phelps v Hillingdon London Borough Council*.⁶¹
- 2.50 In *Barrett*, the House of Lords held, distinguishing *X (Minors) v Bedfordshire County Council*,⁶² that the public policy considerations which meant that it could never be fair, just and reasonable to impose a duty of care on a local authority when deciding whether or not to take action in respect of a case of suspected child abuse did not have the same force in respect of decisions taken once the child was already in local authority care. It must be decided on the facts of each case whether it is fair, just and reasonable to impose such a duty.
- 2.51 In *Phelps*, the House of Lords held that an educational psychologist may owe a duty of care in the performance of her profession to those who might foreseeably be injured if due care and skill were not exercised. Furthermore, where she was specifically asked to advise as to the assessment of and future provision for a child and it was clear that the child’s parents and teachers would follow that advice, a duty of care prima facie arose. The defendants’ argument that it could never be fair, just and reasonable to impose a duty of care in such circumstances was rejected.
- 2.52 Furthermore, there have already been cases, which would once have been automatically struck out, in which a duty of care has been established on the facts.⁶³ It is therefore clear that the courts will not simply go through the motions of considering whether a duty of care arises on the precise facts before invariably

⁵⁷ At para 2.50.

⁵⁸ [2001] 2 AC 550 at 560.

⁵⁹ [2003] EWCA Civ 1848, [2004] 1 WLR 1881 at [34].

⁶⁰ [2001] 2 AC 550.

⁶¹ [2001] 2 AC 619.

⁶² [1995] 2 AC 633.

⁶³ Eg *DN v Greenwich London Borough Council* [2004] EWHC 3322, unreported, 19 December 2003. Judge Sean Overend, sitting in the Queen’s Bench Division of the High Court, held that, on the facts of the case, an educational psychologist owed a duty of care in respect of her professional activities and that, again on the facts, that duty had been breached. The local education authority was therefore vicariously liable in negligence.

denying that it does so arise. Rather, it seems fair to conclude that duties of care are now more readily found in cases concerning performance of public functions than was previously the case. However, this does not necessarily mean that negligence claims against public bodies succeed much more frequently than before. The policy factors which once prompted the courts to deny that any duty of care was owed at all are still being used by the courts to restrict liability. They have reappeared at the next stage of a negligence claim, in relation to the standard of care.

Standard of care

2.53 Once it has been established that a duty of care was owed, the next step is to consider whether that duty was breached. This raises the issue of standard of care – precisely what was the defendant required to do in order to discharge the duty of care which it owed to the claimant?

2.54 The general rule was stated by Pearson J in *Hazell v British Transport Commission*:

The basic rule is that negligence consists in doing something which a reasonable man would not have done in that situation, or omitting to do something which a reasonable man would have done in that situation.⁶⁴

2.55 Although the level at which the standard of care is set is a question of law, the question is posed in the most general terms. The standard in any given case depends upon the precise circumstances of that case. Factors which will influence the court in setting the standard of care include: the importance of the object to be attained by the defendant's act or omission, the probability that loss or harm will result to the claimant from that act or omission, the gravity of the loss or harm that will occur if that probability comes to pass, and the cost or burden of preventing it. These factors form what we might term the standard of care calculus.

2.56 In the context of claims against public bodies for alleged negligence in the exercise of their public functions, the policy arguments which were formerly used by the courts as a reason to deny the existence of a duty of care at all are now relevant in determining the precise standard of care to which the public body ought to adhere. Four groups of arguments against imposing liability were identified above,⁶⁵ of which the first three are particularly important: that imposing liability on the public bodies in question would make bad economic sense; that liability would inhibit the freedom of action of these bodies; and that it would be inappropriate for the courts to control elected bodies and tell them how to exercise their discretionary powers.

2.57 The economic arguments relate more to the *overall* effects of imposing liability on public bodies than to the effects of liability *in particular cases*. As such, these

⁶⁴ [1958] 1 WLR 169 at 171.

⁶⁵ At para 2.40.

arguments are largely a background consideration in the minds of the judges, prompting them in general to be hesitant to impose wide-ranging liability, rather than a prominent factor in determining the standard of care in a particular case.

- 2.58 However, at least one of the economic arguments fits into the standard of care calculus, namely the argument that imposing liability on public authorities will lead to inefficiency in the form of “defensive administration” and the diversion of expenditure. The idea here is that public bodies will shy away from making difficult decisions if they fear incurring liability, even though it is manifestly in the public interest that those decisions be made. As such, this argument can be classed as going to the importance of the object to be attained by the defendant’s act or omission – it is a classic instance of the need to balance the risk of harm against the consequences of not taking that risk.⁶⁶
- 2.59 The arguments that liability would inhibit public bodies’ freedom of action and that it would be wrong for the courts to tell elected or other statutory bodies how to exercise their discretion also play a significant role in determining the standard of care.
- 2.60 The relevant principles here could be termed *institutional competence* and *constitutional legitimacy*. The first principle refers to the fact that the public body is better placed than the court to determine what is the best course of action when a difficult choice must be made. The court must be wary of being wise after the event. The second principle refers to the fact that the public body has been given the task, usually by Parliament, of deciding what course of action to take. The intention of Parliament would be frustrated if the courts were to interfere unduly with the body’s freedom of action.
- 2.61 As a result, where a public body must make a difficult discretionary decision, this will be a key factor in determining the appropriate standard of care. This does not mean that a body required to make such decisions may act carelessly or haphazardly. But it does mean that showing that the public body did not take reasonable care will be a difficult task for the claimant. The courts acknowledge that public bodies often face tough choices between two or more options, with no single option obviously being the most appropriate course of action to take. There will often be little evidence as to the likely consequences of each option, and the decision will often have to be made very quickly.
- 2.62 For example, where a local authority is required to house a child taken into local authority care, it will be difficult for the child to show that the body failed to take reasonable care to provide him or her with appropriate and properly monitored placements with foster parents.⁶⁷ It will be even more difficult to show that the

⁶⁶ See *Daborn v Bath Tramways* [1946] 2 All ER 333 at 336 *per* Asquith LJ: “As has often been pointed out, if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk.”

⁶⁷ This was one of the allegations on which the claim in *Barrett v Enfield London Borough Council* [2001] 2 AC 550 was based.

body failed to take reasonable care in deciding whether to take the child into care in the first place.⁶⁸ As Wright comments:

Deciding whether to take steps to take a child into the care of a local authority will be very finely balanced; sometimes a decision will prove to be erroneous. This does not mean that the local authority or its social workers and other professional advisers will have been negligent. ... Careful professionals may reach the wrong conclusions, but provided that due care is exercised in taking decisions a negligence action will not lie.⁶⁹

- 2.63 It is now clear that the approach set out in the *Bolam* case,⁷⁰ by which a professional is held to have taken reasonable care if he or she can show that his practice accorded with a substantial and respectable body of opinion in his field, can also apply in the public law context. In *A v Essex County Council*, Hale LJ commented that, had a duty of care in fact been owed by a local authority adoption agency to provide all relevant information to prospective adopters, it was “crystal clear” that the *Bolam* test would apply.⁷¹
- 2.64 The adoption of the standard of care based on the *Bolam* test has been used to ensure that the liability of public bodies does not become excessive. In *Phelps*, Lord Clyde stated, “Any fear of a flood of claims may be countered by the consideration that in order to get off the ground the claimant must be able to demonstrate that the standard of care fell short of that set by the *Bolam* test.”⁷²
- 2.65 This approach has already resulted in the failure of claims which might otherwise have succeeded. In *Carty v London Borough of Croydon*,⁷³ the claimant alleged that the defendant had failed to provide him with a proper, suitable or sufficient education appropriate to his needs. Gibbs J said that the facts of the case had initially suggested to him “a *prima facie* case of negligence” but, having observed that “a detailed and realistic appraisal reveals the complex and difficult situation faced by the defendants”, he dismissed the claim.⁷⁴ As Hickman observes, “*Bolam* illustrates that the tortious standard is not monolithic, can absorb policy

⁶⁸ The exclusion of a duty of care in such circumstances by the House of Lords in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 is no longer good law. See below, paras 3.22–3.24.

⁶⁹ J Wright, “Immunity’ no more: Child abuse cases and public authority liability in negligence after *D v East Berkshire Community Health NHS Trust*” (2004) 20 *Journal of Professional Negligence* 58 at 65.

⁷⁰ Named after the case in which it was first articulated: *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

⁷¹ [2003] EWCA Civ 1848, [2004] 1 WLR 1881 at [57].

⁷² *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at p 672. See also Lord Slynn at p 655. Note that not all commentators are persuaded by this argument. See T Weir, *Tort Law* (2002) at pp 60 and 65.

⁷³ [2004] EWHC 228, [2004] All ER (D) 220 (Feb) at [108]–[109].

⁷⁴ *Ibid*, at [108]–[115].

concerns, and can demarcate and reflect a degree of deference in situations in which courts feel ill suited to making normative determinations”.⁷⁵

- 2.66 How does the use of this approach to the standard of care in respect of difficult discretionary decisions fit into the conventional tort standard of care calculus? Clearly most acts by public bodies will be directed to the achievement of a goal that is thought to be in the public interest; the importance of the object to be attained will therefore usually be high. In some cases, though, the probability of harm resulting from a difficult discretionary decision may be very high. Yet, if the local authority has to choose between one of three options, which respectively have an 85%, 90% or 95% probability of causing severe loss, and it chooses the 85% option, should this lead to the conclusion that the public body has not reached the appropriate standard of care? When taking such a decision, it may be impossible to guarantee that the harm will not occur – for example, that a child will not suffer psychological problems in care. In such circumstances, it might be argued that the most that can be expected of a public body is that it minimise the chances of the harm occurring.⁷⁶ The cost of preventing any harm in such cases may be enormous, and would require huge budgetary increases in order effectively to guarantee that the harm will not occur. The consequences of taking a difficult discretionary decision cannot be known in advance with certainty. It may therefore be difficult for the public body to prove that the course it adopted was in fact the “least bad” option.
- 2.67 Indeed there may be other problematic ‘cost-benefit’ issues. For example, a public body exposed to risk of financial claims arising from the carrying out its public law functions may seek to protect itself by adopting safety measures which impose a disproportionate burden on others. During the period when local authorities were exposed to claims from householders arising from the exercise of their functions under the Building Regulations, there is anecdotal evidence, at least, that some authorities responded by requiring the digging of excessive foundations, thus adding to the costs of building.
- 2.68 In short, it is not easy to accommodate all the various factors that have been identified as being used in cases arising out of actions taken by public bodies within the traditional tort standard of care calculus.

Causation

- 2.69 The tortious test of causation is traditionally conceived of as comprising two stages. The first, known as “factual causation” or “the but-for test”, asks whether the defendant’s fault was a necessary condition of the loss occurring. The second, known as “legal causation”, asks whether the link between the defendant’s conduct and the claimant’s loss was sufficiently close.

⁷⁵ T Hickman, “The Reasonableness Principle: Reassessing its Place in the Public Sphere” [2004] CLJ 166 at 179.

⁷⁶ It is worth noting here that the statutory duty itself requires the local authority to “safeguard and promote [the child’s] welfare”: Children Act 1989, s 22. This cannot sensibly amount to an absolute duty to ensure that no psychological harm is suffered by the child.

2.70 Causation may sometimes be a fairly straightforward issue. However, some actions brought against public bodies raise extremely complex questions of causation. The claims in *Barrett* and *Phelps*, discussed above,⁷⁷ are good examples. In such cases, causation could be used as a tool for restricting liability. However, as Fairgrieve notes, “There are weaknesses in relying upon causation to dismiss actions. Due to the highly factual nature of determining the causal link, this question is generally not suited for decision at an early stage of proceedings.”⁷⁸ Public bodies will therefore struggle to have claims struck out on the basis that the claimant is unlikely to establish causation.

A special case: claims arising from a failure to exercise a statutory power

2.71 If the courts are somewhat reluctant to impose liability for breach of a statutory duty,⁷⁹ they are positively unwilling to impose liability for wrongful failure to exercise a statutory power. Since by definition the public body has not breached a statutory *duty*, any attempt to establish such liability must be made through an action for negligence.

2.72 The courts’ unreceptiveness to such claims hinges on the difficulty of deriving a common law duty of care from the existence of a statutory power. It would seem to be in the very nature of a power that one is not *obliged* to act. As Lord Hoffmann pointed out in the leading case of *Stovin v Wise*,⁸⁰ such claims seek “to turn a statutory ‘may’ into a common law ‘ought’.”

2.73 The law’s differing treatment of claims based on statutory powers as opposed to statutory duties was subjected to detailed analysis by the Court of Appeal in *Larner v Solihull Metropolitan Borough Council*:

That there is a distinction between the position where a statutory body has merely a power and where it is under a statutory duty is clear both as a matter of principle and on the authorities. However that simple distinction cannot always be decisive. On the one hand, a statutory body must give proper consideration to the exercise of its powers, and a failure to exercise a power may in a particular factual situation be so unreasonable as to amount to a breach of duty. On the other hand, a statutory duty may involve so large a degree of discretion (and in particular, discretion as to matters of policy) as to be incompatible with a common law duty of care. The more extensive the discretion the greater the difficulty in establishing a common law duty of care. If a body is acting lawfully (or is lawfully taking no action) within the ambit of its statutory discretion, there will be no question of it being under a common law duty to act otherwise. The statute will authorise it to behave in precisely the manner in which it has and the statutory authority will provide a defence to any alleged liability. The fact that a power is discretionary

⁷⁷ At paras 2.50–2.51.

⁷⁸ D Fairgrieve, “Pushing back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom” [2002] PL 288 at 305.

⁷⁹ See above, paras 2.22–2.28.

⁸⁰ [1996] AC 923 at 948.

does not, however, mean that a common law duty of care cannot exist. Any statutory discretion can be transformed into a statutory duty once the body decides to exercise its discretion to act in a particular manner. If it then unreasonably fails to do so the courts may make a mandatory order compelling it to act in accordance with its own decision. Again, if the only reasonable way in which it could exercise its discretion is to act in a particular way the body becomes under a duty to act in that manner. In these situations there can be a duty to act at common law as well as under the statute.⁸¹

2.74 The decision of the House of Lords in *Stovin v Wise*⁸² illustrates the quite different positions which can be taken in considering when an individual should be able to recover damages for loss caused by administrative action (or, as here, *inaction*). The claimant was injured in a collision between his motorcycle and a car emerging from a junction. His claim against the other driver for damages for personal injury was settled. However, the defendant joined the local county council to the action, alleging that it was liable in negligence and breach of statutory duty in its capacity as highway authority. The council had known about a roadside obstruction which blocked the defendant's view of oncoming traffic at the junction and had accepted that the obstruction ought to be removed. However, it had failed to exercise its statutory power to serve a notice requiring that the obstruction be removed.

2.75 The majority of the House of Lords favoured a very strong presumption against liability and invoked various policy arguments to that end.⁸³ They were at pains to stress that the public law unlawfulness of a refusal to exercise a power is a necessary but not a sufficient condition for private law liability. The *ratio* of *Stovin v Wise* is Lord Hoffmann's conclusion that:

[T]he minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.⁸⁴

2.76 The majority found against the existence of a duty of care on both limbs of the test. First, they stated that, "the question of whether anything should be done about the junction was at all times firmly within the area of the council's discretion. As they were therefore not under a public law duty to do the work, the first condition for the imposition of a duty of care was not satisfied."⁸⁵ Secondly,

⁸¹ [2001] RTR 32 at [9] (Lord Woolf CJ, Judge LJ and Robert Walker LJ). Although the decision in *Lamer* was overruled by the House of Lords in *Gorringe v Calderdale MBC* [2004]UKHL15; [2004] 1 WLR 1057, these comments remain valid.

⁸² [1996] AC 923.

⁸³ Lord Hoffmann deployed many of the policy arguments discussed above, para 2.40.

⁸⁴ *Stovin v Wise* [1996] AC 923 at 953.

⁸⁵ *Ibid*, at p 957.

the majority held that even if the council were under such a duty, there were no exceptional grounds such as to satisfy the second limb. On the contrary, they suggested that, “the creation of a duty of care upon a highway authority, even on grounds of irrationality in failing to exercise a power, would inevitably expose the authority’s budgetary decisions to judicial inquiry. This would distort the priorities of local authorities, which would be bound to try to play safe by increasing their spending on road improvements rather than risk enormous liabilities for personal injury accidents.”⁸⁶ Furthermore, they rejected the argument that a duty of care could in the present case be used as a deterrent against low standards on the part of the council, and argued that the claimant was not left unprotected by the denial of a duty of care because the defendant, and all other road users, are obliged by law to have third-party insurance.

- 2.77 Lords Nicholls and Slynn, dissenting, seem to have agreed with the majority as regards the test to be applied. However, they found in favour of the existence of a duty of care on both limbs. First, they held that the council acted irrationally in deciding to exercise its statutory power and then failing to do so. They stated that “[t]he council failed to fulfil its public law obligations just as much as if it were in breach of a statutory duty”.⁸⁷ Secondly, having accepted that “there must be some special circumstance, beyond the mere existence of the power, rendering it fair and reasonable for the authority to be subject to a concurrent common law duty sounding in damages”,⁸⁸ they identified eight factors which together amounted to a special circumstance.⁸⁹
- 2.78 The minority’s approach to the various policy arguments deployed by Lord Hoffmann is noteworthy. They acknowledged that “[t]he powers conferred on public authorities permeate so many fields that a private law duty in all cases, sounding in damages, would be no more acceptable than the opposite extreme” and that “[t]he law must recognise the need to protect the public exchequer as

⁸⁶ *Ibid*, at p 958.

⁸⁷ *Ibid*, at p 936.

⁸⁸ *Ibid*, at p 936.

⁸⁹ *Ibid*, at pp 939–941. These factors were summarised in *Sandhar v Department of Transport, Environment and the Regions* [2004] EWHC 28, (2004) 101(5) LSG 30 at [67] as follows: “(1) The existence of a source of danger exposed road users to a risk of physical injury. Road users are vulnerable where danger exists and the users may be unfamiliar with the road. (2) The authority knew of the dangers of which road users may not have known. (3) The authority had not complied with its public law obligations and had caused the accident. (4) The [relevant statute] gives a right of compensation where duties are imposed and no sensible distinction could be drawn between liability for failing to remove a dead tree fallen into the road and carelessly failing to act when it learned a tree was liable to fall at any moment. (5) Public law could provide no remedy for physical injury caused by a breach of public obligations to remove an obstruction. (6) A highway authority alone has the capacity to remove a source of physical danger to road users. (7) A common law duty would impose no more onerous a duty than existed at public law ‘... its decisions on such issues [extent of danger, weight and cost of remedy] will not be easily overturned by the courts’. (8) The existence of a duty would have a salutary effect on tightening administrative features.”

well as private interests”.⁹⁰ However, Lord Nicholls made a significant point which the majority did not acknowledge:

[I]f there were a common law obligation in the present case, sounding in damages, the extent of the obligation would march hand in hand with the authority’s public law obligations. This is a cardinal feature of the present case. The council’s public law obligation was to act as a reasonable authority. The common law obligation would be to the same effect. ... The common law duty would impose, not a duty to act differently, but a liability to pay damages if the council failed to act as it should.⁹¹

2.79 This realisation led the minority to show far greater willingness than the majority to impose a duty of care and thereby protect the private interests of the aggrieved individual. It is clearly far less intrusive into the operations of a public body merely to require it to pay damages for not doing something it ought in any case to have done, than to say that the body should have taken further steps beyond those required by its public law obligations.⁹²

2.80 An important point which emerges from the case is that while, as noted above,⁹³ the public law hurdle has in general been removed from the tort of negligence, it remains in place where the alleged act of negligence was a failure to exercise a statutory power.⁹⁴ The relationship between public law unlawfulness and private law liability is considered in more detail below.⁹⁵

2.81 In one recent case in which *Stovin v Wise* was applied, the judge drew upon both the majority and minority speeches as a source of the applicable law. In *Sandhar v Department of Transport, Environment and the Regions*, Newman J referred to the factors which prompted Lord Nicholls in *Stovin v Wise* to find against the council on the second limb of the test.⁹⁶ In concluding that the claim in the case before him failed, Newman J sought to show that those factors did not have the same effect as they had done in *Stovin v Wise*.⁹⁷

2.82 More recently, the House of Lords has revisited the issues raised in *Stovin v Wise*, in the case of *Gorringe v Calderdale MBC*.⁹⁸ In that case, the claimant suffered severe injury driving a car on a country road. Just short of a crest in the road, the claimant braked sharply and skidded into an oncoming bus. She sued

⁹⁰ *Ibid*, at pp 931 and 934.

⁹¹ *Ibid*, at p 936.

⁹² See further below paras 5.6–5.15, where academic concerns about whether the public law and private law conceptions of reasonableness are truly co-extensive are addressed.

⁹³ Paras 2.32–2.37.

⁹⁴ A point noted by D Fairgrieve, “Pushing back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom” [2002] PL 288 at 298.

⁹⁵ Part 5.

⁹⁶ [2004] EWHC 28, (2004) 101(5) LSG 30 at [67].

⁹⁷ *Ibid*, at [87].

⁹⁸ [2004]UKHL15; [2004] 1 WLR 1057.

the local authority, arguing that their failure to put warning signs that the road was dangerous at that point was a breach of its statutory duties as a highways authority. In rejecting the claim, the minority judgments in *Stovin v Wise* were subjected to criticism, as was the judgment of Lord Woolf CJ in *Larner v Solihull MBC*⁹⁹ which had adopted the reasoning of the minority. Lord Hoffmann observed in *Gorringe*: “I find 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 duty) to provide.”¹⁰⁰

EXTRA-JUDICIAL REMEDIES

- 2.83 When an individual suffers loss as a result of administrative action, one obvious way in which to seek compensation is to bring an action in court. However, there are other, extra-judicial modes of obtaining redress.

Statutory compensation

- 2.84 Statute may make provision for compensation for loss resulting from administrative action. For example, under the Land Compensation Act 1973, compensation may be payable in cases of compulsory purchase or nuisance resulting from public works. However, there are few instances of statutory compensation schemes, and no attempt has been made to co-ordinate or systematise those which do exist.

***Ex gratia* compensation**

- 2.85 Public bodies sometimes grant compensation to those who suffer loss as a result of administrative action in circumstances in which they are not legally obliged to do so. Such grants do not amount to an admission of legal liability. Rather, they are an acknowledgement that, despite the absence of such liability, the individuals affected ought to receive compensation. The compensation is said to be “*ex gratia*” on the basis that it is a benefit to which the recipient is not legally entitled.
- 2.86 Public bodies sometimes decide to make *ex gratia* payments entirely of their own volition.¹⁰¹ Often, however, their decision is prompted by a recommendation by an ombudsman. We now consider the nature and function of ombudsmen.

