

**The Law Commission**

**REMEDIES AGAINST PUBLIC BODIES**

**A Scoping Report**

The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

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**LAW COMMISSION**  
**REMEDIES AGAINST PUBLIC BODIES**  
**A SCOPING REPORT**  
**CONTENTS**

<b>PART 1: INTRODUCTION</b>	<b>2</b>
<b>PART 2: THE DEVELOPMENT OF THE PROJECT</b>	<b>3</b>
<b>PART 3: PUBLIC BODIES AND COMPENSATION</b>	<b>10</b>
<b>PART 4: ARE DAMAGES ALWAYS THE ANSWER?</b>	<b>32</b>
<b>PART 5: THE SCOPE OF THE PROJECT</b>	<b>42</b>

# PART 1

## INTRODUCTION

- 1.1 This report sets out our plans for a substantive law reform project on the remedies available to the individual against public bodies. We set out our conclusions on the scope of, and terms of reference for, the project in Part 5 below.
- 1.2 The origins of this work lie in the reflection and consultation exercise we undertook in preparing our Ninth Programme of Law Reform. The Ninth Programme was published in March 2005, following approval by the Lord Chancellor. A scoping study, the results of which are contained in this report, was included in that Programme, as a preliminary to a substantive law reform project.<sup>1</sup> We have found the task of delineating a project that was both manageable in terms of workload and likely to produce substantive public benefit a difficult one. We describe the process by which our thinking on the project has developed in Part 2. Understanding that process is, we think, important in appreciating the nature of the substantive project upon which we will now embark.
- 1.3 The purpose of this paper is to delineate the scope of a substantive law reform project. Given the history of the development of the project outlined in Part 2, we do not think it desirable to consult further – this is a report, not a consultation paper. We would, nonetheless, be happy to receive any thoughts that practitioners, academics or others interested in our subject matter might like to submit at any time.<sup>2</sup>
- 1.4 Necessarily, in considering in this report what the scope of the project should be, we have sometimes stated conclusions or taken positions. We emphasise that any such conclusions or positions are very much provisional and preliminary – they do not bind us for the purposes of the substantive project. And, of course, any provisional conclusions we arrive at will be subject to consultation as part of the substantive project. We will publish a full-scale substantive consultation paper in due course.

<sup>1</sup> Law Commission, Ninth Programme of Law Reform (March 2005), paras 3.39 to 3.50.

<sup>2</sup> Communications should be directed to the Public Law Team. Contact details are at <http://www.lawcom.gov.uk>.

# PART 2

## THE DEVELOPMENT OF THE PROJECT

### MONETARY REMEDIES IN PUBLIC LAW

- 2.1 Our initial concern was with the availability of monetary remedies in public law.<sup>1</sup> It was in this phase that we published (in October 2004) a discussion paper.<sup>2</sup> The general rule is supposed to be that, on judicial review, damages are not available.<sup>3</sup> The central argument of the discussion paper was that there was a case for saying that a series of autonomous developments in the law had made that general rule less general, to the point of becoming anomalous. Those developments were in human rights law, European Union law, and in the liability in tort of public bodies (where the impact of the Human Rights Act 1998 and European Union law were themselves having an effect).

#### The limitations on judicial review

- 2.2 Since its reformulation with the introduction of Order 53 in 1977, judicial review has been the central procedure for the development of public law in England and Wales.<sup>4</sup> However, its scope is limited.
- 2.3 First, the remedies generally available on judicial review are discretionary. Although Lord Bingham has suggested extra-judicially that any discretion should be tightly controlled and carefully exercised,<sup>5</sup> the fact remains that remedies sought in judicial review actions are not available as of right.
- 2.4 A second important limitation is the short time limit for claims. A judicial review must be brought promptly and not later than three months after the ground for review first arose.<sup>6</sup> Although an application within three months may be refused,<sup>7</sup> there is also scope for the court to extend the three month period.<sup>8</sup>

<sup>1</sup> This concern was particularly prompted by a paper by Michael Fordham, "Reparation for Maladministration: Public Law's Final Frontier", given at the Government Legal Service's annual conference in March 2003 and subsequently published in (2003) 8(2) *Judicial Review* 104.

<sup>2</sup> Law Commission, Public Law Team Discussion Paper, *Monetary Remedies in Public Law* (October 2004), available at [http://www.lawcom.gov.uk/docs/monetary\\_remedies\\_disc\\_paper.pdf](http://www.lawcom.gov.uk/docs/monetary_remedies_disc_paper.pdf)

<sup>3</sup> The Supreme Court Act 1981, s 31(4) provides that damages are only available on an application for judicial review if a claim for damages is joined to the application and the court is satisfied that damages would have been awarded in that action.

<sup>4</sup> The amended Order 53 of the Rules of the Supreme Court (now replaced by Part 54 of the Civil Procedure Rules) was largely based on the Law Commission Report on Remedies in Administrative Law (1976) Law Com No 73, Cmnd 6407. Much of this reform was subsequently underpinned by the Supreme Court Act 1981, s 31.

<sup>5</sup> T Bingham, "Should Public Law Remedies be Discretionary?" [1991] *Public Law* 64.

<sup>6</sup> Civil Procedure Rules, r 54.5.

<sup>7</sup> Supreme Court Act 1981, s 31(6) and (7).

<sup>8</sup> Civil Procedure Rules, r 3.1(2)(a).

- 2.5 Finally, and crucially for this project, in general the award of damages is not a remedy available on judicial review. Judicial review does not, therefore, provide an avenue for compensation to an applicant who has suffered loss as a result of an unlawful administrative act.

### **The impact of the Human Rights Act 1998**

- 2.6 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.
- 2.7 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. The concepts of a "public body" (subject to judicial review) and a "public authority" (subject to section 6 of the Human Rights Act 1998) have been held to be analogous.<sup>9</sup> Acts of public authorities alleged to breach human rights will usually be acts in the public sphere, and so also subject to judicial review.
- 2.8 If the Human Rights Act 1998 opened up liability for compensation in respect of administrative acts which were (merely) unlawful in a public law sense, the courts have now strictly limited the amount of damages likely to be awarded. Section 8(3) of the Human Rights Act 1998 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. The award of damages is therefore discretionary, the discretion being exercised by reference to specific criteria. Section 8(3) of the Human Rights Act 1998 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 European Convention on Human Rights.
- 2.9 The courts have, as a result, been able to develop a distinct approach to damages. In *Anufrijeva v London Borough of Southwark*,<sup>10</sup> the Court of Appeal made it clear that, unlike private law actions where the only remedy claimed was damages, the primary concern in human rights cases was to end the relevant infringement. In such cases, there was a balance to be struck between the interests of the victim and those of the public as a whole; damages are a remedy of "last resort".<sup>11</sup>
- 2.10 The court said that the "critical message" is:

<sup>9</sup> See *Poplar Housing and Regeneration Community Association v Donohue* [2001] EWCA Civ 595, [2002] QB 48 at [65].

<sup>10</sup> [2003] EWCA Civ 1406, [2004] 2 QB 1124.

<sup>11</sup> Above at [56].

that the remedy has to be “just and appropriate” and “necessary” to afford “just satisfaction”. The approach is an equitable one... There have been cases where the seriousness or the manner of the violation has meant that as a matter of fairness, the European Court of Human Rights has awarded compensation consisting of “moral damages”. The Law Commission stated in its report that the European Court of Human Rights took account of “a range of factors including the character and conduct of the parties, to an extent which is hitherto unknown in English law”.<sup>12</sup>

2.11 The court observed that there is no difficulty in assessing damages where pecuniary loss has occurred. The difficulty was in assessing loss that is not quantifiable in financial terms, such as suffering anxiety and distress. The court considered the issue of the principled approach to be taken to the quantum of Human Rights Act damages. It concluded that damages awards in this area should generally be modest, since limited resources needed for the public benefit, including primary care, would be depleted by substantial damages awards.<sup>13</sup>

2.12 This message was underlined in *R (Greenfield) v Secretary of State for the Home Department*,<sup>14</sup> where Lord Bingham forcefully asserted the secondary nature of damages in the human rights context:

the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted... the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg.<sup>15</sup>

2.13 So damages are available where there has been a breach of a victim’s Convention rights, but those damages are discretionary and modest, allowing the court to tailor the remedies to fit the particular circumstances of the case. Although complaints certainly have been made about the limiting of damages in this way, others may see this flexible approach as an appropriate model for damages in a public law context.

### **The impact of European Union law**

2.14 The European Court of Justice has developed a now well established and comprehensive doctrine of state liability in damages. This law must be applied by our domestic courts when a public body has acted under the authority of EU law.

<sup>12</sup> *Anufrijeva v London Borough of Southwark* [2003] EWCA Civ 1406, [2004] 2 QB 1124 at [66], by Lord Woolf CJ. This referred to our “information” report, Damages under the Human Rights Act 1998 (2000) Law Com No 266; Scot Law Com No 180.

<sup>13</sup> Above at [75].

<sup>14</sup> [2005] UKHL 14, [2005] 1 WLR 673.

<sup>15</sup> Above at [19].

- 2.15 It has been suggested that the principles established by the European Court of Justice, and in particular the “sufficiently serious breach” test could inform reformed principles for English law on state liability.<sup>16</sup>
- 2.16 In the *Francovich* case, the court held that the principle of state liability for breach of EU law is inherent in the EC Treaty.<sup>17</sup> In this and the *Brasserie du Pêcheur* case,<sup>18</sup> the court set out the test for member state liability for damages. Where an act involved an alleged misuse of discretion, three requirements must be satisfied. First, the rule of EU law concerned 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.
- 2.17 The first test is usually easily satisfied; it has been said that “up to now, no decision of the Court of Justice on member states’ liability has found this requirement wanting...It is sufficient that the citizen can derive some benefit from the application of a given provision.”<sup>19</sup> The third test, causation, appears to be broadly similar to the causation requirement in English law. The key element is the second stage of the test, that the breach must be sufficiently serious. The European Court of Justice uses this test as what could be seen as a “control mechanism”<sup>20</sup> to determine when member states should or should not be liable in damages. The court has stated that, for liability to arise, the state institution must have “manifestly and gravely exceeded the limits of its discretion” and that the breach must be “inexcusable”.<sup>21</sup> It is not necessary to prove fault beyond the sufficiently serious breach of EU law.
- 2.18 So damages are now available for the citizen wronged by the state, where that wrong is a breach of European Union law, *and* where the breach is sufficiently serious to justify the payment of compensation.

### **Developments in tort law**

- 2.19 At the same time, the traditional antipathy of the courts to enquiring into mainstream Governmental activity, and awarding damages when people were harmed by it, was being eroded. For an extended discussion of these developments, see Part 3 below. In the discussion paper, we saw these developments as providing an additional argument for extending some form of

<sup>16</sup> See for example, P Craig, “The Domestic Liability of Public Authorities in Damages: Lessons from the European Community?” in J Beatson and T Tridimas eds, *New Directions in European Public Law* (1998); R Carnwath, “The *Thornton* Heresy Exposed: Financial Remedies for Breach of Public Duties” [1998] *Public Law* 407. See also para 3.62 below.

<sup>17</sup> Cases C-6, 9/90 *Francovich v Italy* [1991] ECR I-5357.

<sup>18</sup> Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR-I 1029.

<sup>19</sup> 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), p 348.

<sup>20</sup> See the discussion of “control mechanisms” in Part 3 below.

<sup>21</sup> Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Germany; R v Secretary of State for Transport, ex p Factortame Ltd* [1996] ECR-I 1029.



monetary remedy in the public law sphere – it underpinned the potential unfairness of the “gap” identified below – rather than seeing developments in tort law as one of the main focuses of the project.

### **The gap**

- 2.20 However, notwithstanding these important developments, the general rule remains. Set against the backdrop of the current availability of a private negligence action, this means that there remains the key gap in the law that we identified in the discussion paper: where a public authority has acted unlawfully in a public law sense (but not in breach of Convention rights or European Union law) and thereby caused economic loss to the individual, the individual has no claim against the authority. The paradigm case is that of the wrongful non-issuing, or withdrawal, of a licence to engage in a remunerative activity.<sup>22</sup>

### **THE SEMINAR: A BROADER REMEDIAL FOCUS**

- 2.21 The discussion paper set the scene for a seminar we convened in November 2005. Presided over by Lord Phillips, Master of the Rolls, the seminar was attended by judges, academics, practising lawyers, ombudsmen, and Government officials.<sup>23</sup>
- 2.22 In discussing the seminar, it is important to bear in mind that participants were certainly not all of one mind. However, we drew from the seminar a number of lessons.
- 2.23 Most of those attending thought that the concentration on monetary remedies was too narrow. The feeling was that it was necessary to consider what kind of remedies against public bodies people wanted – which would certainly not always be damages. The role of ombudsmen in particular was emphasised, while it was accepted that there could be problems with their jurisdiction (in particular, where an allegation of maladministration might also be pursued in the courts).
- 2.24 There was also a strong emphasis on the importance of recognising the difficulties facing public bodies, as they try to discharge their functions for the public benefit. First, there was the straightforward point that having to divert funds to pay compensation claims and legal fees could have a debilitating effect on public resources.
- 2.25 Secondly, it was considered that liability in damages could distract public bodies from making decisions in the wider public interest. It could distort service provision by giving rise to “defensive administration”, in which decisions were taken by risk-averse public bodies to avoid liability rather than necessarily in the best interests of the public. The alternative view, that liability would promote good practice, was viewed with some scepticism. Some participants argued that judicial review was in any event sufficient to secure compliance with the law – the extension of liability for compensation was unnecessary to secure that aim.

<sup>22</sup> See Example 11 in Part 3 below (below para 3.16).

<sup>23</sup> A summary report of the discussion, which was held under the Chatham House rule and is therefore reported anonymously, is available on the Law Commission website: [http://www.lawcom.gov.uk/docs/Final\\_report.pdf](http://www.lawcom.gov.uk/docs/Final_report.pdf) (last visited 7 Sept 2006).

