between protection based on article 9 and the exclusive cognizance of Parliament. Lord Phillips' approach is preferable because it recognises that freedom of speech and debate lie at the very heart of what privilege aims to protect. These issues are afforded absolute protection under article 9 and may overlap with, but are distinct from, issues that fall under the exclusive cognizance of Parliament.

The unanimous decision of the nine Justices is an unsurprising development, given the way that judicial scrutiny of parliamentary privilege has evolved. Judicial and parliamentary views have moved from a Blackstonian absolutist concept of privilege towards a democratic model (see J. Chafetz, *Democracy's Privileged Few* (2007)) – a movement in parallel with increasing challenges to the doctrine of undiluted parliamentary sovereignty. The enactment of the Parliamentary Standards Act 2009 to regulate MP allowances and the Bribery Act 2010, which applies equally to parliamentarians, further illustrate the changing perceptions regarding the immunity of democratic representatives. Privilege no longer appears "to dazzle lawyers and judges outside Parliament" (at [101]). The scope of privilege is increasingly being narrowed to avoid it being used for reasons unrelated to those functions considered essential to an MP's democratic duties, central to which is the ability to debate openly and fearlessly in Parliament. Following the Supreme Court's decision that privilege did not pose any bar to prosecution of the MPs, David Chaytor pleaded guilty and was sentenced in the Southwark Crown Court on 7 January 2011 to 18 months in jail. His conviction is a sober reminder that privilege cannot be used to shield MPs from acts which stand in stark contrast to the very ideal it is meant to protect: the fostering of accountability and democratic governance through open debate.

YVONNE TEW

EXEMPLARY DAMAGES: "PUBLIC LAW" FUNCTIONS, *MENS REA* AND QUANTUM

IT is not uncommon to read that "[d]amages and compensatory remedies have not traditionally played a major role in British public law" (Turpin & Tomkins, *British Government and the Constitution*, 6th ed, (Cambridge 2007) p. 276). However, damages actions in tort have long served "public law" functions: protecting fundamental rights, controlling and delineating the bounds of governmental power, and giving effect to rule-of-law principles of equality, and government under law. As the recent case of *Muuse* v. *Secretary of State for the Home Department* [2010] EWCA Civ 453, [2010] W.L.R.(D) 108 demonstrates, exemplary damages are a significant aspect of this

https://doi.org/10.1017/S0008197311000377 Published online by Cambridge University Press

tradition, and continue to play a crucial role in "restraining the arbitrary use of executive power and buttressing civil liberties" (at [77]).

In 2006 Mr Muuse was imprisoned for criminal wrongdoing. Upon his release he was detained for 128 days on the instruction of the Home Office's Immigration Directorate, pending deportation. Muuse brought proceedings in the High Court seeking damages for his detention and treatment. Under the policy then operated by the Home Office an EU national could only be deported under the Immigration Act 1971 if they had been sentenced to imprisonment for two years or more for criminal wrongdoing. The Home Secretary accepted the detention was unlawfull; Muuse was a Dutch national, born in Somalia, and had been sentenced to less than two years' imprisonment. Even if he had not been an EU national the lawful requirements for detention would not have been fulfilled. The Minister claimed that Muuse's detention was due to an innocent error of mistaken identity and because officials believed Muuse was a Somali national. The High Court dismissed the claim of confused identity as a "weak afterthought", and gave a damning indictment of the officials' conduct. They took insufficient steps to verify Muuse's nationality, initiated the deportation process without adequate justification, and disregarded requisite safeguards. Their conduct was "unforgiveable" and reflected "an indifference to doing justice" (at [48]). The Minister admitted false imprisonment, and the Judge also found a breach of Article 5 ECHR, a prima facie breach of Article 14, and misfeasance in public office. For false imprisonment he awarded exemplary damages of £27,000, on top of £25,000 compensatory damages and £7,500 aggravated damages. No further award was necessary for the other claims.

Although the Court of Appeal upheld the Minister's appeal against the finding of misfeasance in public office, importantly, it dismissed the appeal against the award and quantum of exemplary damages. The Court recalled that according to Lord Devlin's authoritative speech in *Rookes* v. *Barnard* [1964] 1 A.C. 1129 exemplary damages can be awarded in cases of oppressive, arbitrary or unconstitutional conduct by servants of the government, *but only if* compensation is inadequate to punish the defendant's outrageous behaviour, to mark the court's disapproval of the conduct, and deter him from repeating it. The Court rejected the Minister's contention that exemplary damages should only be awarded in such circumstances if the officials' conduct "disclosed malice, fraud, insolence, cruelty or the like". There was no need to further qualify the *Rookes* requirements, and no authority for the Minister's contention.