Ombudsmen recommendations

- 2.87 Ombudsmen are independent and impartial officers who investigate complaints of maladministration made by members of the public. Numerous examples of ombudsmen are found in the United Kingdom. The public sector ombudsmen are the Parliamentary Commissioner for Administration (PCA), the Health Service Commissioner (HSC) and the Commissioners for Local Administration, usually

⁹⁹ [2001] RTR 32.

¹⁰⁰ [2004] UKHL 15; [2004] 1 WLR 1057 at [32].

¹⁰¹ For example, schemes have been set up by the Inland Revenue (*Code of Practice 1: Putting Things Right: How to Complain* (2003)) and Customs and Excise (*Notice 1000: Complaints and Putting Things Right: Our Code of Practice* (2002)).

known as the Local Government Ombudsman (LGO).¹⁰² These positions were created by statute and their powers are set out therein.¹⁰³

- 2.88 For present purposes, four questions are of paramount importance. First, what is the combined jurisdiction of the ombudsmen? Secondly, what conception of “maladministration” do they apply? Thirdly, what kind of loss does the complainant need to show in order to succeed in his or her complaint? Fourthly, what powers do the ombudsmen have to grant compensation to complainants?

Jurisdiction

- 2.89 Here we must consider which acts of which bodies can be investigated by the public sector ombudsmen.

BODIES

- 2.90 The PCA can investigate actions taken by a wide range of government departments and public bodies. The HSC can investigate actions taken by any NHS organisation or practitioner. The LGO can investigate actions taken by any local authority or analogous body.¹⁰⁴

ACTS

- 2.91 As a general rule, the ombudsmen can investigate any administrative act carried out by the bodies which are subject to their respective jurisdictions.
- 2.92 There are exceptions in each case. The PCA cannot investigate complaints relating to government policy or the content of legislation; the investigation of crime; matters relating to national security; decisions about whether to begin court proceedings, or how they are conducted; contractual or commercial transactions, except where they involve land subject to compulsory purchase; or complaints about public service personnel matters. Certain specific grievances are also beyond the remit of the HSC and the LGO.¹⁰⁵ More generally, the ombudsmen cannot usually investigate any matter for which an aggrieved individual can obtain a remedy by appeal to an independent tribunal, or by proceedings in a court of law.¹⁰⁶

¹⁰² Note that the Constitutional Reform Bill proposes the creation of a new public sector ombudsman called the Judicial Appointments and Conduct Ombudsman. See Clauses 53 and 82–86 and Schedule 13 of the Bill.

¹⁰³ Respectively, the Parliamentary Commissioner Act 1967, the Health Service Commissioners Act 1993 and the Local Government Act 1974.

¹⁰⁴ Parliamentary Commissioner Act 1967, Schedule 2; Health Service Commissioners Act 1993, s 2; Local Government Act 1974, s 25.

¹⁰⁵ Parliamentary Commissioner Act 1967, s 5(3) and Schedule 3; Health Service Commissioners Act 1993, ss 6 and 7; Local Government Act 1974, s 26(7).

¹⁰⁶ Parliamentary Commissioner Act 1967, s 5(2); Health Service Commissioners Act 1993, s 4; Local Government Act 1974, s 26(6). Note that Lord Woolf proposed that “[t]he discretion of the public ombudsmen to investigate issues involving maladministration which could be raised before the courts should be extended”: see *Access to Justice: Final Report to the Lord Chancellor* (1996), Recommendation 298.

Conception of “maladministration”

- 2.93 As Fairgrieve comments, “There is no statutory definition of ‘maladministration’, and differing attempts have been made to sketch the contours of this notion. One thing that is clear is the flexibility of the notion of maladministration. ... [It] relates to an abstract model of proper administration.”¹⁰⁷
- 2.94 A definition which encompasses all of the elements usually included within the concept was recently provided by the government minister responsible for ombudsmen:

In general, the term “maladministration” is taken to mean poor administration, or the incorrect application of rules. For example, maladministration can usually include avoidable delay, faulty procedures or failing to follow correct procedures, and the term can also include the failure to tell individuals about any rights of appeal that they might have. It can cover unfairness, bias or prejudice, the giving of advice that is misleading or inadequate, and the refusal to answer reasonable questions. Covered too by the term are discourtesy, the failure to apologise properly for errors and mistakes in handling claims, and not offering an adequate remedy where one is due.¹⁰⁸

Type of loss

- 2.95 The maladministration must have resulted in an “injustice” to the complainant in order for him or her to succeed in the complaint. The notion of injustice, like that of maladministration, has been given a wide interpretation. Fairgrieve notes:

The ombudsmen have shown less inhibition than the judiciary in respect of claims for reparation of pure economic loss. ... The position is similar for non-pecuniary harm. Whereas feelings of anxiety and uncertainty do not constitute actionable injury in a negligence action, the ombudsmen may recommend financial redress for distress or worry suffered by the complainant [as well as for] “time and trouble” in pursuing maladministration.¹⁰⁹

- 2.96 The requirement of “injustice” thus seems likely to be met in any case where the ombudsman finds to be true the allegations made by the aggrieved individual. A complaint which does not meet this requirement is highly unlikely to be investigated by the ombudsman in the first place.

Remedies

WHEN CAN COMPENSATION BE RECOMMENDED?

- 2.97 None of the statutes which create the public sector ombudsmen expressly confers the power to recommend payment of compensation by the relevant public

¹⁰⁷ D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) at p 246.

¹⁰⁸ Mr C Leslie, Parliamentary Secretary for the Cabinet Office: Hansard, vol 373, col 983 (31 October 2001).

¹⁰⁹ D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) at pp 246–247.

body to the aggrieved individual.¹¹⁰ However, the statutes all envisage the ombudsman making a report if he or she finds that injustice has been caused to the individual and has not been, or will not be, remedied.¹¹¹ Implicit within this power to make a report is the power to recommend that compensation be paid.

- 2.98 The nature of the act which is the subject of the complaint may have some influence on the decision whether to recommend compensation. Ombudsmen, like judges, are likely to have some sympathy with public bodies which make mistakes in the course of making difficult discretionary decisions. However, as Carnwath notes, “Contrary to the approach taken by the courts, the view has not been taken that functions in the field of social welfare are inappropriate for awards [of compensation].”¹¹²

HOW DO OMBUDSMEN DECIDE ON THE SIZE OF THE AWARD?

- 2.99 No strict rules dictate how the ombudsmen determine the precise amount of money which constitutes an appropriate sum of compensation in a particular case. All the facts of the case will be taken into account in deciding upon a figure. It is clear, however, that ombudsmen do not quantify damages in the same way as the courts in tort claims, where compensation is paid in respect of all foreseeable and causally connected damage or loss. A somewhat impressionistic view is taken as to what constitutes a just sum. A balancing of public and private interests occurs.
- 2.100 In general terms, it is fair to say that “reparation made after an ombudsman’s report is generally modest. Tort actions are undoubtedly more appropriate for obtaining larger sums, and are generally the only way to gain substantial reparation for future loss, such as future loss of earnings.”¹¹³ However, large awards are sometimes recommended. For example, farmers who were victims of governmental maladministration in the salmonella saga received £600,000, while the Barlow Clowes affair resulted in *ex gratia* payments of £150 million.¹¹⁴

ARE OMBUDSMEN’S RECOMMENDATIONS COMPLIED WITH?

- 2.101 Ombudsmen’s recommendations that compensation be paid are not enforceable in the courts. Nobles summarises the methods used by the various public sector ombudsmen to procure compliance:

¹¹⁰ Note, however, that the Judicial Appointments and Conduct Ombudsman would, if created, have an explicit statutory power to recommend the payment of compensation: Constitutional Reform Bill, Clause 83(3).

¹¹¹ Parliamentary Commissioner Act 1967, s 10(3); Health Service Commissioners Act 1993, s 12(3); Local Government Act 1974, s 30.

¹¹² R Carnwath, “The *Thornton* Heresy Exposed: Financial Remedies for Breach of Public Duties” [1998] PL 407 at 420.

¹¹³ D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) at pp 246–249.

¹¹⁴ Third Report of the Select Committee on the PCA, 1992–93, *Compensation to Farmers for Slaughtered Poultry* (1992–93, HC 593); First Report of the PCA, 1989–90, *The Barlow Clowes Affair* (1989–90, HC 76), *Observations by the Government on the Report of the PCA* (1989–90, HC 99).

The Parliamentary Commissioner for Administration relies partially on the willingness of departments to co-operate with his office and to recognise the need for good administration, and partially on the sanctions represented by his identifying any defaulting department in his annual reports, bringing them to the attention of the parliamentary select committee to which he reports, or making a special report to Parliament on a particular matter. The Health Service Commissioner also relies on annual reports, and his ability to bring a defaulting body to the attention of the select committee to which he can report. The Commissioner for Local Administration, generally known as the Local Government Ombudsman, lacks the authority of the Parliamentary Commissioner for Administration and the Health Service Commissioner, having no equivalent of a select committee to which he can report. The final sanction in his case is for the authority to be required to publish an agreed statement in the local press, detailing his recommendation and, if the authority wishes, the reasons for non-compliance.¹¹⁵

- 2.102 Although recommendations are not legally enforceable, it is now generally accepted by public bodies that individuals who suffer loss because of maladministration ought to be compensated.¹¹⁶ The vast majority of ombudsmen recommendations are therefore complied with in practice.¹¹⁷ However, there are some instances where recommendations are ignored.¹¹⁸

Assessment of extra-judicial remedies

- 2.103 The contrast between judicial and extra-judicial remedies is great. There are two particularly significant differences between the two mechanisms for obtaining reparation. First, the ombudsmen can recommend compensation upon proof of maladministration, whereas the courts can only do so if a private law cause of action is established. Secondly, the ombudsmen have a discretion as to whether compensation should be paid and if so, how much, whereas the courts must award full compensation for all foreseeable and causally connected loss or harm if a private law cause of action is established.
- 2.104 Both complainants and public bodies may perceive advantages in the ombudsman system. For complainants, the procedure is more informal and therefore less daunting. The difficulty of establishing a private law cause of action

¹¹⁵ R Nobles, "Keeping Ombudsmen in their Place – The Courts and the Pensions Ombudsman" [2001] PL 308 at 309.

¹¹⁶ See eg *Government Accounting* (The Stationery Office, 1998), para 36.3.5.

¹¹⁷ See M Amos, "The Parliamentary Commissioner for Administration: Redress and Damages for Unlawful Administrative Action" [2000] PL 21 at 24: "In 1991 the PCA confidently stated that in no case in which he considered redress was required 'was the complainant eventually left without it'. In 1999 the PCA reported that 'despite large individual compensation payments sometimes being involved, there were no cases in which eventually departments failed to concede redress if my staff and I were clear that it was due'. It is now generally accepted that there is a strong political obligation on ministers to accept the PCA's findings and take corrective action. ... Government also generally accepts the binding nature of the PCA's recommendations."

¹¹⁸ Eg Report 92/B/1337 *Babergh District Council* [1997] JPL 771.

is avoided, and complaints can even be made in respect of acts which do not fall foul of any of the grounds for judicial review such as to render them unlawful in the public law sense.¹¹⁹ For public bodies, a degree of manoeuvrability is retained in that ombudsmen's recommendations are not legally binding. Moreover, on the whole smaller amounts of compensation are recommended than are awarded by the courts. For both parties, time-consuming and expensive court proceedings are avoided.

¹¹⁹ Since, while all acts which are unlawful in the public law sense constitute maladministration, the converse is not true. See further below, paras 5.6–5.15, where it is suggested that under the current law an individual is highly unlikely to establish a private law cause of action in respect of an administrative act which is lawful in the public law sense.

PART 3

IMPACT OF THE HUMAN RIGHTS ACT 1998

INTRODUCTION

- 3.1 Public authorities may now be liable in damages if they are found to have committed breaches of individuals' human rights contrary to section 6 of the Human Rights Act 1998. The Law Commission, working in conjunction with the Scottish Law Commission, has published a report on that topic.¹ It is important to note, however, that the purpose of that report was "information, rather than law reform".² It provided a detailed analysis of the case-law of the European Court of Human Rights concerning when compensation should be awarded and the proper amount of any award. It did not consider whether the power to award damages under the Human Rights Act is the optimal mechanism by which to balance public and private interests, or whether the Human Rights Act provides a useful model for the award of damages in public law generally.
- 3.2 A degree of overlap exists between the liability of public bodies for loss caused by administrative acts and the liability of public authorities for breaching individuals' human rights. First, the defendants in both scenarios are likely to be drawn from a similar pool of actors. The courts have held that the concepts of a "public body", the acts of which can be subject to judicial review, and a "public authority", the acts of which can breach section 6 of the Human Rights Act, are analogous.³ Secondly, the acts of public authorities which are alleged to breach human rights will usually be acts in the public sphere, which are therefore also subject to judicial review.⁴ As a result, many administrative acts will be subject to challenge on both bases.
- 3.3 The high degree of overlap in material scope, in terms of both defendants and challenged acts, between judicial review and section 6 of the Human Rights Act ensures that the impact of the action for breach of human rights must be considered in any examination of the extent of public bodies' liability for loss caused by administrative acts.

¹ Damages under the Human Rights Act 1998 (2000) Law Com No 266; Scot Law Com No 180.

² *Ibid*, at para 1.3.

³ See *Poplar Housing and Regeneration Community Association v Donohue* [2001] EWCA Civ 595, [2002] QB 48 at [65]. The analogy is not complete because the concept of "public authority" under the Human Rights Act must be interpreted with an eye on the State's obligations in international law. See *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 at [52], *per* Lord Hope. On the definition of "public body" and "public authority", see further below, paras 7.16–7.19.

⁴ Indeed, some bodies are only considered to be "public authorities" under section 6 insofar as they are performing public functions; their activities in the private sphere cannot be challenged for breaching human rights. See s 6(5).

- 3.4 Two points must be considered. First, since the claim for damages under the Human Rights Act is analogous to a claim for damages for loss caused by administrative acts, could the former be used as a model for the latter and, if so, in what way? Secondly, what effect has the incorporation into domestic law of the European Convention on Human Rights had on the law of tort itself?

IMPACT BY ANALOGY WITH THE CAUSE OF ACTION UNDER SECTION 6

- 3.5 Section 7 of the Human Rights Act enables an individual who claims that a public authority has acted, or proposes to act, contrary to section 6 to bring proceedings against the authority, provided that the individual is, or would be, a victim of the unlawful act. The relationship between the cause of action under section 6 and other causes of action was discussed in the Law Commission's previous report.⁵ We are here concerned with whether the former can be used as a source of inspiration on how best to deal with the issue of monetary remedies in public law.
- 3.6 Public law generally⁶ could adopt the approach taken in section 6 as regards *the substance of the cause of action*. A public authority is automatically in breach of section 6 if it breaches an individual's human rights. The equivalent in the non-human rights context seems at first sight to be for a public body to be automatically liable if it breaches a ground of judicial review. Few would support a one-for-one relationship between public law unlawfulness and damages liability, with the latter automatically arising upon proof of the former.⁷ However, as we will see, damages are not in fact automatically awarded when a breach of section 6 is established.
- 3.7 At this point we must look at the approach taken under section 6 as regards *the remedies which may be obtained upon making out the cause of action*. It is possible to claim damages from a public authority for breaching one's human rights, but the principles upon which damages may be awarded are somewhat different from those which apply in ordinary tort law.
- 3.8 Section 8(3) of the Human Rights Act states that damages may only be awarded where the court is satisfied that such an award is necessary to afford just satisfaction to the person in whose favour it is made. Section 8(4) states that in determining whether to award damages, or the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.
- 3.9 The leading English case on the award of damages under the Human Rights Act is *Anufrijeva v London Borough of Southwark*.⁸ The Court of Appeal, comprising Lord Woolf CJ, Lord Phillips MR and Auld LJ, delivered a joint judgment on

⁵ Damages under the Human Rights Act 1998 (2000) Law Com No 266; Scot Law Com No 180 at paras 2.22–2.25.

⁶ That is, public law in the non-human rights context.

⁷ The relationship between these two concepts is considered in more detail in Part V.

⁸ [2003] EWCA Civ 1406, [2004] 2 WLR 603.

appeals from three first instance decisions.⁹ The specific claims at issue in the case concerned alleged breaches of Article 8 of the Convention. Article 8 protects the right to respect for one's private and family life, one's home and one's correspondence. The essential objective of Article 8 is to protect the individual against arbitrary interference by public authorities. In certain limited circumstances, however, Article 8 imposes upon States an obligation to take positive action to secure respect for family life. The claimants argued that there is a positive obligation to provide welfare support. The court accepted this argument in principle while stressing that any such obligation is likely to be very limited.¹⁰

- 3.10 The claimants alleged that the positive obligation had been breached by failure to provide, *inter alia*, accommodation that met the special needs of a family and adequate financial support while an asylum application was processed. The United Kingdom had passed legislation providing for these benefits to be given to those in the claimants' positions but the legislative schemes had been maladministered, resulting in the claimants not receiving that to which they were entitled.
- 3.11 The court attempted to answer two important questions: when should damages be awarded for breaches of human rights, and how should damages be assessed?

When should damages be awarded?

- 3.12 On the first question, the court began by distinguishing a claim under the Human Rights Act for compensation in respect of the consequences of maladministration and a claim against a public officer for damages for breach of a duty owed in tort, stating, "In the former case the claimant is seeking a remedy that would not be available in this jurisdiction for misfeasance prior to the HRA."¹¹ It pointed out that damages are not, as in tort claims, recoverable as of right in a claim under the Human Rights Act. Furthermore, the court emphasised:

The remedy of damages generally plays a less prominent role in actions based on breaches of the articles of the European Court of Human Rights, than in actions based on breaches of private law obligations where, more often than not, the only remedy claimed is damages. Where an infringement of an individual's human rights has occurred, the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance.¹²

- 3.13 The court's next point is crucial:

⁹ *Anufrijeva v London Borough of Southwark* [2002] EWHC 3163, (2003) 6 CCLR 25; *R (N) v Secretary of State for the Home Department* [2002] EWHC 207, [2003] HRLR 20; *R (M) v Secretary of State for the Home Department* [2002] EWHC 319, (2003) 100 (18) LSG 35.

¹⁰ [2003] EWCA Civ 1406, [2004] 2 WLR 603 at [43].

¹¹ *Ibid*, at [49]–[50].

¹² *Ibid*, at [52]–[53].

In considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole. ... The court has a wide discretion in respect of the award of damages for breach of human rights. ... Damages are not an automatic entitlement but ... a remedy of "last resort".¹³

3.14 The court then went on to identify the principles applied by the European Court of Human Rights (ECtHR) in determining when to award damages and how they should be measured. The fundamental principle was that the applicant should, insofar as this is possible, be placed in the same position as if his or her Convention rights had not been infringed. While this was fairly straightforward in the case of pecuniary loss, problems arose in relation to the consequences of a breach of a Convention right which are "not capable of being computed in terms of financial loss".¹⁴

3.15 The court continued:

None of the rights in Part 1 of the Convention is of such a nature that its infringement will automatically give rise to damage that can be quantified in financial terms. Infringements can involve a variety of treatment of an individual which is objectionable in itself. The treatment may give rise to distress, anxiety, and, in extreme cases, psychiatric trauma. The primary object of the proceedings will often be to bring the adverse treatment to an end. If this is achieved is this enough to constitute "just satisfaction" or is it necessary to award damages to compensate for the adverse treatment that has occurred? More particularly, should damages be awarded for anxiety and distress that has been occasioned by the breach? It is in relation to these questions that Strasbourg fails to give a consistent or coherent answer.¹⁵

3.16 The court concluded:

In determining whether damages should be awarded, in the absence of any clear guidance from Strasbourg, principles clearly laid down by the HRA may give the greatest assistance. The critical message is that the remedy has to be "just and appropriate" and "necessary" to afford "just satisfaction". The approach is an equitable one. The "equitable basis" has been cited by the ECtHR both as a reason for awarding damages and as a basis upon which to calculate them. There have been cases where the seriousness or the manner of the violation has meant that as a matter of fairness, the ECtHR has awarded compensation consisting of "moral damages". The Law Commission stated in its report that the ECtHR took account of "a range of factors including the character and

¹³ *Ibid*, at [56].

¹⁴ *Ibid*, at [59].

¹⁵ *Ibid*, at [60].

conduct of the parties, to an extent which is hitherto unknown in English law".¹⁶

How should damages be assessed?

- 3.17 On the second question, the court began by made the following statement:

The fundamental principle underlying the award of compensation is that the Court should achieve what it describes as *restitutio in integrum*. The applicant should, insofar as this is possible, be placed in the same position as if his Convention rights had not been infringed. Where the breach of a Convention right has clearly caused significant pecuniary loss, this will usually be assessed and awarded. ... The problem arises in relation to the consequences of the breach of a Convention right which are not capable of being computed in terms of financial loss.¹⁷

- 3.18 The court went on to consider how damages should be assessed in relation to loss which is not quantifiable in financial terms, such as anxiety and distress which is occasioned by the breach of an individual's human rights. It began by disapproving a statement made extra-judicially by Lord Woolf to the effect that not only should damages be moderate, but also they should be on the low side in comparison to those awarded for torts by the English courts.¹⁸ However, it then went on to state that tort law damages awards are not an appropriate point of comparison, whereas

the levels of damages awarded in respect of torts as reflected in the guidelines issued by the Judicial Studies Board, the levels of awards made by the Criminal Injuries Compensation Board and by the Parliamentary Ombudsman and the Local Government Ombudsman may all provide some rough guidance where the consequences of the infringement of human rights are similar to that being considered in the comparator selected. In cases of maladministration where the consequences are not of a type which gives rise to any right to compensation under our civil law, the awards of the Ombudsman may be the only comparator.¹⁹

- 3.19 Before considering whether there had in fact been a breach of Article 8 in any of the cases before it, the court made the following important comment on the measure of damages where a breach is established:

There are good reasons why, where the breach arises from maladministration, in those cases where an award of damages is appropriate, the scale of such damages should be modest. The cost of supporting those in need falls on society as a whole. Resources

¹⁶ *Ibid*, at [66].

¹⁷ *Ibid*, at [59].

¹⁸ *Ibid*, at [73]. The statement was made in Lord Woolf, "The Human Rights Act 1998 and Remedies" in M Andenas and D Fairgrieve (eds), *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (2000), at p 433.

