

"Reforming the Law of Public Authority Negligence"

1. Last year the Law Commission issued Consultation Paper No 187, entitled "Administrative Redress: Public Bodies and the Citizen." It dealt with the various ways in which a citizen who has a complaint against a public body can obtain redress: through internal complaints procedures, mediation, the intervention of an Ombudsman and finally by legal proceedings, either in public law for judicial review or in private law for damages. It expressed the view that the current state of the law on private law proceedings was unsatisfactory and proposed that there should be a new basis for such claims against public authorities. A person who had suffered loss in consequence of the act or omission of a public body should be able to claim compensation if it had been seriously at fault in the exercise of its powers. He should not have to prove, as now, that the public body owed him a specific statutory duty or that it had been in breach of a duty of care at common law.
2. I think that this is an absolutely terrible idea and I hope it will be quietly dropped. The period of consultation ended a year ago but the Commission has not yet produced a report on the subject. So there may be time for reconsideration.
3. Let me start with the present state of the law, which the Consultation Paper says is confused and uncertain. The question of whether one can bring a claim for breach of statutory duty depends upon whether the statute creates such a duty. That seems straightforward enough. It is a question of construction. The statute must mean that a person who suffers loss because the public body has not performed a statutory duty can claim compensation. It would of course help if the statute expressly said whether it was creating such a right and some statutes make this clear, one way or the other. But others leave the matter to implication. What sometimes causes difficulty is that when a statute uses the language of duty: for example, the public authority *shall* do this or that, it does not necessarily mean that the duty shall be enforceable by legal proceedings. The duty may be expressed in such general terms as to be enforceable only by political means. Take, for example, the duty of the Secretary of State in section 1 of the National Health Service Act 2006:

“(1) The Secretary of State must continue the promotion in England of a comprehensive health service designed to secure improvement—

(a) in the physical and mental health of the people of England, and
(b) in the prevention, diagnosis and treatment of illness.”

4. I cannot imagine a duty in those terms being enforced by a court. Even the duty is sufficiently specific to be enforceable, it may be enforceable only in public law. A person aggrieved by a public authority’s failure to perform a statutory duty may be able to apply for judicial review and obtain an order compelling it to act, or quashing some decision in breach of its duty, but not to bring an action for damages in private law. Again, it is a question of construction of the statute. There are many statutes which impose upon public authorities duties to provide what might be called benefits in kind for citizens: housing, social services like home helps or meals on wheels, public amenities and so on. Most of these are sufficiently specific in their terms to be enforceable by proceedings in public law and a citizen who is wrongfully deprived of such benefits can secure an order that they should be provided. It does not automatically follow, however, that it would be right to construe the statute as creating a right to compensation for any loss he may have suffered by not receiving the benefits at an earlier stage. This involves an additional inquiry into his private circumstances and conduct and an additional claim upon the budget of the public body which may not, as a matter of policy, be justified.
5. Like many questions of the interpretation, the question of whether a statute creates a duty in private law may sometimes be difficult and is likely to be as much dependent upon the apparent policy of the statute as upon the particular language which it uses. But the general principles were clearly stated by the House of Lords in *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 and these have been followed ever since.
6. The other ground upon which one can claim compensation from a public body is when it has been in breach of a duty of care at common law. The story here is slightly more complicated, because although I think that the general principles for deciding whether a public body owes a duty of care were clear up to the mid-1970s and are now clear again, there was a long period when the law on this subject was confused. The principle is clear enough: unless the statute creates an immunity from suit, expressly or by necessary implication, a public body owes a duty of care in such circumstances, and only in such circumstances, as a private body would have owed a duty. There are two sides to this coin. On the one side, if a public body does something which, if undertaken by a private body, would have created a duty of care, it will owe a similar duty of care. On the other side, the fact that a public body has statutory powers to do something, or even a public law duty, does not create a duty of care in circumstances in which a

private body would have owed no such duty. Those are the principles, and it seems to me that they are simple enough.

