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INTRODUCTION

In the collection *Governmental Liability: A Comparative Study*,[1] Tony Bradley and I wrote that governmental liability was widening (immunities were declining and the grounds for obtaining compensation were expanding) and the trend was likely to continue. This volume shows that, in the subsequent 10 years, this prediction has been fulfilled.

In that study, we focused primarily on the rules of liability and how these were changing. But it is necessary to look more broadly at the context. The liability procedure may be used for a number of ancillary processes. It may serve to vindicate rights (as in English law), or be the focus of public accountability. The proper role of compensation may be rather muddled in such circumstances. More profoundly, there have been significant changes in the expectations of the public in relation to public sector services and their providers. In addition, basic values are leading to some convergence of approach across the different European legal systems.

I. THE ROLE OF LIABILITY LAW

To understand governmental liability, it is necessary to appreciate the context within which its rules operate. Two parts of the context are the objectives served by parties in bringing liability actions in courts, and the general character of the relationship between the citizen and the administration.

In Latin languages, the terms 'liability' and 'responsibility' are closely connected. The word '*responsabilité*' (or equivalent) covers both. There is an unfortunate attempt in many systems to use the process of legal liability in order to attribute blame and to establish political or administrative responsibility, In some systems, criminal liability has performed this role, especially where victims can interplead as civil parties. In other systems, the liability process serves to blame officials or public bodies. This is most obvious in England, where certain torts are actionable per se, without proof of loss. The use of particular mechanisms for dealing with such complaints depends both on the existence of various complaints institutions and processes, and traditions for using them. The following chapters frequently discuss complaints about poor schooling or poor performance by social services, which have taken the form of actions for damages, even though it is often difficult to quantify a loss. Such complaints might have

[1] UKNCCL 1991, p. 15

been taken to the Ombudsman in a country like Sweden.[2] We have to ask about the value-added of the legal process in such circumstances. The enforceability of the legal remedy and the quantum are clearly important. But there is also a sense in which 'justice' is associated in the minds of many people with 'a court judgment'. Being vindicated in a public forum plays an important social role, over and above the receipt of compensation.

The criminal process was used in France to prosecute officials in relation to the Furani football stadium disaster.[3] But in England, the similar Hillsborough football disaster led to several civil law actions against the officials (the police) and a public inquiry, but only to two unsuccessful prosecutions.[4] There are, thus, cultural particularities related to the use of civil liability as a public process for establishing blame. In truth, the sanctioning role of liability law remains low, and the compensatory role remains high, but there has been a change in the balance, perceptibly different in different countries.[5] The increasing use of law to attribute blame has contributed to the expansion of the role of governmental liability law. Cases such as *Osman* and *Z* are predominantly about attributing blame, rather than compensating for identifiable monetary losses which have been sustained. The Osman parents had a legitimate grievance, but suffered no monetary loss. Similarly, as is well noted in many of the papers in this collection, it is difficult to quantify the losses of the parents of abused children or even of poorly educated children. The court process is predominantly performing the role of a public inquiry and allocation of blame. Damages are secondary. We must ask, therefore, what is the place of tort in a particular legal system as a vehicle for airing grievances. The answer will not be the same in each legal system.

The chapters in this volume of Atkin and McLay and of Caranta specifically raise the issue about how far the law on liability interferes with the primary functions allocated to the administration. In their view, the administrator should not be given differing messages by different parts of the legal system. If the administration is treated by administrative law as legitimately engaged in the exercise of discretion, then this should not be the subject of actions for damages in other courts. The concern not to inhibit the administration has also been a pre-occupation of the English courts in *Hill* (police), *X* (social services), and *Rondel* (barristers

[2] See Annual Report of the Justitieombudsman 2001/2, 377–84 (available on <http://www.riksdagen.se/debatt/0102/forslag/jo1/jo1.pdf>). See also complaints to the Local Government Ombudsman for England and Wales: <http://www.lgo.org.uk/pdf/digest00/sectb00.pdf>.

[3] J Bell, *French Legal Cultures* (London, 2001), 107.