¹⁹ *Ibid*, at [74].

are limited and payments of substantial damages will deplete the resources available for other needs of the public including primary care.²⁰

IMPACT BY INCORPORATION OF HUMAN RIGHTS PRINCIPLES INTO ENGLISH LAW

- 3.20 We have already seen that human rights principles can have a significant impact upon the substantive content of English law governing the liability of public bodies acting in the public sphere. Although it was later departed from, the decision of the European Court of Human Rights in *Osman*²¹ clearly influenced the English courts in their development of the common law.²²
- 3.21 Another recent example of human rights principles influencing the development of English tort law is *D v East Berkshire Community Health NHS Trust*.²³ These conjoined appeals involved claims in negligence against NHS trusts which had wrongly accused parents of child abuse. In all three cases a parent claimed damages for psychiatric harm allegedly caused by the false accusations or their consequences, while in one case, where the local authority was also a defendant, the child also claimed.
- 3.22 The House of Lords' decision in *X (Minors) v Bedfordshire County Council*²⁴ seemed fatal to the claimants' cases. In that case, the House of Lords held that it could never be "fair, just and reasonable" to impose a duty of care upon local authorities when deciding whether to take children into care. However, the claimants successfully argued that subsequent decisions have varied the principles laid down in *X (Minors)*. The Court of Appeal referred to the changes in the courts' attitude towards such claims and to the shift in emphasis from the existence of a duty of care to the precise standard of care required.²⁵ The court concluded that "[t]hese decisions significantly restrict the effect of [*X (Minors)*]"²⁶ The court then considered whether the enactment of the Human Rights Act 1998 has affected the common law principles of negligence. It observed that, as a result of the European Court of Human Rights' jurisprudence on Article 8,

litigation involving factual inquiries ... is now a potential consequence of the conduct of those involved in taking decisions in child abuse cases. In these circumstances the reasons of policy that led the House of Lords to hold [in *X (Minors)*] that no duty of care towards a child arises, in so far as those reasons have not already been discredited by the subsequent decisions of the House of Lords [in *Barrett* and *Phelps*], will largely cease to apply. Substantial

²⁰ *Ibid*, at [75].

²¹ (2000) 29 EHRR 245.

²² See above, paras 2.43–2.49.

²³ [2003] EWCA Civ 1151, [2004] QB 558.

²⁴ [1995] 2 AC 633.

²⁵ [2003] EWCA Civ 1151, [2004] QB 558 at [34]–[48], referring to the key cases of *Barrett v Enfield London Borough Council* [2001] 2 AC 550 and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619. These cases were discussed above at paras 2.50–2.51.

²⁶ *Ibid*, at [49].

damages will be available on proof of individual shortcomings, which will be relevant alike to a claim based on breach of section 6 of the 1998 Act and a claim based on breach of a common law duty of care.²⁷

- 3.23 As such, the court felt that there was no justification for preserving the rule that no duty of care is owed because it is not fair, just and reasonable to impose such a duty. The possibility of litigation under the Human Rights Act was felt to render redundant the “inhibition” argument against liability, although that argument was not in itself rejected as being unfounded:

In so far as the risk of legal proceedings will inhibit individuals from boldly taking what they believe to be the right course of action in the delicate situation of a case where child abuse is suspected, we think that this factor will henceforth be present, whether the anticipated litigation is founded on the 1998 Act or on the common law duty of care.²⁸

- 3.24 The court therefore held that, as regards the child, the decision in *X (Minors)* cannot survive the 1998 Act.²⁹ It added, “Given the obligation of the local authority to respect a child’s convention rights, the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they perform their duties.”³⁰ However, since the child’s interests are in potential conflict with the parents’ interests, the court held that “there are cogent reasons of public policy for concluding that, where child care decisions are being taken, no common law duty of care should be owed to the parents”.³¹

LESSONS TO BE LEARNED FROM THE HUMAN RIGHTS ACT

The cause of action under section 6

- 3.25 There has been a degree of academic debate over whether the cause of action under section 6 is a “new public law tort of acting in breach of the victim’s Convention rights”³² or whether it is unhelpful to describe it thus.³³ In our previous

²⁷ *Ibid*, at [81].

²⁸ *Ibid*, at [82].

²⁹ For an argument that the Court of Appeal overstepped the mark by overruling a House of Lords’ decision, see J Wright, “‘Immunity’ no more: Child abuse cases and public authority liability in negligence after *D v East Berkshire Community Health NHS Trust*” (2004) 20 *Journal of Professional Negligence* 58 at 63. Nonetheless, Wright describes *D* as “yet another welcome step in the direction of shifting the burden in determining legal accountability to breach of duty, rather than a case standing or falling on the arbitrary and clumsy weapon that is duty of care. ... *D* is to be welcomed as reflecting a sensitive and purposive approach to the vindication of children’s rights” (*ibid*, at p 65).

³⁰ *Ibid*, at [83].

³¹ *Ibid*, at [86].

³² A Lester and D Pannick, “The Impact of the Human Rights Act on Private Law: the Knight’s Move” (2000) 116 *LQR* 380 at 382.

work, we said that “sections 6 and 7 of the HRA create a new form of action, which is in effect a form of action for breach of statutory duty, but with the difference that the remedy is discretionary, rather than as of right”.³⁴ A footnote after the parenthesis explained, “The description may be more useful by way of analogy than as a precise description”.

- 3.26 As Craig notes, “The nature of the cause of action will be significantly affected by the courts’ determination of the standard of liability.”³⁵ It is clear from *Anufrijeva*³⁶ that there has been a significant departure from the tort law paradigm.³⁷ First, the court has discretion as to whether damages should be awarded. Secondly, damages are a remedy of last resort. Thirdly, in considering whether to award non-pecuniary damages and, if so, how much, there is a balance to be drawn between the interests of victims and those of the public as a whole.
- 3.27 Richard Clayton, who represented two of the three claimants in *Anufrijeva*, suggests that the second and third of these rulings are open to question, in that the suggestions that damages are a remedy of last resort and that the interests of the victim must be weighed against those of the public have no support in the case law of the European Court of Human Rights.³⁸ However, even if this is correct, the English courts are merely required by the Human Rights Act to “take into account” the principles applied by that Court.³⁹ They may legitimately depart from those principles. The Strasbourg jurisprudence is arguably of limited assistance in assessing the availability and quantum of damages at national level.⁴⁰
- 3.28 There may be very good reasons for adopting the approach of the Court of Appeal, even if it is correct to say that it does not accord with Strasbourg jurisprudence. In particular, the idea that there is a need to balance public and private interests is important. This is perhaps the main lesson to draw from the cause of action under section 6, as interpreted in *Anufrijeva*.

³³ Lord Woolf, “The Human Rights Act 1998 and Remedies” in M Andenas and D Fairgrieve, *Judicial Review in International Perspective: Liber Amicorum in Honour of Lord Slynn of Hadley* (2000) at p 432.

³⁴ Damages under the Human Rights Act 1998 (2000) Law Com No 266; Scot Law Com No 180 at para 4.20.

³⁵ P Craig, *Administrative Law* (5th ed, 2003) at p 887.

³⁶ [2003] EWCA Civ 1406, [2004] 2 WLR 603.

³⁷ Although it is not departed from entirely. See in particular the adoption of full compensation for pecuniary loss, noted at para 3.17. The appropriateness of such an approach is considered below at paras 8.24–8.26.

³⁸ “Damages under the Human Rights Act”, unpublished paper given at a seminar held by the Human Rights Lawyers Association on 1 December, 2003.

³⁹ Human Rights Act 1998, s 8(4).

⁴⁰ Particularly given the opacity of that jurisprudence. It must be noted that Lord Slynn’s oft-cited dictum that “[i]n the absence of some special circumstances it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights” (*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at [26]) does not extend to unclear and inconstant jurisprudence.

- 3.29 In considering whether public money should be available to compensate individuals for loss caused by administrative action, it would be necessary to identify and evaluate the relevant public and private interests. It would be also be essential to consider whether compensation for breaches of public law duties should simply reflect the rules on damages established in private law. A new approach, which might result in lesser amounts being paid, might legitimately be considered in order to reconcile the competing interests.

The incorporation of human rights principles

- 3.30 The influence exerted upon domestic tort law by human rights principles is likely to be substantial. On the whole, that influence is more likely to result in *clearer articulation of underlying policy considerations* than in *substantive changes to the law*. One area, however, in which substantive changes are likely to occur is tort law in the public sphere. More precisely, the extent of public bodies' liability in tort is likely to increase as the courts become more sympathetic to the plight of individuals who suffer as a result of maladministration.
- 3.31 Hickman observes that while English tort law traditionally defines unlawfulness by reference to duties owed by the defendant, the incorporation of human rights principles will result in a greater focus on the rights of the claimant.⁴¹ He suggests that there will be a tension between rights-based norms which are actionable *per se*, largely irrespective of fault and where interferences are presumed unlawful without the need to prove loss, and the tort of negligence, where the focus is on the reasonableness of the defendant's conduct and whether the claimant has in fact suffered loss. He concludes that "in the post-HRA era rights-based torts [such as trespass] should be reinvigorated by reference to the Convention. Negligence law too will have to adapt."⁴²
- 3.32 Fairgrieve provides cogent arguments in favour of the modification of domestic tort law in line with human rights principles:

It would make sense for human rights breaches to be remedied not only by provision of damages under the HRA – which it is important to underline is perceived as a residual remedy – but also through orthodox tort law by means of the continuing evolution of the fair, just and reasonableness limb of the tort of negligence. Not only would this harmonised approach avoid the courts adopting a different response to the same factual circumstances – depending upon whether the remedy was based on the HRA or on the tort of negligence – but it would also encourage the process of weaving the Convention rights into domestic law, by developing tort law in line with the new human rights considerations.⁴³

⁴¹ T Hickman, "Tort Law, Public Authorities, and the Human Rights Act 1998" in D Fairgrieve, M Andenas and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002) at pp 19–20.

⁴² *Ibid*, at p 53.

⁴³ D Fairgrieve, "Pushing back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom" [2002] PL 288 at 302.

- 3.33 Hickman makes a similar point, while stressing that the effect of human rights principles on tort law should not be taken too far:

The courts should interpret the law from the new constitutional perspective represented by the HRA. It would be remiss for the courts to view the Act's presence as restricting cross-fertilisation between the European Convention and the common law. ... However, if one is hoping for complete consistency between tort law and the HRA, in terms of the two becoming entirely "mutually supporting", one is likely to be disappointed. If the courts drive too hard at attempting to create such a strong form of coherency they risk creating a "self-contradictory" or "disjointed" system; a system which fails to meet even weak standards of coherency.⁴⁴ It is probably inevitable that the law will fall between these two positions.⁴⁵

- 3.34 The consequence of focusing more on the claimant's rights rather than on the reasonableness of the defendant's conduct is likely to be an increase in the extent of liability. At first sight, this may appear very worrying indeed to public bodies. They may envisage having to use more and more of their limited resources to meet compensation claims. However, if we factor in the lesson learned from the section 6 cause of action, namely that there is no *a priori* reason for determining the amount of compensation in the same way as occurs in private law, then perhaps public bodies would have less to fear. The total financial burden might in fact be smaller. A key issue is whether the approach to compensation arising for breach of the Human Rights Act should be regarded as a special case, or as providing the basis for a new general approach to compensation in public law cases.

⁴⁴ See J Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994) at pp 264–265 for the identification of the two forms of coherency referred to here.

⁴⁵ T Hickman, "Tort Law, Public Authorities, and the Human Rights Act 1998" in D Fairgrieve, M Andenas and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002) at p 19.

PART 4

IMPACT OF EUROPEAN COMMUNITY LAW

INTRODUCTION

- 4.1 European Community law is a fertile source of ideas regarding the liability of public bodies for loss caused by administrative acts. The European Court of Justice, which has in effect single-handedly created the EC law on this issue, has produced a jurisprudence which is arguably far more sophisticated than that found in English law. Furthermore, EC law is not merely of interest from a comparative perspective. It is part of English law and is applied by the English courts. We may therefore expect it to have a considerable influence on domestic English law.
- 4.2 The question of damages liability arises in two contexts in EC law. First, when can Member States be liable in damages for loss caused to individuals, for example if they fail correctly to transpose an EC Directive into domestic law? Secondly, when can the European Community itself be so liable? The approaches taken by the European Court of Justice to these two questions were initially rather different, but, as we shall see, they have subsequently been harmonised to a significant extent.

LIABILITY OF THE MEMBER STATES

- 4.3 There is no explicit reference in the Treaty of Rome to the notion of individual Member States being potentially liable in damages in certain circumstances. However, the European Court of Justice declared in the ground-breaking case of *Francovich* that the principle of state liability for breach of EC law is inherent in the Treaty.¹ Two bases for such a principle were cited. First, it was said that the principle of effectiveness of EC law would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of EC law for which a Member State can be held responsible.² Secondly, Article 10 (formerly 5) of the Treaty, under which the Member States are required to take all appropriate measures to ensure fulfilment of their obligations under EC law, was said to require Member States to nullify the unlawful consequences of a breach of Community law.³
- 4.4 Whatever its juridical basis, the concept of Member State liability became well-established in EC law. However, its precise ambit remained uncertain until the seminal decision of *Brasserie du Pêcheur*.⁴ Where the act complained of did not involve the exercise of discretion, the mere fact of illegality, combined with

¹ Cases C-6, 9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357.

² *Ibid*, at para 33.

³ *Ibid*, at para 36.

⁴ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and R v Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029, [1996] QB 404.

causation and loss, is enough to found a claim for damages.⁵ However, as regards acts which involve the exercise of discretion, the Court laid down a three-stage test to be applied in order to determine whether a Member State is liable in damages. First, the rule of EC law infringed must be intended to confer rights on individuals. Secondly, the breach must be sufficiently serious. Thirdly, there must be a direct causal link between the breach and the damage suffered.

- 4.5 The first stage resembles English law's requirement in the tort of breach of statutory duty that the duty in question be intended to give rise to a cause of action in damages and to protect a range of individuals of which the claimant is one.⁶ However, the European Court does not appear to have taken so restrictive an attitude as the English courts on this issue. Caranta comments:

Community law is much more generous than English law in so far as the protective character of the infringed provision ... is considered. Up to now, no decision by the Court of Justice on Member States' liability has found this requirement wanting. Under Community law, no lengthy inquiry into the legislative intention is made. It is sufficient that the citizen can derive some benefit from the application of a given provision. Conferring rights does not need to be the only or even the main purpose. ... It would be mistaken to address the purpose of the Community provision question in the same way it is addressed by English courts with reference to breach of statutory duty.⁷

- 4.6 The second stage of the test is pivotal. Precisely defining the degree of fault required is the main tool used by the European Court to draw a line between those circumstances in which Member States should and should not be liable in damages for loss caused by their (by this stage established) breach of EC law. In *Brasserie du Pêcheur*, the Court laid down a set of guidelines by which to measure the seriousness of the breach:

The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.⁸

⁵ Eg Cases C-258, 259/90 *Pesqueras De Bermeo SA and Naviera Laida SA v Commission of the European Communities* [1992] ECR I-2901.

⁶ Above, para 2.22.

⁷ R Caranta, "Public Law Illegality and Governmental Liability" in D Fairgrieve, M Andenas and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002) at p 348.

⁸ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and R v Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029, [1996] QB 404 at para 56.

- 4.7 A considerable volume of case-law has developed on the point. In *Factortame (No 5)*, Lord Clyde observed:
- No single factor is necessarily decisive. But one factor by itself might, particularly where there was little or nothing to put into the scales on the other side, be sufficient to justify a conclusion of liability.⁹
- 4.8 Lord Clyde identified eight factors which influence the European Court of Justice, and ought to influence national courts, in deciding whether a breach was sufficiently serious.¹⁰ It is interesting that behaviour occurring *after* the act in respect of which damages are claimed could influence the court's decision on liability. This suggests a broad, equitable approach.
- 4.9 The third stage, namely the requirement of causation, appears to be broadly the same as that in English tort law. Tridimas observes that, "So far ... the Court has not elaborated any systematic principles of causation but has approached the issues that arise on a case by case basis."¹¹ However, the Court has recently given some guidance to national courts as to what test of causation applies.¹²
- 4.10 The *Brasserie du Pêcheur* decision was also significant in that the Court invoked a third basis for its "discovery" in the Treaty of a principle of state liability. The existence in the Treaty of Article 288(2) (formerly 215(2)), which lays down a general principle of Community liability, was said to be "simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation on public authorities to make good damage caused in the performance of their duties."¹³ Member State liability could therefore be justified by analogy with Community liability. We now turn to consider the latter.

⁹ *R v Secretary of State for Transport, ex parte Factortame (No 5)* [2000] 1 AC 524 at 554.

¹⁰ *Ibid*, at pp 554–556. These factors are: the importance of the principle which has been breached; the clarity and precision of the rule breached; the degree of excusability of an error of law; the existence of any relevant judgment on the point; the state of mind of the infringer, and in particular whether the infringer was acting intentionally or involuntarily; the behaviour of the infringer after it has become evident that an infringement has occurred may also be of importance; the identity of the persons affected by the breach; and the position (if any) taken by one of the Community institutions in the matter.

¹¹ T Tridimas, "Liability for Breach of Community Law: Growing Up or Mellowing Down?" in D Fairgrieve, M Andenas and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002) at p 158.

¹² Case C–319/96 *Brinkmann Tabakfabriken GmbH v Skatteministeriet* [1998] ECR I–5255; Case C–140/97 *Rechberger and Greindl v Austria* [1999] ECR I–3499.

¹³ Joined Cases C–46/93 and C–48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and R v Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I–1029, [1996] QB 404 at para 29. As we have seen, no such general principle is found in English law. The differences between English law and the domestic laws of other EC countries are considered below at paras 7.6–7.7.

LIABILITY OF THE COMMUNITY

4.11 Article 288(2) (formerly 215(2)) of the Treaty of Rome simply states:

In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

4.12 The European Court of Justice was therefore given a fairly blank canvas on which to sketch a system of damages liability for EC institutions. Its initial approach followed a straightforward formula. If a claimant could establish illegality, causation and damage – that is, an illegal act of an EC institution which caused loss to the claimant – then he or she would recover.

4.13 However, in *Schöppenstedt* the Court accepted that where the EC legislature exercises complex discretionary powers, it should not be held liable for damage flowing from *any* illegality. In such a case, the illegality may often have been quite unforeseeable.¹⁴ The legislature was required to make a difficult decision and cannot be said to be “at fault” for inadvertently taking a decision which was later shown not to have been open to it. Therefore, the Court held that where legislative action involves measures of economic policy over which the legislature has a high degree of discretion, liability will be incurred only where there has been “a sufficiently flagrant violation of a superior rule of law for the protection of the individual”.¹⁵

4.14 This formula of course begs the question, what does “sufficiently flagrant” mean? The Court initially interpreted that phrase strictly, requiring that the breach involve conduct verging on the arbitrary¹⁶ and that the losses incurred by the claimant be beyond the normal risk of loss for individuals acting in the particular sphere of activity.¹⁷ Thus an applicant would have to show that both the *manner* of the breach and its *effects* were of an extreme nature.

4.15 The scope for recovery under Article 288(2) was consequently very limited. Perhaps realising that so restrictive an approach was somewhat unfair to claimants, the Court modified its position on the *manner* of the breach in *Bergaderm*. It drew upon its jurisprudence on Member States’ liability for breaches of EC law, explicitly stating that the rules governing Member State liability should in principle be the same as those governing the liability of EC

¹⁴ Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt v Council of the European Communities* [1971] ECR 975.

¹⁵ *Ibid*, at para 11.

¹⁶ Case 116/77 *G R Amylum NV and Tunnel Refineries Limited v Council and Commission of the European Communities* [1979] ECR 3497.

¹⁷ Joined Cases 83, 94/76, 4, 15 & 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co KG v Council and Commission of the European Communities* [1978] ECR 1209.

institutions.¹⁸ As a result, the three-stage *Brasserie du Pêcheur* test, described above,¹⁹ now applies.

- 4.16 Furthermore, this test applies to *all* EC acts which involve a high degree of discretion, not merely legislative acts. This extension of *Schöppenstedt* must be correct in principle in EC law. Administrative acts can often involve the same complex discretionary elements which militate against liability, and in any case the distinction between legislative and administrative acts is nowhere more blurred than in EC law.
- 4.17 The Court has also relaxed its position on the *effects* of the breach. In *Mulder*, it held that the possibility of a large number of claimants will not, in itself, rule out an Article 288(2) action.²⁰ This remedies the apparent illogicality of saying that because the breach caused widespread loss, that loss should not be compensated, which in effect meant that the more damage respondent bodies could point to, the more likely they were to avoid liability.

LESSONS TO BE LEARNED FROM EUROPEAN COMMUNITY LAW

- 4.18 EC law regarding liability for administrative acts is highly sophisticated. The sufficiently serious breach test is a tool which can be deployed with great precision to separate cases in which individuals should and should not be able to claim damages from public bodies. Craig has long argued that English law should take inspiration from the test.²¹ It is perhaps surprising that the English courts have resisted its attractions.
- 4.19 One might argue that, by modifying the standard of care in negligence by applying the *Bolam* test in cases involving difficult discretionary decisions, the English courts have created a similar test, or at any rate that liability will be of roughly the same extent in English and EC law. However, the fact remains that the courts' attitude to liability of public bodies is quite different from that of EC law.
- 4.20 As Fairgrieve notes, this point is well illustrated by contrasting two statements made by Lord Hoffmann.²² In *Factortame (No 5)*, he said, in relation to loss caused to private individuals by the UK legislation which breached EC law on freedom of movement:

¹⁸ Case C-352/98 *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities* [2000] ECR I-5291 at para 41.

¹⁹ Para 4.4.

²⁰ Joined Cases C-104/89 and C-37/90 *J M Mulder, W H Brinkhoff, J M M Muskens, T Twijnstra and Otto Heinemann v Council of the European Union and Commission of the European Communities* [1992] ECR I-3061.

²¹ See eg P Craig, "The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?" in J Beatson and T Tridimas, *New Directions in European Public Law* (1998).

²² D Fairgrieve, "The Human Rights Act 1998, Damages and Tort Law" [2001] PL 695 at 701-702.

I do not think that the United Kingdom ... can say that the losses caused by the legislation should lie where they fell. Justice requires that the wrong should be made good.²³

4.21 However, in *Stovin v Wise*, Lord Hoffmann made the following remark:

The trend of [English] authorities [on negligence] has been to discourage the assumption that anyone who suffers loss is prima facie entitled to compensation from a person (preferably insured or a public authority) whose act or omission can be said to have caused it. The default position is that he is not.²⁴

4.22 These two statements show the same judge starting from diametrically opposite positions in two cases in which State action (that term encompassing both legislative acts, as in *Factortame*, and administrative acts, as in *Stovin*) has caused loss. The only distinguishing feature is that one case arose in a context which called for the application of EC law and the other did not.