7. A very early illustration is the position of highway authorities. The ancient common law imposed upon the inhabitants of every parish a public law duty to keep its highways in repair and when statutory highway authorities were created in the 19th century, this duty was transferred to them. But it was enforceable only in public law, by prosecution on indictment. The citizens had to take the highways as they found them and could not claim compensation from the parish or afterwards the highway authority if they suffered injury because the road was out of repair. No doubt it was thought enough of a burden on the parish or the ratepayers to have to repair the roads, without having to pay compensation because of the neglect of the highway authority or its employees. Nor could one finesse the absence of a privately actionable duty of repair by alleging a duty of care at common law. It would have been absurd to say that although the highway authority owed the citizen no actionable duty of repair, it could foresee that someone might be injured driving through a pothole and therefore owed a duty of care at common law. For the purposes of the duty of care, the highway authority was treated in exactly the same way as if it had been a private citizen. A private citizen would be liable if he created an obstruction on the highway which he could foresee might cause an accident. But he had no duty of care to get out and mend potholes, even if he had the resources and could see them from his window. And the same principle applied to a highway authority. It was liable if it created a danger on the highway but not because it could foresee that injury might be caused by failure to repair. It owed no duty to repair in private law.
8. Some people said that it was illogical that highway authorities should have what they called an immunity from liability for non-repair. But that immunity was exactly the same as everyone else had. No one owed a private law duty to repair the highway. The highway authority owed a public law duty to repair, but that, as a matter of ancient policy, was not enforceable in private law.
9. Until the mid-1970s, the same principles were applied to all other statutory powers and duties. They were either enforceable as a matter of construction of the statute by action for breach of statutory duty or they were irrelevant. They could not be relied upon to create a duty of care at common law. The best known leading case was *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74, in which a public authority with statutory powers to repair breaches in sea walls were sued for negligence at common law by a farmer whose land had remained flooded for an unconscionably long time. The House of Lords

agreed that the Board's statutory powers were irrelevant to the question of whether it owed the farmer a duty of care to mend the breach with reasonable expedition. Lord Atkin dissented because he thought that if the Board had been a private contractor, the fact that it went on the farmers land and undertook the work created a duty to finish it with reasonable expedition. The other members of the House thought that, in the absence of a contractual relationship, this was not enough. But they all agreed that the statutory powers were irrelevant.

10. Confusion crept into the law later when some judges began to suggest that there might be circumstances in which the existence of statutory powers, or public law duties, could create a common law duty of care to people who might be affected by the exercise of those powers. In the last quarter of the 20th century, the law was destabilised by two unfortunate decisions, one of the House of Lords and the other of the European Court of Human Rights. The House of Lords case was *Anns v Merton LBC* [1978] AC 728 in which a local authority's statutory power under the building regulations to inspect foundations was held to create a common law duty of care to potential purchasers of the house. After *Anns*, a good deal of intellectual effort was put into deciding how cases in which the statutory powers created a common law duty should be distinguished from those in which they did not. One suggestion was that one should ask whether the question of whether the statutory powers should have been used was justiciable by a court. Another way of making this point was to ask whether it involved a question of policy, with which courts should not interfere, or whether it was a purely administrative matter. Another suggestion was that one should apply the administrative law test of whether it was *Wednesbury* unreasonable not to exercise the statutory powers. For some years the courts wrestled with these distinctions, but not to universal satisfaction.
11. The confusion caused by *Anns* was compounded when the Strasbourg court, in the notorious *Osman* case, found in article 6 of the Convention a human right to sue public authorities in tort. English law had always held, consistently with the principles I have stated, that the police do not owe a greater duty of care to members of the public in conducting investigations than would be owed by a private person. That is, they owe a duty to drive with due care when going to the scene of the crime but not as to how they go about their detective work. The Human Rights court said that this was not consistent with article 6 and there should be a right to sue the police for negligent investigation. The reasoning was by no means clear and no one quite knew how far this right extended. Continental lawyers have a different philosophical approach to public authority liability. They consider that the state owes broad duties of protection and support to citizens which should be

enforceable by litigation. But the system of litigation is different, the damages awarded are more modest than in English tort actions and the grounds of liability are narrower than in an English action for negligence. It would require radical changes in our legal system if we were to adopt the same philosophy.

