

THE ROLE OF DAMAGES IN PUBLIC LAW

The intentional torts

1. In early days actions for damages were a means of bringing the government (through its officers) to account: see *Dr Bonham's Case* 77 Eng. Rep.638 for an early precedent.
2. The typical pattern was the commission of an intentional trespass to person or property with a plea of justification. If the plea failed because there was no lawful justification, those committing the trespass were liable in the ordinary way.
3. Cases of this type can still have contemporary importance: see *R v Governor of Brockhill Prison ex parte Evans (No 2)* [2001] 2 AC 19; *D v Home Office* [2006] 1WLR 1003, CA. Liability is strict unless there is a statutory exception.

Negligence

4. The growth of liability for negligence began to create difficult issues which are still with us. Could the same approach apply here? Could public authorities be liable for negligent conduct under the same conditions as applied to ordinary citizens?
5. Where the public authority causes direct physical damage it is liable like anyone else: see Buxton LJ in *Perrett v Collins* [1998] 2 Lloyd's Rep. 255, CA. The difficult cases concern, first, economic loss (although see *A v Secretary of State for the Home Department* [2004] EWHC 1585) and indirect damage, that is, damage caused not directly by the public authority but by some third party, such as the borstal boys in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, or some natural phenomenon, such as the physical obstruction in *Stovin v Wise* [1996] AC 923. In these case should the state be treated differently, on what basis, and for what?
6. Difference in treatment is often defended by reason of:

- Impact on public resources
 - The open pocket of the public authority (supported by rules on subrogation and joint and several liability)
 - The discretionary nature of public authority decision making and the public interest dimension
 - The possible distortion of decision-making (risk aversion).
7. It is also often claimed that a discrete area of “governmental” activity can be identified to which special rules of liability might attach. The NHS should be treated like a private party, but the armed forces are different from anything in the private sector. This distinction is used in some jurisdictions (France, United States). It is easier to identify “governmental” activities than to define them. Analogy with the private sector has a strong pulling force towards liability: see *Phelps v Hillingdon London Borough Council* [2001] 2AC 619. 653, by Lord Slynn.

The Big Principles

8. The courts appeal to certain big principles in the hard cases:
- Corrective justice: see Lord Steyn in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057 at [2].
 - Distributive justice: see Lord Hoffmann in *Stovin* above.
 - Setting standards of conduct: see Lord Clyde in *Phelps* above and Lord Nicholls in *Stovin* above (but quere what is the evidence that tort law in general acts as a deterrent even in the private sector?).

Control Mechanisms: justiciability

9. At the same time the court developed a set of control mechanisms through which the big principles could be balanced.

10. First, certain claims are considered “non-justiciable”. But what does that mean? In judicial review there are guidelines based on institutional competence and expertise (see, for example, Supperstone and others, *Judicial Review* at para 7.12). But here the test seems broader. It had been suggested that a claim was non-justiciable where the public authority had exercised a discretion in a “policy” area (see *X v Bedfordshire* [1995] 2 AC 633) but that has been largely rejected (see *Gorringe, Stovin and Phelps*). It is nonetheless a rationale relied on in some other jurisdictions.

11. There seem to be two types of case:

- Cases where it does not seem appropriate in principle to allow an action for damages in negligence (for example, a claim for loss of life caused by a “negligent” decision to invade Iraq)
- Claims which are in effect disguised judicial reviews (see, for example, *Smith v Department of Health* (2002) 67 BMLR 34 concerning damage caused by a delayed warning about drug; *A v Essex City Council* [2004] 1WLR 1881,CA concerning the information to be provided to prospective adopting parents).

12. The second type of case seems to raise two issues:

- Was the decision unlawful – indeed is there even an arguable case that it was unlawful?
- If so, does it nonetheless fall into the first category in paragraph 11 above?