4.23 Fairgrieve suggests that, "The lesson to draw from this is that attitudes to policy considerations depend greatly upon the context within which a cause of action is framed."²⁵ One may legitimately argue that it was right to impose liability in *Factortame* and to deny liability in *Stovin*. However, it seems indefensible to begin from a presumption of liability in EC law but from a presumption of non-liability in domestic law.

4.24 A comment by Lord Woolf MR, delivering the judgment of the Court of Appeal in *Factortame (No 5)*, indicates that the possibility of principles and concepts derived from EC law informing the development of domestic law has been recognised by some judges:

[W]e leave for consideration on another occasion the circumstances, if any, in which, quite apart from any requirement of Community law, our law will give a remedy for damage caused by legislation enacted in breach of a superior legal rule. Traditionally this remedy has not been available in our law. Now that it is undoubtedly available in circumstances which contain a Community law element it may be right on some future occasion to re-examine that tradition.²⁶

4.25 Carnwath LJ, writing extra-judicially, has indicated his support for the sufficiently serious breach test.²⁷ Signs of support for the test have now also appeared in the case law, in the joint dissenting opinion of Lords Bingham and Steyn in *Cullen v Chief Constable of the Royal Ulster Constabulary*.²⁸ In that case, the claimant

²³ *R v Secretary of State for Transport, ex parte Factortame (No 5)* [2000] 1 AC 524 at 548.

²⁴ *Stovin v Wise* [1996] AC 923 at 949.

²⁵ D Fairgrieve, "The Human Rights Act 1998, Damages and Tort Law" [2001] PL 695 at 702.

²⁶ *R v Secretary of State for Transport, ex parte Factortame (No 5)* [1998] EuLR 456 at 469.

²⁷ R Carnwath, "The *Thornton* Heresy Exposed: Financial Remedies for Breach of Public Duties" [1998] PL 407 at 422.

²⁸ [2003] UKHL 39, [2003] 1 WLR 1763.

sought damages for loss caused by the defendant's breach of section 15(9)(a) of the Northern Ireland (Emergency Provisions) Act 1987, which required the defendant to give reasons for authorising a delay in complying with the claimant's request for access to a solicitor. The claimant sued for breach of statutory duty and argued that if that cause of action failed, he should recover under a new innominate tort.

- 4.26 Lords Bingham and Steyn were of the opinion that, applying the test for actionability described above,²⁹ there was a cause of action for breach of statutory duty. Of particular interest for present purposes is the following comment:

We would hold that a breach of the right under section 15 is actionable *per se*. But, applying the test enunciated by the European Court of Justice, we would be inclined to hold that proof of a serious breach is required for a damages action.³⁰

- 4.27 This is the first explicit judicial endorsement of the adoption into domestic law of the sufficiently serious breach test. Any such adoption was, however, not supported by the majority. The majority held that, construing the statute, there was no cause of action for breach of statutory duty. It is not unusual for judges to disagree on the interpretation of a statute. However, it is arguable that the majority were influenced against finding a cause of action because they feared excessively wide liability. In this regard, they may have failed to see the useful role which could be played by the EC law sufficiently serious breach test.³¹

- 4.28 It must be noted that another area of English law relating to the liability of public bodies was modified in part because of the influence of EC law. In *Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)*, the House of Lords held that there is a *prima facie* right to recover money paid pursuant to a demand which is unlawful in the public law sense made by a public body. One of the reasons for extending restitutionary relief was that EC law demanded the existence of such relief where was a Community element. As Lord Goff observed,

at a time when Community law is becoming increasingly important, it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law.³²

- 4.29 A similar argument could be made in relation to the liability in damages of public bodies: it seems strange that the right of the citizen to recover damages for loss caused by administrative action is more restricted under domestic law than it is under EC law.

²⁹ Para 2.23.

³⁰ [2003] UKHL 39, [2003] 1 WLR 1763 at [21].

³¹ The majority's failure to make the connection with the EC law test is most apparent in Lord Hutton's speech, at [44].

³² [1993] AC 70 at 177.

PART 5

PUBLIC LAW UNLAWFULNESS AND LIABILITY IN DAMAGES

INTRODUCTION

- 5.1 We have hitherto talked in terms of the liability of public bodies for loss caused by administrative acts. We have deliberately avoided referring to “unlawful” administrative acts, in order that this specific topic can be considered separately.
- 5.2 The relationship between public law unlawfulness and liability in damages would be central to any examination of monetary remedies that should be available against public bodies. By “public law unlawfulness”, we mean the species of illegality that render a public body liable to be judicially reviewed, in relation to either the procedure by which it decides how to act or the substance of the act itself. By “liability in damages”, we mean the duty imposed by the courts upon a public body to pay compensation in respect of loss caused by its act or failure to act.
- 5.3 At present, legal liability in damages exists solely as a remedy arising out of a private law action. The question raised for discussion in this paper is whether a distinct concept of “public law liability” should be created. In this regard, it may be useful to conceive of the various possible bases for liability as a spectrum. There could be liability for acts which are unlawful in the public law sense, liability for maladministration short of public law unlawfulness, and/or liability without fault. Each of these concepts will be examined below.

THE CURRENT LAW

- 5.4 When a private law claim is made against a public body which relates to that body’s performance of its public functions, is the public law lawfulness of that performance in any way relevant? More precisely, can private law liability be established when the act is not shown to have been unlawful in the public law sense, or is public law unlawfulness a necessary precondition for private law liability?
- 5.5 Any successful action for misfeasance in public office or breach of statutory duty must by definition be founded upon an administrative act which is unlawful in the public law sense. As such, this issue is not a live one as regards these torts. The issue is, however, an important one in the context of negligence.

Converging conceptions of reasonableness?

- 5.6 We saw above¹ that the courts have removed the so-called public law hurdle from the tort of negligence.² An individual suing a public body for negligent

¹ Paras 2.34–2.37.

² Except as regards allegations of negligence through failure to exercise a statutory power. See para 2.82.

performance of its public functions need not show that that performance was unlawful in the public law sense in order to succeed in establishing liability and recovering damages. This leads to a possibility, which may seem counter-intuitive, namely that an act which is lawful in the public law sense could still give rise to a liability to pay compensation under private law. This separation of public law and private law forms of illegality may create confusion in public bodies as to what the law requires of them. As Hickman remarks, that separation “is hardly satisfactory from the perspective of public officials who are subjected to different standards of reasonableness in respect of the same conduct, depending on the form that the claim eventually takes”.³

- 5.7 Two points must be made. First, it may be wrong to assume that *in principle* private law liability should never exist in the absence of public law unlawfulness. Whether an act could be declared void in proceedings for judicial review, and whether it could found an action for damages, can be two entirely separate questions. This point is considered in more detail below.⁴
- 5.8 Secondly, it may be wrong to believe that *in practice* an act which is not unreasonable in the public law sense could ever found a successful negligence claim. The minority of the House of Lords in *Stovin v Wise* was prepared to impose liability on the council on the basis that “if there were a common law obligation in the present case, sounding in damages, the extent of the obligation would march hand in hand with the authority’s public law obligations. ... The council’s public law obligation was to act as a reasonable authority. The common law obligation would be to the same effect.”⁵ The minority thus suggested that the public law and private law conceptions of reasonableness are co-extensive. What is unreasonable in the public law sense would always be unreasonable in the private law sense and *vice versa*. Were this to be true, a public body could never be found to have committed an act of actionable negligence in circumstances in which everything that it had done was lawful in the public law sense.⁶
- 5.9 Are the two conceptions of unreasonableness co-extensive? Traditional formulations of those two conceptions would suggest not.⁷ As we saw earlier, the private law meaning of unreasonableness is doing something which a reasonable man would not have done in that situation, or omitting to do something which a reasonable man would have done.⁸ In public law, a much stronger meaning

³ T Hickman, “The Reasonableness Principle: Reassessing its Place in the Public Sphere” [2004] CLJ 166 at 176.

⁴ Paras 5.30–5.37.

⁵ [1996] AC 923 at 936.

⁶ The correctness of this approach has been severely criticised by the House of Lords in *Gorringe v Calderdale MBC*. [2004] UKHL 15, [2004] 1 WLR 1057, in particular Lord Hoffman at [27]-[32].

⁷ Convery criticises the reasoning of the minority in *Stovin v Wise* on this basis, arguing that “the public law obligation is to refrain from acting unreasonably in the public law sense; not, as Lord Nicholls held, to ‘act as a reasonable authority’”. See J Convery, “Public or Private? Duty of Care in a Statutory Framework: *Stovin v Wise* in the House of Lords” (1997) 60 MLR 559 at 567.

⁸ Para 2.54.

traditionally prevails. In the famous *Wednesbury* case, the Court of Appeal stated that a public body would only act unreasonably in the public law sense if it took a decision or carried out an act which no reasonable body could ever have taken or carried out.⁹ Lord Diplock in the *GCHQ* case felt that a decision or act would only be rendered unlawful because of unreasonableness or irrationality if it were “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”.¹⁰

- 5.10 However, it is argued that the private law concept has recently been strengthened while the public law concept has been relaxed.¹¹ Particularly where public bodies have to take very difficult discretionary decisions, we saw earlier how hard it is for the courts to apply the traditional standard of care calculus.¹² In practice, it appears to have become more difficult to show that a public body acted unreasonably and thereby breached its common law duty of care.
- 5.11 At the same time, the degree of irrationality in decision-making which is required before the courts will find a decision to be unreasonable in the public law sense has been reduced. For years the courts retained the language of *Wednesbury* unreasonableness while in fact scrutinising decisions more closely and intervening more readily than that language would suggest. This was most apparent in cases concerning fundamental rights,¹³ but it also occurred in other cases.¹⁴
- 5.12 Recently, the courts have felt able to discard the extreme language of *Wednesbury* altogether. In *ITF*, Lord Cooke pointed out that the formula “so unreasonable that no reasonable body could ever have come to it” is tautologous, opining that “judges are entirely accustomed to respecting the proper scope of administrative discretions [and] do not need to be warned off the course by

⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

¹⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410.

¹¹ A point made by D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003) at pp 50–51. See further T Hickman, “The Reasonableness Principle: Reassessing its Place in the Public Sphere” [2004] CLJ 166 at 176–183.

¹² See above para 2.68.

¹³ Eg *R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514. See in particular Lord Bridge at p 531: “The most fundamental of all human rights is the individual’s right to life and when an administrative decision under challenge is said to be one which may put the applicant’s life at risk, the basis of the decision must surely call for the most anxious scrutiny.” The departure from *Wednesbury* became even more apparent in such cases as *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 and *R v Ministry of Defence, ex parte Smith* [1996] QB 517.

¹⁴ P Craig, *Administrative Law* (5th ed, 2003), p 612, cites examples such as *Hall & Co Ltd v Shoreham-by-Sea Urban District Council* [1964] 1 WLR 240 and *R v Hillingdon London Borough Council, ex parte Royco Homes Ltd* [1974] QB 720 as cases in which the courts intervened even though “it is difficult to regard the subject-matter under attack as determinations which were so unreasonable that no reasonable authority could have made them. ... The test was applied in a way that made it closer to asking whether the court believed that the exercise of discretion was reasonable.”

admonitory circumlocutions”. Lord Cooke preferred the “unexaggerated” standard of simple unreasonableness.¹⁵ He developed the point in *Daly*:

I think that the day will come when it will be more widely recognised that *Wednesbury* was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.¹⁶

- 5.13 In *Begbie*, Laws LJ made extremely important comments concerning the flexibility of the public law conception of reasonableness:

Fairness and reasonableness (and their contraries) are objective concepts; otherwise there would be no public law, or if there were it would be palm tree justice. But each is a spectrum, not a single point, and they shade into one another. It is now well established that the *Wednesbury* principle itself constitutes a sliding scale of review, more or less intrusive according to the nature and gravity of what is at stake.¹⁷

- 5.14 As a result of these developments, it may be thought that a unified concept of reasonableness is emerging. What is reasonable or unreasonable in both public law and private law will depend upon the particular context and circumstances of the case, and the same factors will be relevant in both the public and private spheres. There have been indications of judicial acceptance of this convergence,¹⁸ although the courts have yet to accept that the two conceptions of reasonableness are fully co-extensive.¹⁹ It may be fair to conclude that, under the

¹⁵ *R v Chief Constable of Sussex, ex parte International Trader's Ferry* [1999] 2 AC 418 at 452.

¹⁶ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [32]. For extra-judicial comments to the same effect, see R Cooke, “The Road Ahead for the Common Law” [2004] ICLQ 273 at 282 and 284–285.

¹⁷ *R v Secretary of State for Education and Employment, ex parte Begbie* [2000] 1 WLR 1115 at 1130.

¹⁸ Eg in *R (S) v Airedale NHS Trust* [2002] EWHC 1780, [2003] Lloyd's Rep Med 21 at [103], per Stanley Burnton J: “At least nominally the *Wednesbury* test of lawfulness (and even the super-*Wednesbury* test) differs from the *Bolam/Bolitho* test applicable to claims in negligence. It is unnecessary for me to determine whether there is any difference in practice between them: I suspect that in the present context there is not.”

¹⁹ Resistance to such a development is most clearly illustrated in *Thomson v Home Office* [2001] EWCA Civ 331, Independent, 16 March 2001 at [6], per May LJ: “[Counsel for the defendant] came close to submitting that the standard of care to be exercised by the prison authorities should be equated with that by which the exercise by a public authority of a discretion is judged in public law proceedings. In my view, this submission muddles public law and private law duties.” Hickman comments, “This evasion of conceptual comparison must have left [the defendant], if not legal counsel, befuddled as to precisely what obligations govern the exercise of discretion in this context. A far greater readiness to engage with the relationship between the various concepts of reasonableness is surely

current law, a decision which is not unreasonable in the public law sense is unlikely to found a successful negligence action. As such, public bodies are unlikely to be held liable in negligence for lawful acts.

A glimmer of revolution?

- 5.15 There are, however, some signs that the courts might be seeking to develop the common law in such a way that compensation could be recovered for loss caused by lawful acts. The clearest indication comes from in *Marcic v Thames Water Utilities Ltd.*²⁰ The case merits close examination as it graphically illustrates the difficulty of deciding whether to make public bodies liable for loss caused by lawful acts.
- 5.16 The claimant's property was repeatedly flooded by sewage discharged from sewers operated and maintained by the defendant. The flooding was caused by the overloading of a section of the sewerage system which the defendant had inherited from the previous statutory sewerage undertaker. When built, that section had been adequate for the foreseeable needs of the area it served, but it had become inadequate because of increased use following the connection of more houses to the system as of right. The defendant operated a points system to determine its priorities for spending money to alleviate flooding. Under that system, in which the seriousness of a flooding incident was balanced against the estimated cost of the necessary works, there was no prospect of work being done to remedy the flooding to the claimant's property although it was practicable to carry out the necessary work. The claimant brought an action against the defendant for nuisance, breach of statutory duty, and breach of Article 8 of the European Convention of Human Rights contrary to section 6 of the Human Rights Act. In a joint judgment, the Court of Appeal held that the defendant was liable in nuisance and under the Human Rights Act.²¹
- 5.17 As regards nuisance,²² the court held that the defendant had failed to show that its system of priorities was a fair way of devoting limited resources to the widespread problem of nuisances emanating from its sewers and therefore that it had taken all reasonable steps to prevent the nuisance. Since the claim was not of failure by the defendant to drain the claimant's property but of its drainage of others' property in such a way as to result in discharge on to the claimant's property thereby causing damage, it was not a concealed attempt to make the

required, particularly since each concept is in a state of development." See T Hickman, "The Reasonableness Principle: Reassessing its Place in the Public Sphere" [2004] CLJ 166 at 195.

²⁰ [2002] EWCA Civ 64, [2002] QB 929; [2003] UKHL 66, [2004] 2 AC 42.

²¹ [2002] EWCA Civ 64, [2002] QB 929 (Lord Phillips of Worth Matravers MR, Aldous and Ward LJ).

²² The fact that the claim was in nuisance rather than negligence is not important for present purposes. As the court pointed out at [55], "At the end of the day the question of categorisation is academic. ... [T]he forms of action no longer rule us. The cases clearly establish that ownership of land carries with it a duty to do whatever is reasonable in all the circumstances to prevent hazards on the land, however they may arise, from causing damage to a neighbour."

defendant perform a statutory duty. Since the nuisance was not the inevitable consequence of the exercise of its statutory duties or powers, the defendant could not establish a defence of statutory authority to claims at common law.

- 5.18 As regards the Human Rights Act, the court held that a fair balance had to be struck between protection of the claimant's fundamental rights and the general interest of the community. Since the claimant's claim under section 6 was for interference with his Convention rights as an incident of the performance by the defendant of its statutory duty, the statutory complaints procedure under the relevant statute, which provided a mechanism for striking the necessary balance in the case of those who were being denied the benefits that the defendant was required to provide to them under the statute, was not sufficient to vindicate the claimant's Convention rights. Accordingly, the judge at first instance had been right to hold that the defendant had infringed the claimant's Convention rights. However, the claimant's right to damages at common law was sufficient to afford him "just satisfaction" for the wrong he had suffered and displaced any right he would otherwise have had to damages under the Human Rights Act.
- 5.19 The important point to bear in mind for present purposes is that the defendant had not acted unlawfully in the public law sense at any stage. Nonetheless, the court was willing to hold that it was liable to pay damages to the claimant for loss caused by it in the course of exercising its public functions.
- 5.20 Furthermore, towards the end of its joint judgment in a section entitled "Unanswered questions", the court made several potentially significant comments. First, the court observed:

Where a nuisance results because an existing system becomes surcharged as a consequence of increased user, it does not seem to us just that the liability of the undertaker should depend upon whether in all the circumstances there are steps which the undertaker should reasonably have taken to abate the nuisance. If a single house is at risk of flooding by sewerage discharge once every five years, this may not justify the investment that would be needed to remove that risk. It does not follow, however, that it is just that the householder should receive no compensation for the damage done. The flooding is a consequence of the benefit that is provided to those making use of the system. It seems to us at least arguable that to strike a fair balance between the individual and the general community, those who pay to make use of a sewerage system should be charged sufficient to cover the cost of paying compensation to the minority who suffer damage as a consequence of the operation of the system.²³

- 5.21 The court went on to say:

When considering Mr Marcic's claim under the Human Rights Act, the judge proceeded on the premise that this required a fair balance to be struck between the competing interests of Mr Marcic and

²³ [2002] EWCA Civ 64, [2002] QB 929 at [113].

Thames's other customers. In this context he was prepared to contemplate that the system of priorities used by Thames might be "entirely fair", notwithstanding that this would result in nothing being done to remedy Mr Marcic's flooding in the foreseeable future. We doubt whether such a situation would be compatible with Mr Marcic's rights under article 8. The decision of the European Commission of Human Rights in *S v France* suggests to the contrary.²⁴ ... [It] suggests that where an authority carries on an undertaking in the interest of the community as a whole it may have to pay compensation to individuals whose rights are infringed by that undertaking in order to achieve a fair balance between the interests of the individual and the community.²⁵

- 5.22 These comments go so far as to suggest that not only is there no need for the defendant public body to have acted unlawfully in the public law sense in order for it to be held liable, it need not even have been at fault. The idea here is that some particularly serious loss must always be compensated, regardless of fault.
- 5.23 The Court of Appeal's decision in *Marcic* was overruled by a unanimous House of Lords.²⁶ As regards nuisance, it was held that the common law should not impose on the defendant obligations inconsistent with the statutory scheme imposed by the relevant statute, as to do so would run counter to the intention of Parliament. The claimant's action in nuisance was inconsistent with the statutory scheme under which the defendant operated the sewers. It ignored the statutory limitations on the enforcement of sewerage undertakers' drainage obligations. Enforcement powers were conferred upon the Director General of Water Services, who is responsible for the supervision and control of Thames Waters' exercise of its statutory functions. One important purpose of the enforcement scheme was that individual householders should not be able to launch proceedings in respect of failure to build sufficient sewers.
- 5.24 As regards the Human Rights Act, it was held that the statutory scheme was, as a whole, compliant with the Convention. The human rights claim, like the claim in nuisance, did not take sufficient account of the statutory scheme under which the defendant was operating the offending sewers. In considering questions of general policy, a fair balance had to be struck between the interests of the individual and those of the community as a whole. In the instant case, the interests that Parliament had had to balance included, on the one hand, the interests of the minority of customers of a company, whose properties were prone to sewer flooding and, on the other hand, all the customers of the company, whose properties were drained through the company's sewers and who met the cost of building more sewers. In principle the statutory scheme struck a reasonable balance between those interests. Whilst in the claimant's case matters had clearly gone awry, the malfunctioning of the scheme on that occasion did not cast doubt on its overall fairness as a scheme.

²⁴ (1990) 65 DR 250.

²⁵ [2002] EWCA Civ 64, [2002] QB 929 at [115]–[117].

²⁶ [2003] UKHL 66, [2004] 2 AC 42.

- 5.25 One could interpret this decision as halting the possible judicial development of no-fault liability in English law. Two factors make this conclusion unsafe. First, the House of Lords stressed that the defendant in *Marcic* was no ordinary public body. Lord Nicholls observed:

Thames Water is a commercial company carrying on business as a public sewerage undertaker within this statutory framework. ... Commercial companies cannot be expected to take up appointments as sewerage undertakers unless there is a prospect of obtaining a reasonable rate of return on their invested capital. ... Sewerage undertakers receive no subsidy from public funds for [carrying out remedial work]. The cost has to be met out of money received from customers by way of sewerage charges. But sewerage undertakers are not at liberty to fix the amount of sewerage charges at whatever amount they wish. The Director sets limits on these charges.²⁷

- 5.26 The Court of Appeal had in effect said that since Thames Water is a commercial enterprise, it ought to be liable to the same extent as any other private company. The implication was that, if Thames Water wants to have the benefit of (potentially) making a profit from operating sewers, it must accept the corresponding burden of ensuring that its activities do not cause harm to others.²⁸ The House of Lords, in contrast, seemed to think that the fact that Thames Water is a commercial enterprise should prompt them to restrict its liability, since otherwise commercial enterprises might be dissuaded from becoming public sewerage undertakers.²⁹ The point is that, had the defendant been an ordinary public body, fully funded by the taxpayer, the House of Lords may have been more willing to impose liability in the present case.³⁰
- 5.27 Secondly, at least one of their Lordships was willing to make broad-ranging comments similar to those of the Court of Appeal. Lord Nicholls stated:

It seems to me that, in principle, if it is not practicable for reasons of expense to carry out remedial works for the time being, those who enjoy the benefit of effective drainage should bear the cost of paying some compensation to those whose properties are situated lower down in the catchment area and who, in consequence, have to endure intolerable sewer flooding, whether internal or external. As the Court of Appeal noted, the flooding is the consequence of the benefit provided to those making use of the system. ... The minority who suffer damage and disturbance as a consequence of the inadequacy of the sewerage system ought not to be required to bear

²⁷ *Ibid*, at [11]–[12], [24].