12. More recently, however both of these malign influences have been removed. The Strasbourg court has accepted that it was wrong in *Osman* and that English tort law is a matter for the English. And *Anns* has been overruled. There have been two decisions of the House of Lords which have restored the law to what it was before *Anns* and re-established the principle in the *East Suffolk* case. The principle is now once more that in considering whether a public body owed a duty of care at common law, its statutory powers and duties are irrelevant. You do not ask whether the case raises a question of policy or administration. Nor do you ask whether it would have been *Wednesbury* unreasonable for the public authority not to exercise its powers. You simply ignore them and ask whether the public authority has done something which, if it had been a private body, would have created a duty of care. So, for example, an NHS trust owes the same duties to patients as a company running a private hospital: no more and no less. On the other hand, a highway authority owes no duty to put up road signs because no private person would owe such a duty.
13. The two cases which have re-established the law are *Stovin v Wise* [1996] AC 923 and *Gorringe v Calderdale MBC* [2004] 1 WLR 1057. In the first case it was claimed that a highway authority owed a duty to improve a country intersection by removing a natural obstacle to the sightlines on someone else's land. It could have done so by acquiring the land under statutory powers and two of its officers had thought it would be a good idea to do so. But the House of Lords said that did not create a duty of care at common law. It owed no greater duty to remove the obstacle than the owner of the land would have done. The second decision was, I regret to say, necessary because of some silly remarks of my own in the first. I left open the possibility that there might be a power in some statute which was so obviously intended to be exercised that it would be *Wednesbury* unreasonable not to do so, and that one might infer from the policy of the statute that a failure to exercise the power was intended to be actionable in negligence. In retrospect, this was ridiculous. The statute either gave rise to a private law statutory duty or it did not. However, in the *Gorringe* these remarks enabled the lower courts to create a common law duty to paint a SLOW sign on the road from a general public law statutory duty to improve the road system and prevent accidents. The decision of the House of Lords slammed shut the door which had been left slightly ajar in *Stovin v Wise* and said clearly that you cannot get a

common law duty of care out of a statutory power or public law duty. Such powers or duties are simply irrelevant to whether a common law duty of care is owed. Such a duty is created, if at all, by what the public body has actually done: whether it assumed responsibilities or done acts which, if they had been done by a private body, would have given rise to a duty of care.

14. In my view, the law on this point is now simple and clear, although I must admit that there is a problem about getting some judges and academic writers to believe it. For example, in *Rice v Secretary of State for Trade and Industry*, decided after *Gorringe*, the Court of Appeal decided that the statutory powers of the National Dock Labour Board to control employment in the docks imposed upon it a common law duty of care to require employers to protect workers from asbestos-related diseases. This case seems to me plainly wrongly decided. The Consultation Paper says that *Stovin v Wise* was “vulnerable in the long term” because it was a 3-2 decision and had been “subject to significant academic criticism”. The authors do not appear to have noticed that the principle upon which it was decided was clarified and affirmed by a unanimous House of Lords in *Gorringe*. Likewise, the authors say that despite the Strasbourg Court’s admission that *Osman* was wrongly decided, its underlying principle “continues to influence much of the jurisprudence in this area” and therefore what it calls “blanket bans”, that is, the general principles I have described “must be seen as standing, at least legally, on shaky foundations.” There is no doubt that many academic writers regret what they always call “the retreat from *Anns*” and thought that *Osman* would help stem the retreat. So did some forward-looking judges. The Canadians in particular thought that *Anns* was an excellent decision and that public authorities should be liable in negligence for not exercising statutory powers when the courts thought it would have been reasonable for them to do so. But that is not the law of England.
15. The present position of English law, as it was before 1978, is therefore that public bodies owe no duty of care by virtue only of the fact that they have statutory powers or public law duties. An actual relationship with the claimant, such as would give rise to a duty of care on the part of a private body, is required. The effect is to take out of the law of negligence most questions of whether a public body has made the right decisions about how it should exercise its powers, that is to say, questions of administration. Does that mean that there should be no external control over the administration of public bodies and no compensation for those who suffer detriment because of poor administration? Not at all. That is why the Parliamentary Commission or Ombudsman was created in 1967 and has been augmented by Ombudsmen for local government and the health service. The Ombudsman procedures are inquisitorial and far cheaper than court proceedings. In fact,