- 2.26 Further, there was a sense that while there was a case for providing useful feedback to decision makers, and tort-litigation was not well suited to perform such a role, other mechanisms could do so. Ombudsmen may make recommendations for changes in practice, for instance, in a particular public body as a result of an individual complaint, and can also make general recommendations in their annual reports.
- 2.27 Participants discussed the possibility of fashioning a new remedy in public law, designed to secure monetary redress, calculated in an appropriate way, and taking account of resource implications. Speaking broadly (for again it should be emphasised that not all participants were of one voice), the seminar dismissed tort as a template for a new public law remedy.
- 2.28 Finally, many participants agreed that reform should be accomplished by legislation rather than primarily by the courts. Any new approach to remedies would, of course, have to be implemented in an indefinite variety of situations by the courts. But the common law was unlikely to have the reach required to make the necessary reforms, and there were advantages in legislation laying down the basic principles.

#### **FURTHER CONSIDERATION: THE IMPORTANCE OF TORTIOUS REMEDIES**

- 2.29 But rejecting the development of tort law (particularly by the courts) does not mean side-lining the importance of tort liability for a substantive project. Further consideration has led us to conclude that the project must concern itself centrally with the liability of public bodies in tort. For us to come to a principled solution to the question of when and how citizens should be able to obtain redress from public bodies that have acted wrongfully requires that we consider *both* the remedies available in public law and those available in private law.
- 2.30 Many of the broader considerations that apply to the development of remedies in public law – the particular position of public bodies as actors in the public, rather than a private, interest; the public nature of their resources; the poly-centric nature of decision making, at least in discretionary areas with a high policy content; the standing of the executive in a democracy – apply with equal force to liability in, say, negligence, as they do to public law. If a potential defect of the current law is the divergence of the tests for lawfulness/liability in public and private law (a public body can act unlawfully, but not be liable in negligence, and, in theory, could be liable in negligence when it has not acted unlawfully), then that would only be exacerbated if we were to consider public law remedies in isolation.
- 2.31 Put another way, there is a danger in identifying a “gap”, and thinking of law reform as simply filling that gap. We must also look to see to what extent those parts of the law that constitute the filling between which the gap appears are justified and appropriately configured. To the extent that liability in tort is one of the columns between which the gap identified above appears, it deserves critical scrutiny.

- 2.32 Nothing in this reconsideration casts doubt on the continuing importance of the other principal conclusions of the seminar – that we must consider alternative remedies, including ombudsmen, mediation, the role of internal reviews and complaints systems and so on; that the particular position of public bodies should be recognised and validated; and the importance of feed-back mechanisms recognised, to ensure that actions for remedies improve the future delivery of public services.
- 2.33 A recognition of the role of non-court mechanisms does not, however, mean that it would be either practical or desirable for us to attempt to stipulate exactly how such methods should be configured and used by Government. Our central concern must remain the law as implemented by the courts. But the challenge is to ensure that the law is constructed in such a way as to ensure that the advantages of non-court processes are recognised and given the space they need. The law, or the interests of the legal system and those who work it, should not be allowed to over-ride the greater public benefit that could be delivered by these approaches in appropriate cases. We must at least consider how the gravitational pull of litigation for compensation can be neutralised or reversed.
- 2.34 While we need to consider tort liability, our target is *not* the ordinary liability of state bodies in circumstances identical to those in which a private citizen or company would be liable. Our concern is with those activities which are of a truly Governmental nature, involving policy making or the implementation of policy involving a significant exercise of discretion. We will later suggest that there are great difficulties in drawing a line on the spectrum of Government activity that clearly distinguishes between this kind of activity and ordinary operations in the context of which the treatment of public authorities as private bodies is unproblematic. The extent to which it will be either possible or desirable to do so will be a fundamental question for the substantive project and will depend on how our proposals develop. Our subject matter, however, is the truly Governmental, not that which is merely incidental to any activity.
- 2.35 Accordingly, our starting point now, while maintaining a broad perspective on the notion of remedies, is to approach the question *bi-focally* – to maintain a focus on both public law unlawfulness and liability in tort.
- 2.36 To properly understand this position requires a more detailed consideration of how and when damages may be awarded against public bodies. We turn to this in Part 3.

## PART 3

# PUBLIC BODIES AND COMPENSATION

- 3.1 Public bodies become liable to pay compensation to citizens in a multiplicity of circumstances. Even before the advent of judicial review in its modern form, those employed by the executive were liable to pay damages for intentional and unjustified interference with the person or property of the citizen. Indeed such actions were in early days the principal, and sometimes the only, weapon for testing the validity of executive measures and for bringing the executive to account.<sup>1</sup> They retain contemporary significance.
- 3.2 In considering private law liability, we will primarily cover liability in negligence. It is in relation to negligence that the courts have constructed special rules for public authority liability. However, public bodies can be liable to pay damages under a number of torts; in principle they can be liable for the same range of torts as private individuals. For example, the police might be liable for the torts of battery or false imprisonment; public bodies which own land could be liable for nuisance; any type of public body may potentially be liable for defamation when it makes statements to the media.<sup>2</sup> The torts of breach of statutory duty and misfeasance in public office, which particularly apply to public bodies, are discussed at paragraphs 3.64 to 3.67 below. Different constituent elements must be satisfied for different torts; in particular, the liability of a public body will depend on the fault element required for the tort in question.<sup>3</sup>

### EXAMPLE 1

- 3.3 A prison governor releases a prisoner on the day that he believes is by law the due date for release. The governor is wrong because the due date has already passed. The governor is liable to pay the prisoner substantial damages for false imprisonment.<sup>4</sup>
- 3.4 It is notable in this example that the governor may be blameless in any moral sense. In the actual case the governor relied on a binding judicial decision (later shown to be erroneous) for calculating the due date for release. The governor could not have acted otherwise.

<sup>1</sup> See A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed 1931) p 114, and Jaffe, "The Right to Judicial Review" (1958) 71 *Harvard Law Review* 401; Henderson and Jaffe, "Judicial Review and the Rule of Law" (1956) 72 *Law Quarterly Review* 345.

<sup>2</sup> These examples are drawn from Clerk and Lindsell on Torts (19th ed 2006), para 14-01.

<sup>3</sup> The spectrum includes intentional harm, negligence and strict liability.

<sup>4</sup> *R. v Governor of Brockhill Prison ex parte Evans (No 2)* [2001] 2 AC 19. Liability for the tort of false imprisonment is strict; it was irrelevant in this case that the governor had not been negligent and had acted in good faith. For the tort of false imprisonment see Clerk and Lindsell on Torts (19th ed 2006) ch 15.

3.5 In other circumstances, however, liability for deprivation of liberty may depend on a showing of fault. For example, a police officer may arrest someone without a warrant if the officer has reasonable grounds for suspecting that the person is about to commit an offence.<sup>5</sup> If there are no such reasonable grounds, there will be liability. Nonetheless exercise of care may not always confer immunity. For example, it is uncertain whether a police officer may deprive a person of liberty in reliance upon a by-law that is invalid, even if the officer has no reason to doubt its validity. The citizen, invoking the rule of law (as now expressed in Article 5.1(b) of the European Convention on Human Rights), may claim that no one should be arrested for an “offence” that does not exist. The police officer, invoking legal certainty, may claim that the arrest is justified if the officer has no reason to believe that the “offence” does not exist.<sup>6</sup>

3.6 However, the liability of public bodies does not require an unjustified *intentional* infliction of injury to person or property. As a general rule a public authority which without exercising reasonable care *directly* inflicts *physical damage* upon a person or upon the property of a person will be liable to pay damages by way of compensation. The really difficult cases in this area of the law are, first, those where the public authority has not caused *direct physical damage* to the person or property of the claimant, either because the damage was “economic” loss or because the immediate cause of the damage was an act of a third party or a natural phenomenon not brought about by the public authority. The second type of difficult case, illustrated in Example 11 below, is where the immediate cause of the loss is an unlawful administrative measure but the facts do not constitute one of the traditional torts such as false imprisonment. The following examples give an idea of the range of circumstances in which these difficult cases may arise.

#### **EXAMPLE 2**

3.7 The Home Office establishes a Borstal to operate under “open” conditions. Owing to the negligence of the guards several offenders escape, and in the course of the escape damage private property. The owners recover substantial damages, even though they have insured the property against such loss, and the Home Office has arranged voluntarily to pay compensation to those suffering loss in such circumstances that are not insured.<sup>7</sup>

<sup>5</sup> Police and Criminal Evidence Act 1984, s 24.

<sup>6</sup> *Boddington v British Transport Police* [1999] AC 143; *Percy v Hall* [1997] QB 924, CA; *R v Central London County Council ex part London* [1988] QB 1261, 1274F to 1278E.

<sup>7</sup> *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004. For the Home Office compensation scheme see Report of the Parliamentary Commissioner for Administration HC 42 (1973/4) 112.

### EXAMPLE 3

- 3.8 A local authority negligently decides that a child should be placed in care. The child while mistakenly placed in care suffers physical abuse and psychiatric injury. The child may obtain compensation from the local authority for the injuries that the child has suffered.<sup>8</sup> The child's parents whom the local authority carelessly thought were abusing the child allege that they suffered lasting psychiatric injury. They have no claim for compensation.<sup>9</sup>

### EXAMPLE 4

- 3.9 A householder, seeing that the house has caught fire, rings 999 for a fire engine. The fire service takes the call but owing to the incompetent driving of a fire officer fails to arrive before the householder has sustained substantial property damage. The householder has no claim for compensation against the fire service.<sup>10</sup>

### EXAMPLE 5

- 3.10 A householder feeling seriously unwell rings 999 for an ambulance. The ambulance service takes the call but owing to the incompetent driving of an ambulance officer fails to arrive before the householder's condition has been made worse than would have been the case if the ambulance had arrived on time. The householder has a claim for compensation against the ambulance service.<sup>11</sup>

### EXAMPLE 6

- 3.11 An authority responsible for the maintenance of the highway does not take steps to secure the removal of an obstacle, which although not on the highway, impairs road visibility. A motorist has an accident and sustains personal injuries, partly because visibility was obscured by the obstacle. The motorist has no claim for compensation against the highway authority, even if the authority had no good reason for not exercising its power to secure the removal of the obstacle and the authority's inaction could fairly be described as defying logic and reason (that is, "irrational").<sup>12</sup>

<sup>8</sup> *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558, the Court of Appeal holding that in the light of the Human Rights Act 1998 and the jurisprudence of the European Court of Human Rights, *X v Bedfordshire County Council* [1995] 2 AC 632 could not be followed. The decision of the Court of Appeal on this point was not challenged in the subsequent appeal to the House of Lords.

<sup>9</sup> *D v East Berkshire Community NHS Trust* [2005] UKHL 23, [2005] 2 AC 373. The decision was applied in *D v Bury Metropolitan Borough Council* [2006] EWCA Civ 1, [2006] 1 WLR 917.

<sup>10</sup> *Capital and Counties plc v Hampshire County Council* [1997] QB 1004, approved on this point by Lord Hoffmann in *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [37].

<sup>11</sup> *Kent v Griffiths* [2001] QB 36. It is perhaps uncertain whether the decision in *Kent* has survived *Gorringe* (see note 10 above).

<sup>12</sup> *Stovin v Wise* [1996] AC 923, as interpreted in *Gorringe* (see note 10 above).

### **EXAMPLE 7**

- 3.12 An authority responsible for certifying the seaworthiness of merchant ships negligently certifies that a certain vessel is seaworthy. The ship sinks with the loss of its cargo. A cargo owner has no claim for compensation against the authority.<sup>13</sup>

### **EXAMPLE 8**

- 3.13 An authority responsible for certifying that privately owned passenger-carrying aeroplanes are fit to fly negligently certifies that a plane is airworthy. The plane crashes and passengers suffer personal injury. The passengers have a claim for compensation against the authority.<sup>14</sup>

### **EXAMPLE 9**

- 3.14 A serial killer is at large. The police negligently fail to arrest the killer before the killer claims another victim. The victim (or the dependants of the victim) has no claim for compensation.<sup>15</sup>

### **EXAMPLE 10**

- 3.15 A bank regulator negligently but in good faith permits a bank to continue to operate when careful supervision would require the cessation of activities. Depositors whose funds would have been repaid if the bank's activities had been terminated in good time have no claim for compensation against the bank regulator.<sup>16</sup>

### **EXAMPLE 11**

- 3.16 A fishing authority unlawfully denies a fishing licence. The owner of the fishing vessel is wrongfully prohibited from fishing and suffers financial loss. If EU law governs the licensing regime, the owner may have a claim for compensation if the authority is seriously at fault. If not, he has no claim unless the conduct of the authority amounts to misfeasance in public office.<sup>17</sup>

<sup>13</sup> *Marc Rich Co AG v Bishop Rock Marine Co* [1996] AC 211.

<sup>14</sup> *Perrett v Collins* [1998] 2 Lloyd's Rep. 255.

<sup>15</sup> *Hill v Chief Constable of West Yorkshire* [1989] AC 53. See also *Brooks v Metropolitan Police Commissioner* [2005] UKHL 24, [2005] 1 WLR 1495.

<sup>16</sup> Financial Services and Markets Act 2000, sch 1, para 19. Financial regulators would in any event be very unlikely to be liable at common law: see *Yuen Kun Yew v Attorney General of Hong Kong* [1988] AC 175; *Davis v Radcliffe* [1990] 1 WLR 821.

<sup>17</sup> *Abbott v Sullivan* [1952] 1 K.B 189; *Dunlop v Woolahara Municipal Council* [1982] AC 158 PC; *X v Bedfordshire County Council* [1995] 2 AC 633, 730. Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357. See K Lenaerts and P Van Nuffel, *Constitutional Law of the European Union* (2nd ed 2005) paras 17-012 to 17-014; J Steiner and L Woods, *Textbook on EC Law* (8th ed 2003) pp 111 to 125.