[4] The Hillsborough disaster: see generally <http://news.bbc.co.uk/hi/english/special_report/1999/04/99/hillsborough/newsid_319000/ 319303.stm>. On the unsuccessful criminal trial of police officers initiated by the victims, see *The Guardian*, 24 July 2000.

[5] See C Guettier, *La responsabilité administrative* (Paris, 1993), 181.

in court).[6] Yet, as is also remarked, there is very limited evidence that liability will have an impact on administrators. To begin with, the administrator will not have to pay personally—the employer will pay. Often the official will have moved post before the liability action is tried. In many cases, the budget for paying damages is not the budget out of which the relevant public service is operated, although the trend for decentralised budgets may increase the pressure on services which are subject to lawsuits. The incentives for the administrator to perform well are more likely to relate to come from the potential for disciplinary action or complaints, rather than the slower liability process. To take the example of social workers,[7] the criticism which arises from inquiries into the mishandling of cases involving vulnerable children is likely to have far more of an impact that the award of damages. That said, the arguments of Atkin and McLay remain important. We ought to be consistent in the way we encourage officials to act not only in relation to liability law, but also in relation to other comments on administrative action. Are they to be encouraged to experiment, and thus to reach the wrong result in some situations, or are we holding them responsible for not achieving the right result?

II. POLICY TRENDS: THE CITIZEN AND THE STATE

A critical change in recent years has been in the relationship of the administration and the citizens. During much of the twentieth century, the public administration moved from simply policing respect for public order and basic public hygiene to providing a range of essential services: education, housing, health, and so on. The framework of services thus established made an offer to the public as a whole (a universal service) and was designed according to the estimations of pubic need made by public officials. In French terminology, the individuals were 'users' of these public services. In the 1980s, this picture began to change. Services were run less by public enterprises and more by private or privatised organisations. In addition, the culture changed in that the public were no longer passive recipients of the beneficence of public bodies, but were seen as much more active 'clients' or 'customers' whose needs had to be met.[8] The most striking examples have been in the core powers of the state, such as policing and taxation, in which

[6] *Hill v Chief Constable of West Yorkshire* [1989] AC 53; *X (Minors) v Bedfordshire CC* [1995] 2 AC 633; *Rondel v Worsley* [1969] 1 AC 191. But now compare *Barrett v Enfield LBC* [2001] 2 AC 550; *Phelps v Hillingdon LBC* [2001] 2 AC 59 ; *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673.

[7] See generally H Brayne and G Martin, *Law for Social Workers*, 6th edn (London 1999), pp 20-3.

[8] See D Truchet in F Tiphine (ed), *Administration: droit et attentes des citoyens* (La documentation française, Paris 1997), 23–35.

'service' concepts have been used to characterise relationships. A recipient of public largesse has not much standing to complain if the benefit received is less than he hoped, or even less than the donor intended. But the disappointed 'customer' of a public service would feel fully justified in complaining if the service purchased on his behalf turns out to be less than satisfactory. In more recent years, public sector train service providers in many countries have begun to offer 'compensation' for late or deficient services. In some systems, the relationship of the customer to the public service is a matter of contract, in others it is a matter of non-contractual liability. Guettier argues that the specificity of governmental liability is to be found in the balance which has to be struck between protecting the interests of the citizen and preserving the ability of the administration to act in the public interest.[9] This has led, in some systems like the French, to a limitation of liability to cases in which there is serious fault (*faute lourde*) or, as in EU law, to liability for legislative actions only where there is *manifest* illegality. In the English system, this concern has led to a finding that no duty of care is owed in certain categories of case.[10] Such an approach is well suited to the relationship of the public 'authority' and a 'user' of services. It is much less suited to the relationship between a 'customer' and a 'service provider'. The reconceptualisation of the public sector has called in question attitudes towards the extent to which citizens can expect to be compensated when the system fails them. In particular, the re-positioning of the state as regulator or as the 'purchaser' of services from the private sector calls into question the specific nature of public sector liability. In that the person regulated or the provider of a service is the first person to be blamed if things go wrong, the public authority has often only a secondary liability—usually a failure to supervise or to check. But this is not significantly different from positions of responsibility in the private sector. Basil Markesinis captures the change in mood in his inaugural lecture. He talks of a 'consumerist vision of public liability' under which 'compensating the damages suffered by citizens because of administrative activities can never be a wrong use of public money'. [11]

Furthermore, when the public sector provides the service directly, then the tendency is to treat it as holding out its ability to deliver a similar quality of service to the private sector, eg in hospitals or education. These changes undermine the claim to special treatment from the state. The public–private divide is less sharp than it once was. For instance, in France, blood transfusions might be provided in one region by the public hospital and in the next region by a private service. The incongruity of different rules for compensation between public and private sectors is stark.