²⁸ [2002] EWCA Civ 64, [2002] QB 929 at [83], [87] and [90].

²⁹ This is interesting given the courts' usual reluctance, on policy grounds, to impose liability on *public* bodies. One might argue that the House of Lords is prepared to use either the "but the defendant is a public body" argument *or* the "but the defendant is a private body" argument in order to deny recovery.

³⁰ The problems associated with the blurring of the distinction between public bodies and private bodies is discussed in more detail below, at paras 7.14–7.22.

an unreasonable burden. This is a matter the Director and others should reconsider in the light of the facts in the present case.³¹

- 5.28 The final sentence in this quotation indicates Lord Nicholls' acceptance that it is not for the courts to create a system of no-fault liability. Instead, this is a matter for the Director General of Water Services. The Director could conceivably act in a similar capacity to an ombudsman, by recommending that a sewerage undertaker pay compensation to those affected by its actions.³² However, such an individual will not exist in relation to every case in which a claimant seeks to establish liability in the absence of fault. The possibility therefore remains that in another case the courts will be prepared to impose such liability.

LIABILITY FOR ACTS WHICH ARE UNLAWFUL IN THE PUBLIC LAW SENSE: A NEW APPROACH?

- 5.29 The removal of the public law hurdle from the tort of negligence may be seen as the courts reinforcing the public-private divide by indicating that public law unlawfulness and private law liability are two separate concepts. It may also be seen as weakening this divide by giving support to the argument that public bodies should be treated no differently from private individuals where tortious liability is concerned. Any Law Commission project would need to consider these developments and what the relationship should be between public law unlawfulness and the recovery of compensation.
- 5.30 An obvious way in which to address the issue of compensation directly in public law would be to give the courts a power to award damages in judicial review once the public law unlawfulness of the challenged decision has been established. The argument for such a power is succinctly made by Cane:

[I]f a citizen is made worse off by the illegitimate performance (or non-performance) of governmental functions, damages should, in principle, be available to rectify the citizen's position.³³

- 5.31 A key factor in favour of creating a power for the court to award damages in respect of loss caused by unlawful administrative acts could be that the existence of such liability would not require the public body to do anything which it was not already obliged to do. As we saw earlier, the realisation that liability could only exist where the defendant had breached its public law obligations led the minority

³¹ [2003] UKHL 66, [2004] 2 AC 42 at [45].

³² Although no explicit power to recommend payment of compensation is conferred upon the Director by the Water Services Act 1991, such a power may be implicit. Section 30(4) states that it is the duty of the Director to take "such steps ... as he considers appropriate" in response to a complaint by a customer regarding a statutory sewerage undertaker's performance of its duties. Such steps could arguably include recommending that the sewerage undertaker pay compensation to the customer. Furthermore, an explicit power regarding compensation for compulsory acquisition of sewers or sewage disposal works by sewerage undertakers is given to the Director by s 105(5). Parliament has therefore accepted that in principle the Director is in a position to recommend payment of compensation.

³³ P Cane, "Damages in Public Law" (1999) 9 Otago Law Review 489 at 505.

in *Stovin v Wise*³⁴ to show far greater willingness than the majority to impose a duty of care.³⁵ It may be far less intrusive into the operations of a public body merely to require it to pay damages for not doing something that it ought in any case to have done, than to say that the body should have taken further steps beyond those required by its public law obligations.³⁶

5.32 A similar point is made by Harlow:

By a finding of liability, the courts are not necessarily dictating choices to public authorities. Or perhaps the choice is marginally a different one, in that, if the authority decides to act, it must act carefully. It may have to calculate the risk and set aside sums for insurance and compensation.³⁷

5.33 It is worth noting that breach of a ground of judicial review other than unreasonableness will not always result in a public body being compelled to make a particular substantive decision. For example, suppose that the body has breached the rules on procedural fairness by denying an applicant for a licence the opportunity to put forward submissions as to why a licence should be granted. When the body follows the lawful procedure, it may still ultimately decide against the applicant.³⁸

5.34 Nonetheless, it is argued by some that the very fact that the body breached a ground of review should open up the possibility of *some* compensation being awarded to the aggrieved individual, even if this does not amount to giving him or

³⁴ [1996] AC 923.

³⁵ Paras 2.77–2.79.

³⁶ Hickman suggests that even when a public body is said to have acted unreasonably in the public law sense, this does not mean that it ought to have done what the claimant wanted it to do, for example by exercising a statutory power, whereas the private law meaning of unreasonableness clearly does have that result. He states: “The contention that an irrational decision not to act in effect gives rise to a public law duty to act is, in public law terms, a *non sequitur*. Even where mandamus is granted it is usually to compel the remaking of a decision which is irrational but not to compel the conferment of a benefit on the claimant.” See T Hickman, “‘And That’s Magic!’ – Making Public Bodies Liable for Failure to Confer Benefits” [2000] CLJ 432 at 435. However, one type of irrational decision not to exercise a power does give rise to a public law duty to act. The distinction between two different decisions – whether to consider using the power and, having done so, whether in fact to use the power – must be borne in mind. It is clear that if an irrational refusal to consider using a power has been declared unlawful and a mandatory order to do so granted, the public body need merely consider using the power and need not ultimately use the power. However, if due consideration is given to the question of whether to exercise the power, and it is decided not to do so, the resultant refusal to exercise the power may *itself* be irrational. If this is the case, it is difficult to see how (barring any significant change in the circumstances) a new decision, in which it is again decided not to exercise the power, could itself avoid being characterised as irrational. Thus, the latter type of irrational decision not to act *does* in effect give rise to a public law duty to act.

³⁷ C Harlow, “Fault Liability in French and English Public Law” (1976) 39 MLR 516 at 540.

³⁸ See above, para 2.11, fn 12.

her the actual benefit which he or she hoped to obtain through a favourable decision by the body.³⁹

- 5.35 Furthermore, reasonableness is not the only public law principle which can sometimes dictate that specific actions be taken. The fact that the same result was required by the public law duty to respect human rights as by a proposed private law duty of care encouraged the court to find such a duty in *D v East Berkshire Community Health NHS Trust*,⁴⁰ discussed above.⁴¹ The court fortified its conclusion that a duty of care was owed by adding, “Given the obligation of the local authority to respect a child’s convention rights, the recognition of a duty of care to the child on the part of those involved should not have a significantly adverse effect on the manner in which they perform their duties.”⁴²
- 5.36 Another public law principle which can dictate that specific actions be taken is that of substantive legitimate expectations, which states that a public body must not abuse its power by unjustifiably resiling from an expectation legitimately held by an individual that he or she would receive some benefit. The usual remedy awarded by the court is full substantive protection – the body must give the applicant what it originally promised to give him or her. This is an area in which the possibility of a compensatory remedy sometimes being awarded in place of full substantive protection has yet to be fully explored.⁴³
- 5.37 A future enquiry would have to consider in detail the interaction between public law obligations and monetary remedies. Would the possibility of liability arising from an unlawful act have an effect on administrative decision-making? If it did, would it be positive - ensuring that decisions are made more carefully and fairly - or negative - encouraging decision-makers to be unduly cautious and risk-averse? Economic analysis may be needed to answer these questions.⁴⁴

Limits to liability: the importance of “fault”

- 5.38 It must be stressed that there are compelling arguments against instituting a one-for-one relationship between public law unlawfulness and liability to pay compensation, the former automatically giving rise to the latter. In practical terms, Craig points out that “[t]o render public bodies liable in damages whenever *any* of the various heads of *ultra vires* behaviour can be found would be to impose a

³⁹ Although we may equally feel that the grant of a quashing order in judicial review proceedings is sufficient to vindicate the individual’s rights.

⁴⁰ [2003] EWCA Civ 1151, [2004] QB 558.

⁴¹ Paras 3.21–3.24.

⁴² [2003] EWCA Civ 1151, [2004] QB 558 at [83].

⁴³ The role of compensation as a remedy for unlawful breach of a substantive legitimate expectation is discussed in detail in I Steele, “Substantive Legitimate Expectations: Striking the Right Balance?” (2005) 121 LQR (forthcoming).

⁴⁴ For a more detailed account of the policy arguments for and against liability, see paras 2.41–2.42. As regards the importance of economic analysis, see paras 7.9–7.13.

very extensive liability”.⁴⁵ It may legitimately be felt that such liability would be *too* extensive.

- 5.39 In a similar vein, Harlow argues that the idea that “all loss resulting from illegitimate administrative action should fall on the state” is “a dangerously wide form of risk liability, which requires of the state that its plans and services should be infallible – or else! Administration, in other words, acts ‘at its risks and perils’ and carries the risk of failure in the enterprise of governance. This is an outcome that would play havoc with public finance, too perilous for any court or any government to contemplate.”⁴⁶
- 5.40 More importantly, in conceptual terms, it is fault, not public law unlawfulness, which is normally thought to be the prerequisite for liability. It seems doubtful that whenever a public body acts unlawfully in the public law sense, it can be said to be “at fault”. The fact of the defendant’s conduct being unlawful in public law merely influences, *but does not conclusively determine*, our judgment as to whether the defendant was “at fault”.
- 5.41 The importance of fault as a basis for liability was recognised by the Council of Europe in its recommendation of 1984 on public liability. The first principle which it proposed should govern the liability of public bodies in relation to their public functions was as follows:

Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. Such a failure is presumed in case of transgression of an established legal rule.⁴⁷

- 5.42 Few commentators have directly addressed this issue. However, Bell has observed:

[W]hat are the basic values in compensation and how are they developing? There seem to be two broad bases. The first is fault and the second is the principle of unjust burden, which underlies no-fault. In the case of fault, we are dealing with a failure by a public authority to conduct itself in a way which can be reasonably expected. ... [T]he specific difficulties of the situation in which a public official is placed are taken into account. Structured in this way, it is hard to argue that public authorities should owe no duty to

⁴⁵ P Craig, *Administrative Law* (5th ed, 2003), p 938 (emphasis in original).

⁴⁶ C Harlow, “Administrative Compensation: Brave New World?” in *State Liability – Tort Law and Beyond* (forthcoming, 2004; we are grateful to Professor Harlow for allowing us to see a draft copy).

⁴⁷ Recommendation No R (84) 15 on Public Liability, adopted by the Council of Ministers of the Council of Europe on 18 September, 1984. This recommendation was the result of a process which began in 1979 when a Council of Europe colloquy on European law was held in Madrid. As a result of the comparative analysis conducted on that occasion, it was decided to instruct the committee of experts on administrative law to produce an instrument aimed at achieving a uniform approach in the various Member States of the European Community.

avoid causing loss by their fault. But it may be reasonable to say that it will be hard to show that they are in breach of their duty unless the fault is particularly glaring or the illegality is manifest.⁴⁸

- 5.43 The European Community law jurisprudence on the issue of “sufficiently serious breach” is of great relevance here.⁴⁹ The European Court of Justice has sought to determine with accuracy the factors which will prompt the Court to award damages in respect of loss caused by unlawful acts of the Community or of Member States. The Court’s guiding principle seems to be that damages should only be payable when the institution responsible for causing loss was at fault in so doing.⁵⁰
- 5.44 The realisation that a public body may act unlawfully and yet without fault shows that public law unlawfulness should not be a *sufficient* condition for liability. It is now necessary to consider whether public law unlawfulness should even be a *necessary* condition for liability.
- 5.45 This gives rise to two distinct inquiries. First, should it be possible to show that a public body was at fault, and should therefore be liable, even where it acted lawfully in the public law sense? Secondly, should we countenance making a public body liable to pay damages where its actions were *neither* unlawful in the public law sense *nor* could be said to render it at fault – in other words, should we ever base liability solely upon the principle of unjust burden referred to by Bell?

LIABILITY FOR MALADMINISTRATION SHORT OF PUBLIC LAW UNLAWFULNESS

- 5.46 The removal of the public law hurdle in negligence raises the issue of whether public bodies should, in principle, be potentially liable for acts which are not unlawful in the public law sense.
- 5.47 It may seem odd to talk about liability for lawful acts – one might ask why a public body should pay damages in respect of loss caused by an act which it was legally entitled to carry out. However, it is at this point that the distinction between public law unlawfulness and liability to pay compensation must be most clearly borne in mind. If we accept that there is no one-for-one relationship between the two, with the former automatically triggering the latter, then it is perfectly plausible that in some circumstances the latter might exist in the absence of the former.
- 5.48 The reason that it at first sight seems strange to suggest that a public body could be liable for loss caused by a lawful act is that it is difficult to say that the public body was “at fault” in causing the loss. We have seen that it is fault, not public law unlawfulness, which is normally thought to be the prerequisite for liability. It

⁴⁸ J Bell, “Introduction” in D Fairgrieve, M Andenas and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002) at p xx.

⁴⁹ See above, paras 4.6–4.8.

⁵⁰ See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and R v Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029, [1996] QB 404 at para 78: “certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining whether or not a given breach of Community law is serious”.

may be that whenever a public body acts unlawfully in the public law sense, it can be said to be “at fault”.⁵¹ However, the converse is certainly not true. In order to be “at fault”, in the sense of having failed to conduct itself in a way which can be reasonably expected, a public body need not have acted unlawfully in the public law sense.

- 5.49 When the High Court declares that an administrative act is unlawful and void, it is in effect saying that the defendant public body took a decision which was not open to it to take. Suppose that there were three options open to the body, of which one was unlawful in this sense. It was entirely open to the body to choose either of the remaining options. However, it may be that, while being legal in that it would not breach any ground of judicial review, one of the remaining options would nonetheless have been a “bad” decision. Perhaps it would have caused unnecessary hardship to an individual or group of individuals. In such circumstances, we may feel that those individuals should be able to recover compensation.
- 5.50 The obvious objection is that there are no objective criteria by which we can denounce a decision as “bad” or hardship as “unnecessary”. For one thing, while prepared to impugn particularly bad decisions by reference to the *Wednesbury* test of unreasonableness,⁵² the courts are careful to steer clear of laying down such criteria, lest they comment unduly on the merits of administrative decisions and cross the divide between review and appeal.⁵³ For another, it may simply be impossible to devise such criteria – this may be an issue on which opinions may reasonably differ.
- 5.51 It may be, however, that some decisions which would survive judicial review clearly constitute maladministration, in that no-one could deny that these decisions were “bad” or that the public body was “at fault”. As we suggested in our discussion of ombudsmen, while all acts which are unlawful in the public law sense constitute maladministration, the converse is not true.⁵⁴ Should the law leave loss caused by such decisions where it lies, or should it instead require the public body responsible to compensate those affected?
- 5.52 The first point to consider is whether the law should concern itself at all with loss caused by lawful acts. As we have seen, at present such loss is dealt with largely by extra-judicial means, principally by the ombudsmen.⁵⁵ We might feel that the

⁵¹ However, as suggested above at paras 5.32–5.45, the EC law jurisprudence on the issue of “sufficiently serious breach” provides a compelling argument that this is not the case.

⁵² Discussed above, paras 5.10–5.15.

⁵³ This explains the courts’ refusal to apply the test of proportionality other than in the human rights context, although the realisation that the test can be applied with varying degrees of intensity may lead to its adoption in non-rights cases. See *R (Association of British Civilian Internees: Far East Region) v Secretary of State for Defence* [2003] EWCA Civ 473, [2003] QB 1397.

⁵⁴ Para 2.104, fn 118.

⁵⁵ Above at paras 2.83–2.104. We do not say that such loss is dealt with *exclusively* by extra-legal means because the possibility of a successful negligence action being founded upon a lawful administrative act, however remote, cannot be excluded altogether.

current two-tiered approach, with both judicial and extra-judicial remedies, creates a system which produces overall an acceptable incidence and extent of monetary redress for loss caused by public bodies acting in the public sphere.⁵⁶ Alternatively, we may feel that loss caused by lawful acts should be dealt with through formal legal avenues. This may either be because of the weaknesses of the ombudsman system,⁵⁷ or because in principle we feel it should be the courts and not an administrative officer (albeit one independent of the executive) which determine liability and award compensation.⁵⁸

5.53 The second point to consider is whether it would *in principle* be appropriate to confer upon the courts the power to grant compensation in respect of loss caused by maladministration which falls short of public law unlawfulness. At present, absent a private law cause of action, the courts cannot even award compensation in respect of loss caused by acts which are unlawful in the public law sense. We might feel that considerations of institutional competence and constitutional legitimacy preclude the grant of such a power.⁵⁹ On the other hand, we may feel that sufficient guidance and democratic legitimacy could be provided by Parliament setting out a clear statutory scheme of liability, with the courts merely being required to apply the principles contained therein.⁶⁰

5.54 The third point to consider is how *in practice* such a power could and should be exercised. First, when would liability arise – would maladministration in itself be sufficient for liability, or would other factors be relevant? Secondly, would the monetary remedy be discretionary, as other public law remedies are,⁶¹ or would it be available as of right once maladministration is established? Thirdly, how would the level of compensation be decided? Would it be appropriate to adopt the approach to quantum of damages taken in tort law, with full compensation payable in respect of all foreseeable and causally connected damage or loss, or would a reduced level of compensation, perhaps inspired by the approach taken

⁵⁶ The relationship between judicial and extra-judicial standards and remedies is complex. See the comments of Advocate-General Slynn in Case 64/82 *Tradax Graanhandel BV v Commission of the European Communities* [1984] ECR 1359 at 1385: “Nor do I consider ... that there is any generalised principle of law that what is required by good administration will necessarily amount to a legally enforceable rule. ... Legal rules and good administration may overlap ... the requirements of the latter may be a factor in the elucidation of the former. The two are not necessarily synonymous. Indeed, sometimes when the courts urge that something should be done as a matter of good administration, they do it because there is not a precise legal rule which a litigant can enforce.”

⁵⁷ Principally the unenforceability of recommendations that compensation should be paid. See paras 2.101–2.102.

⁵⁸ In this regard, Bell rightly notes, “We have to ask about the value-added of the legal process in such circumstances. The enforceability of the legal remedy and the quantum are clearly important. But there is also a sense in which ‘justice’ is associated in the minds of many people with ‘a court judgment’. Being vindicated in a public forum plays an important social role, over and above the receipt of compensation.” See J Bell, “Introduction” in D Fairgrieve, M Andenas and J Bell, *Tort Liability of Public Authorities in Comparative Perspective* (2002) at p xvi.

⁵⁹ For discussion of these principles, see above, para 2.60.

⁶⁰ This idea is returned to in para 8.10.

⁶¹ See above, para 2.9.

in relation to damages for non-pecuniary loss under the Human Rights Act, be more appropriate?⁶²

- 5.55 It should be noted that the continued development of the grounds of judicial review may narrow the gap between public law unlawfulness and the broader notion of maladministration. Difficult questions regarding liability for maladministration which does not amount to public law unlawfulness may therefore become less important in practice. However, it will remain important to address these questions head-on. It should not be assumed that the extension of orthodox public law principles will automatically make it acceptable to limit compensation to loss caused by acts which contravene those principles.

LIABILITY WITHOUT FAULT?

- 5.56 Another much more radical and controversial approach might be through the principle of no-fault liability. As Bell suggests, the principle which underlies no-fault liability is that of unjust burden.⁶³ A limited form of no-fault liability was advocated by the Council of Europe in the second principle which it proposed should govern the liability of public bodies.⁶⁴ No-fault liability of the type contemplated in this principle is found in the laws of certain other countries and has also been acknowledged in principle as a possibility in EC law.⁶⁵ The most prominent example of no-fault liability is in French law.⁶⁶
- 5.57 It must be acknowledged, though, that if liability for fault which does not actually amount to public law unlawfulness has been a controversial concept in English law, the idea of liability without either public law unlawfulness or fault would until recently have been almost unthinkable.
- 5.58 However, eminent academics have voiced their support for the concept.⁶⁷ Harlow has recently argued:

I see the need for a general principle of compensation to guide those who have to handle claims. This should clearly distinguish liability from compensation. ... [T]he basis for compensation is neither fault nor illegality. It may represent redress; it may, on the other hand, be merely a manifestation of sympathy and solace. I

⁶² For the approach under the Human Rights Act, see above, paras 3.12–3.19 and 3.25–3.29.

⁶³ See above, note 58.

⁶⁴ Recommendation No R (84) 15 on Public Liability, adopted by the Council of Ministers of the Council of Europe on 18 September, 1984.

⁶⁵ Although to date the European courts have been extremely restrictive in their approach. See the decision of the Court of First Instance in Case T-184/95 *Dorsch Consult Ingenieurgesellschaft mbH v Council and Commission* [1998] ECR II-667, upheld by the ECJ in Case C-237/98P, [2001] ECR I-4549.

⁶⁶ See N Brown and J Bell, *French Administrative Law* (5th ed, 1998) at pp 193–194.

⁶⁷ See eg H Street, *Governmental Liability: A Comparative Study* (1953) at p 78; G Ganz, “Compensation for Negligent Administrative Action” [1973] PL 84 at 99; P Craig, “Negligence in the Exercise of a Statutory Power” (1978) 94 LQR 428 at 455 and “Compensation in Public Law” (1980) 96 LQR 413 at 455. S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin’s Tort Law* (5th ed, 2003) at p 413.

favour a simple and flexible principle narrowly interpreted to cover situations of 'abnormal loss' and hardship, with 'botheration payments' in appropriate cases.⁶⁸

Furthermore, the comments of the Court of Appeal and of Lord Nicholls in *Marcic*⁶⁹ indicate that some judges may be becoming more receptive to the concept of no-fault liability.⁷⁰

5.59 It is unlikely that the common law, under which fault is almost always a prerequisite for liability, could be developed by the courts to produce a coherent scheme of no-fault liability. Moreover, any removal of the link between fault and liability could damage the coherence of the common law itself. However, absent legislative intervention, the courts may do what they can to create no-fault liability where they deem it to be appropriate.⁷¹ This prospect may strengthen the need for serious consideration of this issue by the legislature.

⁶⁸ C Harlow, "Administrative Compensation: Brave New World?" in *State Liability – Tort Law and Beyond* (forthcoming, 2004). By "botheration payments", Harlow means compensation in "cases of grave maladministration, where excessive rudeness and malice were involved or exceptional worry and distress caused". She adds that "[t]his terminology of 'botheration payments' nicely captures the idea of affront to human dignity, fast becoming a fashionable human rights value".