they cost the complainant nothing. The Ombudsman's background or experience learned on the job gives him a knowledge of the problems of administration and particularly the difficulties faced by public authorities in funding their services and administration.

16. The curious thing is that the Consultation Paper acknowledges these advantages of the Ombudsman procedure and likewise the advantages of sorting out problems at an even earlier stage by internal complaints procedures and mediation. They say that most complainants do not want monetary compensation so much as a recognition that something has gone wrong and demonstration of a willingness to try to make sure that it does not happen again. They accept the unsuitability and huge expense of court procedures for inquiring into the administration of public bodies. In *Gorringe*, for example, where the deputy county court judge held that the common law duty of care required the council to paint a sign saying SLOW on the road, there was a 6 day inquiry into why it had not done. The committee and official decision-making structure of the council was examined; large numbers of documents were disclosed and witnesses from the Council cross-examined. The judge found that the Council, by not painting a SLOW sign on the road, were entirely responsible for an accident in which a woman had driven too fast without being able to see what was coming and collided head on with a bus. She was not even contributorily negligent. Judges often have little knowledge of the problems of administration and will seldom be qualified to express an opinion on how a public body should be run.
17. The concept of the duty of care in negligence, growing up in the 18th and 19th centuries, has been shaped by the model of the individual agent who carelessly causes loss to someone else. The moral basis for that law has been the Aristotelian concept of corrective justice: someone who has wrongfully injured another owes a moral duty to restore him, so far as possible, to his previous position.
18. But this primitive and individualist template fits awkwardly upon questions involving the administration of public bodies. In the case of individuals, one can say that if a person lacks the skill or resources to do something, he should not undertake to do it at all. If you cannot afford to employ skilled bricklayers and plumbers, you should not be in the construction industry. The standard of reasonable care for a bricklayer or plumber is objective and takes no account of individual circumstances. With public bodies, there is often no choice about whether they will provide a service or not. Councils have a public law duty to provide housing, social services and so on. But their funds are limited and, in a democratic country, they have choices about their spending priorities. So the question of whether they have acted

reasonably in matters of administration cannot be equated with whether a plumber or doctor has exercised reasonable care. In *Stovin v Wise*, two of the Council employees thought it would be a good idea to improve the junction. But the chief of the highway department said that the Council operated a black spot points system according to the number of accidents which had occurred. The intersection was dangerous but infrequently used and the improvement of other stretches of road came first. The highway department had its budget and had to set its priorities. Whether this was a reasonable point of view hardly seems a question suitable for a judge trying an action for negligence.