3.17 These examples must, of course, be approached with caution because the complete statutory background has not been stated in the brief summary and the facts have been reduced to a minimum. Nonetheless the examples show the diversity of circumstances in which difficult questions of state liability arise. They also show the complexity of the subject. Save for Example 10, the legislature did not expressly provide that compensation should, or should not, be payable to the claimants. The results were determined by the courts. Very distinguished judges at the highest level have disagreed about the results. In Example 6 Lord Nicholls (with whom Lord Slynn agreed) powerfully dissented from the majority. In Example 3 Lord Bingham in a closely reasoned speech dissented on the issue of liability towards the parents. Someone unfamiliar with the field of state liability might be forgiven for not immediately identifying what coherent and consistent set of legal principles could account for the outcomes described in the examples. Even those reasonably well versed in the subject do not seem to find identification straightforward. Most would perhaps recognise that Examples 10 and 11 concern pure “economic” loss where recovery of compensation for negligent conduct is available as a general rule only under special conditions.<sup>18</sup>

### **THE POSITION OF PUBLIC BODIES AND THE EXERCISE OF PUBLIC FUNCTIONS**

3.18 It cannot be said that the courts have been insensitive to the position of public bodies which find themselves exposed to claims for compensation. There appears to be a measure of agreement that, despite Dicey’s arguments,<sup>19</sup> public bodies should not be treated in precisely the same way as private citizens.<sup>20</sup> The authors of a leading textbook identify four reasons for this difference in treatment.<sup>21</sup> First, public finance is not unlimited and the payment of compensation for loss shifts resources from other applications. Second, public bodies do not disappear or become insolvent, which makes them an attractive target for compensation claims. Third, public bodies are not untypically required in their decision-making to balance complex and sometimes competing considerations, and the courts may be loath to have to “second guess” their appraisal. Fourth, the imposition of liability may lead public bodies to change their priorities and become more risk averse, contrary to the public interest.

<sup>18</sup> See *Hedley Byrne and Co Ltd v Heller and Partners* [1964] AC 465.

<sup>19</sup> Dicey believed that the rule of law meant that the “ordinary law” should apply to government in the same way as it is applied to private citizens. See A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed 1931).

<sup>20</sup> Some commentators strongly disagree: see eg S Bailey and M Bowman, “Public Authority Negligence Revisited” (2000) 59 *Cambridge Law Journal* 85.

<sup>21</sup> *Markesinis and Deakin’s Tort Law* (5th ed 2003) pp 376 to 381. The authors make clear their view that only the second reason has economic justification: see B Markesinis, J-B Auby, D Coester-Waltjen, S Deakin, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (1999).



- 3.19 It might be argued that public bodies should be treated differently only in so far as they are engaged in “governmental” activities. However the line between “governmental” and “private” activities is not easy to draw. The state may supply services or regulate the supply of goods and services where, for example, what is supplied is in whole or part a public good, or competition is inadequate, or there is a significant information failure, or considerations of equitable distribution of income or wealth dictate.<sup>22</sup> Sometimes the state is the exclusive provider and exclusivity is unlikely to be surrendered (for example, national defence; police; emergency services), or the state is the only regulator. The description of the activity as “governmental” is then relatively easy to justify. It may be that the concept of “governmental” should be confined to those functions *uniquely* carried out by the state where there is no private analogue. If the private sector supplies similar services (for example, healthcare, education, housing) the public sector may nonetheless have to discharge its functions under different conditions from private enterprise. Even activities perceived as typically “private”, such as the management of land or renting property, may well take on a public interest dimension. However, if the concept of “governmental” were to extend beyond functions uniquely carried on by the state, there would probably be a considerable grey area of dispute.
- 3.20 It is nonetheless indisputable that, in determining the liability of public bodies in new and controversial areas, the courts are usually assisted if they can find what they perceive to be a strong *private* analogy. So if the claim is that an educational psychologist employed by a local authority owes a duty of care to a child in diagnosing the child’s special educational needs, the analogy with comparable private professionals is likely to have powerful persuasive force in establishing the duty.<sup>23</sup> However, as the Examples indicate, the most difficult cases of potential state liability concern activities where there is no, or no strong, private analogy.
- 3.21 The converse situation is where the person from whom compensation is claimed is not a public authority but is arguably carrying out “public” functions. This situation would typically arise where the public authority, for reasons of efficiency, economy and competition, has “contracted out” to the private sector the delivery of services to the public. Contracting out poses challenges to public law, but the correct solutions are not easy to reach, as is shown by the cases where the courts have had to decide whether a private enterprise, delivering services under arrangements with a public authority, is amenable to judicial review<sup>24</sup> or is carrying out “public functions” for the purposes of the Human Rights Act 1998.<sup>25</sup>

<sup>22</sup> These are technical economic reasons for state control over the delivery of certain goods and services: see SJ Bailey, *Public Sector Economics* (2nd ed 2001) chapters 1 and 2.

<sup>23</sup> See *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 653, by Lord Slynn.

<sup>24</sup> *R v Servite Houses and the London Borough of Wandsworth Council ex parte Goldsmith and Chatting* (2000) 2 LGLR 997.

<sup>25</sup> *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2001] EWCA Civ 595, [2002] QB 48; *R (Heather) v Leonard Cheshire Foundation (A Charity)* [2002] EWCA Civ 366, [2002] 2 All ER 936.

The phenomenon of contracting out seems to be permanent, and the courts are likely, therefore, to be increasingly confronted with private enterprises urging that any restrictions of liability discernible in actions against public bodies should be extended to them in so far as the claim relates to execution of a “public” function.

### **THE COMPETING PRINCIPLES**

- 3.22 The underlying tension in the difficult cases of public sector liability was stated by Lord Steyn as follows:

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....Sometimes cases may not obviously fall in one category or the other. Truly difficult cases arise.<sup>26</sup>

Apart from the need to achieve “corrective justice”,<sup>27</sup> as described by Lord Steyn, it is sometimes argued that an important justification for imposing liability to pay compensation is to deter carelessness, to raise the quality of goods and services, and to make economic operators bear the full costs of their activities<sup>28</sup>

- 3.23 This raises the very large question of whether tort law in general is effective as an instrument of deterrence, and whether, in particular, the imposition of liability upon public bodies results in efficient risk taking.<sup>29</sup>

### **HOW THE DIFFICULT CASES ARE DECIDED**

- 3.24 The willingness of the courts to find public bodies liable to pay compensation has swung to and fro from time to time. It would appear that, perhaps with the advent of the Human Rights Act 1998, the courts have returned to a more expansionist phase. A number of specific mechanisms have been used by the courts in the past to control the extent to which public bodies might be found liable to pay compensation. These control mechanisms are briefly described below. It should

<sup>26</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057 at [2].

<sup>27</sup> Under corrective justice the claimant seeks compensation on the basis that the defendant is responsible in some sense (usually requiring fault) for the other's loss. Distributive justice looks at the allocation of benefits and burdens throughout society as a whole.

<sup>28</sup> Eg *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 672 (by Lord Clyde); *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 568 (Lord Slynn) and Lord Nicholls dissenting speech in *Stovin v Wise* [1996] AC 923, 941.

<sup>29</sup> This is a highly contentious issue – for the argument in the American context, see P Schuck, *Suing Government: Citizens Remedies for Official Wrongs* (1983) and B Feldthusen, “The Recovery of Pure Economic Loss in Canada: Proximity, Justice, Rationality and Chaos” (1996) 24 *Manitoba Law Journal* 1; W Baxter, “Enterprise Liability, Public and Private”, *Law and Contemporary Problems* 1978 at p 45. There appears to be a lack of hard empirical evidence – this is an issue on which we consider further work is necessary (see 5.9 to 5.11 below).

be stressed at the outset that, save for “justiciability” and “ultra vires” (see below), the control mechanisms are of *general* application in the law of torts; but the focus in the analysis below is on their particular use where the liability of a public authority for negligence is in issue.

### **Justiciability**

- 3.25 First, the courts have stated that some issues are “non-justiciable” and have struck out claims to compensation against public bodies on that basis. The courts have been concerned not to trespass on areas of public administration where they believe that they lack expertise, or where they believe that under democratic principles the decision should be left to another institution of the state. Example 10 above illustrates the circumstances where the courts would traditionally decline jurisdiction to hear an action for damages, and the language of non-justiciability can be found in the cases noted under that Example. To that extent the rationale is the same as that which led the courts to show in judicial review proceedings reticence when confronted with issues in some sensitive areas of public administration.
- 3.26 However, since *CCSU*<sup>30</sup> the courts in such proceedings have penetrated more extensively and more deeply into areas of public administration which in the past would have been considered judicial “no go” areas. The very concept of judicial deference to the executive has been questioned at the highest level and the scope of the discretionary area of judgement is uncertain. Recent cases dramatically show that even in matters of national security – the traditional “no go” area par excellence – the courts may feel that it is appropriate to intervene. Blanket “no go” areas have ceased to exist as far as judicial review is concerned: whether or not an application is “non-justiciable” will depend on the precise nature of the impugned decision and the precise ground of alleged illegality relied upon by the claimant.<sup>31</sup>
- 3.27 However, in the context of actions for compensation, as distinct from judicial review, the concept of “non-justiciable” seems to be employed in a potentially broader but uncertain manner.
- 3.28 It was once thought that questions of justiciability arose if the public authority was exercising a “discretion”, particularly on a “policy” rather than an “operational” matter.<sup>32</sup> However, it was pointed out that the exercise of discretion lies at the heart of government<sup>33</sup> and that the policy/operational distinction was “often elusive....Practically every decision about the provision of such benefits, no matter how trivial it may seem, affects the budget of the public authority in either

<sup>30</sup> *Council of Civil Services Unions v Minister for the Civil Service* [1985] AC 374.

<sup>31</sup> For a recent survey see M Supperstone, J Goudie and Sir Paul Walker, *Judicial Review* (3rd ed 2005) para 7.12. See also J Jowell, “Judicial deference: Servility, Civility or Institutional Capacity” [2003] *Public Law* 592.

<sup>32</sup> *X v Bedfordshire* [1995] 2 AC 633.

<sup>33</sup> *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1WLR 1057 at [5] by Lord Steyn, quoting from P Craig, *Administrative Law* (5th ed 2003) p 898.

timing or amount”.<sup>34</sup> In *Barrett*<sup>35</sup> and *Phepys*<sup>36</sup> the House of Lords, departing from *X*<sup>37</sup> held that the distinction should not automatically determine justiciability. However, it is now somewhat unclear as to how the test of “non-justiciability” should be applied in actions for damages.

- 3.29 In proceedings for judicial review the concept of the non-justiciable has a clear rationale and reasonably predictable application. Should the concept be applied in the same way if the claim is for compensation? First, if it were, it would meet the criticism that a broadly applicable test of justiciability, aimed at weeding out cases where, for example, difficult issues of resource allocation are at stake, may potentially rule out practically all claims.<sup>38</sup> Secondly, the real concern of the courts seems to focus on a relatively small group of claims where, if closely analysed, the basis of the action for damages constitutes an indirect attack on the validity of the exercise of discretionary powers in a heavily policy-laden area; *and where the court believes that such an attack, if it were being assessed on an application for judicial review by reference to public law principles, would be hopeless.*<sup>39</sup> A different approach to such cases would be if the court, instead of labelling them non-justiciable, was able to strike out actions for damages where the claim was an indirect attack on the validity of a public law decision in circumstances where, if the attack had been made on an application for judicial review, permission would have been denied.
- 3.30 An alternative approach would be to stipulate an explicit rule conferring immunity upon public bodies in respect of any discretionary decisions taken in the exercise of a governmental function and positively based upon considerations of, for example, social, political and economic policy. The rationale for an immunity of this nature would not be confined to “non-justiciability” in the sense recognised by public law and applied in proceedings for judicial review. It is not that the judiciary necessarily lacks expertise or institutional competence to evaluate, for example, whether social services have been careless in the formulation of a policy regarding the provision of information to prospective adopting parents.<sup>40</sup> If such an issue arose in proceedings for judicial review, the Administrative Court would have no hesitation in assuming jurisdiction to examine the legal issues. The putative immunity would be based on a broader legal policy, namely, that certain

<sup>34</sup> *Stovin v Wise* [1996] AC 923, 951, by Lord Hoffmann.

<sup>35</sup> [2001] 2 AC 550, 583, by Lord Hutton; 571, by Lord Slynn.

<sup>36</sup> [2001] 2 AC 619, 673 to 674, by Lord Clyde.

<sup>37</sup> See note 32 above.

<sup>38</sup> See C Booth and D Squires, *The Negligence Liability of Public Authorities* (2006) pp 77 to 81.

<sup>39</sup> Examples include *Danns v Department of Health* [1996] PIQR P69, affirmed [1998] PIQR P226, CA, *Smith v Secretary of State for Health* [2002] EWHC 200, (2002) 67 BMLR 34; and in Canada *Doe v Metropolitan Board of Commissioners of Police* (1989) 58 DLR (4th) 396, affirmed (1990) 74 OR (2d) 225 (discussed S Childs and P Ceyssens, “*Doe v Metropolitan Toronto Board of Commissioners of Police and the Status of Public Oversight of the Police in Canada*” (1998) 36 *Alberta Law Review* 1000).

<sup>40</sup> See *A v Essex County Council* [2003] EWCA Civ 1848, [2004] 1WLR 1881.

discretionary decisions by public bodies should not be the subject of actions for negligence because of the implications regarding cost, resource allocation and efficient decision making. There is no doubt, however, that such an immunity would both pose problems of definition, as the debate described above over justiciability has shown, and would be controversial. Nonetheless it may be that this important issue, which is central to the question of public authority liability, should be faced squarely and considered in greater detail.

