



# MONETARY REMEDIES IN PUBLIC LAW

## REPORT OF A SEMINAR

1. The seminar, held in November 2004 at the Institute of Advanced Legal Studies, followed the Law Commission's publication of a discussion paper, *Monetary Remedies in Public Law*.<sup>1</sup> The seminar opened with a number of preliminary responses to the paper which had been invited from legal experts. There followed a general discussion involving delegates drawn from legal practice, academia, government, ombudsmen and the judiciary. This note provides a summary of the main points of the discussion. As the discussion was under 'Chatham House Rules' it is presented in this anonymous form.
2. The Law Commission emphasised that, whilst not a formal consultation paper, the discussion paper was an attempt to identify key issues in a difficult area law with a view to helping it formulate the terms of a project it hoped would be included in the Law Commission's Ninth Programme of law reform.<sup>2</sup>

### **MONETARY REMEDIES IN PUBLIC LAW – CHALLENGING THE STATUS QUO**

3. The starting point was that there currently exists a gap in the remedies that should be available for wrongdoing by public authorities. Current tools – especially those found in the law of tort – are inappropriate. The gap is disclosed in cases such as *Maguire*,<sup>3</sup> where the claimant suffered considerable financial hardship as a result of an arbitrary and irrational refusal by a local authority to grant him a taxi licence. Although judicial review quashed the decision and ordered the local authority to reconsider the claimant's application, which was subsequently granted, there was no financial redress for his loss of profit in the meantime. As the claimant was unable to show that the public authority had been negligent, he was unable to claim damages through the tort route.
4. More generally, tort law has developed inconsistently. This suggests that it is not the appropriate mechanism for compensating for certain types of public authority wrongdoing. Moreover, to leave the law subject to judicial development would run the risk either of leaving individuals without a remedy, or of excessively and inappropriately expanding the scope of liability in tort.

<sup>1</sup> It can be found on the Law Commission website: [www.lawcom.gov.uk](http://www.lawcom.gov.uk)

<sup>2</sup> This will be published in early Spring 2005.

<sup>3</sup> *R v Knowsley MBC ex p Maguire* [1992] C.O.D 499

5. The Law Commission, as an independent body, would be well placed to be able to identify ways in which to deal with this perceived gap and to explore whether a new approach and legislative solution was needed.

## EXISTING REMEDIES

### The inadequacies of the law of tort

6. Most participants agreed that tort law did not provide the right toolkit for dealing with these issues. The tort of misfeasance in public office is severely constrained in its application, particularly since the *Three Rivers*<sup>4</sup> judgment. The tort of breach of statutory duty has also been shown to be too blunt a tool. In a consistent line of authority, the courts have refused to imply such a remedy into statutes. This cause of action is unlikely to develop as a coherent public law remedy.
7. As regards the tort of negligence, in respect of public authorities, this tort had developed considerably over the past 30 years. Nevertheless the tort had failed to provide a coherent solution to the particular problems involved in determining the extent of the liability of public authorities. The difficulties revealed in cases such as *D and F*,<sup>5</sup> *Murphy*<sup>6</sup> and *Junior Books*<sup>7</sup> suggested that it would be unhelpful to attempt to extend negligence liability to the distinct issues that arise in the context of wrongdoing by public authorities.
8. In dealing with the liability of public authorities, negligence has difficulty in dealing with pure economic loss. More generally, the activities of public authorities create a multitude of different scenarios and a multitude of different interests. The *Donoghue*<sup>8</sup>/*Hedley Byrne*<sup>9</sup> formula does not provide a “one-size fits all” solution. Despite the nuanced approach of *Caparo*<sup>10</sup>, the tort of negligence lacks the subtlety that is required when dealing with the potential liability of public authorities for wrongdoing.
9. Discussants noted that there is nothing inherent in the nature of tort claims that need cause difficulty in the use of this branch of law against public authorities. Many of the restrictions on the use of torts are of judicial creation. For example, *O'Rourke*<sup>11</sup> was dealt with on the assumption that liability for breach of statutory duty must be strict, when in fact there is nothing in the cause of action itself to suggest that this must be the case. Nevertheless the outcome was that the liability of public authorities in tort was fraught with uncertainty and lacked a coherent framework.