⁶⁹ [2002] EWCA Civ 64, [2002] QB 929 at [113]–[117]; [2003] UKHL 66, [2004] 2 AC 42 at [45].

⁷⁰ See paras 5.21–5.22 and 5.28.

⁷¹ See R A Buckley, "Nuisance and the Public Interest" (2002) 118 LQR 508 at 512: "While so bold a cutting of the Gordian knot linking compensation to culpability [as that attempted in the past] may now be beyond the capacity of the common law itself to achieve openly, even when assisted by the legislature, the approach of the Court of Appeal in *Marcic v Thames Water Utilities* may be applauded for achieving much the same result in practice. ... While it is not wholly satisfactory to reconcile conflicting public and private interests by manipulation of the law of remedies, rather than by more overt methodology and more appropriate machinery, the achievement of that reconciliation is greatly to be preferred to a conceptually driven refusal to recognise that such an accommodation is possible at all."

PART 6

PROCEDURAL IMPLICATIONS

INTRODUCTION

- 6.1 An important issue which would need to be addressed in any enquiry into monetary remedies in public law is procedure. How does an individual who suffers loss as a result of administrative action go about claiming damages from the public body responsible? How would he or she do so under any new framework of liability? What are the implications for existing public law procedural principles? Unless a satisfactory procedure by which such claims can be adjudicated upon is devised, any reform of the substantive law governing those claims will to a large extent be in vain.

THE CURRENT LAW

- 6.2 The fact that an individual who suffers loss as a result of administrative action can only recover damages if he or she establishes a private law cause of action creates an obvious dilemma. Should he or she proceed by way of judicial review and supplement that action with a private law claim, or bring a claim for damages through an ordinary private law action?
- 6.3 To an extent, this dilemma is solved where the preferred cause of action is negligence by the removal of the public law hurdle. As we have seen, except where the claim is based on a failure to exercise a statutory power, it is no longer necessary to establish that an administrative act was unlawful in the public law sense before going on to argue that the act constituted a breach of a tortious duty of care.¹ As such, a claimant wishing to sue in negligence need not consider seeking judicial review, but may simply proceed with a private law action.
- 6.4 However, the removal of the public law hurdle in negligence is by no means uncontroversial, and public law unlawfulness is still an essential feature of a claim for misfeasance in public office or breach of statutory duty. Furthermore, individuals may in some circumstances wish to obtain both a traditional public law remedy and damages.² The dilemma therefore remains: which procedure should be used?
- 6.5 At present, a public-private divide is present in English law not only in *substantive law* but also in *procedure*.³ The concept is usually termed “procedural

¹ Above, paras 2.32–2.37.

² Eg in the example used in para 2.11, where the aggrieved individual might seek a quashing order to quash the unlawful refusal to grant a licence, a mandatory order to require the public body to retake the decision, and damages for loss incurred in the period during which the individual claims to have been wrongfully deprived of a licence.

³ Indeed, one distinguished judge has opined that “It is useful to remember that the division between private and public law has no rationale beyond the procedural, and that there is a series of cases where [the] two have been found to coexist” (*R v Institute of Chartered Accountants of England and Wales, ex parte Nawaz* [1997] COD 111, *per* Sedley J).

exclusivity". In theory there is a clear dividing line in both *function* and *nature* between public law proceedings and private law proceedings. As we shall see, however, the courts have struggled to draw that line with any great accuracy.⁴

The function of public law proceedings and private law proceedings

- 6.6 Public law proceedings, namely applications for judicial review, are designed to challenge the lawfulness in the public law sense of administrative acts. The applicant may seek to have an unlawful act or decision quashed, or a proposed act prohibited, or a refused act performed. The various remedies which an applicant may seek were outlined above.⁵
- 6.7 In contrast, private law proceedings are designed to vindicate private law rights. The claimant may bring a claim in tort, contract, restitution or equity, or may base his or her claim on a right in property. Different remedies are appropriate in different situations. The claimant may seek damages for loss suffered as a result of breach of his or her rights, an injunction against further breach, or a declaration that there has been a breach; he or she may seek specific performance of an obligation owed to him.

The nature of public law proceedings and private law proceedings

- 6.8 Public law proceedings are brought in the High Court. As we saw above, various conditions must be satisfied by an applicant wishing to challenge an administrative decision.⁶ Several remedies are available at the discretion of the court.⁷ Damages can be awarded only if the applicant also seeks other remedies⁸ and would have recovered damages if the claim had been made in an ordinary private law action.⁹
- 6.9 In contrast, private law proceedings may be brought in the County Court. The claimant does not need the permission of the court to proceed. The claim can only be struck out if the statement of case discloses no reasonable grounds for bringing it.¹⁰ If the claimant establishes a cause of action and proves loss, damages are not discretionary but instead are available as of right.¹¹

⁴ This issue was previously considered by the Law Commission in *Administrative Law: Judicial Review and Statutory Appeals* (1994) Law Com No 226, Part III.

⁵ Paras 2.6–2.8.

⁶ Para 2.4.

⁷ Above, paras 2.6–2.8.

⁸ CPR r 54.3(2).

⁹ Supreme Court Act 1981, s 31(4).

¹⁰ CPR r 3.4.

¹¹ Note that even in private law proceedings, the Crown (but not public bodies generally) currently enjoys certain procedural advantages not afforded to ordinary litigants. Under the Crown Proceedings Act 1947, summary judgment cannot be obtained against the Crown; the Crown can insist on a case being heard in the High Court; except where the court agrees, judgment cannot be made against the Crown simply because the Crown has not acknowledged service nor provided a defence (a default judgment); a court order must be

- 6.10 Thus there are important differences between public law and private law as regards the *forum* for proceedings, the *conditions for entry into* proceedings and the *consequences which flow from* proceedings. However, perhaps the most significant difference concerns their respective processes during the actual hearing of the claim. Judicial review is intended to be a very fast procedure. The courts have emphasised that the aim of judicial review is to ensure a simplified and expeditious procedure to deal with public law claims.¹² Evidence is given in writing by affidavit (sworn statement). Cross-examination of witnesses is extremely rare.¹³ As a result of these features, judicial review in its present form is unsuited to resolution of complex questions of fact.

The statement of principle

- 6.11 As a result of these differences in function and nature between public law proceedings and private law proceedings, the courts laid down a principle of procedural exclusivity. The seminal decision was *O'Reilly v Mackman*. In that case, Lord Diplock, speaking for a unanimous House of Lords, delivered the following statement of principle:

Now that [various] disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53¹⁴ for the protection of such authorities.¹⁵

Pressures on procedural exclusivity

- 6.12 While in theory there is a clear dividing line in both *function* and *nature* between public law proceedings and private law proceedings, in practice that line has become increasingly blurred. It is now necessary briefly to examine the gradual

obtained where disclosure of documents by the Crown is sought; and the general enforcement rules do not apply. However, the DCA recently issued a Consultation Paper in which it proposes the abolition of many of these advantages. See *Civil Proceedings by or against the Crown – a review of Civil Procedures* (2004), available at <http://www.dca.gov.uk/consult/civilproc/crownclaims.htm>.

¹² See eg *R v Institute of Chartered Accountants in England and Wales, ex parte Andreou* (1996) 8 Admin LR 557 at 562–563.

¹³ See C Lewis, *Judicial Remedies in Public Law* (2nd ed, 2000) at para 9–112: “In practice, the view that the courts take of the nature of judicial review means that cross-examination will be rare. The courts act as supervisory bodies only and leave the findings of fact to the decision-maker. The courts will usually only determine whether, given the facts as found, the decision-maker has made a reviewable error.”

¹⁴ Order 53 was the procedure for seeking judicial review prior to the creation of the Civil Procedure Rules (CPR). The relevant provision is now CPR Part 54.

¹⁵ [1983] 2 AC 237 at 285.

erosion of the concept of “procedural exclusivity”. It has come under pressure from two sources, one inherent in the concept of a public-private divide, the other resulting from litigation tactics.

- 6.13 The inherent pressure is that the substantive divide between public law and private law is not a clean one. As Lord Slynn observed in *Mercury Ltd v Director General of Telecommunications*, “the precise limits of what is called ‘public law’ and what is called ‘private law’ are by no means worked out”.¹⁶ Furthermore, even if those limits were to be worked out, cases which involve a mixture of public law issues and private law issues would still arise. Yet procedurally, a *via media* is inconceivable – the claim is either brought by way of judicial review, or it is not.
- 6.14 Pressure has also been put on the concept of procedural exclusivity by factors which are not inherent in the public-private divide (in that these factors need not inevitably follow from the mere existence of such a divide). These mainly relate to the desire of claimants to bring their cases by way of the most favourable proceedings possible.
- 6.15 There are circumstances in which an individual may wish to bring a case in judicial review, even though it would arguably more appropriately be dealt with by private law proceedings. There are three possible reasons. First, he or she may have no private law cause of action; secondly, he or she may believe that the remedies available in judicial review will be more effective than those available in private law proceedings; thirdly, the scope of the obligations imposed upon the defendant public body may exceed the scope of those that would be imposed in a private law cause of action.¹⁷
- 6.16 Conversely, and more importantly for present purposes, there are circumstances in which an individual may wish to bring a case in private law proceedings, even though it would arguably more appropriately be dealt with by judicial review. Craig identifies two reasons.¹⁸ The main one is that he or she may fear not being able to satisfy the conditions in judicial review regarding permission or prompt commencement of proceedings.¹⁹ A secondary reason is that he or she may wish to investigate factual issues relating to the case, and to have the possibility of cross-examining those involved. As we have seen, judicial review is ill-suited to such investigation.
- 6.17 As a result of the desire of claimants to bring their cases in proceedings which are arguably not appropriate, there has been much litigation regarding the precise line of demarcation between judicial review and private law proceedings.

¹⁶ [1996] 1 WLR 48 at 57.

¹⁷ P Craig, *Administrative Law* (5th ed, 2003), pp 805–806.

¹⁸ P Craig, *Administrative Law* (5th ed, 2003), pp 793–794.

¹⁹ Described above, para 2.4.

The decline of procedural exclusivity

- 6.18 Where the individual's primary concern is to establish that an administrative act is unlawful, the availability of the prerogative remedies ensures that he or she will prefer to institute public law proceedings. Where his or her primary concern is to recover damages for loss caused by an administrative act, the inability of judicial review to deal with complex questions of fact, combined with the extra hurdles faced by an individual who wishes to seek judicial review,²⁰ ensures that he or she will prefer to institute private law proceedings. The question is whether he or she will be permitted to do so if the claim will inevitably result in a challenge to the lawfulness of an administrative act.
- 6.19 Immediately after laying down the principle of procedural exclusivity in *O'Reilly v Mackman*, Lord Diplock highlighted the limitations of such a rule:
- I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis.²¹
- 6.20 In a long line of subsequent cases, the courts have sought to determine precisely when they will permit collateral challenge to the public law legality of an administrative decision to occur in private law proceedings.
- 6.21 The main question has been the meaning of "a right of the plaintiff arising under private law". The courts' initial approach was very restrictive. In *Cocks v Thanet District Council*, decided on the same day as *O'Reilly v Mackman*, the House of Lords observed that a ruling on the extent of the defendant's public law obligations under the Housing (Homeless Persons) Act 1977 was a condition precedent to resolution of the claimant's private law action for breach of statutory duty. As a result, the House held that the claimant must challenge the defendant's decision not to house him by way of judicial review before any private law claim could be considered.²²
- 6.22 The inconvenience of such a requirement is obvious. The claimant would have to bring two actions, first an action for judicial review in order to establish the public law unlawfulness of the defendant's actions, then a private law action to establish the defendant's private law liability. This duplication of proceedings would be time-consuming and expensive.
- 6.23 Perhaps with this consideration in mind, the courts have subsequently sought to minimise the circumstances in which a claimant will need to bring two sets of

²⁰ Above, para 2.4.

²¹ [1983] 2 AC 237 at 285.

²² [1983] 2 AC 286.

proceedings. They have done so by widening the concept of “private law rights”. In *Wandsworth London Borough Council v Winder*, Winder sought to defend an action for rent arrears and possession brought by the Council on the basis that the Council had acted unlawfully in the public law sense by charging excessive rents. The Council’s argument that the legality of the rents could only be contested by way of judicial review was rejected.²³

6.24 The House of Lords distinguished *Cocks* for two reasons. First, the key point in that case had been that the claimant had no private law rights unless and until the defendant made a public law determination that it ought to house him. In contrast, Winder complained of the infringement of a contractual right in private law which existed independently of any public law acts.²⁴ Secondly, the individual had initiated the action in *Cocks*, whereas here the individual was the defendant. As he did not select the procedure to be adopted, it would be “a very strange use of language to describe [his] behaviour in relation to this litigation as an abuse or misuse by him of the process of the court”.²⁵

6.25 The trend of limiting the inconvenient effects of the principle of procedural exclusivity continued in *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*. The claimant was a doctor who received payment under National Health Service regulations for treating patients. His family practitioner committee decided that, under those regulations, the claimant did not devote sufficient time to treating NHS patients, as opposed to private patients, and therefore reduced his allowance by 20 per cent. The claimant sued the committee for breach of contract. The House of Lords allowed the claimant’s action to proceed.²⁶

6.26 Lord Bridge stated:

It is appropriate that an issue which depends exclusively on the existence of a purely public law right should be determined in judicial review proceedings and not otherwise. But where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.²⁷

²³ [1985] AC 461.

²⁴ *Ibid*, at p 508, *per* Lord Fraser: “The essential difference between that case [ie *Cocks*] and the present is that the impugned decision of the local authority did not deprive the plaintiff of a pre-existing private law right; it prevented him from establishing a new private law right.”

²⁵ *Ibid*, at p 509, *per* Lord Fraser.

²⁶ [1992] 1 AC 624.

²⁷ *Ibid*, at pp 628–629.

6.27 Lord Bridge was of the opinion that the present case fell into the latter category. It did not matter whether the claimant's private law rights were based on contract or derived from the relevant statute, since the terms set out in the statute were "just as effective as they would be if they were contractual to confer upon the doctor an enforceable right in private law to receive the remuneration to which the terms entitle him".²⁸

6.28 In the other speech of substance, two possible interpretations of the exception in *O'Reilly v Mackman* were outlined by Lord Lowry:

The "broad approach" was that the rule in *O'Reilly v Mackman* did not apply generally against bringing actions to vindicate private rights in all circumstances in which those actions involved a challenge to a public law act or decision, but that it merely required the aggrieved person to proceed by judicial review only when private law rights were not at stake. The "narrow approach" assumed that the rule applied generally to *all* proceedings in which public law acts or decisions were challenged, subject to some exceptions when private law rights were involved.²⁹

6.29 Lord Lowry indicated his preference for the broad approach but held that even if the narrow approach prevailed, the claimant's action would still be allowed to proceed. This view has generally been adopted in later cases.³⁰

6.30 It is possible that a private law action may be permitted to proceed even in the absence of any private law right. In *Mercury Ltd v Director General of Telecommunications*, Lord Slynn, speaking for a unanimous House of Lords, held:

In the absence of a single procedure allowing all remedies – quashing, injunctive and declaratory relief, damages – some flexibility as to the use of different procedures is necessary. It has to be borne in mind that the overriding question is whether the proceedings constitute an abuse of the process of the court.³¹

6.31 As Craig observes, "[t]he abuse of process test does not on its face require the existence of any private right as a condition precedent for an applicant to be able to proceed outside [judicial review]".³² He adds that it would have been difficult to find private rights that the claimant in *Mercury* had as against the defendant, yet the House of Lords allowed the claimant to proceed. He suggests that the crucial change of approach is that, unlike in *O'Reilly*, the very fact that the claimant was trying to avoid the procedural protections afforded to public bodies in judicial review was felt not in itself to constitute an abuse of process.

²⁸ *Ibid*, at p 630.

²⁹ *Ibid*, at p 653.

³⁰ Eg *British Steel plc v Customs and Excise Commissioners* [1997] 2 All ER 366; *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 WLR 840.

³¹ [1996] 1 WLR 48 at 57.

³² P Craig, *Administrative Law* (5th ed, 2003), p 799.

The effect of the Civil Procedure Rules

- 6.32 The Civil Procedure Rules (CPR) have inevitably had an impact on the relationship between public law procedure and private law procedure. The leading case is *Clark v University of Lincolnshire and Humberside*. The claimant, a former student at the defendant university, sought to argue that the defendant had wrongly failed her in an examination. The Court of Appeal held that the claimant could proceed with a private law action against the defendant for breach of contract. Sedley LJ made the following comments:

[T]he Civil Procedure Rules 1998 have given substance to [the] suggestion that the mode of commencement of proceedings should not matter, and that what should matter is whether the choice of procedure (which will now be represented by the identification of the issues) is critical to the outcome. This focuses attention on what in my view is the single important difference between judicial review and civil suit, the differing time limits. To permit what is in substance a public law challenge to be brought as of right up to six years later if the relationship happens also to be contractual will in many cases circumvent the valuable provision of RSC, Ord 53, r 4(1)³³ ... that applications for leave must be made promptly and in any event within three months of when the grounds arose, unless time is enlarged by agreement or by the court. Until the introduction of the CPR this was a dilemma which could be solved only by forbidding the use of the contractual route – a solution which, as *Roy* demonstrated,³⁴ could not justly be made universal. But ... the CPR now enable the court to prevent the unfair exploitation of the longer limitation period for civil suits without resorting to a rigid exclusionary rule capable of doing equal and opposite injustice. Just as on a judicial review application the court may enlarge time if justice so requires, in a civil suit it may now intervene, notwithstanding the currency of the limitation period, if the entirety of circumstances – including of course the availability of judicial review – demonstrates that the court's processes are being misused, or if it is clear that because of the lapse of time or other circumstances no worthwhile relief can be expected.³⁵

- 6.33 It is therefore clear that the principle of procedural exclusivity has been further eroded by the creation of the CPR. As Craig comments, the premise underlying *Clark* is that the differences between an ordinary private law action and one for judicial review should be minimised. Thus, individuals can bring cases involving private rights by ordinary action but the incentives for doing so have diminished.³⁶

³³ Now CPR r 54.5(1).

³⁴ *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624.

³⁵ [2000] 1 WLR 1988 at [17]. Lord Woolf's more detailed analysis of the effect of the CPR on the principle of procedural exclusivity are at [22]–[39].

³⁶ P Craig, *Administrative Law* (5th ed, 2003), p 804.

The effect of the Human Rights Act 1998

- 6.34 Section 7 of the Human Rights Act 1998 provides that claims under section 6 against public authorities for breach of one's Convention rights may be brought "in the appropriate court or tribunal" as determined in rules to be made on the matter. It is apparent from subsection 3 that judicial review is one way in which such proceedings may be brought.
- 6.35 It therefore seems that claims under section 6 may but need not be brought by way of judicial review. As Craig points out, this constitutes a further qualification to the principle of procedural exclusivity. He suggests that the qualification will be significant for two reasons. First, many public law cases will be cast as breaches of the Human Rights Act, enabling claimants to avoid using judicial review. Secondly, claims for breach of the Human Rights Act are likely to arise as one of a number of allegations of conduct which is unlawful in the public law sense. The presence of a claim of breach of the Human Rights Act will enable the claimant to avoid using judicial review. If that claim ultimately fails, it is unlikely that the court will refuse to hear argument on the other claims, even if those other claims would ordinarily have had to be brought by way of judicial review.³⁷
- 6.36 In discussing the possibility of claiming damages under section 6 for breach of Article 8 caused by unreasonable delay in child-care proceedings, Sir Robert Carnwath has made the following observations:

[T]here will be a distinct remedy in damages, under the HRA.... [T]he rules will allow such a claim to be brought through the ordinary civil courts, subject to the normal jurisdictional limits. Presumably, a civil court faced with such a claim following prolonged delay could also make a coercive order of some kind to force the authority to make a decision – in practice having the same effect as mandamus. If that is right, then it seems yet a further nail in the coffin of the procedural divide – between civil proceedings and judicial review – in *O'Reilly v Mackman*.³⁸ It will also make it increasingly difficult to maintain the traditional common law position that breach of a public law right by itself gives rise to no claim for damages. A claim for damages under the HRA is a species of "public" or "constitutional" right, but procedurally it will progress like any private law action against a public authority.³⁹

The effect of the decline of procedural exclusivity upon damages claims against public bodies

- 6.37 A right to compensation for loss caused by the commission of a tort is clearly a "private right" sufficient to permit an individual to challenge the public law lawfulness of an administrative act in private law proceedings. Therefore, even if the principle of procedural exclusivity can be said to retain any significance after

³⁷ P Craig, *Administrative Law* (5th ed, 2003), pp 800–801.

³⁸ [1983] 2 AC 237.

³⁹ R Carnwath, "ECHR Remedies from a Common Law Perspective" (2000) 49 ICLQ 517 at 525–526.

the creation of the CPR, an individual wishing to sue a public body in tort for loss caused by an administrative act may clearly do so in private law proceedings.

THE FUTURE

- 6.38 It seems difficult to dissent from the view that an individual should be able to have his private law rights determined by way of private law proceedings. The key question which a future enquiry would have to consider is whether recovery of compensation from public bodies in respect of loss caused by administrative acts should in fact be considered a “private law right” in the first place.
- 6.39 If a full review of the issues were to lead to a recommendation that such recovery should instead be a public law remedy awarded at the discretion of the court, it would also be necessary to consider whether the existence of such a remedy ought to preclude individuals from bringing private law claims against public bodies in respect of loss caused by them in the exercise of their public functions.
- 6.40 From a procedural perspective, it would have to be asked whether the erosion of the principle of procedural exclusivity is desirable. If any new remedy were available only upon establishing the public law unlawfulness of the relevant administrative act, it would make sense that the claimant would have to proceed by way of judicial review. Upon finding that the act was unlawful, the court could award damages at its discretion.
- 6.41 However, at least two features of the present procedure for judicial review might need to be reconsidered. First, the limited ability to investigate complex questions of fact in such proceedings might prevent any discretionary power of the court to award damages in judicial review proceedings from being meaningfully exercised. Such questions of fact might arise when the court, having found the act to be unlawful, comes to consider whether to award damages. Secondly, the time limit in judicial review is much shorter than the normal private law time limit – three months as opposed to six years.⁴⁰ It may be unfair on claimants to apply the three month time limit to claims for damages. For example, the loss caused by an administrative act may not come to light within so short a period.
- 6.42 More broadly, it would be necessary to consider whether it is desirable to retain the public-private divide as regards procedure. Although the resultant twin-track approach has to an extent been merged into one by the CPR,⁴¹ important differences do remain between public law proceedings and private law proceedings.⁴² There are still cases which may only be brought through one or other type of proceedings. Should this twin-track approach remain intact even

⁴⁰ CPR r 54.5(1); Limitation Act 1980, s 2.