### **The ultra vires test**

- 3.31 Secondly, and very closely related to the issue of justiciability, it was until quite recently thought that, at least in respect of “policy” decisions, liability to pay compensation required a finding that the action of the public authority was “ultra vires” in the sense of “Wednesbury” unreasonable,<sup>41</sup> that is, so unreasonable that no reasonable decision maker could have made it. The distinction between the formulation of “policy” and “operational” activities has been seriously questioned, and a showing of “ultra vires” no longer appears necessary,<sup>42</sup> at least in those cases which do not raise questions of justiciability.
- 3.32 The ultra vires test has been criticised as too restrictive and difficult to delimit.<sup>43</sup> However, the ultra vires condition is not logically restricted to “Wednesbury” unreasonableness in a way that this first criticism seems to assume. The ultra vires test was designed to ensure that a public authority was not made liable for negligence when it had taken a discretionary decision *within the lawful limits of its powers*. Consistent with that rationale it would be open to a claimant challenging a discretionary decision in a negligence action for damages to satisfy the ultra vires threshold condition by showing, on *any* legitimate public law ground, that the decision was not one that the public authority could lawfully have taken.
- 3.33 The second criticism of the ultra vires test explores cases where such a public law hurdle would be plainly inappropriate. For example, no one would sensibly ask whether a police officer driving carelessly was acting “ultra vires”; nor even whether an educational psychologist negligently misdiagnosing a child’s special educational needs was taking an “ultra vires” decision.
- 3.34 This criticism has considerable force. However, there would appear to be cases where a finding of public law illegality (not necessarily confined to “Wednesbury” unreasonableness) would appear essential to found a claim for damages. For example, reverting to Example 2, let it be assumed that the claimants’ complaint had been that the Home Office was negligent in establishing an open institution at all, or in designing the safeguards for such a regime. It would seem that no such claim could succeed unless the impugned decisions were flawed in a public

<sup>41</sup> *X v Bedfordshire* [1995] 2 AC 633.

<sup>42</sup> See *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 653, by Lord Slynn; 674, by Lord Clyde.

<sup>43</sup> See eg *Pyrenees Shire Council v Day* (1998) 192 CLR 330 (High Court of Australia), where Kirby J. said at [253] that “it may be “fair, just and reasonable” to impose on a public authority a duty of care to exercise relevant statutory powers in given circumstances although a refusal to do so would not have attracted the epithet “irrational”; and see D Fairgrieve, *State Liability* (2003) p 45.

law sense (because they were outside the relevant statutory powers, were “Wednesbury” unreasonable or otherwise infringed substantive principles of administrative law) and the Home Office was precluded from acting as it did. That of course would still leave open the question of in what circumstances those suffering loss by reason of the unlawful policy choice of the administration should be entitled to compensation. However, to accept in such a case that the decision to establish an open institution, or in designing the relevant safeguards for such an institution, was a lawful policy choice by the public authority but then to hold the authority liable for negligence in making such a lawful choice would appear a contradiction in terms. The reason for the contradiction is that in such a case all the factors relevant to a finding of negligence have already been taken into account in the assessment of legality. Therefore, notwithstanding the difficulties of delimitation, there appear to be cases where the issue of public law legality cannot be avoided.<sup>44</sup>

### **Other Control Mechanisms**

- 3.35 Control mechanisms may be seen most strongly where the complaint is that the public authority has failed carelessly to prevent a third party, or some natural cause, from injuring the claimant’s person, property or economic interests. The reason for this is obvious. In these cases the authority may be at a long distance from the immediate cause of the claimant’s injury, whether the cause be the intentional or negligent conduct of another actor or the occurrence of some natural event. Concern is most acute when it is very serious wrongdoing by a third party that has led to the loss, especially if the claimant is insured and the real claimant is an insurer relying upon its right of subrogation. Under English law the principle of joint and several liability means that the public authority is liable for the whole of the loss, with a right of contribution against any joint wrongdoer (if he can be found and is solvent), although its moral responsibility for the damage may seem far less. The well-established rule of subrogation ensures that the beneficiary is an insurance company that has received premiums for assuming the very risk that has materialised. It is in this type of case that recovery of compensation against the public authority can be perceived as promoting a compensation culture and as weakening a common law tradition of robust self-reliance.
- 3.36 Example 2 above shows that the public authority may nonetheless be found liable to pay compensation in such circumstances. In that case (unlike some of the other Examples) the public authority had created the risk by establishing the open institution, and the risk was arguably of an exceptionally high nature.

### **Omissions**

- 3.37 In many instances of this type of case liability will be precluded by the “omissions” rule, that is, a public authority may not as a general rule be made liable for failing negligently to exercise a discretionary power. This is so, even if a lawful exercise of the power would have conferred a benefit on the claimant or would have protected the claimant against loss (see, in particular, Example 6 above).

<sup>44</sup> The cases mentioned at note 39 would appear to fall into this category.

- 3.38 This rule, which reflects a long common law tradition, has not escaped criticism.<sup>45</sup> First, it is not always easy to distinguish affirmative action from a failure to act. It has been observed that there are many situations in which it is impossible to draw any logical line.<sup>46</sup> Even in Example 6 the conduct of the highway authority, taking account of its statutory responsibilities, could perhaps be described in affirmative terms as careless management of the highway, just as a driver's failure to apply the car brakes to avoid a child on the road could be described affirmatively as negligent driving. In what is generally seen as the leading private law case on "omissions" Lord Mackay, who gave one of the two principal speeches, avoided relying on the distinction between acts and omissions.<sup>47</sup> In a number of cases concerning public authority liability the courts have not relied on the distinction (see Example 9 above where liability was denied without any reference to the omission rule).
- 3.39 Secondly, the application of the rule produces fine distinctions that do not seem to reflect considerations of policy. For instance, if a rescue service instructs a volunteer to cease a rescue attempt, this is an affirmative act and the service is liable, but if it instructs a rescuer to search in the wrong place, this is an omission and there is no liability.<sup>48</sup> Furthermore, the grounds for excluding liability for omissions in private law do not seem so obviously applicable in the public law context.<sup>49</sup> This appears particularly to be the case where the public authority has no good reason for not exercising the statutory power and under principles of public law would be treated as misusing its discretion if it did not exercise the power.<sup>50</sup> Thirdly, it would appear that in many cases an omission rule is in any event unnecessary to preclude the liability of the public authority. For example, in *Stovin* (see Example 6) the highway authority did not directly cause physical damage to the claimant and the authority did not know, and had no reason to know, that the particular claimant was at risk if the hazard was not removed. There was, therefore, arguably insufficient "proximity" (see below) between the claimant and the authority. The injured party had a right of action against the other road user, who was insured, and the sole purpose of bringing the authority into the action was to enable the insurer of the other road user to recover from the public authority part of the payment that it had made to the injured party. The claimant would, therefore, not suffer injustice if the claim were denied and it would not obviously improve distributive justice to require the taxpayer to fund the claimant's insurer.

<sup>45</sup> The rule has not been adopted by the High Court of Australia: see eg *Pyrenees Shire Council v Day* (1988) 192 CLR 330; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

<sup>46</sup> P Atiyah, *Atiyah's Accidents, Compensation and the Law* (6th ed 1999 by P Cane) p 60.

<sup>47</sup> *Smith v Littlewoods Organisation Ltd* [1987] AC 241, where the conduct could be described affirmatively as careless control of property or as an omission to take security measures.

<sup>48</sup> *Daly v Surrey County Council*, (unreported, QBD 24 October 1997); *Oll Ltd v Secretary of State for Transport* [1997] 3 All ER 897.

<sup>49</sup> See C Booth and D Squires, *The Negligence Liability of Public Authorities* (2005) pp 148 to 149.

<sup>50</sup> See eg *Padfield v Minister of Agriculture, Fisheries and Food* [1986] AC 997.

- 3.40 In any event the “omission” rule is not absolute. It may be displaced if the public authority has a “special relationship” with the claimant or has assumed “responsibility” for the claimant. The conditions for establishing a special relationship or assumption of responsibility appear to be very similar to, if not the same as, those necessary for establishing that the claimant was sufficiently “proximate” to the public authority, a control mechanism used quite generally to exclude a duty of care in actions for negligent infliction of damage.

### **Proximity**

- 3.41 Proximity may be denied if there is no prior connection between the claimant and the defendant public authority; Examples 6, 9 and 10 are good illustrations. In this kind of case the public authority may be very seriously at fault but the courts seem concerned not to impose liability where the claimant is simply one of a large and indeterminate class of those who might be affected by the careless conduct. The position is likely to be different if the public authority itself brings about the very source of danger,<sup>51</sup> or if the public authority knows, or ought to know, that a particular person is at risk of serious harm,<sup>52</sup> especially where the public authority had prior contact with the claimant and had either given express assurances of protection<sup>53</sup> or had conducted itself in a way that strongly suggested that the claimant would be protected. Sometimes proximity is denied even if the claimant has been in close contact with the public authority, but in circumstances where a duty of care to the claimant would conflict with the authority’s primary obligations.<sup>54</sup>
- 3.42 In some cases proximity has been found even though the public authority did not know, and had no reason to know, that a particular claimant was at risk of harm. Important distinguishing factors in these cases seem to be the intensity of control exercised by the public authority, the vulnerability of the claimant, the reliance of the claimant upon the authority acting carefully, and the likelihood of grave harm occurring if care were not exercised.<sup>55</sup> However, extending the duty of care in this way certainly increases the exposure of public bodies, particularly those that are responsible for health and safety even if they are not the primary actors, to very considerable liability. It may also be the case that the courts are more willing to find proximity if a smaller group of persons is at risk than the public generally. A

<sup>51</sup> See Example 2 where it might be argued that the public authority created a situation of exceptional risk.

<sup>52</sup> See *Swinney v Chief Constable of Northumbria* [1997] QB 464.

<sup>53</sup> See *Welsh v Chief Constable of the Merseyside Police* [1993] 1 All ER 692, where the Crown Prosecution Service was held liable for the detention of the claimant caused by its failure to pass to the court information which it had undertaken to convey. See also *T v Surrey County Council* [1994] 4 All ER 577, where the local authority was held liable for negligently assuring the claimant that she could safely use a particular child minder.

<sup>54</sup> See *Elguzouli v Commissioner of the Police of the Metropolis* [1995] QB 335.

<sup>55</sup> All these factors were present in Example 8 above even if the damage could be seen as directly caused. See also *Thames Trains v Health and Safety Executive* [2003] EWCA Civ 720, (2003) 147 Solicitor’s Journal Law Brief 661 where the Court of Appeal did not use the language of “direct” and “indirect” infliction of damage.



good example is *Godden v Kent and Medway Strategic Health Authority*,<sup>56</sup> where it was held arguable that the authority owed a duty of care to investigate complaints against a general practitioner that he had abused female patients, and therefore to protect subsequent patients from similar abuse. However, the line between a group of persons who may be at risk and the public generally seems somewhat arbitrary: it might be argued that even in Example 9 above the group of those objectively at risk was small.

- 3.43 It is not easy to predict how these factors will be applied to new situations. For example, a topic of considerable concern is how proximity would be applied if the claimant were a child alleging that a local authority, although it did not know the child's actual circumstances, ought to have known that it was being abused and should have taken the child into care. It is probable, but not certain, that the authority would be held to owe a duty of care. Relevant factors would be the vulnerability of the child, its dependence on the authority, and the likelihood of serious harm if reasonable care were not taken. In addition, there would be a distorting effect on decision making if there were no duty in this case but, following *D*<sup>57</sup> there were a duty to exercise care in taking a child into care.

#### ***The Caparo test***

- 3.44 Even if "proximity" is established, the claimant in the kind of case presently under consideration must show on the *Caparo*<sup>58</sup> test that it would be "fair, just and reasonable" to impose a duty of care on the public authority. Since the case of *Osman*<sup>59</sup> in the European Court of Human Rights, the English courts seem to have been less inclined to employ blanket public policy grounds to exclude the liability in negligence of public bodies, but a number of fairly general reasons for denying a duty of care seem to remain potentially applicable.
- 3.45 For example, the courts might hold that a putative duty of care and the liability to pay damages in the event of breach would reduce the resources available to the authority. Such an argument exposes the tension between corrective justice to the individual claimant and considerations of distributive justice to the community – some might well believe that public money is better spent on improving public services than in compensating remote victims of public authority carelessness. The court might also fear that imposing liability could lead public bodies to be overcautious in formulating policies. The latter has been a particular concern. For example, in *X v Bedfordshire County Council*<sup>60</sup> Lord Browne-Wilkinson, in considering whether a local authority should be held liable for negligently taking a child into care, said:

<sup>56</sup> [2004] EWHC 1629, [2004] Lloyd's Rep Med 521.

<sup>57</sup> See Example 3 and note 8 above.

<sup>58</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605.

<sup>59</sup> *Osman v United Kingdom* (2000) 29 EHRR 245.

<sup>60</sup> [1995] 2 AC 633, 750.

If a liability in damages were to be imposed, it might well be that local authorities would adopt a more cautious and defensive approach to their duties....If the authority is to be made liable in damages for a negligent decision to remove a child (such negligence lying in the failure properly first to investigate the allegations) there would be a substantial temptation to postpone making such a decision until further inquiries have been made in the hope of getting more concrete facts. Not only would the child in fact being abused be prejudiced by such delay: the increased workload inherent in making such investigations would reduce the time available to deal with other cases and other children.

Similarly in *Stovin v Wise*<sup>61</sup> Lord Hoffmann remarked that imposition of liability would distort the priorities of local authorities, which he believed would be bound to play safe by increasing their spending on road improvements rather than risk enormous liabilities for personal injuries accidents.

