only what to publish, but when to publish. The spirit of Blackstone is abroad in the Strand.

A.T.H. SMITH

PUBLIC LAW LIABILITY—THE HUMAN RIGHTS ACT AND BEYOND

ENGLISH law traditionally draws no distinction between the liability of public bodies and that of private individuals. There is no general right to recover damages in respect of loss caused by an administrative act, even where that act is unlawful according to public law principles. An aggrieved individual must establish an ordinary private law cause of action: Supreme Court Act 1981, section 31(4). One of the most important innovations contained in the Human Rights Act 1998 is the creation of a form of public law liability. Section 6(1) states that it is unlawful for a public authority to act incompatibly with a Convention right. Section 7 enables a victim of an act contrary to section 6 to bring proceedings against the offending authority. Section 8(3) empowers the court to award damages if it is satisfied that such an award is necessary to afford just satisfaction to the victim.

There has been some debate as to whether the cause of action under section 6 is a "new public law tort of acting in breach of the victim's Convention rights" (A. Lester and D. Pannick, "The Impact of the Human Rights Act on Private Law: the Knight's Move" (2000) 116 L.Q.R. 380 at 382) or whether it is unhelpful to describe it thus (Lord Woolf, "The Human Rights Act 1998 and Remedies" in M. Andenas and D. Fairgrieve (eds.), *Judicial Review in International Perspective: II* (2000)). Paul Craig observes that "[t]he nature of the cause of action will be significantly affected by the courts' determination of the standard of liability" (*Administrative Law* (5th ed., 2003) at p. 887).

Anufrijeva v. *Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] Q.B. 1124 shows that the HRA departs significantly from the tort law paradigm. In certain circumstances, Article 8 of the Convention imposes upon States an obligation to take positive action to secure respect for family life. The claimants argued that there is a positive obligation to provide welfare support. In its joint judgment, the Court of Appeal (Lord Woolf C.J., Lord Phillips of Worth Matravers M.R. and Auld L.J.) accepted this argument in principle while stressing that any such obligation is likely to be very limited. Although it went on to hold that there had been no breaches of Article 8 in the instant cases,

https://doi.org/10.1017/S0008197305236760 Published online by Cambridge University Press

the court dealt at length with two key questions: when should damages be awarded for breaches of Convention rights, and how should such damages be assessed?

On the first question, the court began by observing that damages are not, as in tort claims, recoverable as of right in a claim under the HRA (at [50]). Where infringement of a Convention right has occurred, "the concern will usually be to bring the infringement to an end and any question of compensation will be of secondary, if any, importance" (at [53]). Significantly, the court added (at [56]): "In considering whether to award compensation and, if so, how much, there is a balance to be drawn between the interests of the victim and those of the public as a whole. ... The court has a wide discretion in respect of the award of damages for breach of human rights. ... Damages are not an automatic entitlement but ... a remedy of 'last resort'." On the second question, the court stated that the "fundamental principle" is that the applicant should, as far as possible, be placed in the same position as if his Convention rights had not been infringed (at [59]). However, while this is fairly straightforward as regards pecuniary loss, problems arise in relation to consequences of an infringement which are "not capable of being computed in terms of financial loss", such as anxiety and distress. Here the court stressed that tort law damages awards are not an appropriate point of comparison, whereas compensation levels set by the Judicial Studies Board, the Criminal Injuries Compensation Board and the public sector Ombudsmen may provide "some rough guidance" (at [74]).

The court's strong composition and detailed analysis give these comments authority that belies their *obiter* status. Several key principles emerge from the judgment. Most important is the idea that the court must weigh the interests of victims against those of the public as a whole. There is much to recommend this approach. In considering whether to use public money to compensate individuals for loss caused by administrative action, identification and evaluation of the relevant public and private interests must surely be carried out. It will always be in the individual's interest to receive damages. It may or may not be in the public interest for damages to be paid. If it is, then damages must be paid. If it is not, then the stronger interest should prevail. However, there is no obvious need to adopt the "all-or-nothing" approach of tort law, whereby the individual receives either full compensation for all foreseeable and causally connected loss or no compensation at all. A new approach, whereby a lesser amount of compensation is paid,

https://doi.org/10.1017/S0008197305236760 Published online by Cambridge University Press

may legitimately be taken in order to reconcile the competing interests.