19. The Aristotelean moral principle does not fit very well either. Whoever may wrongfully caused loss and come under a moral obligation to make restoration is not the person who is actually going to pay. Payment is going to come out of public funds, out of your money and mine, in competition with other claims on public funds, including the claims of other people who may be in a far worse position than the claimant, but have nothing but the social security system against whom they can claim. In such a situation, an appeal to the moral principle of making good does not seem particularly relevant.
20. Claimants often cite a well known quotation from Lord Bingham: “the rule of public policy which has first claim on the loyalty of the law [is] that wrongs should be remedied.” I yield to no one in my admiration for Lord Bingham, but I am bound to say that is as question-begging a statement as you could find. By what procedure should they be remedied; what should the remedy be; at whose expense should they be remedied? Should the law provide that every wrong should be remedied from the public purse? Because we are lawyers, does that mean that an action for damages is obviously the only right way of remedying a wrong?
21. Then there is the question of democracy. The argument for constructing a duty of care starts from the assumption that Parliament has chosen to grant powers, perhaps impose a public law duty, but not to confer a right of action in private law. Otherwise you could sue for breach of statutory duty. Is it right for judges to create a private law right of action by using the common law of negligence when Parliament had omitted to do so? Creating such a liability means adding to the financial burdens upon the public body: to defend actions or to pay compensation. Should it not be a matter for Parliament to decide whether resources should be used in this way? Of course, if Parliament creates statutory powers or duties which enable public authorities to do things which create a duty of care in private law, Parliament must be taken to have accepted that if the public body is in breach of that

duty of care, it will be liable to pay compensation just as a private body would have been liable. You cannot set up a National Health Trust which treats patients as in a private hospital and then claim that public funds should not be used in paying compensation for medical malpractice. But when Parliament has created a purely public power or duty and the public body has done nothing which would generate a duty of care in private law, the question is a very different one.

22. Another advantage of leaving it to Parliament to decide whether to create a statutory duty, rather than having a general action in damages for maladministration, is that Parliament can be selective about the situations in which it wishes to impose such a duty. The Law Commission prefers to approach the matter from the other end and say that if Parliament wishes, in the case of particular statutory powers or a particular public body, to confer immunity against the general liability for maladministration, it can always do so. But past experience shows that privately actionable statutory duties are very much the exception, other than in areas which do not specially involve public bodies, such as health and safety laws. I therefore think it better that Parliament's attention should be drawn to any case in which such a duty is created.

23. The authors of the Consultation Paper expressed the view that the interests of public bodies would be sufficiently safeguarded by the requirement that there be not merely negligence but 'serious fault' in their administration. They acknowledge that this would be an entirely new concept in English law but were confident that a body of jurisprudence would build up to enable public bodies to recognise what behaviour would fall on one side of the line or the other. This seems an extremely expensive form of education, based, as Bentham pointed out, on the same principle by which you train a dog: if he does something which you did not want him to do, you beat him and then he knows for next time. It is a change in the law which could be justified only by the most pressing need. The Law Commission say that is analogy with the principles of European law by which a state is liable to pay compensation to persons who suffer loss by reason of its breach of a Community obligation. But those principles seem to me no help at all, because they are applied to the United Kingdom as a state and are indifferent as to the particular organ of the State committed the breach. It would be hard to derive from such cases any useful lesson for deciding whether the omissions of a hard pressed and underfunded local authority social services department amounted to serious fault.

24. The Consultation Paper deals in appendices with certain pragmatic or consequentialist arguments about the possible effect of the new cause of action they propose. One is that it would affect the behaviour of public bodies by making them more defensive and the other is that it would lead to a great increase in litigation and the financial burden upon public authorities. They do not appear to have done any empirical work of their own but refer to some American academic studies which are inconclusive. Concerns about legal liability certainly affected the behaviour of public bodies and made them re-order their priorities but whether that was a good thing or not was hard to say.
25. I am surprised that the Commission did not undertake any inquiries of their own because there is material available in this country about the effect of the introduction of new causes of action upon the behaviour of public bodies. A couple of years ago I made some inquiries of my own about the effect of the House of Lords decision in 2000 in *Phelps v Hillingdon BC*, which created a cause of action against a local education authority for negligence in failing to diagnose dyslexia in school children. This decision was not contrary to the general principles I have tried to explain, because it did not use the authority's statutory powers to generate a duty of care at common law. Instead, the House said that the authority's educational psychologist, who examined the child, had assumed a duty similar to that which would be undertaken by a private medical adviser and therefore owed a duty of care. I found this rather surprising because it seemed to me that the duty of the educational psychologist was not to advise the child or its parents but to advise its employer, the local authority, for the purpose of enabling it to carry out its statutory duties. However, the House had taken a different view and, seven or eight years later, I wanted to find out what the effect had been.
26. The time and opportunities of a Law Lord for empirical research are limited but I went to speak to the Chief Educational Psychologist of Leicestershire County Council, who often gave evidence as an expert witness in actions against other LEAs and had some idea of the national picture as well as the the experience of his own county. Immediately after the Phelps case they were faced with 58 claims. A parents' organisation to recruit claimants was set up in Leicester with lottery funding and advertised itself on local radio. The Council resisted all of them and eventually two went to court. One collapsed during the trial and another was abandoned at the door of the court, with a wasted costs order bring made against the claimant's solicitor for not abandoning the case after the exchange of experts' reports. The experience of other local educational authorities was similar. A large number of actions were brought but virtually none succeeded. At considerable expense, the LEAs succeeded in defending themselves.