- 3.46 The courts are here, therefore, concerned that the imposition of liability might *over* deter the public authority and distort decision making. Such a reaction to liability in certain contexts might not be implausible for public bodies are not ordinarily subject to the kind of market pressures that would make over-cautious private businesses uncompetitive.<sup>62</sup> We refer elsewhere to the importance of establishing an empirical understanding in this area.<sup>63</sup>
- 3.47 A related concern is that the imposition of a duty of care would distract the public authority from the performance of its primary functions. This has become a strong theme in recent cases. For example, the primary function of the police is the investigation and detection of crime,<sup>64</sup> and the primary function of the CPS is to prosecute suspected offenders.<sup>65</sup> The imposition of a duty of care in the handling of witnesses or potential witnesses, or in respect of pre-trial custody procedures, might impair the efficient performance of the primary functions.
- 3.48 That concern is all the greater when the imposition of a duty of care towards the claimant would conflict with the duty of protecting the interests of others for whose benefit the statutory regime is primarily intended, and, therefore, might lead the authority to give insufficient weight to those interests. Most notably in *D v*

<sup>61</sup> [1996] AC 923, 958.

<sup>62</sup> This a point made by a number of commentators: see eg R Cass, "Damage Suits Against Public Officers" (1981) *University of Pennsylvania Law Review* 1110, 1133 to 1174; D Cohen and J Smith, "Entitlement and the Body Politic: rethinking negligence in public law" (1986) 64 *Canadian Bar Review* 1, 8 to 9.

<sup>63</sup> Para 5.11 below.

<sup>64</sup> *Brooks v Metropolitan Police Commissioner* [2005] UKHL 24, [2005] 1 WLR 1495.

<sup>65</sup> *Elguzouli v Commissioner of Police of the Metropolis* [1995] QB 335.

East Berkshire Community NHS Trust (see Example 3 above) the House of Lords held that the local authority did not owe a duty of care towards a parent when it was deciding whether to take a child into care, because the imposition of such a duty would conflict with the paramount obligation of the authority to safeguard the interests of the child.<sup>66</sup>

3.49 Indeed in some cases a duty of care has been denied on the straightforward basis that the relevant statutory regime was established, for example, in the interests of protecting the health and safety of the public, and not to advance the economic interests of those in the claimant's position. For example, in *Reeman v Department of Transport*<sup>67</sup> one reason why the claimant failed in his action against the Department for the latter's negligent issue of a certificate of seaworthiness was that the purpose of the statutory regime was to protect the physical safety of those at sea, not the financial interests of purchasers. The imposition of a duty in those circumstances would not have conflicted with the Department's primary obligations, but the Court of Appeal was plainly concerned that the claimant should not be able to enjoy what might be seen as a "free ride" on the statutory regime when the claimant had other means of protecting itself against the loss which occurred.<sup>68</sup> Similarly, in *Philcox v Civil Aviation Authority*<sup>69</sup> the owner of an aircraft, negligently certified as airworthy by the CAA, failed in his action against the CAA: the purpose of the statutory regime was not to protect the interests of aircraft owners.

3.50 In other instances the specific statutory regime may have been established to advance the interests of those in the claimant's position, but the regime provides a special procedure for challenging the conduct of the relevant public authority. For example, in the fields of social security and planning there are elaborate statutory schemes which provide specific procedures for challenging the decisions of public bodies, and it is very unlikely that the claimant will be able to use an action in negligence as a means of recovering compensation for an adverse decision.<sup>70</sup> The rationale in these cases has been reinforced by the important decision of the House of Lords in *Marcic v Thames Water Utilities*.<sup>71</sup> In that case the defendant was not a public authority in the strict sense but a privatised undertaking subject to a strict regime of statutory regulation; and the action was for nuisance rather than negligence. Nonetheless the House of Lords held that in the circumstances the only route of complaint was through the statutory regulator who was best placed to evaluate questions of efficiency, capacity and the allocation of resources.

<sup>66</sup> [2005] 2 AC 373. See also eg *A v Essex County Council* [2004] 1 WLR 1881 and *Harris v Evans* [1998] 1 WLR 1285.

<sup>67</sup> [1997] 2 Lloyd's Rep 648.

<sup>68</sup> See J Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) *Law Quarterly Review* 301.

<sup>69</sup> (1995) 92 (27) *Law Society Gazette* 33.

<sup>70</sup> See eg *Jones v Department of Employment* [1998] 1 QB 1 and *Strable v Dartford Borough Council* [1984] *Journal of Planning and Environment Law* 329.

<sup>71</sup> [2004] 2 AC 42.

- 3.51 The use of such procedures may leave the claimant uncompensated for past losses, but the existence of the procedure has nonetheless been held to exclude a common law action in negligence. Other more general alternative remedies, such as complaints to Ombudsmen or recourse to the Criminal Injuries Compensation Board, have only occasionally precluded common law actions.<sup>72</sup> The availability of judicial review has not generally been held to rule out a common law action in negligence. However, in certain circumstances a timely application for judicial review, if successful, would avoid all or most of the loss that the claimant might otherwise sustain. In such cases there seems no good reason why a failure to apply in good time for judicial review should not on ordinary principles of causation exclude an action for damages.

### **Conclusions on Control Mechanisms**

- 3.52 Some commentators have criticised the way in which the courts have used the foregoing control mechanisms to restrict the liability of public bodies, particularly where the courts' reasoning seems to rest on factual premises for which the critics believe there is inadequate empirical evidence.<sup>73</sup> They point to other jurisdictions in which the courts have imposed liability more extensively on public bodies, without any reported detrimental consequences on good administration or on society generally.<sup>74</sup> They argue that the courts can limit the liability of public bodies in a manner consistent with public policy by tailoring the standard of care to reflect the complexity of much administrative decision making.<sup>75</sup> They do not believe that either the Ombudsmen or government compensation schemes are an appropriate substitute for legal liability to pay damages for government failure.
- 3.53 On the other hand there are commentators who believe equally strongly that the courts have already gone too far in extending the liability of public bodies. This is particularly so in cases where the public authority is far removed from the immediate cause of the claimant's damage, where the authority may have to balance a number of competing interests, taking account of the resources available to it and the opportunity costs of action or inaction, or where the claimant had practicable means of avoiding loss. They are also concerned that liability in such cases breeds an undesirable compensation culture: "If the public

<sup>72</sup> We discuss the relationship between the courts and other remedies at 4.7 to 4.38 below. One possibility for reform might be for the courts to have the power to direct claimants to other remedies, for example the ombudsmen. See further para 4.37 below.

<sup>73</sup> See eg B Marquesinis, J-B Auby, D Coester-Waltjen and S Deakin, *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis of Five English Cases* (1999).

<sup>74</sup> In particular, the Conseil D'Etat in France.

<sup>75</sup> Evidence of the courts shifting the emphasis from duty to breach can be found in *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 572, 591; and in *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, 655, 672. Some commentators have welcomed this shift; see eg D Fairgrieve, "Pushing back the boundaries of public authority liability: Tort enters the classroom" [2002] *Public Law* 288.

thinks – as some people seem to think – that ultimately the government is responsible for everything that happens in society, then the government (and other public bodies) are liable to get sued, whatever they do or fail to do”.<sup>76</sup>

- 3.54 In evaluating these arguments it is important to bear in mind the impact of the European Convention on Human Rights and the Human Rights Act 1998. The European Court of Human Rights has held that some of the Articles of the Convention impose positive duties on the state to protect citizens from certain harms. For example, the Court has held that Article 2 requires the police to take positive steps to protect individuals whom they know, or ought to know, are threatened with a real and immediate risk to their lives.<sup>77</sup> Similarly, it has held that under Article 3 local authorities must take reasonable steps to take into care children whom they know, or ought to know, are being seriously harmed by their parents.<sup>78</sup> Decisions of this nature impose duties on public bodies in circumstances where no duty might have been held to exist at common law, because, for example, the omissions rule (see above) might have precluded liability. Furthermore, where the court rejects certain policy arguments against imposing liability on a public authority, the weight of such arguments in other non-Convention contexts tends also to be weakened.
- 3.55 From the point of view of the public administration, the major concerns would appear to be that tort liability may well have a seriously detrimental impact on decision making, and that large-scale awards of damages divert resources that could more beneficially be otherwise deployed.<sup>79</sup> There are arguably cases where imposition of liability would not give the correct “signals” as to who is principally responsible for the claimant’s loss and would not be an economically efficient outcome. The rules on joint and several liability often leave a public authority that is remote from the immediate cause of the claimant’s loss shouldering the whole responsibility for compensating the claimant.
- 3.56 These competing arguments raise difficult issues of public policy that are of great importance. The sums of public money at stake are very large and the impact on public administration is considerable. Any evaluation of these arguments must also have regard to the question *why* citizens resort to actions for damages. We must consider whether there are other remedies which would meet the demands of the citizen, or at least strike a better balance between individual claims of the citizen and the public interest.<sup>80</sup>

<sup>76</sup> P Atiyah, “*The Damages Lottery*” (1997) p139; T Weir, “Governmental Liability” [1989] *Public Law* 40. See also para 4.2 below.

<sup>77</sup> *Osman v United Kingdom* [2000] 29 EHRR 245. In *Van Colle v Chief Constable of Hertfordshire Police* [2006] EWHC 360, [2006] 3 All ER 963 the police were held liable to pay substantial damages because they had failed to take reasonable steps to prevent the murder of a witness whom they knew, or ought to have known, was exposed to such a real and immediate threat.

<sup>78</sup> *Z v United Kingdom* (2001) 34 EHRR 97.

<sup>79</sup> See eg Harlow, *State Liability* (2004) especially pp 26 to 27, 84 to 85 and 126 to 127.

<sup>80</sup> See Part 4 below.

## LIABILITY FOR UNLAWFUL ADMINISTRATIVE DECISIONS

- 3.57 So far the analysis has concerned cases where the claimant alleges that the public authority has *negligently* injured the claimant, the claimant's property or the claimant's economic interests, and the crucial question is whether the authority owes a duty of care. Example 11 raises a different, but closely related, question: should the public authority be liable to pay compensation where it has taken an *unlawful* administrative decision?
- 3.58 A decision or other measure is unlawful on public law grounds when, for example, it conflicts with a relevant superior rule of law contained in primary or secondary legislation, or infringes binding EU law, or is contrary to applicable principles of administrative law. Such an unlawful decision or other measure is liable to be quashed in proceedings for judicial review. An unlawful decision or other measure may not have been taken *negligently*; and not all negligent conduct by public bodies could be appropriately described as unlawful in a public law sense. Negligence and illegality are, therefore, distinct, but overlapping, concepts.
- 3.59 In Example 11 it should be assumed for the purposes of the present discussion that the decision to deny a licence was arguably unlawful in a public law sense but was not negligently taken. The claimant could, therefore, bring proceedings for judicial review in respect of the adverse decision in the Administrative Court. The claimant may persuade the Administrative Court that the decision denying a licence is procedurally and/or substantively flawed, and in that event the claimant has open all the remedies available on judicial review. These include a declaration upon any point of law, an order quashing the decision and an order remitting the matter to the decision maker to reconsider in accordance with any legal directions given by the court. If the decision were procedurally flawed because, for example, the claimant had been denied an opportunity to make representations before the adverse decision was taken, the public authority, after hearing representations before taking any fresh decision, might still lawfully deny a licence to the claimant. Even if the decision were substantively unlawful, and were quashed on judicial review, the public authority might be able in certain cases to take a new decision refusing a licence on other lawful grounds. But frequently a quashing of a decision on substantive grounds leads to a favourable outcome for the claimant because the public authority has no alternative legal basis for achieving the same original result.
- 3.60 However, even assuming a favourable outcome on judicial review, the claimant will not be able to recover for past losses caused by the original unlawful decision. A prompt application for judicial review may in some cases avoid, or at least substantially reduce, any loss. The court has power to grant interim relief pending the hearing of the application and/or to order an expedited hearing of the application. Nonetheless there will be cases where for good reason interim relief is not granted, and even an expedited hearing may not be sufficient to forestall substantial loss, particularly if the matter is taken to appeal, as is likely if a significant point of law is in issue. On the facts of the Example an interim order maintaining the status quo (that is, the last uncontested position between the

parties) would not be sufficient for the claimant. The claimant would need to obtain an interim order to change the status quo in his favour, that is, a mandatory interim order requiring the authority to grant a licence. Interim mandatory injunctions are in any event granted only in exceptional circumstances<sup>81</sup> and are particularly difficult to obtain against public bodies where considerations of public interest must be weighed in the scales.

3.61 To allow an action for damages, however, would be a radical departure from the existing law, almost certainly requiring legislation. Such a change would move English law towards the system of French administrative law, where the liability of public bodies is founded upon “fault” and “mere illegality is in itself a fault capable of giving rise to liability without more”,<sup>82</sup> and towards EU law.<sup>83</sup> This would raise a number of issues, including the following.

3.62 First, it would be necessary to specify precisely what kind of “fault” would be sufficient to ground liability. If illegality as such were sufficient to give rise to liability, there would be concern that public bodies might become liable to pay very large amounts of compensation in respect of economic losses where they had made excusable errors of law. That would be likely to be the case even if the claimant was required to take all reasonable steps to mitigate any loss arising from unlawful administrative action, including, where appropriate, the bringing of timely proceedings for judicial review to have the unlawful decision or other measure set aside. Public law today is often complex and uncertain, and error in its application is inevitable, even if the public authority has exercised reasonable care. This real concern might be addressed if liability to pay compensation for illegality was restricted to cases where the loss was significant and clearly established, and where the public authority had made a manifest and serious error, for example, where the applicable law was precise and clear and the public authority had failed to apply it correctly. This is the test developed by the Court of Justice in Luxembourg for determining whether a member state should pay damages for breach of EU law.<sup>84</sup> Several commentators have urged that the domestic principles governing liability for unlawful administrative measures should be brought into line with the principles of state liability for breach of EU law, contending that there is no good reason for distinguishing illegality under domestic and EU law. Others have argued that the Court of Justice developed the doctrine of state liability as a response to a perceived failure of political will on the part of certain member states to implement EU law correctly or at all, and that

<sup>81</sup> See Spry, *Equitable Remedies* (6th ed 2001) at pp 556 to 560.