<sup>4</sup> *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1

<sup>5</sup> *D&F Estates Ltd v Church Commissioners for England* [1989] AC 177

<sup>6</sup> *Murphy v Brentwood DC* [1991] 1 AC 398

<sup>7</sup> *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 52

<sup>8</sup> *Donoghue v Stevenson* [1932] AC 562

<sup>9</sup> *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

<sup>10</sup> *Caparo Industries plc v Dickman* [1990] 2 AC 605

<sup>11</sup> *O'Rourke v Camden LBC* [1998] AC 188

### **Remedies in public law**

10. Judicial review was also considered. As developed in the UK, the remedies of judicial review contemplated the quashing of decisions by public bodies, but did not permit parties to obtain financial redress. This was in stark contrast to the approach in other jurisdictions. In France, for example, the annulment of an administrative decision was seen as a draconian measure to be resorted to only with the greatest reluctance, whereas (modest) financial compensation for the wrongdoing of public authorities was relatively commonplace. In this country, the reverse is the case.
11. Particular procedural limitations on judicial review were also noted, though some of these appeared to be misconceived. (For example, a claimant seeking damages under s 7 Human Rights Act 1998 did not need to bring an action in the Administrative Court. The County Courts have jurisdiction to make such an award.)

### **Beyond the court: the role of ombudsman schemes**

12. The contribution made by ombudsman schemes to the range of remedies available was stressed. There were, however, difficult boundary lines between courts and ombudsmen. Ombudsmen hoped that the courts could avoid encroaching on their territory, particularly in the assessment of what is maladministration.
13. Particular difficulties arise in “mixed” cases, where an allegation of maladministration is being examined by the ombudsman at the same time as a legal cause of action is being brought to court. Some argued that because the ombudsman’s decision was subject to judicial review it would be better for the courts to determine in the first instance whether there had been maladministration. Others thought that the courts should decline to make such judgments.
14. In general, ombudsmen would be reluctant to see an extension of role of the courts. Ombudsmen offer distinct advantages. They are free, confidential and accessible and perceived by the public as independent. They offer a range of remedies including financial redress, which may take the form of payments of money owed or compensation for quantifiable losses, losses of a non-monetary kind, “botheration” and lost opportunities. Monetary redress may be subject to interest payments and set-off and is calculated by a standard formula. Although determinations made by an ombudsman are not binding, this did not present a problem in the vast majority of cases. Ombudsman schemes also seek to promote good administration by considering the standards to be expected of public authorities and framing their decision-making accordingly, as well as providing feedback and advice to ensure that errors are not repeated.
15. Ombudsmen did not want to be perceived as part of the court structure. Users value their separation from the courts. At the same time, both the courts and the ombudsman form part of the overall landscape of administrative justice. There was broad agreement that in considering any new framework of remedies in public law, the role of the ombudsman must be taken into account.