[9] Op cit, 97.

[10] *Hill* and *X*, above n 6, serve as good examples of the concern not to compromise the administrative effectiveness of the public service.

[11] Below, p. 451.

III. BASIC VALUES

A. Are there distinct duties to avoid causing loss?

Rules on liability constitute the secondary or remedial rules of administrative law. The primary rules set out the powers and duties of the administration.[12] If these primary rules identify a duty owed to an individual, then it is usually straightforward to accept that there is both a secondary rule about enforcement and a secondary rule about compensation for breach, the rules on government liability. The standard of the primary duty is thus clearly established and can be the basis for criticism in disciplinary, liability or ombudsman proceedings. The problem lies in the many situations in which it is unclear from the primary rules to whom a duty is owed. That issue is one which falls to be determined as an integral issue for liability proceedings.

Where the basis of liability is breach of a protective norm, as in German law or the English breach of a statutory duty, then there will be a coincidence between the view of administrative law on who owes the duty and the law on liability. But where there is a more generic liability for administrative fault, then there is scope for a difference between who is protected for the purposes of enforcing a duty, and who can be compensated for harm caused.

The difficulty is to determine whether there should be one set of protected persons for the purposes of the enforcement of the administrative duty, and another for liability purposes. On one scenario, the law could provide that there is a primary duty to act and anyone adversely affected should be able to claim compensation. In the alternative, there could be a primary duty, enforceable through secondary rules on judicial review, but compensation rules might be distinct. There may be duties to compensate when there is no breach of a primary duty, and, correspondingly, there may be no duty to compensate in some situations of breach of a primary duty. Within the law on liability, the question arises whether it should determine independently to whom a duty is owed, or whether the range of people able to claim compensation is simply a matter of causation. The English model is that the law on governmental liability sets up its own tests of duty, to run alongside public duty issues under the enforcement procedure, judicial review. The French model is to use causation to identify who has suffered sufficiently from a breach in order to be able to claim. Italian civil law has expanded to provide compensation not only for interference with rights, but also with legitimate expectations. As a result, a diverse range of affected individuals can claim compensation, where the administration does not perform correctly. Where illegality is taken as a

[12] See J Bell, *AJDA* 1995, spécial, 99 at 100–3

sufficient basis for awarding compensation to those directly affected, then causation will inevitably play a controlling function. The English model is more complex in that the law on liability seeks to establish both primary duties and then secondary rules on remedies.

If anything, the trend is towards adopting the French model. A difference between the scope of a primary duty to achieve administrative outcomes and a duty not to cause loss in the process is hard to sustain in the modern 'consumerist' climate noted above. Although the English cases struggle to maintain this in a formal way, the recent raft of cases studied in this volume reveal that, in practice, the 'duty' concept is waning as a control on the scope of liability.

B. Fault

So what are the basic values in compensation and how are they developing? There seem to be two broad bases. The first is fault and the second is the principle of unjust burden, which underlies no-fault. In the case of fault, we are dealing with a failure by a public authority to conduct itself in a way which can be reasonably expected. As Van Gerven points out, fault and reasonable expectation go hand-in-hand. How different is this from private law, where the concept of the 'reasonable man' or the 'bonus paterfamilias' stands as an objective standard against which the performance of the specific defendant is measured.[13] Now such a standard has to be situated. The objective person has to be performing the same kind of role. So we have the reasonable car driver, the reasonable parent, the reasonable occupier of land, the reasonable policymaker and so on. In this way, the specific difficulties of the situation in which a public official is placed are taken into account. Structured in this way, it is hard to argue that public authorities should owe no duty to avoid causing loss by their fault. But it may be reasonable to say that it will be hard to show that they are in breach of their duty unless the fault is particularly glaring or the illegality is manifest. This perspective is set out in the first principle of the Council of Europe's Recommendation of 1984:[14]

> Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person.