⁴¹ Above, paras 6.32–6.33.

⁴² In an action for judicial review, the claimant must still seek permission to proceed; in an ordinary action, it remains for the defendant to establish that the action should be dismissed because it has no prospect of success. In an action for judicial review, the time limit is three months; in an ordinary action, it is for the defendant to show that commencing proceedings within the limitation period constituted an abuse of process.

where the substantive laws which are to be applied straddle the public-private divide?

- 6.43 It is important here to note that the courts are already able to alter the type of proceedings if it emerges that the case has been brought in inappropriate proceedings.⁴³ Is this procedural manoeuvrability enough to ensure that each issue is adjudicated upon using the optimal procedure? Is it in principle acceptable to leave the decision as to the correct procedure to be decided by judicial case management?
- 6.44 The crucial point is that, whatever proposals might be developed as regards the substantive law, a clear and adequate procedure would also need to be provided for applying that substantive law, whether it be one of the existing procedures (either that in public law or that in private law) or some new procedure. The inadequacy of existing procedures should not inhibit ideas for the development of proposals for reform of the substantive law. However, if substantial procedural difficulties were anticipated arising from any preliminary views on reform of the substantive law, they might quite properly prompt reconsideration and perhaps amendment of those views.

⁴³ See *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 WLR 840 at 848–849, *per* Lord Woolf MR: “If judicial review is used when it should not, the court can protect its resources either by directing that the application should continue as if begun by writ or by directing it should be heard by a judge who is not nominated to hear cases in the Crown Office List. ... [I]n cases where it is unclear whether proceedings have been correctly brought by an ordinary action it should be remembered that after consulting the Crown Office a case can always be transferred to the Crown Office List as an alternative to being struck out.”

PART 7

THE CONTOURS OF LIABILITY

INTRODUCTION

- 7.1 The main thrust of the argument hitherto has been that it may be wrong to use private law, substantively and procedurally, to determine the liability of public bodies acting in the public sphere. The purpose of this Part is to highlight several other issues which would have to be considered in detail were there to be a future enquiry into monetary remedies against public bodies.
- 7.2 If there were to be a new legal framework of liability, numerous issues would have to be considered. At least four may be identified here. First, can a single framework cover all actions of all public bodies? Secondly, can we learn from the approach to liability taken in other legal systems? Thirdly, what are the economic and operational implications of any given approach to liability? Fourthly, which bodies should be covered by any new framework?

A GENERAL PRINCIPLE OF LIABILITY OR A CONTEXT-SPECIFIC APPROACH?

- 7.3 In private law, where a cause of action is established, damages are available as of right. By contrast, most remedies in public law are discretionary.¹ Were a purely public law remedy of damages, not dependent on private law, to be developed, should that remedy also be discretionary?
- 7.4 If a public law damages remedy were to be discretionary, it might be possible that an overarching framework could be created to govern the liability of public bodies generally, since the courts would always have sufficient flexibility to deny damages where appropriate and to make appropriate awards of damages. Alternatively, it might be felt that public bodies are such so diverse, and the contexts in which they operate are so varied, that any attempt to create a “one-size-fits-all” set of rules regarding liability would be doomed to failure.²
- 7.5 It is instructive at this point to consider two typical scenarios in which liability might be alleged. The state is increasingly being sued in respect of loss allegedly caused by it when acting in its capacity as social engineer,³ for example in relation to adoption. It may have placed a child with an unsuitable family and thereby harmed that child’s development and wellbeing. Compare this with the scenario outlined earlier, in which a wrongful denial of a licence has caused a

¹ See above, para 2.9.

² See P Craig, “Compensation in Public Law” (1980) 96 LQR 413 at 443: “It is important not to lose sight of the diversity of areas that constitute Administrative Law. What may be appropriate in one particular area may be inappropriate in another.”

³ To borrow the phrase of Hale LJ in *A v Essex County Council* [2003] EWCA Civ 1848, [2004] 1 WLR 1881 at [53] and [72].

commercial enterprise to miss out on the opportunity to conduct its business and generate profits.⁴ Could the same general principle of liability govern both cases?

COMPARISONS WITH THE LAW IN OTHER JURISDICTIONS

- 7.6 The reference in *Brasserie du Pêcheur* to “the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused”⁵ probably raised eyebrows among the English legal profession. As we have seen, no such general principle is found in English law.
- 7.7 As this discrepancy indicates, English law is quite different from the laws of other EC countries in its approach to the question of damages liability of public bodies acting in the public sphere. An important issue for consideration in a future enquiry would be to achieve a much better understanding of how those other legal systems deal with the question. Of particular interest, because of their developed jurisprudence and willingness to address head-on the competing considerations of principle and policy, would be France and Germany.
- 7.8 In addition to considering the approaches taken in other EC countries, much could be gained from comparative analysis of other common law approaches, most obviously Australia, Canada, New Zealand, South Africa and the USA.⁶ Certain common law jurisdictions have acknowledged that there is a conceptual difference between a private law claim for damages and a pecuniary claim in public law.⁷ Any future enquiry would have to consider whether English law should similarly acknowledge an independent concept of public law liability.

THE ECONOMIC AND OPERATIONAL IMPLICATIONS OF LIABILITY

- 7.9 An issue which invariably influences the English courts in making decisions as to the extent of tortious liability is the economic implications which may flow from the awarding of, or refusal to award, damages. Economic considerations arguably play an even more significant role when the courts are dealing with the liability of public bodies in respect of their public functions, rather than the liability of private individuals. If public bodies are economically unable to perform their functions adequately, or are discouraged from doing so by the prospect of liability, society as a whole will suffer.

⁴ Above, para 2.11.

⁵ Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and R v Secretary of State for Transport, ex parte Factortame Ltd and others* [1996] ECR I-1029, [1996] QB 404 at para 29.

⁶ An indication of the value of a comparative approach is given by two collections of essays on the liability of public bodies: J Bell and A Bradley (eds), *Governmental Liability: A Comparative Study* (1991) and D Fairgrieve, M Andenas and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002). See also D Fairgrieve, *State Liability in Tort: A Comparative Law Study* (2003).

⁷ In *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385, the Privy Council held that the concept of “redress” under the Constitution of Trinidad and Tobago referred to the liability of the State not in tort, but rather in public law itself. Lord Diplock at p 400 described the claim as “a claim in public law for compensation”.

7.10 As we saw earlier, the courts frequently invoke economic arguments to justify restricting liability.⁸ Markesinis and others have identified four economic arguments used by the English courts. First, the courts state that economics opposes the imposition of duties of affirmative action where this would lead to “externalities” in the form of unbargained-for benefits.⁹ Secondly, they believe that imposing liability on public authorities will lead to inefficiency in the form of “defensive administration” and the diversion of expenditure. Thirdly, it is suggested that first party insurance is a more effective way of spreading the loss than imposing liability upon public bodies. Fourthly, they feel that public bodies need special protection as “defendants of last resort”, which cannot escape liability in the ways open to normal defendants (for example, through bankruptcy or insolvency).¹⁰

7.11 However, as Markesinis and others observe, these arguments have not been verified by actual economic analysis. Furthermore, they directly question the cogency of the arguments. As regards the first argument, they suggest that public bodies do have the resources to act in such a way as to obviate the dangers to third parties and point out that in these cases the public body is usually under a pre-existing public law obligation to act. As regards the second argument, they observe that the courts are more sceptical in other contexts of arguments about the inhibitive effect of liability and that more widespread liability has not crippled public bodies in other countries.¹¹ As regards the third argument, they argue that a system of fault plus liability will often be a more effective deterrent than a no-fault scheme. As regards the fourth argument, they acknowledge that this is may be a valid reason for treating public authorities as a special case but argue that this need not amount to a near-blanket denial of liability.

⁸ Para 2.40.

⁹ This argument was particularly prominent in *Stovin v Wise* [1996] AC 923, discussed above at paras 2.74–2.80. At p 944, Lord Hoffmann, with whom Lords Goff and Jauncey agreed, said: “In economic terms, the efficient allocation of resources usually requires an activity should bear its own costs. If it benefits from being able to impose some of its costs on other people (what economists call ‘externalities’) the market is distorted because the activity appears cheaper than it really is. So liability to pay compensation for loss caused by negligent conduct acts as a deterrent against increasing the cost of the activity to the community and reduces externalities. But there is no similar justification for requiring a person who is not doing anything to spend money on behalf of someone else. Except in special cases (such as marine salvage) English law does not reward someone who voluntarily confers a benefit on another. So there must be some special reason why he should have to put his hand in his pocket.”

¹⁰ B Markesinis, J-P Auby, D Coester-Waltjen and S Deakin, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (1999) at pp 76–87.

¹¹ See also the criticisms of the defensive administration argument in D Fairgrieve, “Pushing back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom” [2002] PL 288 at 296: “Given that many public servants are protected by their employer from being financially responsible for negligence in the workplace, it is uncertain how powerful the financial fear of liability actually is upon individual behaviour. This policy factor also rests upon questionable logic in the sense that it assumes that those persons subject to the legal duty will misread the standard of behaviour that is required of them and react in an overly cautious manner.”

- 7.12 No definitive position can be taken on these opposing arguments unless substantial economic analysis is undertaken. However, as Harlow observes, “[s]tudies of the effect of tort law on public decision-making are uncommon, inconclusive and sometimes unreliable and such information as we do possess is fragmentary”.¹² Any future enquiry should include the commissioning of such an analysis. Theoretical research into the effects of extending or restricting liability would be a key element in the development of an acceptable framework of public law liability.
- 7.13 In addition to evaluating the economic arguments mentioned above, broader questions of the economic and operational effects of liability would have to be addressed. What are the effects as regards resource allocation?¹³ Are concerns about distortion or queue-jumping well-founded? What is the distributive efficiency of compensation awards against public bodies? It will be crucial to have access to economic expertise in order to produce reliable answers to such questions.

THE MATERIAL SCOPE OF LIABILITY – WHICH BODIES ARE COVERED?

- 7.14 It has been suggested that there is a case for treating the liability of public bodies differently from that of private individuals. An important issue which then arises is where the boundary is to be drawn between the public and the private. In this regard, it must be noted that the public-private divide has become increasingly blurred. More and more bodies are being created which possess both public and private characteristics and perform both public and private functions. The reason for this trend is changes in the pattern of government. Policies of privatisation, deregulation and contracting-out remain popular within government. The question is whether the law should reflect these changes, and if so, in what way.
- 7.15 The courts are already aware of the changes. In *Aston Cantlow*, Lord Bingham said:

In a modern developed state governmental functions extend far beyond maintenance of law and order and defence of the realm. Further, the manner in which wide ranging governmental functions are discharged varies considerably. In the interests of efficiency and economy, and for other reasons, functions of a governmental nature are frequently discharged by non-governmental bodies. Sometimes this will be a consequence of privatisation, sometimes not. One obvious example is the running of prisons by commercial

¹² C Harlow, “Corrective Justice in the Frame” in *State Liability – Tort Law and Beyond* (forthcoming, 2004).

¹³ See J Convery, “Public or Private? Duty of Care in a Statutory Framework: *Stovin v Wise* in the House of Lords” (1997) 60 MLR 559 at 562: “[i]f a finding of liability does have the effect of skewing resource allocation priorities for the future, the imposition of liability could be viewed as indirectly confining the discretion of public authorities to decide how best to fulfil any number of competing statutory calls on their limited budgets”. For a more positive view, see P Cane, “Damages in Public Law” (1999) 9 Otago Law Review 489.

organisations. Another is the discharge of regulatory functions by organisations in the private sector, for instance, the Law Society.¹⁴

- 7.16 Largely as a result of the blurring of public and private, the courts have given lengthy consideration to the question of what bodies are “public bodies” such as to enable their acts to be challenged in proceedings for judicial review.¹⁵ More recently, the courts have also had to address the question of what bodies are “public authorities” such as to enable their acts to be challenged under section 6 of the Human Rights Act. As noted above,¹⁶ the courts have held that the two concepts are analogous.¹⁷ The analogy is not complete because the concept of “public authority” under the Human Rights Act must be interpreted with an eye on the State’s obligations in international law.¹⁸
- 7.17 In response to the changes in the pattern of government, the courts have sought to define “public bodies” using a two-stage process. First, they consider whether a body is inherently “public” in nature. If it is not, they consider whether the body nevertheless performs public functions.¹⁹ A similar approach is taken in relation to the concept of “public authorities” under the Human Rights Act. There are two types of public authority: “core public authorities”, every act of which is caught by section 6, and “hybrid public authorities”, whose “private” acts are not caught by section 6.²⁰ The former concept seems to cover authorities which are inherently “public” in nature, whereas the latter focuses on public functions.²¹

¹⁴ *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 at [9].

¹⁵ See eg *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815; *R v Disciplinary Committee of the Jockey Club, ex parte Aga Khan* [1993] 1 WLR 909; *R v Chief Rabbi of the United Congregations of Great Britain and the Commonwealth, ex parte Wachmann* [1992] 1 WLR 1036.

¹⁶ Para 3.2.

¹⁷ See *Poplar Housing and Regeneration Community Association v Donohue* [2001] EWCA Civ 595, [2002] QB 48 at [65].

¹⁸ *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 AC 546 at [52], per Lord Hope. Note that Lord Hobhouse went further, suggesting at [87] that the definition of “public body” in judicial review does not assist at all in the quest to define “public authority” under the Human Rights Act.

¹⁹ In the leading case of *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815, the Court of Appeal held that judicial review can be used to challenge the decisions of any body which performs or operates as an integral part of a system which performed public law duties, which is supported by public law sanctions and which is under an obligation to act judicially, but whose source of power is not simply the consent of those over whom it exercises that power.

²⁰ See the Human Rights Act 1998, s 6(3) and (5).

²¹ There is some doubt as to whether the concept of “core public authority” can be fitted into an understanding of the public realm that defines its limits in terms of a set of functions rather than a set of institutions or actors. In *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37, [2004] 1 AC 546, Lord Hobhouse (at [85]) thought that it can, whereas Lords Nicholls (at [8]) and Hope (at [47]) preferred an institutional understanding of what a core public authority is. See P Cane, “Church, State and Human Rights: Are Parish Councils Public Authorities?” (2004) 120 LQR 41.

- 7.18 There is undeniably a degree of circularity in the attempts to define both “public body” and “public authority”. Cane suggests that “the only way of deciding whether a function is public or private for the purposes of section 6 [of the Human Rights Act] is to apply normative criteria about the desirable reach of human-rights norms. Functions are ‘public’ or ‘private’ only because we make them so for particular and varied purposes.”²² The same point might be made in relation to the public functions test used to define “public body” for the purposes of judicial review.
- 7.19 In short, when answering the questions, “is this entity a public body?” or “is this entity a public authority?”, it is arguable that the courts are really asking whether this entity should be subjected to, respectively, the principles of good administration embodied in the grounds of judicial review, or the principles of human rights embodied in the European Convention.
- 7.20 It must be stressed that the reason why there has been such a wealth of litigation on the definition of “public body” and “public authority” is that both procedural and substantive consequences flow from whether or not the defendant falls within the definition. The procedural aspect of the public-private divide was considered above.²³ The substantive aspect is clear. Only “public bodies” need act in conformity with the principles of good administration in order to avoid having their acts declared unlawful. Only “public authorities” need act in conformity with the human rights of others in order to avoid having their acts declared unlawful.²⁴
- 7.21 The public-private divide is a relatively recent innovation in English law.²⁵ Some commentators suggest that the innovation is unwelcome. Allison has argued that a satisfactory distinction between public law and private law depends on a particular legal and political context, a context which is absent in present-day England.²⁶ Lord Wilberforce delivered a similar warning in *Davy v Spelthorne Borough Council*.²⁷ More recently, Lord Hoffmann referred in *Alconbury* to English

²² P Cane, “Church, State and Human Rights: Are Parish Councils Public Authorities?” (2004) 120 LQR 41 at 45.

²³ Part 6.

²⁴ Subject to the possibility of indirect horizontal effect, whereby private law is developed in order to take account of human rights principles. See above, paras 3.20–3.24 and 3.30–3.35.

²⁵ In *In re State of Norway’s Application* [1987] QB 433 at 475, Kerr LJ said, “the common law does not – or at any rate not yet – recognise any clear distinction between public and private law. But the division is beginning to be recognised.” In *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at 845, Lloyd LJ referred to “the new-found distinction between public and private law”.

²⁶ J Allison, *A Continental Distinction in the Common Law* (2000).

²⁷ [1984] AC 262 at 276: “The expressions ‘private law’ and ‘public law’ have recently been imported into the law of England from countries which, unlike our own, have separate systems concerning public law and private law. No doubt they are convenient expressions for descriptive purposes. In this country they must be used with caution, for, typically, English law fastens, not upon principles but upon remedies. The principle remains intact that public authorities and public servants are, unless clearly exempted, answerable in the ordinary courts for wrongs done to individuals. But by an extension of remedies and a flexible procedure it can be said that something resembling a system of public law is being developed. Before the expression ‘public law’ can be used to deny a subject a right of

law's "lack of a clear distinction between public and private law which was noted by Dicey".²⁸ On the other hand, some academics and judges see the divide as of crucial importance.²⁹

7.22 Any future enquiry would have to reconsider the public-private divide in *substantive law*. From a theoretical perspective, were a new approach to the liability of public bodies to be proposed, this would in effect strengthen that divide. From a more practical perspective, it would be necessary to specify with some precision to which entities fell within the concept of "public bodies". As a result, it would be necessary to consider the public-private divide in terms of *actors*.³⁰ Another aspect of the public-private divide which would have to be examined is that relating to *procedure*, which we considered above.³¹

action in the court of his choice it must be related to a positive prescription of law, by statute or by statutory rules. We have not yet reached the point at which mere characterisation of a claim as a claim in public law is sufficient to exclude it from consideration by the ordinary courts: to permit this would be to create a dual system of law with the rigidity and procedural hardship for plaintiffs which it was the purpose of the recent reforms to remove."

²⁸ *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295 at [78].

²⁹ Lord Woolf has argued extra-judicially that "the distinction between public law and private law needs to exist because public law requires the court to perform a different role from that which it has traditionally adopted in private law disputes. In addition, the interest of the public in the outcome of litigation over public duties requires procedural safeguards which are not necessary in disputes over private rights." See Lord Woolf, "Public Law–Private Law: Why the Divide? A Personal View" [1986] PL 220 at 237–238.

³⁰ Whether this question is approached from an institutional or a functional perspective. See above, fn 21.

³¹ Part 6.

PART 8

IS THERE A CASE FOR REFORM?

INTRODUCTION

- 8.1 This paper has sought to outline issues which would have to be considered in any future enquiry into monetary remedies in public law. The purpose of this Part is to draw together the various strands and examine whether there is a case for reform. First, we address the issues of principle. Second, we highlight possible problems with the extent of liability under the current law.

ISSUES OF PRINCIPLE: THE ROLE OF THE COURTS AND PRIVATE LAW

- 8.2 In the most recent decision of the House of Lords on the liability of public bodies for loss caused by administrative action, Lord Steyn made the following remarks:

This is a subject of great complexity and very much an evolving area of the law. No single decision is capable of providing a comprehensive analysis. It is a subject on which an intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary. On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled grounds the compelling demands of corrective justice or what has been called “the rule of public policy which has first claim on the loyalty of the law: that wrongs should be remedied”.¹ Sometimes cases may not obviously fall in one category or the other. Truly difficult cases arise.²

- 8.3 As this quotation makes clear, the courts are finding it increasingly difficult to decide whether a claim in tort against a public body in respect of loss caused while it was performing its public functions ought to succeed. This raises two questions of principle. Is this a task for the courts? And, should principles of private law be used to determine the extent of public bodies’ legal liabilities?
- 8.4 As regards the first, there are compelling arguments either way. On the one hand, it is the legislature that gives public bodies the authority to act in the public interest. Therefore it may be suggested that the legislature should also set the criteria for the damages to be awarded when public bodies fail to act or act improperly. On the other hand, it can be argued that we should put our faith in the courts to develop fair and rational principles. After all, it was the courts that developed the principles of judicial review.

¹ Here citing *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 663, per Sir Thomas Bingham MR.

² *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [2].

- 8.5 As regards the second, there are, of course, sound social and economic reasons why claims for damages against public bodies for the misuse (or failure to make proper use) of their powers should be restricted to cases of serious dereliction. The line which divides those situations where there ought to be liability from those where there ought not is not easy to draw. Nor is the question of what should be the measure of compensation that should be awarded in those cases which fall on the wrong side of that line.
- 8.6 At present, private law principles are used to determine in what circumstances public bodies are liable not only for losses resulting from the exercise of functions which properly fall in the private law sphere (for example negligent driving of a van by an employee) but also for losses caused by acts or omissions which properly fall in the public sphere of their work.³ This can be seen as the traditional English position, expressed in Dicey's passionate rejection of the desirability of a separate *droit administratif*.⁴ Ultimately, it is to be justified on rule of law principles (or perhaps more accurately, an Anglo-Saxon conception of the rule of law).
- 8.7 The contrary argument is that such issues cannot adequately be addressed in private law. If these issues are currently being concealed behind a façade of private law doctrine, this may in turn have led to an unacceptable extension of liability.
- 8.8 Moreover, the traditional maxim that the executive ought to be subject to the ordinary law of the land was, historically, formulated as a bulwark against *total* immunities for public bodies. It is arguable that it does not provide useful guidance when considering what should be the principled legal framework which should be adopted to govern that liability.
- 8.9 In any event, the way the law has in fact developed is that, while in theory the liability of public bodies is the same as that of private individuals, in practice the courts have found numerous ways in which to limit liability.⁵ Furthermore, the very existence of a tort which can only be committed in the public sphere, namely misfeasance in public office, may be viewed as an indication that even private law acknowledges that public acts and private acts are qualitatively different.

Is private law being distorted by its application to public bodies?

- 8.10 A further consideration is whether, whatever its desirability as a matter of principle, applying the ordinary principles of tort law to public bodies acting in the public sphere damages the integrity of tort law by leading to a distortion of those principles. Some academics have spoken of "the damage done to the law of tort by suits against local authorities".⁶ Harlow argues that the expansion of liability in the public sphere is distorting the theoretical framework of the corrective justice

³ This principle can be traced back to such seminal cases as *Entick v Carrington* (1765) 19 St Tr 1030.

⁴ A V Dicey, *Introduction to the Law of the Constitution* (10th edition, 1959).

⁵ See generally Part 2, above.