### **THE DIFFICULTIES FACING PUBLIC AUTHORITIES**

16. It was stressed that, in thinking about remedies, it would be essential to take into account the difficulties that public authorities face when dealing with individuals who allege that official wrongdoing has caused them loss. For example, public authorities may find it difficult to justify *ex gratia* payments made to individuals to their auditors. More generally, the pressures on public authorities are very heavy. The interrelationship between these factors and any legal remedies available against public authorities had to be considered carefully. It would not be in the public interest if public authorities were spending so much in compensation they could not provide the services they were supposed to provide.
17. It was suggested by some that there is no need for any new legal remedy to fill the perceived gap in public authority liability. In cases where a claimant's economic interest has been injured, the claimant would be entitled to bring a claim for damages under the Human Rights Act 1998 for a violation of his rights under Article 1 of the First Protocol. In other cases, the claimant may be able to identify breach of other rights protected under the HRA. If the existence of such rights cannot be shown, any alleged infringement should not lead to an award of damages against the public authority. For exceptional cases the existence of an actionable tort against the authority should be sufficient.
18. Any right to compensation for maladministration could act as a financial penalty against the public authority. The threat of such penalties is unnecessary to secure compliance with the rule of law; judicial review was sufficient. Furthermore, such penalties may have a negative effect on the decision-making process by encouraging public authorities to become preoccupied with protecting their limited budgets from private claims rather than acting in the wider public interest. Any decision to allow the movement of public money to the private purse would raise policy considerations that many would regard as generally unattractive.
19. Others stated that these arguments strengthened the case for the sort of fundamental review of remedies that the Law Commission was contemplating. Judicial developments could be quite unpredictable and lead to very undesirable consequences. An independent review, which sought to balance the conflicting interests involved, and develop proposals on a principled basis was greatly to be preferred.

### **FASHIONING A NEW REMEDY IN PUBLIC LAW?**

20. Amongst those who thought there was a case for reform, there was widespread acceptance that private law provided an inadequate template. Indeed, it was suggested that the very use of the word "monetary" in the title to the Discussion Paper disclosed a private law mindset that was unhelpful. Although it might be possible for the courts to relax current constraints on tort claims, this could lead to considerable uncertainty and excessive litigation. This would not be welcome.
21. If there were to be a new public law cause of action that might lead to an award of damages a number of key issues would need to be addressed.
22. First, what kind of wrongdoing should lead to monetary redress? It was important that 'fault' and 'public law unlawfulness' were kept conceptually distinct. In French law there is a nuanced approach to this issue. Some situations are regarded

illegal *per se* (with strict liability arising once causation has been shown), but others require a more complex balancing of interests. The ECJ had also developed a sophisticated test in this area.

23. It was accepted that there must be limitations on awards of compensation against public authorities. Such limitations should be considered in light of the wider public interest which might be harmed by the economic impact of awards in situations where the scale of damage arising from an unlawful administrative act might be large. Procedural limitations should not, however, deny meritorious claims (as was the case with *O'Reilly*<sup>12</sup> procedural exclusivity principle). Limitation periods may be required, but should be flexible. A short limitation period may be appropriate in judicial review, but less so where monetary redress is in question. The rules on standing would also need to be addressed. The broad approach to standing for judicial review might be less appropriate where a claimant sought compensation. Disclosure rules would also need to be modified should the courts have to enquire as to the merits of the case when considering a compensatory award. More generally, a remedy which is of a public law nature need not necessarily be premised upon the judicial review model. The relationship between any new remedy and existing remedies must be carefully considered.
24. Second, what would such a cause of action look like? Would it be possible to claim a monetary remedy if any ultra vires act could be demonstrated, or would the claimant have to go further and show a "sufficiently serious breach" as in EU law?
25. Third, there would need to be detailed analysis of boundary problems. Developments such as contracting out, privatisation and (more generally) private bodies exercising public-type powers produce major definitional difficulties. The scope of any proposed cause of action would have to be prescribed. It may be difficult to identify the class of wrongs to be penalised and the class of relevant interests to be protected. At the same time, any framework that is developed must be practical. The key elements, e.g. the standard of care, the requisite mental element, any possible defences and mitigating factors would all need careful definition.
26. Fourth, the relationship between the role of the courts and the role of other bodies such as ombudsmen would need careful exploration. One of the principal problems facing the citizen is the complex range of routes to redress that currently exist. This makes it difficult for individuals and their advisers to know where to turn for help.
27. Aside from the development of a new remedy, it may be appropriate for any proposed project to deal with some of the inadequacies of the common law. For example, consideration might be given to amending the law on statutory interpretation, to create a presumption in favour of a cause of action arising for

<sup>12</sup> *O'Reilly v Mackman* [1983] 2 AC 237

breach of statutory duty unless contrary provision is made in the relevant legislation.