This statement offers a good perspective from which to understand the problems seen by European courts with English law. Much of the ECHR's problem with the English law lay in the suggestion that there was no duty owed to certain victims at all, rather than that the duty had not been

[13] Below p. 125.

[14] Recommendation N° R (84) 15 on Public Liability, adopted by the Council of Ministers of the Council of Europe on 18 Sept 1984 (Strasbourg, 1985).

breached in the kinds of facts before the court.[15] As Markesinis and Fairgrieve point out, there are ways of achieving the similar result by the use of concepts of causation or to identify losses that are difficult to recover. But to deny any recovery on the basis of the absence of a duty of care goes against the principles from which the Council of Europe starts. If there is a primary duty to achieve an outcome in conformity with principles of good administration, then this establishes what the citizen can reasonably expect the administrator should do. If damage results from this failure, to deny liability on the basis that there was no duty owed and to say this in the absence of written texts smacks of opportunism, rather than principle. In short, once it is established that the administration is supposed to act in a specific way, then it is hard to resist the view that a failure to act like a reasonable administrator is fault. More recent developments lead to a more casuistic and less wide-ranging approach to exceptions.

C. No fault

Much less has been said in this book about the second principle enunciated by the Council of Europe:

> Reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances:
> —the act is in the general interest;
> —only one person or a limited number of persons have suffered damage, and
> —the act was exceptional or the damage was an exceptional result of the act.

This is a less common basis for liability, and is not recognised in all jurisdictions to the same extent.

This principle is based on spreading the social risk of administrative policies. We are not concerned about the misperformance of policies, but merely with the ancillary costs of implementing the policy properly. To that extent the German idea of an exceptional sacrifice (*Sonderopfer*) captures the idea well. All systems find it easy to accept this principle in relation to the ***planned consequences*** of a policy. The administration (and through it society as a whole) is asked to internalise the cost of a particular policy. If it is planned that a road will be driven through my house, then it is accepted that compensation will be paid. In relation to property, the first protocol to the European Convention has an abundant case-law to elaborate this idea. The more problematic cases are those of ***unplanned conse-***

[15] The approach of adopting prima facie rights and then finding reasons not to apply them may be rationally sound, but politically naive in a system of fundamental rights: cf R Mullender, in M Kramer (ed), *Rights, Wrongs and responsibilities* (Basingstoke, 2001), ch 6.

[16] CE Sect, 29 Apr 1987, *AJDA* 1987, 488.

quences. To take the case of the *Banque Populaire de Strasbourg*,[16] prisoners were released on parole or licence and they committed a bank robbery during their period of freedom. Could the bank claim compensation? The planned policy of release of prisoners increased the risk of offences, but it was not the purpose of the policy. The French Conseil d'Etat decided that this loss was a sufficiently direct part of the policy as to come within the duty to compensate for exceptional losses. This has also seemed an appropriate basis for medical risks. Few other legal systems use the rules on liability to deal with this problem. In constitutional terms, this ought to be part of the legislative design. Compensation for established interests is something which any constitution recognises and which the European Convention reinforces. But the logic of this principle stops when the harm suffered is of a type which was unforeseeable. At that point, there is no conscious risk taking by a public body. If our concern is to internalise the costs of policies, then that is a logical point to stop. On the other hand, if our concern is the fairness of leaving the loss where it lies, then we might be driven to look further.

At this point we need to distinguish *liability* from *social solidarity*. Liability is based on a principle of justice that a public body which has acted in a certain way ought to bear the consequences of its actions (whether these are the result of fault or of risk-taking). Social solidarity gives us a reason to offer assistance to those who find themselves in an unfortunate position. It is a principle of compassion, not justice. If there is a flood and many houses are damaged, then society as a whole might provide support to the victims, or might leave such support to private initiative through charity. Most systems acknowledge this principle in relation to riots (the public purse picks up the cost of riots. You do not have to show any fault in the policing of an event. Compensation systems for vaccine damage, or the effects of defective blood, or industrial disease fall into this category. I have argued elsewhere that the French willingness to provide compensation for the effects of protests or of medical experiments would be better based on social solidarity, rather than liability (even no-fault liability).[17] Under both principles, the government pays, but the reasons for paying are fundamentally different.