27. These cases are very difficult to prove, both on liability and causation. On liability, dyslexia and other learning difficulties are controversial subjects: there is no agreement about their aetiology and still less about possible treatment. Different views are held and cases usually fail on the *Bolam* test, although it seems easy to find an expert who will say that the educational provision for a child had been scandalously negligent. In a case last year, the judge said of the Chartered Educational Psychologist who gave evidence for the child:

She was an advocate for Andrew; her first report might have been useful as a series of suggestions for someone with limitless funds to undertake to help Andrew but it was not couched as a report in a negligence action. She seemed unable to come to grips with the problems which teachers face in dealing with someone as disruptive as Andrew, or to come to grips with his own failings and poor behavioural choices: everything was someone else's responsibility or fault. She had no sense of the limitations of time and resource."

28. As you can see, in these cases about poor performance of statutory duties by public bodies, questions of resource loom large. There are also problems of causation: whether the child's problems were caused by dyslexia rather than disruptive behaviour; what kind of treatment would have been possible within the options open to a school with many other children to teach and finally, whether it would have made any difference to the child's subsequent life. It is almost impossible to prove on a balance of probability that if the child had received a different form a teaching, he would have become a model and prosperous citizen instead of the drug-addicted petty criminal whom the judge sees in the witness box.
29. The result is that, so far as my researches were able to go, I could find only three cases in which such claims had succeeded and in those the amounts recovered were relatively trivial. On the other hand, there have been many such cases which have gone to court and many more, as the Leicestershire experience shows, which were started and then abandoned. Those that have gone to trial usually last about 8 or 10 days, because it is necessary to go into some detail about what happened many years ago, examine records and hear expert evidence. Records now have to be kept for long period. In Leicester I was shown a huge air conditioned warehouse in which school records are now kept until the latest possible extension of the limitation period has expired. The costs of such an action are at least £500,000, funded by the local authority on one side and the state on the other. Emotions run high because

parents are usually convinced that the child's failure in life was the fault of the local educational authority and not the inadequacy of its home life and will have an expert to sustain them in this belief. When the action fails, as it almost invariably done, they will feel that the system has let them down again.

30. I only managed to scratch the surface of the consequences of the *Phelps* decision but I saw enough to suggest it has been an unqualified disaster for this country's education system. It has produced about three trivial and probably aberrant awards at enormous cost, both financially and emotionally. The only people who seem to have gained are the lawyers.

31. I should have thought that before any new cause of action against public bodies is introduced, it would be wise to undertake some kind of cost benefit analysis, based on the experience of cases like *Phelps*. It is all very well to say that wrongs should be remedied, but at what cost? If we are considering whether the National Health Service should provide some drug which may in a few cases be helpful to some patients, we balance the advantages against the cost of providing the drug. But there are some lawyers who think that the right, not merely to a remedy, such as one might obtain under an Ombudsman system, but to bring an action for damages in court, is literally priceless and the cost should not enter into the calculation. This may be what the French call *deformation professionnelle*. But I hope that the lawyers on the Law Commission will think again.