⁶ T Weir, "Governmental Liability" [1989] PL 40 at 51.

model on which tort law is traditionally thought to be based.⁷ On the other hand, some commentators believe that private law principles are sufficiently flexible to accommodate the policy considerations which must be taken into account in determining the proper extent of public bodies' liability.⁸

- 8.11 The Human Rights Act 1998 gives fresh impetus to this issue. As Hickman comments, "fashioning remedies to protect rights out of existing common law actions may have serious repercussions for the wider coherency of private law".⁹
- 8.12 This issue requires further consideration. Were it to be concluded that private law has indeed been distorted by its application to public bodies acting in the public sphere, this would constitute another strong reason for ceasing to use private law to determine the extent of public bodies' liability, but instead for creating a new statutory framework for that purpose. At the same time, if such a framework were to be created, the effect of this reform on private law would have to be considered. In short, we would have to consider whether more harm would be done to private law by continuing to use it to determine public bodies' liability or by ceasing to do so.

THE EXTENT OF PUBLIC BODIES' LIABILITY UNDER THE CURRENT LAW

- 8.13 We have suggested that the essence of the approach to public law liability in English law – leaving it to the courts and private law – may be wrong. If this were to be the case, it would be surprising if the extent of liability were found to be acceptable. The reverse is also true: if we were to find serious problems with the current extent of liability, that in itself would suggest that the governing principles and theory are flawed. We will now briefly highlight some possible deficiencies in the results produced by the current law.
- 8.14 The obvious practical problem with the current approach is that the courts are left to determine the extent of liability on a case-by-case basis. Judges cannot step back from the particular case before them and attempt to create an overarching legal framework. As we observed in our previous work, the *ad hoc* approach to damages liability adopted by the European Court of Human Rights is characterised by a "lack of clear principles as to when damages should be awarded and how they should be measured".¹⁰ The similarly reactive, incremental approach of domestic law has also been criticised in numerous ways.

⁷ C Harlow, "Corrective Justice in the Frame" in *State Liability – Tort Law and Beyond* (forthcoming, 2004).

⁸ See in particular the work of SH Bailey and MJ Bowman: "Negligence in the Realms of Public Law – A Positive Obligation to Rescue" [1984] PL 277; "The Policy/Operational Dichotomy – A Cuckoo in the Nest" [1986] CLJ 430; "Public Authority Negligence Revisited" [2000] CLJ 85.

⁹ T Hickman, "Tort Law, Public Authorities, and the Human Rights Act 1998" in D Fairgrieve, M Andenas and J Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002) at p 51.

¹⁰ Damages under the Human Rights Act 1998 (2000) Law Com No 266; Scot Law Com No 180 at para 3.4.

Is the current law unfair?

- 8.15 We believe that at present there may well be both unjust denial of compensation and wrongful use of public funds in providing compensation. Some individuals may be unjustly being denied compensation while others may be unjustifiably receiving compensation, or more compensation than is justifiable.

Unjust denial of compensation

- 8.16 The most obvious example of injustice to aggrieved individuals arises from the courts' inability to award compensation in respect of loss caused by unlawful administrative acts. A prime example is *R v Knowsley Metropolitan Borough Council, ex parte Maguire*, in which individuals who had unlawfully been refused licences to pursue business activities were unable to recover any compensation for loss suffered as a result. As Schiemann J observed, their claims failed "because we do not have in our law a general right to damages for maladministration".¹¹
- 8.17 More recently, in another case concerning losses caused by an unlawful refusal to grant a licence, Collins J affirmed that "English law does not provide a remedy in damages for a breach of a public law right".¹² Having dismissed the claim "with some regret since the claimants have an apparently strong case that they have suffered loss as a result of unlawful acts by the defendant", he concluded that "this case is yet another which shows that consideration should be given by Parliament to providing some possibility of a claim for damages for unlawful executive action which causes loss. It is clearly not something which can be done by the courts."¹³
- 8.18 Similarly, Sullivan J recently rejected a claim for compensation for loss caused by administrative action that had been found to be unlawful for procedural unfairness. He observed that since no private law cause of action could be identified, "I would not be able to award damages in these proceedings to the claimants even though they have suffered substantial financial loss".¹⁴
- 8.19 A further example is provided by *Chagos Islanders v Attorney-General*, in which former inhabitants of Chagos Island, who had been unlawfully removed from the island by the British government, were denied compensation.¹⁵ The Court of Appeal evidently sympathised with the claimants' plight but no private law cause of action could be established.¹⁶

¹¹ [1992] COD 499.

¹² *R (Quark) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2003] EWHC 1743, [2003] ACD 96 at [14]. Collins J's decision was upheld by the Court of Appeal, [2004] EWCA Civ 527, [2004] 3 WLR 1.

¹³ *Ibid*, at [44].

¹⁴ *R (Banks) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 416, [2004] NPC 43 at [117].

¹⁵ [2004] EWCA Civ 997.

¹⁶ *Ibid*, at [54]. See also [20] of the court's joint judgment.

- 8.20 There is merit in the view of Carnwath that “although judicial review is now generally an effective means of ensuring future compliance, by itself it provides no redress for injury caused by past failures. ... In principle ... where serious harm has been caused to individuals by illegal action by public authorities, or by failure to carry out legal duties or obligations imposed upon them for the benefit of individuals, justice demands a suitable remedy for breach. For past failures the only effective remedy in most circumstances is monetary compensation.”¹⁷
- 8.21 Lord Woolf has argued that “the proper protection of the citizen requires the court to have some new, wider power to award compensation ... it is in the interests of government, both central and local, that there should be such a power”. He proposed a step-by-step approach whereby the courts would have the power to award compensation in those cases where “the alternative remedies provided by judicial review are insufficient to secure substantial justice in the case and material hardship would be caused to an applicant if compensation were not awarded in lieu of or in addition to other relief”.¹⁸
- 8.22 The possibility of an ombudsman recommending that compensation be paid may not be an adequate substitute for legal redress. Fordham may be right to suggest that “[t]he absence of a public law reparation remedy for maladministration is a deficiency. It is a cause of injustice, and one which the patchwork of special remedies (statutory and *ex gratia* compensation, public sector ombudsmen) does not properly address.”¹⁹
- 8.23 The ombudsmen system could continue alongside a new public law monetary remedy. In Carnwath’s view, “[t]he ombudsman can continue to provide remedies for inconvenience and distress caused by maladministration. Serious harm caused by illegality requires a remedy in the courts”.²⁰ Indeed, the very existence of the ombudsmen system could allay any fears that we might be imposing excessive liability on public bodies.²¹ The interaction between judicial and extra-judicial forms of redress would have to be examined in detail in any future enquiry.

¹⁷ R Carnwath, “The *Thornton* Heresy Exposed: Financial Remedies for Breach of Public Duties” [1998] PL 407 at 418 and 422.

¹⁸ *Protection of the Public – A New Challenge* (1990) at p 57.

¹⁹ M Fordham, “Reparation for Maladministration: Public Law’s Final Frontier” [2003] JR 104 at 104.

²⁰ R Carnwath, “The *Thornton* Heresy Exposed: Financial Remedies for Breach of Public Duties” [1998] PL 407 at 422.

²¹ See M Amos, “The Parliamentary Commissioner for Administration: Redress and Damages for Unlawful Administrative Action” [2000] PL 21 at 29: “what is required to make damages for wrongful administrative action possible is statutory reform as ‘there is no real likelihood that the common law will develop in that direction’. Any campaign to extend the liability of the State in this way can only be boosted by the recent activities and success of the PCA who, in making recommendations for redress, does not appear to be unduly concerned with increasing the burden on public funds or engendering a cautious and defensive approach in public bodies.”

Unjustifiable awards of compensation

8.24 The dominance of the private law paradigm has led to the unthinking adoption of rules which are entirely appropriate in private law but which may not be appropriate in the public law context. A particular problem concerns the measure of damages. It may be entirely appropriate that, where one private individual establishes that another private individual has committed a tort against him, compensation should be paid in respect of all foreseeable and causally connected damage or loss. However, the resultant “all-or-nothing” approach – the claimant either getting full compensation if he or she establishes a tort or no compensation if he or she does not – may simply be inappropriate where loss is caused by a public body acting in performance of its public functions.

8.25 This point is powerfully made by Fordham:

Clumsy bright-line distinctions cannot really provide the sophistication necessary to address the justice of the particular case, against the need to strike a fair balance from the point of view of society’s resources. ... A public lawyer’s problem cannot be solved with a private lawyer’s solution. ... The court applies remedies in judicial review as a menu of options, the choice and tailoring of which can match the justice of the particular case. Why not the same with pecuniary reparation? There is no need, in principle, for a reparation remedy to be wedded to notions of “tort” or “fault”. There is no reason why it should be driven by notions of “compensation”, still less “full compensation”.²²

8.26 The courts have had great difficulty in freeing themselves from the private law paradigm in determining the appropriate extent of compensation payable by public bodies. Even in relation to damages under the Human Rights Act, the “all-or-nothing” approach remains intact as regards pecuniary loss. The important insight of the Court of Appeal in *Anufrijeva*²³ that in considering whether to award damages and, if so, how much, there is a balance to be struck between the interests of victims and those of the public as a whole, was reserved only for cases of non-pecuniary loss.²⁴

Is the current law inconsistent?

8.27 In light of the strong possibility that some individuals who suffer loss as a result of administrative action are overcompensated while others are undercompensated, the current law can fairly be criticised for its inconsistency. It may be that this inconsistency cannot be put right within the existing approach to liability, with its reliance on private law causes of action. A more principled overall approach may be needed in order to produce a fair result in every case.

²² M Fordham, “Reparation for Maladministration: Public Law’s Final Frontier” [2003] JR 104 at 105–106.

²³ *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [2004] 2 WLR 603.

²⁴ See paras 3.17–3.19 and 3.25–3.29.

8.28 Another possible inconsistency in the law arises from the different extent of liability under the Human Rights Act 1998 and under EC law,²⁵ as compared with the extent of liability under domestic law in the non-human rights context. When an individual who has suffered loss as a result of administrative action formulates his claim, his chances of success are likely to vary depending on whether he brings his claim in tort, for breach of EC law or under section 6 of the Human Rights Act.

8.29 It may be that there are perfectly sound reasons for the extent of liability varying in the three contexts. However, other things being equal, it would be advantageous for the same test to be used to deal with claims arising under EC law, the Human Rights Act and non-human rights domestic law. This is particularly so because it will be common for at least two such claims to arise from the same set of facts.

8.30 Furthermore, statutory interpretation presents its own problems. As long ago as 1949, Lord du Parc urged Parliament to make clear in the relevant statute whether it intended damages to be available for breach of statutory duty.²⁶ However, as Lord Denning MR observed almost thirty years later:

The truth is that in many of these statutes the legislature has left the point open. It has ignored the plea of Lord du Parc ... So it has left the courts with a guess-work puzzle. The dividing line between the pro-cases and the contra-cases is so blurred and so ill-defined that you might as well toss a coin to decide it. I decline to indulge in such a game of chance. To my mind, we should seek for other ways to do "therein what to justice shall appertain".²⁷

8.31 The current law has not produced a rational way by which to determine when public bodies should be liable in damages to individuals who suffer loss as a result of breaches of statutory duties.

Is the current law's approach to policy arguments inadequate?

8.32 The courts have frequently invoked arguments relating to the economic and operational effects of liability to justify their decisions as to whether liability exists in particular cases. We agree that these arguments have a crucial role to play in shaping the contours of liability. However, as we saw earlier, policy arguments can be used both in favour of and against liability.²⁸ We endorse the view that "[l]egal arguments cannot be solved, and litigation cannot be determined, on the basis of hunches, however eminent and experienced their sources may be".²⁹

²⁵ See respectively Parts 3 and 4.

²⁶ *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 410.

²⁷ *In Re Island Records* [1978] Ch 122 at 134–135.

²⁸ Paras 2.40–2.41 and 7.9–7.13.

²⁹ B Markesinis, J-P Auby, D Coester-Waltjen and S Deakin, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (1999) at p 79.

Is the current law is unnecessarily complex?

- 8.33 The current law is a minefield for claimants and defendants alike. The subject of public bodies' liability for acts performed in the public sphere was described by McKinnon LJ in 1939 as "in a state of lamentable obscurity and confusion".³⁰ There is force in Carnwath's assessment that it "is in no happier condition 60 years later".³¹
- 8.34 The variety of private law causes of action which may be used is itself a source of complexity, while the uncertain scope and application of the causes of action add to the problem. Recent developments in relation to negligence have made the limits of liability even more uncertain. Commenting on *D v East Berkshire Community Health NHS Trust*,³² Harlow remarks that "[i]t follows that no decision can be seen as really final; there is always a different plaintiff, a different fact situation and a different defendant from among the many services and officials – social workers, schools, police, doctors and clinics – involved." She concludes:

This process of incremental extension by what Atiyah terms 'selective comparison' with cases that have succeeded or nearly succeeded³³ leaves decision-makers in a hopeless quandary. They are left to guess at possible judicial reaction to unpredictable happenings that have not yet taken place in the sure and certain knowledge that judges always have the benefit of hindsight and the last word. The position is exacerbated by the fluid and unpredictable nature of the 'fair, just and reasonable' test, a euphemistic way of describing virtually unstructured judicial discretion.³⁴

- 8.35 The possibility of a remedy being sought outside the courts altogether, through the public sector ombudsmen, completes the picture. Carnwath may be right to suggest that "we have too many types of remedy for the same thing".³⁵ The dichotomy between judicial and extra-judicial avenues of redress is confusing and incoherent. What is needed is a more open, explicit addressing of the question of when damages should be paid and in what amounts.³⁶

³⁰ *East Suffolk Catchment Board v Kent* [1940] KB 319 at 332.

³¹ R Carnwath, "Welfare services – liabilities in tort after the Human Rights Act. Postscript" [2001] PL 475 at 478.

³² [2003] EWCA Civ 1151, [2004] 2 WLR 58. This case was discussed above, at paras 3.21–3.24.

³³ Here citing P S Atiyah, *The Damages Lottery* (1997).

³⁴ C Harlow, "Corrective Justice in the Frame" in *State Liability – Tort Law and Beyond* (forthcoming, 2004).

³⁵ R Carnwath, "Welfare services – liabilities in tort after the Human Rights Act" [2001] PL 210 at 218.

³⁶ This could also ensure that unnecessary litigation was avoided. Cf the comments of the Court of Appeal in *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [2004] 2 WLR 603 at [80]: "The reality is that a claim for damages under the HRA in respect of maladministration, whether brought as a free-standing claim or ancillary to a claim for other substantive relief, if pursued in court by adversarial proceedings, is likely to cost substantially more to try than the amount of any damages that are likely to be awarded."

PART 9

THE NEXT STAGE?

INTRODUCTION

9.1 Part 8 outlined some of the issues which, on an admittedly preliminary analysis, we think are raised by English law's current approach to the question of when an individual can recover compensation for loss caused by administrative acts. Where do we go from here? There appear to be two options as to what could happen next:

- (1) Do nothing and rely on the courts;
- (2) Develop proposals for a new legislative framework.

MAINTAIN THE STATUS QUO?

9.2 In one sense, the easiest option would be to do nothing and leave it to the courts to correct, or at least minimise, the problems which seem to arise under the current approach. The difficulty with this approach is that, as we have seen above, those problems in large part stem from the very fact that the courts are expected single-handedly to determine the proper extent of public law liability. Maintaining the *status quo* could therefore result in even deeper entrenchment of existing problems in the law.

9.3 Furthermore, without legislative support, it is clear that the judges are unwilling to remove the need for a private law cause of action to be made out before awarding damages, despite remarking on numerous occasions that this might be a positive development.¹ The need for a legislative imprimatur was recently confirmed by Sedley LJ:

That the cases do not include damages for abuses of power falling short of m[is]feasance in public office does not necessarily mean that door is closed to them in principle. But the policy implications of such a step are immense, and it may well be that – despite the presence for some years in the rules of a power to award damages on an application for judicial review – a legal entitlement to them cannot now come into being without legislation.²

9.4 It seems highly unlikely that the courts will come to award damages in the absence of a private law cause of action. Indeed, they are barred by statute from so doing.³ It seems likely, however, that they will attempt to extend the ambit of existing private law causes of action in order to ensure that individuals are compensated. Fordham predicts such an outcome:

¹ See above, para 8.24–8.26.

² *R v Commissioners of Custom and Excise, ex parte F & I Services Ltd* [2001] EWCA Civ 762, [2001] STC 939 at [73].

³ Supreme Court Act 1981, s 31(4).

[U]nless and until a public law cause of action is discovered, the tension will continue and private law will have to address it. There is danger in this. Boxed into a corner, the judiciary might come out fighting with “tort” law, notwithstanding its unsatisfactory profile as a suitable solution.⁴

- 9.5 Fordham suggests that a judicial solution may result in the distortion of private law principles.⁵ Furthermore, it could entail the extension of the full tortious measure of damages to even more cases, despite the fact that this may not be appropriate.⁶ This could be an extremely expensive outcome for public bodies.
- 9.6 It may therefore be suggested that the principal difficulty with leaving the courts to reform the law is not that the courts will refuse to extend the liability of public bodies, but that they will do so inappropriately.

LEGISLATIVE INTERVENTION?

- 9.7 Given the difficulties which would be encountered in leaving it to the courts to solve the various problems experienced under the current law, it may be preferable for Parliament to intervene. Parliamentary intervention could take one of several forms.

A statutory framework to govern liability

- 9.8 One option would be for Parliament to set out a legal framework of principles to govern public law liability. This approach would have the benefit of giving the law a fresh start, enabling key principles to be decided and stated explicitly. On the other hand, a new legislative framework could appear to be too radical a step, jettisoning the longstanding common law orthodoxy. This concern would be especially acute if the new form of liability were entirely to replace the existing tortious liability of public bodies in respect of their public functions, rather than merely supplementing it.⁷ It would also be an extremely complex task given the enormous diversity of powers which public bodies exercise. Other more limited forms of legislative intervention might therefore have to be considered.

Private law liability plus discretionary power

- 9.9 Parliament could repeal section 31(4) of the Supreme Court Act 1981, which limits the courts’ power to award damages in judicial review proceedings to

⁴ M Fordham, “Reparation for Maladministration: Public Law’s Final Frontier” [2003] JR 104 at 108.

⁵ See above, paras 8.10–8.12.

⁶ See above, paras 8.24–8.26.

⁷ Even commentators who favour a distinct public law concept of damages are often loath to abandon tortious liability altogether. See eg P Cane, “Damages in Public Law” (1999) 9 Otago Law Review 489 at 509.

situations in which damages would have been awarded had the claim been made in an ordinary private law action.⁸

9.10 However, the courts might be wary about extending the incidence of public bodies' liability beyond the boundaries of private law, even in the absence of a statutory bar on so doing.⁹ As we have seen, they do not appear confident of their ability to provide a complete and coherent scheme of public law liability.¹⁰ They may need positive encouragement from the legislature before they will abandon the requirement of a private law cause of action.

9.11 Instead, Fordham has suggested that section 31(4) of the Supreme Court Act 1981 might be amended to read:

“A reparation order may be made ... [where] the High Court considers that, having regard to (a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari; (b) the nature of the persons and bodies against whom relief may be granted by such orders; and (c) all the circumstances of the case, it would be just and convenient for the order to be made.”¹¹

9.12 Harlow agrees that the Administrative Court should be given a wide discretionary power to order the payment of compensation:

All that is needed is a marginal adjustment to judicial review procedure to entrust the Administrative Court with power, in exceptional cases, to make an award of *compensation*: in short, to endow that prestigious Court – at least on an experimental basis – with an *equitable* jurisdiction to act in exceptional cases of *abnormal* loss or *exceptional* hardship or *grave* violation of human rights as government, administrators and ombudsmen already do.¹²

9.13 Lord Woolf is of a similar opinion.¹³ A provision such as that advocated by Lord Woolf, Fordham and Harlow would give considerable discretion to the courts to develop the principles underpinning a new public law monetary reparation

⁸ This would enable the courts to award damages in cases in which, although no private law cause of action is available, justice requires that compensation be awarded, as Collins J felt was the case in *R (Quark) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2003] EWHC 1743, [2003] ACD 96. See above, para 8.23.

⁹ Eg in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1763, the House of Lords rejected the applicant's argument that if his claim for breach of statutory duty failed, he should recover under a new innominate tort. Even the minority, who would have awarded him damages, preferred to widen the ambit of the existing tort of breach of statutory duty rather than create some new species of liability. See above, paras 4.25–4.27.

¹⁰ Above, para 8.9.

¹¹ M Fordham, “Reparation for Maladministration: Public Law's Final Frontier” [2003] JR 104 at 108.

¹² C Harlow, “Administrative Compensation: Brave New World?” in *State Liability – Tort Law and Beyond* (forthcoming, 2004).

¹³ See above, para 8.21.

remedy. Any future enquiry would have to consider whether this suggestion is preferable to Parliament setting out the principles for the courts to apply.

Extension of private law liability

- 9.14 Parliament could enact legislation designed to widen the ambit of certain existing private law causes of action. Most obviously, Parliament could make a general provision as to when breach of statutory duty is to be actionable in tort, or could specify in individual statutes whether breaches of particular duties contained therein are to be actionable.¹⁴ Other causes of action could also be clarified and extended. Lowering the degree of fault required for misfeasance in public office would be one option.¹⁵
- 9.15 This approach would have the advantage of merely building upon the current law rather than replacing it. However, the additional liability would presumably be limited to public bodies. The resultant twin-track approach to torts could create problems for the coherence of private law.¹⁶ Furthermore, the problems associated with the level of damages in tort law would remain.¹⁷

CONCLUSION

- 9.16 In Part 8 it was argued that there was a good case for further investigation of the principles which should underpin the question of the extent of liability of public bodies for loss caused in exercising their public functions. In this Part, we have indicated a number of options that would be available if it was decided that reform of the law was necessary. In light of the important issues of principle and policy at stake, however, any possible reform of the law would need to be preceded by extensive research and consultation.
- 9.17 The questions posed in this discussion paper have been designed deliberately to provoke thought and reaction. If, as a result, there were to emerge a view that principled reform of the law relating to the liability of public bodies was desirable, we think that the Law Commission would be well placed to take the issue forward as part of its programme of work in the area of public law.

¹⁴ On the problems flowing from Parliament's failure to do so hitherto, see above, paras 8.39–8.41.

¹⁵ Perhaps along the lines suggested by counsel for the claimants in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, whereby an objective error leading to an excess of power, which caused an objectively foreseeable loss, would suffice. See above, para 2.18.

¹⁶ Which has arguably already occurred as a result of the courts' attempts to fashion private law causes of action in such a way that they can provide compensation when loss is caused by administrative acts. See above, paras 8.16–8.26.

¹⁷ See above, paras 8.24–8.26.