IV. THE SPHERES OF LIABILITY

There are four major areas in which liability is invoked: the protection of rights, the exercise of discretion, the regulation of the activities of others, and the implementation of policy.

[17] J Bell, 'Governmental Liability in Tort' (1996) 6 *National Journal of Constitutional Law* 85, at 90–2.

A. Rights

The European Convention has given an added impetus to the existence of liability for the interference with rights. Article 13 of the Convention requires signatory states to provide a remedy where convention rights have been interfered with, and it is this (rather than Article 6) which provided the basis for the finding of breach in Z. The result is that there can be no immunity for interference with rights, and there must be adequate compensation.

B. Discretion

Many of the more complex cases involve discretion. As has been said, there is a widespread concern not to interfere with the legitimate sphere of discretion of the administration. First, this means that the administrators must be allowed to make mistakes without incurring liability. Secondly, the difficulty and complexity of administrative decision-making has to be recognised. The mere fact of making a wrong decision or weighing up the alternatives wrongly is insufficient to give rise to liability. Particular seriousness is needed in the error. But such latitude only applies in the sphere of legitimate discretion—not where the action is unlawful. In addition, the deference to the administration is shown only where there is complex decision-making

C. Regulation

An important area for the exercise of discretion discussed in this volume is regulation. In particular, the chapter by Andenas and Fairgrieve discusses its importance. A major role of the administration in recent years has been to be a regulator, rather than a direct provider of services. The processes of 'privatisation' and 'deregulation' have been intended to enable private initiative to provide more responsive and higher quality services to the public than would have been possible from the public sector, particularly in the light of the constraints it faces on raising money for investment.[18] But a major consequence of this shift has been to increase the monitoring responsibility of the state for the actions of private-law persons and bodies.[19] In addition, there is the increased pressure on the state to provide security in preventing harm, such as child abuse, or in protecting the less aware, such as consumers in financial services. The state has an agenda in some areas to improve social behaviour, such as respecting the rights of

[18] G Majone, 'The Rise of the Regulatory state in Europe' (1994) 17 *West European Politics*, 77. R Baldwin, C Scott and C Hood, *A Reader on Regulation* (Oxford, 1998), 8–34.

[19] See J Richardson, 'Doing Less by Doing More: British Government 1979–1993' (1994) 17 *West European Politics*, 178.

the child, prisoners or other groups, or in improving the environment. In other areas, it wishes to encourage participation in financial investment markets, and offers the guarantee of supervision to provide a level of comfort to the hesitant new consumer. The net result is a major increase in supervision and regulation. Major concerns are expressed about how such regulation is performed, and how to handle regulatory failure. To what extent is the regulator setting and enforcing standards (a 'policeman role'), and to what extent is the regulator underwriting the system of compliance ('a guarantor role')? Concerns expressed in public about food safety, the solvency of banks and life insurance companies, or supplies of blood for transfusion have all proceeded on assumptions that it is not enough for the regulator to demonstrate that he has performed a policeman role. There is an increasing expectation that the regulator guarantees the outcomes which the system of regulation is intended to secure. The regulator is expected by the public to be pro-active in ensuring that regulatees are complying. This policy change has a major impact on the expected role of tort liability. Of course, the moral duty to pay compensation has been recognised for some time.[20] But the legal duty is one with which the various legal systems in this volume (German, Dutch, French, Italian, and English) have all struggled. On the whole, the trend will be towards some form of liability, but only for the direct victims of serious maladministration. Perhaps it is necessary for the government to contain expectations.

D. Implementation

By contrast with discretionary decisions, decisions on implementation require limited choices and are relatively less complex. As a result, the implementation of policy requires less deference. It is for this reason that, in spheres such as the assessment of taxation or the operation of the postal service, the French have moved away from requiring ***faute lourde*** to establish liability and are content to base it on simple fault. No great and complex policy choices are involved in most taxation cases. All the same, it has to be recognised that there is no sharp line between the decision to make a policy and its implementation. Indeed, incremental decision making may involve a gradual development of a policy on a case-by-case basis. Situations such as dealing with special educational needs or the handling of delicate child protection cases are complex decisions, and there needs to be deference to the administrator in such cases. The discussions in this volume reflect the difficulty of making the basis of liability depend on an artificial distinction between policy and operational decisions.