28. The introduction of a monetary remedy for public law unlawfulness could also have an effect on judicial approaches to claims founded in tort. It is likely that courts would feel less pressure to award damages in tort if there was an appropriate public law remedy which permitted the payment of compensation.

#### **The choice of reformer**

29. There was some discussion as to who would be best placed to achieve the development of a new remedy in public law: the courts or Parliament. This issue would also need to be considered carefully.
30. The courts could advance the law on a case by case basis, shaping the new law to particular situations. However, it was thought rather unlikely that the courts would feel it appropriate to develop a wholly new remedy outside the scope of judicial review and the particular cause of action for breach of the Human Rights Convention.
31. Legislation would have the potential for greater clarity but there would be difficulties in anticipating all the situations in which any new remedy should be available. Legislation would need to be sufficiently flexible to meet different factual situations. Reference was made to the European Court of Human Rights' jurisprudence, in which the court has assessed (having found a breach of a right and the requisite causation) the nature of the wrongdoing, the mental element, the conduct of the claimant and the availability of alternative remedies in awarding "just settlement".
32. Legislation that set out in "bright lines" the scope of the remedy would not exclude the judiciary from the reform process. Arguably Parliament should lay down the basic principles, including limits on the amounts of compensation that might be made. The courts should be called upon to analyse the nature of the administrative act in question when considering the award of compensation.
33. One delegate suggested that the neutrality and objectivity of the Law Commission would be a key to the successful development of proposals for a new remedy.

#### **Consumer perspective**

34. In line with the DCA's current thinking on the development of both civil and administrative justice, any reforms should take account of the perspective of the users of the system. A choice of mechanisms should be available to the individual seeking redress for the wrongdoing of public authorities. Further considerations in developing proposals for reform included the provision of advice for the complainant and the potential unsuitability of the adversarial system to the needs of the user. At the same time, the opportunity to create a more coherent system, through which the citizen could find their way, would be welcomed

### **The wider context**

35. The provision of a new monetary remedy in public law must be placed within the context of other public law remedies. Accordingly any review of the law should consider alternative existing remedies. Recent suggestions for reform – such as the creation of an office equivalent to the DPP to bring maladministration cases – should be addressed concurrently. Systematic feedback is seen as key to ensuring the “good behaviour” of public bodies. In this respect, the role of institutions such as the Commission for Racial Equality and the proposed Human Rights Commission are of some significance. A project such as this must ask what standards a public body should adhere to. This would allow a clear enunciation of the obligations that exist upon public authorities. Overall, any new public law remedy should be placed in the context of mechanisms for improving standards of performance by public authorities and other bodies performing services of a public nature.

### **THE FUTURE**

36. The final issue considered was how the Law Commission might proceed. The majority opinion was that this area of law is ripe for review and that it was most desirable that the topic be included in the Law Commission’s draft Ninth Programme of reform. The terms of reference of a project such as this would clearly need to be very carefully considered. Although there was a general feeling that monetary remedies should be considered as part of the general system of remedies against public authorities, there will clearly be a need to delineate the scope of the Law Commission’s project to ensure that the work can be done in a reasonable timeframe. It was thought that this topic might particularly benefit from an initial scoping study.
37. One particular suggestion was that empirical research would be required in particular areas. For example, the importance of economic considerations to public authority decision-making may be crucial to understanding how any new public law remedy would impact upon public administration. Fear of compensation might lead to defensive decision-making by public authorities; or it might stimulate better standards of service delivery as part of a broader risk assessment strategy.
38. A project such as this one must be founded in practicality. It must seek to balance public and private interests, and be informed by a sense of what individuals require from a system of administrative justice.