Anufrijeva confirms that the HRA does not merely create a new instance of tortious liability, but rather institutes a distinct form of compensation in public law. The principles laid down by the Court of Appeal could usefully inform non-HRA compensation claims against public bodies. The current application of ordinary private law principles provides the courts with little flexibility to address directly the competing public and private interests. Their attempts to do so are inevitably clumsy (*e.g.*, the now-discarded policy/operational dichotomy) and risk distorting the private law principles in question (C. Harlow, *State Liability—Tort Law and Beyond* (2004), ch. l). Furthermore, failure precisely to articulate and carefully to evaluate the considerations of principle and policy for and against liability has arguably resulted in liability being at once too narrow and too wide. These possibilities are not mutually exclusive. It is quite possible that some individuals are unjustly being denied compensation while others are unjustifiably receiving compensation, or are receiving more compensation than is justifiable. The most obvious example of injustice to aggrieved individuals arises from the courts' inability, absent a tortious cause of action, to award compensation in respect of loss caused by unlawful administrative acts (see, *e.g.*, *R. (Quark)* v. *Secretary of State for Foreign and Commonwealth Affairs (No.2)* [2003] EWHC 1743 (Admin), [2003] A.C.D. 96 at [44], affirmed [2004] EWCA Civ 527, [2004] 3 W.L.R. 1). On the other hand, unjustifiably large awards of compensation may result from the adoption in the public law context of the full private law measure of damages (M. Fordham, "Reparation for Maladministration: Public Law's Final Frontier" [2003] J.R. 104).

The traditional maxim that the executive should be subject to the ordinary law of the land was formulated as a bulwark against total immunities for public bodies. It does not provide useful guidance when constructing a principled legal framework to govern their liability. That task raises issues of fundamental constitutional importance concerning the relationship between citizen and State and the correct balance of public and private interests. At present, these issues are concealed behind a façade of private law doctrine. Insofar as they challenge the unthinking application of private law rules in the public sphere, the Court of Appeal's comments in *Anufrijeva* are to be welcomed. However, further legislative intervention may be needed to extend the more principled "balancing of interests" approach beyond the human rights context. Now that the Law Commission is investigating this area (see

https://doi.org/10.1017/S0008197305236760 Published online by Cambridge University Press

"Monetary Remedies in Public Law: A Discussion Paper" (October 2004)), such intervention may be within the realms of possibility.

IAIN STEELE

REQUIEM FOR A FAIRYTALE

"THE law is a ass!" said Mr. Bumble upon being told that he was considered more guilty than his wife in the eye of the law, for the law (quite contrary to Mr. Bumble's humble personal experience of the matter) supposed that his wife acted under his direction (see Charles Dickens, *Oliver Twist*, ch. 51). A similar sentiment must have stirred in the breasts of Mr. and Mrs. E, the paid carers of Mr. L, a 49-year-old man suffering from autism and severe learning disabilities, when they heard that the highest court of the land had declared that L's prolonged stay in a mental hospital following his informal admission as a "compliant incapacitated patient"—devoid of any of the procedural safeguards enjoyed by patients admitted compulsorily under the Mental Health Act 1983—did not amount to unlawful detention. This was because, as an informally admitted patient, L had legally speaking at all times been free to leave, though (what with his having been heavily sedated, and not being one of the brightest, and with his carers being discouraged from visiting him in order not to stir up any impulse within him of wanting to go home with them) that realisation of the legal niceties of his situation was unlikely to enter his mind and even more unlikely to be acted upon by him (*R.* v. *Bournewood Community and Mental Health NHS Trust, ex parte L* [1999] A.C. 458). The European Court of Human Rights has now held that L's admission and stay in hospital as an informal patient violated L's rights under Article 5(1) and Article 5(4) of the Convention (*HL* v. *United Kingdom,* application no. 45508/99, judgment of 5 October 2004).

Article 5(1) protects everybody's right to liberty and security of person. It allows for a deprivation of liberty only in accordance with a procedure prescribed by law and on narrow substantive grounds, one of which is the lawful detention of persons of unsound mind. Whether restrictions on a person's freedom of movement amount to a deprivation of that person's liberty within the meaning of Article 5(1) depends a range of factors, particularly on the type, duration, effect and manner of implementation of the measure in question. It is a matter of degree or intensity, and not one of nature or substance (see further *Ashingdane* v. *United Kingdom,* judgment of 28 May 1985, Series A no. 93). Applying

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