<sup>82</sup> I Neville Brown and J Bell, *French Administrative Law* (5th ed 1998) p 190, citing the conclusions of the *commissaire du gouvernement* in *Ville de Paris c. Driancourt* (CE Sect. 26 January 1973) that “subjects have a genuine right to legality and can claim damages for the harmful consequences of the breach of this right”. Exceptionally fault may not be required and liability can be established on the principles of risk or of equality of sacrifice: see above pp 193 to 200.

<sup>83</sup> See note 17 above.

<sup>84</sup> See Cases C-46 and 48/93 *Brasserie du Pêcheur SA v Germany*; *R v Secretary of State for Transport, ex parte Factortame (No 3)* [1996] ECR I-1029. See also paras 2.14 to 2.18 above.

this rationale for state liability has no application in the UK context. However, the approach of the Court of Justice to state liability may arguably be examined on its own merits whatever the precise motivation that led the Court to develop its jurisprudence.

- 3.63 Secondly, it would be necessary to harmonise the relationship between an action based on “fault” and existing remedies. For example, a successful application for judicial review leads typically to the quashing of an unlawful decision. It does not lead automatically to the result desired by the claimant because the public authority may be able to retake the same substantive decision after a successful judicial review. This would give rise to two concerns. First, the public authority could be made potentially liable to pay compensation following the quashing of an unlawful administrative decision or other measure, even though it could lawfully retake the same substantive decision. Some would argue that it would be wrong to require the public authority to pay compensation where the prejudice to the claimant was in reality a consequence of an ultimately lawful decision or other measure. Secondly, if the public authority was not made liable in those circumstances, public bodies might be induced to seek alternative justifications for the substantive decision, or to achieve the same result through a fresh decision, with a view to avoiding the payment of compensation. In other words, decision making might be distorted in a manner not consistent with the public interest.
- 3.64 There would also be an uneasy tension with the existing tort of breach of statutory duty. Breach of statutory duty would appear to be an obvious “fault” in any fault-based system, but “claims for breach of statutory duty are unlikely to be permitted in relation to public bodies complying with statutory duties to provide public services. Indeed, other than in cases of industrial safety, or those relating to statutes which expressly create a right to a remedy in damages, it is hard to find any cases in which the courts will recognise that breach of statutory duty ought to give rise to a remedy in damages”.<sup>85</sup> The principal reason is that the courts have construed the relevant legislation imposing a statutory duty as not conferring rights on individual claimants.<sup>86</sup> If the same approach were taken on a putative “fault” based claim in respect of the facts in Example 11 above, it is far from clear that the claimant would succeed in obtaining damages from the public authority. It could plausibly be argued that such licensing legislation was intended to conserve a common property resource in the public interest<sup>87</sup> and was not intended to promote the commercial interests of any particular fisherman.
- 3.65 So if the law were changed to allow an action for compensation in respect of unlawful administrative decisions or other measures, the new right could be frustrated if the courts required the claimant to show, by reference to the strict tests currently applied, that the infringed rule of law was intended to confer an

<sup>85</sup> C Booth and D Squires, *The Negligence Liability of Public Authorities* (2005) at p 305.

<sup>86</sup> See eg *O'Rourke v Camden London Borough Council* [1998] AC 188 This approach has been criticised by Sir Robert Carnworth, “The *Thornton* heresy exposed: Financial Remedies for Breach of Public Duties” 1998 *Public Law* 407.

<sup>87</sup> This is the economic rationale: see eg Lipsey and Chrystal, *Economics* (10th ed 2004) at pp 322 to 325.



- 3.66 individual right on the claimant. But if there was no such requirement, or a significantly weaker test were applied, claimants could potentially recover compensation in situations where in the past the courts have denied that breach of statutory duty gave rise to a private cause of action for damages.
- 3.67 Similarly, the relationship between any new fault-based action and actions for negligence would not appear clear cut. For example, some actions in negligence have been based upon allegations of administrative error or delay leading to loss. However, the courts have rarely held that public bodies owe a duty of care in their administrative procedures to avoid infliction of economic loss.<sup>88</sup> Such cases are considered suitable par excellence for Ombudsmen or specific compensation schemes. It has sometimes been suggested that unreasonable delay should be a fault giving rise to liability to pay compensation.<sup>89</sup> However, if a putative fault-based system of liability were to include careless administrative error or delay within the scope of fault, potential liability would be much enlarged from the present position.
- 3.68 Any fault-based scheme would also raise questions about the continuing utility of the tort of misfeasance in public office.<sup>90</sup> There would be considerable overlap between the two forms of liability, but it would in general be much easier to establish liability on the basis of fault than on misfeasance, and the principal reason for preferring the latter would be the hope of obtaining punitive damages. However, even if liability for unlawful administrative action were based upon serious and manifest error, as mentioned above, it would not be necessary to show that the public authority had either maliciously targeted the claimant or had intentionally acted unlawfully, as it is with the tort of misfeasance. It might be thought that malicious targeting or intentional wrongdoing by a public authority remained in a separate and distinct category of fault and that the historic tort of misfeasance in public office should be retained as a residual remedy in the very rare cases of such exceptionally serious illegality. On any view any new remedy for unlawful administrative action would in practice much reduce the importance of the traditional tort.

<sup>88</sup> See note 18 above

<sup>89</sup> See the Justice-All Souls Committee, *Administrative Justice – Some Necessary Reforms* (1988) Chapter 11.

<sup>90</sup> See note 17 above.

# **PART 4**

## **ARE DAMAGES ALWAYS THE ANSWER?**

### **INTRODUCTION**

- 4.1 Sometimes a complainant may not want damages. Sometimes damages may not be the appropriate remedy on a principled basis. The courts themselves accept that sometimes an alternative remedy may be more appropriate.<sup>1</sup> This Part examines the alternatives available and raises some questions about the relationship between damages available through the courts and other remedies.
- 4.2 It is important to bear in mind when considering the proper availability of damages and other remedies the current debates on the so-called “compensation culture”. This was considered in a report by the Better Regulation Task Force in May 2004, which examined to what extent the compensation culture actually exists and what could be done to improve the current system for people with genuine claims for compensation.<sup>2</sup> The Compensation Act 2006 received Royal Assent on 25 July 2006. Part 1 of the Act contains provisions about the law relating to negligence and breach of statutory duty. Part 2 relates to the regulation of claims management services.

### **HOW DO YOU MEASURE DAMAGES?**

- 4.3 As a preliminary matter, it is worth noting that the idea of damages is not a unitary or simple one. The courts may use different methods of assessing damages depending on the type of action concerned. The measure of damages in tort is full compensation: the aim is to put the claimant back in the same position he or she would have been in had it not been for the tortious action. But what constitutes full compensation is determined by rules of law, and, where there is no direct relationship between the loss and money, by conventional measures, such as the calculus of general damages in personal injury cases.
- 4.4 As we have seen, the courts have decided that damages under the Human Rights Act 1998 are of a more limited nature.
- 4.5 The public sector ombudsmen are able to recommend the payment of compensation where they find maladministration. Most ombudsmen, if they decide to recommend the award of compensation, will do so on the basis that the complainant should be put back in the position that he or she would have been in

<sup>1</sup> See *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124 and *X (minors) v Bedfordshire CC* [1995] 2 AC 633 (but note that the court’s reasoning on the availability of alternative remedies was rejected by the European Court of Human Rights in *Z v UK* (2002) 34 EHHR 3, who said that neither the Criminal Injuries Compensation Scheme nor the possibility of applying to the Local Government Ombudsman provided the claimants with an adequate alternative means of redress).

<sup>2</sup> Better Regulation Task Force, *Better Routes to Redress* (May 2004).

but for the maladministration, possibly with additional compensation for distress. But the ombudsmen have a great deal of discretion, both over the amount of any award and in respect of how it will feature in a package of remedies. The Local Government Ombudsman's guidance on remedies suggests that they will award financial compensation as a last resort, and only if other remedies are not sufficient because of the passage of time or events that have occurred. The guidance states that in some circumstances an apology may be all that is necessary.<sup>3</sup>

- 4.6 Tortious damages are all or nothing. A finding of negligence liability in the courts will lead to a public body paying the full measure of tortious damages. A finding of no liability means the claimant gets nothing. This has been argued to be inappropriate when public bodies and public actions are concerned.<sup>4</sup> As noted, sometimes the measure of damages will be different, for example under the Human Rights Act, or where the ombudsman has made a recommendation for compensation. The substantive project must consider questions about the appropriate measure of damages where public bodies are concerned. But we must also consider what people want when they seek damages: do they always want the full measure of damages or do they sometimes just want a more nominal amount by way of recognition of what has happened? Or is the demand for money really standing in for some other desire, like that for a full explanation, or an assurance that the defect leading to the loss has been cured?

#### **ALTERNATIVE REMEDIES: THE OPTIONS AVAILABLE**

- 4.7 There are a number of alternative redress mechanisms to the courts. The relationships between these bodies and the courts and the relationships between these other bodies themselves, are not simple. Redress may be available through ombudsmen, tribunals, statutory compensation schemes or through ex gratia payments made by public bodies. Parties may be encouraged or required to attempt dispute resolution through alternative dispute resolution mechanisms such as mediation.
- 4.8 The substantive project will consider the interrelationship between these alternative redress mechanisms and the courts and the relationship between damages and alternative remedies and in particular, what principles should decide what remedy is most appropriate in any given case.

<sup>3</sup> The Commissioner for Local Administration in England, "Remedies: Guidance on good practice 6", available on <http://www.lgo.org.uk/pdf/remedies.pdf> (last visited 18 September 2006). See paras 8 and 11. This document generally contains detailed guidance on the award of different remedies, including compensation, including in different factual situations.

<sup>4</sup> See M Fordham, "Reparation for Maladministration: Public Law's Final Frontier" (2003) 8(2) *Judicial Review* 104, at p 106, in which he argues that "a public lawyer's problem cannot be solved with a private lawyer's solution. Administrative law does not thrive using 'on-off' switches. It never has. It is of their essence that principles of public law are contextual and flexible."

- 4.9 To help us answer this question, we will look at the purposes of each type of remedy, and what people want by way of remedy when they pursue any type of complaint or dispute against a public body. We have in this scoping paper taken damages through the courts as our primary focus, and cast other remedies as “alternatives”. The substantive project will need to look at the extent to which other remedies are satisfactory alternatives to damages obtained through the courts. To what extent does each provide what people are really looking for by way of remedy?<sup>5</sup>
- 4.10 These alternative routes to redress may sometimes allow for the award of monetary compensation. Often, however, the focus is on different types of remedy, for example apologies, specific remedial action or revision of a public body’s practices and procedures.
- 4.11 Although the different redress mechanisms have been set out in categories below, it is notable that in fact they do not always neatly fit into categories. For example, complaints bodies exist that are not truly internal complaints mechanisms and do not fall within the criteria for ombudsmen as set out by the British and Irish Ombudsmen Association, but fall somewhere in between. To give another example, the Pensions Ombudsman in fact falls under the supervision of the Council on Tribunals and is different from other ombudsmen in that he can make binding recommendations. Different sectors have their own complaints structures; it is difficult to make many generalisations.
- 4.12 We have attempted to focus on “public sector” institutions, that is those that deal with complaints against public rather than private bodies. This is not a clear cut distinction. The Housing Ombudsman, for example, might be termed a “hybrid” ombudsman, in that he deals with complaints made against both Registered Social Landlords (which may or may not count as public bodies) and some private sector landlords.

#### **The impact of the Administrative Justice White Paper**

- 4.13 The government is in the process of reforming the administrative justice system. A White Paper was published in July 2004, which set out reforms to the tribunal system and created the idea of “proportionate dispute resolution”, described in the White Paper as follows:

The aim is to develop a range of policies and services that, so far as possible, will help people to avoid problems and legal disputes in the first place and; where they cannot, provides tailored solutions to resolve the dispute as quickly and cost-effectively as possible.<sup>6</sup>

<sup>5</sup> For research related to this question see H Genn, *Paths to Justice: What People do and Think About Going to Law* (1999), ch 6; also P Pleasance, *Causes of Action: Civil Law and Social Justice* (2nd ed 2006), ch 4.

<sup>6</sup> Transforming Public Services: Complaints, Redress and Tribunals (2004) Cm 6243, para 2.2.

A draft Tribunals, Courts and Enforcement Bill, following on from the White Paper, has now been published for consultation.<sup>7</sup>

4.14 Our project will need to take these reforms into account and in particular consider what impact proportionate dispute resolution should have on any recommendations we make.

4.15 In our recently published issues paper “Housing: Proportionate Dispute Resolution”<sup>8</sup> we attempted to develop ideas for a more proportionate system for solving housing problems and resolving housing disputes. Our work in this area was specifically highlighted in the government’s Administrative Justice White Paper.<sup>9</sup>

#### **Public sector ombudsmen<sup>10</sup>**

4.16 There are a number of public sector ombudsmen who have jurisdiction to consider complaints about public bodies, principally the Parliamentary Commissioner for Administration; the Health Service Commissioner; and the Commissioners for Local Administration, commonly known as the Local Government Ombudsmen.<sup>11</sup> In Wales, there is one Public Services Ombudsman. There are proposals to remove certain legislative restrictions to enable the three main public sector ombudsmen in England to work more closely together.<sup>12</sup>

4.17 Each ombudsman service operates under its own rules; it is not possible to do more at this stage than make general statements about ombudsman services. Private sector ombudsman may provide useful comparisons in terms of when and how much compensation they will award and how they award other remedies, as well as their working practices in general. Although ombudsmen all operate separately, there is some linkage in their common membership of the British and Irish Ombudsmen Association.<sup>13</sup>

<sup>7</sup> See <http://www.dca.gov.uk/legist/tribenforce.htm> (last visited 7 September 2006). The consultation period runs to 22 September 2006.

<sup>8</sup> Housing: Proportionate Dispute Resolution (2006) Law Commission Issues Paper, available online at [http://www.lawcom.gov.uk/housing\\_disputes.htm](http://www.lawcom.gov.uk/housing_disputes.htm).