[20] See R Gregory, 'Barlow Clowes and the Ombudsman' [1991] *PL* 191 and 408.

V. EUROPEAN LAWS AS STANDARDS

Comparative lawyers in Europe are interested in the mechanisms and character of any convergence in the rules and principles of legal systems. Compared with the volume which I edited with Professor Bradley in 1991, this volume of essays is far more pre-occupied with the European Convention and European Union law as standards for national laws. Both have direct application in one form or another in the European legal systems discussed here. The concern of national systems is to ensure compatibility between national rules and these European standards, where the two cover the same case. In addition, national laws seek to ensure what Van Gerven calls 'homogeneity', ie to ensure that national rules are similar, whether they cover situations also governed by European rules or not. The result of this latter process is what is frequently described as the 'spillover' effect of European rules—that they have an impact beyond the sphere in which they are directly applicable. In both direct application and in spill over, European standards are having an appreciable impact on the character of national rules.

As Van Gerven points out, the process is not one-sided. EU law and the ECHR base themselves on the most protective standards in European national legal systems. These are then applied to EU institutions, as well as to member states. As he suggests, there is a process of dialogue between the legal orders. On the whole, this passes through the central courts, rather than horizontally, though the work of Markesinis does note the way in which national legal systems influence each other. The chapter by Jane Wright in this volume also notes the way in which there is scope for dialogue between the national courts and Strasbourg in developing the law. Although Strasbourg may appear to be the final court, a more European attitude to precedent, viz a process of respectful disobedience, may ensure a more sensible outcome.

But what kind of standards do the European Convention and EU law represent? As far as the European Convention is concerned, the papers in this collection identify three areas of impact. The first is that there should be effective remedies for breaches of Convention rights. If, as in Z, there is no effective remedy for a breach of a right, such as the right not to be subjected to inhumane and degrading treatment, then the liability law systems of the country will have to be changed to provide a remedy. In this situation, the Convention identifies a gap in the system of protection. The second area of impact is the adequacy of compensation. This matter is discussed in Judge Costa's paper. The Convention and the European Court of Human Rights establish areas in which compensation will be awarded. Where a national legal system fails to match such compensation, it may be guilty of a breach of the Convention's Article 13. The third area is Article

6, and the provision of access to the courts. At first sight, this is a negative provision in that it removes obstacles to access to the courts, but does not prescribe the remedy that should be made available. But, as *Osman* and *Z* show, the finding that certain rules constitute barriers to access to the court effectively encourages a legal system to create a direct, if limited, remedy. The careful renegotiation of the ruling in *Hill* and *X* by the House of Lords in *Barrett* and *Phelps*, and the parallel removal of the immunity of barristers for work in court have followed from the rulings in the European Court of Human Rights.[21] The existence of a duty of care is to be determined far more on a case-by-case basis, rather than by creating blanket rules of immunity. Although the Convention is useful in dealing with the interference with rights, it has less to say on the exercise of discretion. After all, the exercise of discretion is a major feature of administrative life. In those situations in which rights are affected, decisions like *X* and *Phelps* provide some standards. But in situations in which there are no rights affected, but interests or legitimate expectations are affected, then a different standard is required. EU law offers this in that most of the decisions its liability rules relate to are the exercise of legislative or administrative discretion. In the case of legislative action, liability only arises where there has been manifest illegality. Ordinary fault is insufficient. A similar concern is reflected in the handling of administrative discretion.

The future development of public liability in Europe will depend on the ability of legal systems to adapt to and influence European-wide debates on principles of liability. The fact that liability is not merely a matter on which individual legal systems are criticised by a central body, but on which they can influence the liability of bodies like the European Commission, enables a fruitful debate to be established.

JOHN BELL

[21] See n 6 above.

PART I:

HUMAN RIGHTS AND LIABILITY

TORT LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE

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