The Court was correct in this. As a matter of precedent, malice, fraud etc may be relevant to the established *Rookes* criteria, and quantum, but are not a prerequisite for an award: *Holden* v. *Chief*

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Constable of Lancashire [1987] Q.B. 380, 388; *A* v. *Bottrill* [2003] UKPC 44, [2003] 1 A.C. 449; *Lamb* v. *Cotogno* (1987) 164 C.L.R. 1. Whether one considers that a mental element, such as malice, ought to be a prerequisite is likely to depend on one's view of the primary function of exemplary awards. If they are primarily to punish the defendant, one might expect the requirements for their award to be analogous to those of a criminal offence. However, it does not necessarily follow that the mental element ought to be malice, especially given many criminal offences require a lesser standard such as recklessness. Alternatively, if the primary rationale for exemplary damages is the protection and vindication of important rights, then a stricter approach focused on the nature of the rights-infringement, and which does not condition an award upon proof of a particular mental state, could be more easily rationalised. In any case, it is clear that the overarching function of the tort of false imprisonment is protection of the basic right to liberty, and a high threshold for recovery of exemplary damages would undermine protection of this right in cases involving the most egregious interferences.

The Court held that the officials had acted unconstitutionally and arbitrarily in imprisoning Muuse. Their conduct was so outrageous that exemplary damages were required to punish, deter, and vindicate the strength of the law. The outrageousness of the conduct was exhibited by: (1) the officials' treatment of Muuse (for example, subjecting him to racist remarks) and their disregarding his protestations that he was Dutch; (2) the "manifest incompetence" of officials, such as failing to properly examine the grounds for deportation; and (3) the failure of officials to take basic steps to check the information in their possession which showed Muuse's nationality, including his passport. The overarching system which allowed these events to transpire, for which the Minister and senior officials were responsible, was also open to criticism. There was no evidence that anyone had assessed the competence of the junior officials who were empowered to imprison, and the facts strongly suggested that no one of seniority exercised supervision over them.

Muuse demonstrates the continuing relevance of the torts actionable per se, which have for centuries functioned to protect fundamental rights. This is despite modern developments such as the Human Rights Act 1998 (under which damages awards have been rare, modest, and limited to compensation), and improved mechanisms for political accountability. There had been no parliamentary inquiry into Muuse's case, no Minister or senior official held accountable, no evidence of an internal inquiry, and a "paucity of measures" taken to prevent a recurrence: "[t]he only way in which the misconduct of the Home Office has been exposed to public view and [Muuse's] rights vindicated is by

https://doi.org/10.1017/S0008197311000377 Published online by Cambridge University Press

the action in the High Court" (at [75]–[77]). In the light of this the Chancellor of the High Court entreated that the circumstances required urgent investigation and action by the Minister. Such statements demonstrate the potential for damages actions to spur political accountability.

The Court affirmed the quantum of exemplary damages, recalling Lord Devlin's dicta in *Rookes* that a restrained approach should be taken, with attention paid to the means of the defendant. In this respect the Court recorded that £27,000 "is miniscule in the context of the Home Office budget" (at [84]). In general a court should be slow to deny or reduce awards on the basis of a department's means in the serious case of an abuse of public power and violation of basic rights. In response to the concern that exemplary awards drain public funds, common law judges have maintained that, "the proceeds of taxation represent the price paid for maintaining respect by public officials for the observance of the rule of law, to the benefit of taxpayers and society as a whole" (*New South Wales* v. *Ibbett* (2006) 229 C.L.R. 638, [48]).

JASON N.E. VARUHAS

TAKING A (TAXI) STAND ON LEGITIMATE EXPECTATIONS

THE doctrine of substantive legitimate expectations is still in its infancy. Despite having been generally accepted by the courts, some important questions remain unanswered. In *Paponette and Others* v. *The Attorney General of Trinidad and Tobago* [2010] UKPC 32, the Privy Council (Sir John Dyson S.C.J. giving the leading judgment, Lord Brown dissenting) gave some guidance on what a public authority must do in order to justify frustrating a legitimate expectation.

The appellants were an association of operators of "maxi-taxis" (a form of commercial transportation) in Trinidad. In 1995, new regulations compelled them to move their stand to an area owned by the Public Transport Service Corporation ("PTSC"), which the appellants viewed as a commercial rival. The appellants were given an assurance by the Minister for Works and Transport that PTSC would not be given management control over them. However, this is what happened in 1998, and by 2001, PTSC was charging members of the Association to pass through exit barriers.

In August 2004, the appellants brought proceedings in the High Court, claiming a breach of their constitutional right to property. It was argued that PTSC's management of the appellants' business constituted an interference with their property rights, and this interference had not been subject to law, due to breach of their legitimate

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