<sup>9</sup> Transforming Public Services: Complaints, Redress and Tribunals (2004) Cm 6243, Annex D.

<sup>10</sup> For a more detailed discussion of ombudsmen, see Housing: Proportionate Dispute Resolution (2006) Law Commission Issues Paper, Part 6, available online at [http://www.lawcom.gov.uk/housing\\_disputes.htm](http://www.lawcom.gov.uk/housing_disputes.htm).

<sup>11</sup> There are also other “hybrid” ombudsmen which can hear complaints about public and private sector bodies, for example the Independent Housing Ombudsman Service.

<sup>12</sup> Reform of Public Sector Ombudsmen Services in England: A Consultation Paper issued by the Cabinet Office, August 2005

<sup>13</sup> See <http://www.bioa.org.uk> (last visited 18 September 2006). Among the objects of the Association are to formulate standards of best practice for ombudsmen and to hold meetings and conferences and other activities to encourage the efficiency and effectiveness of ombudsman services.

- 4.18 The ombudsmen have a potentially wide jurisdiction to investigate complaints of maladministration by public bodies. There is no definition of what constitutes maladministration, but it has generally been given a wide definition and interpreted flexibly. By statute the ombudsmen cannot investigate matters for which a complainant could obtain a remedy through court proceedings, although it may be that this restriction is interpreted loosely by ombudsmen.<sup>14</sup> The ombudsmen are intended in general to provide a cost-free and more informal method of dealing with grievances against the state. It has been said that the ombudsmen may in some ways be a better long-term complaints resolution mechanism where public bodies are concerned, on the grounds that they are more able to deal with the systemic nature of some public law disputes and are able to provide feedback to public bodies to enable them to improve their working practices and policies.
- 4.19 The ombudsmen can recommend an award of compensation if a finding of maladministration is made. The awards recommended by the public sector ombudsmen will often be more modest than awards awarded by the courts. Their recommendations are not legally enforceable (other than those of the Pensions Ombudsman), although in practice they are usually followed.
- 4.20 Ombudsmen can also make recommendations as to remedies other than monetary compensation. They often require public bodies to offer apologies, to take specific action to put the complainant back in the same position as before, or to take action to make sure that similar mistakes are not made in the future.

#### **Independent complaints handlers**

- 4.21 The Adjudicator and the Independent Case Examiner are both significant bodies in the resolution of complaints against public bodies. The Adjudicator deals with complaints about HM Revenue and Customs and other bodies. The Independent Case Examiner examines complaints against the Child Support Agency. Other similar bodies exist.

#### **Tribunals**

- 4.22 A large number of cases against public bodies are brought in tribunals rather than in the courts. Tribunals hear complaints in areas including social security and child support, immigration, education, and taxation.<sup>15</sup> Like the ombudsmen, tribunals were intended to provide a more informal and less expensive alternative

<sup>14</sup> Local Government Act 1974 s 26(6), Parliamentary Commissioner Act 1967, s 5(2)(b); Public Services Ombudsman (Wales) Act 2005, s 9(1)(b).

<sup>15</sup> For example Social Security and Child Support Commissioners decided 7,064 cases 2004 to 2005; Immigration Adjudicators decided 100,034 cases 2004 to 2005; the Immigration Appeal Tribunal decided 47,009 cases 2004 to 2005; School Admission Appeal Panels decided 59,901 cases in the school year 2003 to 2004; and General Commissioners acting under the Taxes Management Act 1970 s 2 decided 16,562 cases 2004 to 2005. These statistics are taken from the Council on Tribunals Annual Report 2004/05 Appendix G at pp 43 to 54.

to the courts. The extent to which this is still true of practice in tribunals today varies between different tribunals. They are also intended to provide an expert dispute resolution service on areas of law and practice which can be complex and technical.

- 4.23 As with ombudsmen, tribunals differ widely in terms of their powers and procedures, size, degree of formality, workload and costs. Our project will consider primarily those that deal with disputes between public bodies and individuals. Some tribunals deal with disputes between individuals; where we can draw useful lessons from these tribunals we will do so.<sup>16</sup> We will also take into account the reforms mentioned above, which are fundamentally reshaping the tribunals system, in particular the unified Tribunals Service which is now responsible for the administration of a large number of tribunals,<sup>17</sup> as well as the impact of our housing disputes project.<sup>18</sup>
- 4.24 Broadly speaking, tribunals tend not to award compensation. Although the precise outcome of a tribunal case will depend on the tribunal concerned, tribunals appear to award by way of remedy that which the claimant would have been entitled to if their case had been correctly decided by the original decision-maker at the outset. So, for example, the Social Security and Child Support Appeals Tribunal will rule on whether or not a claimant is entitled to the benefit in question, the remedy being that the claimant will be awarded the appropriate benefit.<sup>19</sup>

#### **Alternative Dispute Resolution**

- 4.25 For many years there has been a focus on moving disputes away from the courts where possible by resolving disputes through alternative mechanisms. One of the key principles of the Access to Justice report was that litigation should be avoided wherever possible and that people should be encouraged to use the courts only as a dispute resolution mechanism of last resort.<sup>20</sup> The Civil Procedure Rules impose a duty on the court to encourage the parties to a case to use alternative dispute resolution procedures and to facilitate the use of alternative dispute resolution.<sup>21</sup> All the redress mechanisms discussed in this Part can be described

<sup>16</sup> Important tribunals that deal with disputes between individuals include the Employment and Employment Appeal Tribunals and the Residential Property Tribunal Service. The Residential Property Tribunal Service also has jurisdiction for some disputes between individuals and public bodies: see in particular the Housing Act 2004.

<sup>17</sup> See *Transforming Public Services: Complaints, Redress and Tribunals* (2004) Cm 6243 and the Tribunals Service website at <http://www.tribunals.gov.uk> (last visited 18 September 2006).

<sup>18</sup> *Housing: Proportionate Dispute Resolution* (2006) Law Commission Issues Paper, available online at [http://www.lawcom.gov.uk/housing\\_disputes.htm](http://www.lawcom.gov.uk/housing_disputes.htm).

<sup>19</sup> Although the tribunal has no power to enforce its decisions.

<sup>20</sup> Lord Woolf, *Access to Justice Final Report* (July 1996) Section 1 at para 9.

<sup>21</sup> Civil Procedure Rules r 1.4(e).

as alternative dispute resolution in the sense that they are alternatives to the courts. We use the phrase here as it is often used to refer collectively to dispute resolution through mechanisms such as mediation, conciliation and arbitration. We focus here primarily on mediation.<sup>22</sup>

- 4.26 There have been some moves towards acceptance of mediation in the public sector. The government made a pledge in 2001 to use alternative dispute resolution wherever possible, using court procedures as a last resort.<sup>23</sup> A report commissioned by the Department of the Environment, Transport and the Regions (now the Department for Communities and Local Government) identified some advantages in mediation for certain types of planning disputes, although it said there would need to be incentives to achieve an increased use of mediation.<sup>24</sup>
- 4.27 Our project will examine the extent to which methods of alternative dispute resolution, particularly mediation, are used in cases against public bodies. We will examine the extent to which mediation can be adapted to administrative law disputes that tend to involve multiple interests and a range of interested parties.<sup>25</sup> Important advantages of mediation have been said to be the maintaining of long-term relationships and the ability to deal with multi-faceted problems: to what extent are these advantages important in the public law context?<sup>26</sup> Is mediation, which takes place in private, a suitable vehicle for the resolution of disputes against public bodies that arguably ought to be made public?

<sup>22</sup> See also the Law Commission's Housing Disputes Issues Paper, Part 7, on mediation.

<sup>23</sup> On 23 March 2001 the Lord Chancellor published a formal pledge committing Government departments and agencies to settle legal cases by Alternative Dispute Resolution techniques whenever the other side agreed to it, and to only go to court as a last resort. See DCA Report, *Monitoring the Effectiveness of the Government's commitment to using Alternative Dispute Resolution (ADR)* (July 2002) [http://www.dca.gov.uk/civil/adr/adrrep\\_0102.htm](http://www.dca.gov.uk/civil/adr/adrrep_0102.htm) part1 (last visited 18 September 2006) and the Government News Network website <http://www.gnn.gov.uk/Content/Detail.asp?ReleaseID=24434&NewsAreaID=> (last visited 18 September 2006) for more information.

<sup>24</sup> Report commissioned by the Department of the Environment, Transport and the Regions from Michael Welbank, *Mediation in the Planning System* (August 1998).

<sup>25</sup> There is already some research into this area, eg M Supperstone, D Stilitz and C Sheldon, "ADR and Public Law" [2006] *Public Law* 299; and for comparisons with experiences in other jurisdictions see: S Byron, "The Rise of Mediation in Administrative Law Disputes: Experiences from England, France and Germany" [2006] *Public Law* 320; T Buck, *European methods of administrative law redress: Netherlands, Norway and Germany*, DCA Research Series 2/04 (November 2004) [http://www.dca.gov.uk/research/2004/2\\_2004.pdf](http://www.dca.gov.uk/research/2004/2_2004.pdf) (last visited 18 September 2006); and T Buck, *Administrative justice and alternative dispute resolution: the Australian experience*, DCA Research Series 8/05 (November 2005), [http://www.dca.gov.uk/research/2005/8\\_2005\\_full.pdf](http://www.dca.gov.uk/research/2005/8_2005_full.pdf) (last visited 18 September 2006). The Public Law Project held a conference on ADR in public law on 23 April 2004. They hope to be able to carry out a research project into the viability of mediation in public law. More information is available from their website at <http://www.publiclawproject.org.uk/policyres.html> (last visited 18 September 2006).

<sup>26</sup> For a discussion of the perceived advantages of mediation see Housing: Proportionate Dispute Resolution (2006) Law Commission Issues Paper, paras 7.16 to 7.20.



### **Statutory Compensation Schemes and ex gratia payments**

- 4.28 Statute can impose liability to pay compensation on public bodies. A good example of this is the duty to pay compensation for compulsory purchase.<sup>27</sup> Compensation is also payable to victims of miscarriages of justice<sup>28</sup> and for criminal injuries. When it was introduced in 1964, the Criminal Injuries Compensation Scheme was an ex gratia scheme. The scheme became statutory under the Criminal Injuries Compensation Act 1995. There is a tariff scheme whereby fixed payments are set for specific types of injury.<sup>29</sup> The government has announced reforms to both the miscarriages of justice and criminal injuries compensation schemes.<sup>30</sup>
- 4.29 Public bodies may also sometimes make payments on an ex gratia basis. Individual public bodies will have their own rules and procedures dealing with when they might make such payments. For example, HM Revenue and Customs' Code of Practice sets out when the department will make compensation payments or take other remedial steps. The Code states that HM Revenue and Customs will apologise, explain what went wrong, correct mistakes to put people back in their original position as far as possible, and learn from experience. Payments of up to £500 may be made for distress or mistakes made in dealing with the complaint.<sup>31</sup> The Government Accounting manual provides guidance to public bodies on when to make ex gratia compensation payments and the principles that determine the amount of payments.<sup>32</sup>

### **The NHS Redress Bill**

- 4.30 The NHS Redress Bill provides for a scheme for dealing with low value claims arising out of NHS hospital treatment. The Bill gives effect to a proposal for an NHS redress scheme by the Chief Medical Officer.<sup>33</sup> The details of the scheme are still to be decided: the Bill has not yet passed through Parliament and many of the details will be set out in secondary legislation.<sup>34</sup> There have been criticisms

<sup>27</sup> Under the Land Compensation Acts 1961 and 1973.

<sup>28</sup> See the Criminal Justice Act 1988.

<sup>29</sup> The tariff was revised in 2001.

<sup>30</sup> See <http://www.press.homeoffice.gov.uk/press-releases/miscarriages-justice> and [www.police.homeoffice.gov.uk/news-and-publications/news/new-compensation-arrangements](http://www.police.homeoffice.gov.uk/news-and-publications/news/new-compensation-arrangements), both visited on 18 September 2006. See also the Home Office's consultation document *Rebuilding Lives – Supporting Victims of Crime*, published on 7 December 2005.

<sup>31</sup> Information from HM Revenue and Customs leaflet "Putting things right – how to complain", available on <http://www.hmrc.gov.uk/leaflets/cop1.htm> (last visited 18 September 2006).

<sup>32</sup> Para 18.7. The manual is available at <http://www.government-accounting.gov.uk> (last visited 18 September 2006).

<sup>33</sup> *Making Amends* (July 2003), available on <http://www.dh.gov.uk> (last visited 18 September 2006).

<sup>34</sup> At the time of writing the Bill had been through the House of Commons on 14 July 2006, but it is not clear what will happen to the Bill if it does not pass through Parliament in the current session.

of the proposed scheme.<sup>35</sup> However, we consider the scheme envisaged by the NHS Redress Bill might be a useful one for study in our substantive project.

- 4.31 It appears that it is intended that claimants will use the NHS Redress scheme to obtain compensation and other remedies rather than pursuing an action through the courts, although claimants are not barred from taking court proceedings.<sup>36</sup> The scheme is intended to provide for a mixture of remedies: compensation, the giving of an explanation or the giving of an apology.<sup>37</sup> The government has stated that “it is intended that financial compensation offered under the scheme will be broadly equivalent to the level of compensation that would be provided in a successful claim before a court.”<sup>38</sup> As well as financial compensation, the Bill provides for compensation in the form of care or treatment.<sup>39</sup>

#### **HOW DO WE DECIDE WHICH REMEDIES ARE APPROPRIATE?**

- 4.32 Even on a brief overview, it is apparent that there are a number of remedies available other than damages awarded by the courts. Our project will need to examine how it should be decided which remedies are appropriate in any given case or in different types of cases or at least principles which could inform the decision about which remedy is appropriate. We will need to consider what the purpose of redress is in any given situation.
- 4.33 A key factor will be what people want by way of remedy. It is often said that people do not necessarily want monetary compensation and may often want something else, for example an apology from the public body concerned.<sup>40</sup> Our project will need to examine the socio-legal and other research on what people want as a remedy.<sup>41</sup>
- 4.34 What people want from a remedy cannot be the only consideration. Remedies must be in the public as well as in private interests. They must not unduly burden public bodies. There are a large number of competing claims on public money,

<sup>35</sup> In particular the proposal for the scheme to be administered by the NHS Litigation Authority. The scheme has been the subject of comment in the House of Commons Constitutional Affairs Committee Report on the Compensation Culture (2005-06) HC 754.