Control Mechanisms: ultra vires

13. This takes one to the second control mechanism which is closely related, the ultra vires test.

14. It was once thought that it was necessary to show that the conduct was ultra vires in the *Wednesbury* sense (see X above). This was criticised as too restrictive (see Kirby J in *Pyrenees Shire Council v Day* (1998) 192 CLR 330; and difficult to delimit (see Fairgrieve, *State Liability* p45). After *Phelps* it seems no longer necessary to show that the conduct was ultra vires. But see paragraph 11 above.

Control mechanisms: general

15. There are also general control mechanisms with special effects in public law cases:

- Omissions
- Proximity
- *Caparo* (otherwise fair and reasonable to impose liability)

16. The omission rule was emphasised by Lord Hoffmann in *Stovin* but has been criticised as:

- Difficult to apply and generating fine distinctions (see the rescue cases)
- Inappropriate for public authorities which are given specific statutory powers to intervene and may, following *Padfield*, even have a duty to act
- Unnecessary because other control devices can exclude a duty in appropriate cases (see, for example, *Hill v Chief Constable of West Yorkshire* [1989] AC 53, applied in *Brooks v Metropolitan Police Commissioner* [2005] 1 WLR 1495, HL.)

19. Proximity is used to deny liability where there is no prior relationship between the parties. Sometimes such a relationship is not required (*Perrett* above, *Godden v Kent & Medway Health Authority* [2004] EWHC 1629).

20. Important factors under *Caparo* are:

- Resources
- The need to prevent defensive decision making (*X, Stovin*)
- The need to prevent the authority being distracted from carrying out its primary task
- The need to avoid conflict of interest (*D v East Berkshire Community NHS Trust* [2005] 2 AC 373).
- The existence of specific statutory schemes (cf. *Marcic v Thames Water Utilities* [2004] 2 AC 42). General statutory schemes (Ombudsmen, Criminal Injuries Compensation) etc. have not tended to preclude liability.

21. Finally, on this aspect it is necessary to bear in mind:

- The trend to shift control from duty to the standard of care (*Barrett, Phelps*)
- The impact of the Convention which may impose positive duties on the State to take care to protect life and welfare of vulnerable groups (see, for example, *Osman v United Kingdom* [2000] 29 EHRR 245; *Z v United Kingdom* (2001) 34 EHRR 97; *D; Van Colle v Chief Constable of Hertfordshire Police* [2006] EWHC 360).

Damages for unlawful administrative action

22. It is trite law that there is no general right to damages for unlawful administrative action, unlike the position in other jurisdictions (France) and under EU law (*Francovich*). This has often been strongly criticised (see, for example, Sir Robert Carnworth, 1998 Public Law 407, commenting on *O'Rourke v Camden London Borough Council* [1998] AC 188). Since then of course damages have become available under the HRA, and it may become very important whether a breach of the Convention can be established. For example, if a licence were a "possession" under Article 1 Protocol 1, deprivation would need to be justified as proportionate and damages would in principle be available (contrast *Countryside*

Alliance and others v Attorney General and others [2006] EWCA Civ 817 with *R (Malik) v Waltham Forest Primary Care Trust* [2006] EWHC 487 (Admin) and *Nicholds and others v Security Industry Authority* [2006] EWHC 1792 (Admin).

23. If there were to be such a remedy, a number of issues need to be faced:

- What kind of fault?
- How to harmonise with:
 1. Judicial review
 2. Breach of statutory duty
 3. Negligence
 4. Misfeasance in public office.

24. Thus, judicial review is concerned with the legality of the decision or measure before the court. The decision or measure may be procedurally flawed or substantively flawed on the reasoning. The authority may be able to take the same decision lawfully. Awarding damages may not be appropriate but the potential relief from damages could distort decision-making.

25. Breach of statutory duty has rarely sounded in damages (see for example, *O'Rourke*). If the courts were to translate the same reasoning to any new statutory claim any new remedy could be frustrated.

26. There is an overlap with negligence, as shown above, particularly where questions of justiciability arise.

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