<sup>36</sup> Clause 1(1) of the Bill provides that a scheme may be established “for the purpose of enabling redress to be provided without recourse to civil proceedings...”. All references to the Bill in this scoping paper are to the Bill as amended in the House of Commons on 14 July 2006. It is not clear how the interface between the scheme and the courts will be affected by the availability of civil legal aid.

<sup>37</sup> Clause 3(2).

<sup>38</sup> Department of Health, *NHS Redress: Statement of Policy* (November 2005), para 35.

<sup>39</sup> Clause 3(3)(a).

<sup>40</sup> See for example, Better Regulation Task Force, *Better Routes to Redress* (May 2004), p 7.

<sup>41</sup> For example L Mulcahy, *Disputing Doctors: The Socio-Legal Dynamics of Complaints about Medical Care* (2003); H Genn, *Paths to Justice: What People do and Think About Going to Law* (1999); and P Pleasance, *Causes of Action: Civil Law and Social Justice* (2nd ed 2006).

and public resources should not be used excessively to dispute claims or to make payments of compensation which are not justified in principle or in terms of quantum.

- 4.35 The question of what is an appropriate remedy also depends as a matter of principle and public policy on what is appropriate for the type of wrong that has been suffered. For example, when a legal right has been infringed, it could be argued that an apology will not suffice by way of remedy and that an award of damages is necessary. Some of the issues can be seen in the courts' recent attempts to delineate principles about appropriate remedies for breaches of the Human Rights Act.<sup>42</sup>

#### **THE RELATIONSHIP BETWEEN DIFFERENT ROUTES TO REDRESS**

- 4.36 A complainant will often have more than one route to redress. Particular problems arise with the relationship between the ombudsmen and the courts.
- 4.37 The project will consider whether procedural reforms might make the system as a whole operate more smoothly and eliminate some of the current problems. One option to consider is whether there could usefully be some kind of power for the courts to be able to make references to the ombudsmen where appropriate, and vice versa. We may also consider reform of the rules that mean that the ombudsmen cannot investigate cases in which court proceedings are possible.
- 4.38 Before recommending any procedural reforms, we will need to look at the competing options of allowing people a choice of redress mechanisms versus making the choice for them, for example by allowing a court to refer a matter to the ombudsman. It is arguable that each redress mechanism is intended to provide a different means of dispute resolution and a different set of remedies, with different advantages and disadvantages to each, and that as long as people have sufficient information and advice, they should be able to choose how they want their dispute or complaint dealt with. An alternative view is that people should not be allowed to pursue inappropriate routes to redress or remedies, and that the courts or other bodies should have some measure of control over the dispute resolution process.

<sup>42</sup> See *Greenfield* and *Anufrijeva*, discussed at paras 2.9 to 2.12 above.

# PART 5

## THE SCOPE OF THE PROJECT

### THE QUESTION FOR THE PROJECT

- 5.1 The big question that the substantive project we propose should consider is:

When and how should the individual be able to obtain redress against a public body that has acted wrongfully?

We propose that this question should provide the terms of reference of the project.

- 5.2 This formulation clearly hides a multitude of questions. Some we can answer now, others will have to be teased out as the project gets under way. To clarify what we mean by the terms in the question:
- 5.3 By “when”, we mean “what should the individual’s substantive law rights to a remedy be?”
- 5.4 By “how”, we mean, “what mechanisms should be available to the individual to receive redress?” This includes both the procedures that should be available for the vindication of an individual’s rights, and the methodologies that might be available – for instance, ombudsmen or mediation, as well as court procedures.
- 5.5 By “redress” we mean *primarily* the award of a monetary remedy. We do not envisage undertaking a detailed examination of other remedies, such as the orders available to the court on judicial review, or the internal structure of complaints systems, and proposing free-standing reforms to them. An understanding of the proper place of non-monetary remedies will, however, be central to the project. At the minimum, we will need to consider how the availability of non-monetary remedies should impact on the availability of monetary remedies. But further, we think it will be necessary to consider more widely the relationship between non-monetary remedies and the courts. This in turn may lead us to make recommendations in relation to non-court mechanisms. For example, if we were to conclude that the limits on the jurisdictions of the public sector ombudsmen impeded a more productive relationship with the courts, we would consider it right to make appropriate recommendations.
- 5.6 By “wrongfully”, we mean a situation in which a public body has acted in a way that is unlawful in the public law sense; or one which makes it liable in tort. We do not envisage considering the substantive merits of the existing approach of the courts to public law unlawfulness. On the tort side, our *point of departure* will be the current general approach to negligence and the other relevant torts. But central to the project will be a consideration of how the rules that apply between private citizens might be modified in relation to Governmental activities when the defendant is the state.

## **STEPS TO ANSWERING THE QUESTION**

- 5.7 Necessarily, with a project of the importance, difficulty and complexity of this one, the exact course it takes must be sensitive to the development of our thinking. In particular, we anticipate that comparative work, looking at both common law and civil jurisdictions, will be particularly significant in relation to this project. However, and preliminarily, we consider that the steps we should be taking towards answering the question posed by the question above are as follows.

### **What principles should inform the liability of the state?**

- 5.8 This will involve us considering the following issues:

#### ***What is distinctive about the state as a party?***

- 5.9 Seen from an individual victim's perspective, of course, in many situations, it would be very difficult to justify a difference of treatment where an injury had been caused by a state actor as opposed to a private actor – should it make any difference to a victim of a road accident that the driver at fault was a Government employee driving in the course of his performance of his job? That there are, however, differences between the state as a party and a private person as a party, seems evident. Reasons that have been advanced for this include the following:<sup>1</sup>

#### **DIVERTING PUBLIC RESOURCES**

- 5.10 The payment of compensation (and of costs) by the state diverts (scarce) public resources from its application to socially desirable ends. Of course, the very point of compensation is always to divert resources, from a wrong-doer to a victim. Where the state is the defendant, however, the resources are being diverted not from the gratification of the wrong-doers private interests, but from democratically endorsed expenditure in the public interest.

#### **TECHNICALLY DIFFICULT DECISION MAKING**

- 5.11 Public decision-making (at least in areas with a high policy content) is poly-centric and involves the balancing of difficult and often competing considerations. At one level, this argument is about the technical difficulties that reviewing such a decision-making process presents the courts. Courts do not necessarily see themselves as being well placed to assess decisions involving the weighing up of far-reaching economic or social policy matters. However, in other areas, the courts are not generally deterred from coming to a determination by the difficulty of a question. Is it really the case that there is something uniquely *hard* about the decisions public bodies must take? Perhaps this reason sometimes masks a rather different concern, with the constitutional propriety of the courts considering such questions (see below).

<sup>1</sup> See also the discussion in para 3.18 above.

## CONSTITUTIONALLY APPROPRIATE DECISION MAKING

- 5.12 In a democracy and under the rule of law, the courts should refrain from imposing their own views on those of the democratically accountable executive. It is not for the judges to substitute their assessment of far-reaching economic or social policy matters not because they are too difficult, but because it is the executive that has the democratic legitimacy to do so. While the legitimacy of the executive is powerfully circumscribed by the legislature, within its proper sphere, the executive is better equipped to answer certain questions than the courts, not because it has better research at its disposal, or more administrative know-how, but because those are the decisions it was elected to make.<sup>2</sup>

## THE DANGER OF DEFENSIVE ADMINISTRATION

- 5.13 The imposition of liability, particularly for compensation, may make public bodies risk averse, and lead them to adopt administrative practices or policies that are not optimally in the public interest, but which are more likely to protect them from actions for compensation. There is, of course, a flip side to this argument – that liability encourages good administration.
- 5.14 The argument from defensive practice could apply to any (potential) litigation repeat-player. What makes it particularly acute in relation to public bodies, however, is that there are no competitive market pressures off-setting the negative pressure of litigation.
- 5.15 At heart, this is essentially an empirical question, and we would expect to engage with the existing empirical literature in this area before relying significantly on this argument one way or the other.

### ***What do citizens want from the state?***

- 5.16 Clearly, sometimes individuals are indifferent to the nature of the state as a defendant, and simply want to be appropriately compensated for a loss they have suffered. But it would seem that at other times, other remedies or actions by the state are desired. We deal with these possibilities in Part 4 above.
- 5.17 The substantive project will consider how the availability of other remedies should impact on rights to compensation through the courts, and the relationship between remedial mechanisms. If, for instance, the bar to the jurisdiction of the ombudsmen where legal action was possible were to be removed, might it be appropriate to allow the ombudsman to refer a legal question that arose in an investigation to the court? Might the court be empowered to refer a case to the ombudsman, either to allow the ombudsman to use his or her investigative procedure, or alternatively, to issue a report which would encapsulate the appropriate remedies?

<sup>2</sup> As an example, see the comments of Lord Hoffman in *Southwark LBC v Mills* [2001] 1 AC 1 at 9-10 that “in a field such as housing law, which is very much a matter for the allocation of resources in accordance with democratically determined procedures, the development of the common law should not get out of step with legislative policy.”

## **What should be the relationship between public law and private law?**

### ***A separate sphere?***

- 5.18 The project will need to at least ask the question: is the state so different as a party in whatever capacity that it should inhabit a completely separate legal sphere? The lessons from the French and other continental experiences will be particularly useful in this respect.

### ***Drawing the line***

- 5.19 However, it may very well be that we would conclude that the general law should apply to the state, but subject to special rules in particular circumstances. If that were to be the case, how would it be possible to draw a line between the state qua state, and the state qua employer, the state qua landlord, or occupier of land or whatever.
- 5.20 In our discussion of negligence above, we expressed some scepticism about drawing such a line.<sup>3</sup> But if a clear line cannot be drawn, is it possible to construct procedures that allow courts to determine limits on a context-specific basis? Would such an approach undermine legal certainty for both litigant citizen and defendant state, or should it be seen as playing to the strengths of a common law system? What other basis might there be for delimiting state liability?

### **What should substantive remedial rights be?**

- 5.21 Answering this question, of course, crucially depends on the development of thinking on the issues set out above. Should we seek to develop a new state liability cause of action, designed to provide compensation against the state, where appropriate, but only where appropriate, and on a principled measure? Should such a cause of action be designed to replace negligence and the other torts, or to supplement them? What should its relationship be to the judicial review remedies (should it be seen as a public law remedy or a private law matter, or some sort of hybrid)? Or should any new compensatory remedy merely seek to fill gaps left by the current law?
- 5.22 In considering these questions, we may be led to take views on such questions as:
- 5.23 The relevance of fault and seriousness of breach.<sup>4</sup> At the moment, there are disparate fault elements in negligence and the intentional torts, and in the European Union jurisprudence. As a matter of principle, should fault matter in the relations between citizen and state? Or should the role ascribed traditionally to fault be replaced by seriousness of breach? What role should seriousness of breach play, if any?
- 5.24 The relevance of nature of loss: Are the traditional rules in relation to the nature of loss in tort appropriate in the context of state liability?

<sup>3</sup> See above para 3.19.

<sup>4</sup> For a discussion of seriousness of breach as part of the test of liability under EU law, see paras 2.15 to 2.18 above.

- 5.25 The relevance of nature of decision: Is the kind of decision making likely to be relevant to the availability of a remedy (or is its relevance confined to marking out the scope of special rules for state liability, whatever these are to be)?
- 5.26 Joint liability: The state is an easy target for litigation, because it does not go bankrupt or disappear. Is the principle that where there is more than one wrongdoer, each should be liable for all of the victim's losses always appropriate in relation to state liability? This issue may be particularly acute where the public body has failed to adequately regulate or supervise the conduct of others.
- 5.27 Failures to supervise: How far should the state be liable at all for the actions of second actors, where the state has some supervisory or regulatory role in relation to their activities?
- 5.28 Omissions: Do the rules limiting liability for omissions make sense in the context of state liability?
- 5.29 Quantum: are full damages the most appropriate measure, or should consideration be given to a different method of quantifying compensation against public bodies?

#### **THE WAY FORWARD**

- 5.30 This scoping paper sets out how we intend to progress on the substantive law reform project.
- 5.31 Our aim now is to publish a consultation paper before the end of 2007, setting out our provisional proposals for reform. Following consultation, we would expect to publish a final report, with, if appropriate, a draft bill, in the summer of 2009.
- 5.32 Consultation is always of great importance in the law reform process. We will need, as always, to engage with the full range of professional legal opinion, legal academics and potential litigants and their representatives.
- 5.33 Unusually, Government itself, and other public bodies such as local authorities, regulators, police forces and so on, will be a primary focus for consultation in this project. The effect of liability and litigation, and of whatever proposals we make, on good administration and the effective delivery of public services will obviously be a key issue. We will consider how best we can establish appropriate mechanisms to ensure that we are exposed to the full range of views and insights from public bodies, as well as others concerned.
- 5.34 As we said in the introduction to this report, this is not a consultation document. However, we would be very grateful if potential consultees reading this paper would make themselves known to us so that we can contact them in due course.



5.35 It will be particularly important in this project for us to clearly understand the resource implications, and their impact on the public, of what we may wish to propose. The Law Commission recognises in general the importance of economic analysis of the effects of law reform proposals, where appropriate. We consider that this will be a particularly important feature of this project. It will be of central importance that we develop proposals that can be clearly demonstrated to deliver real public benefit. We will be exploring ways to ensure that we can gain access to the necessary economic and statistical resources to undertake appropriate cost/benefit analyses.