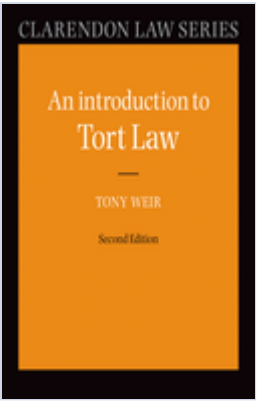

An Introduction to Tort Law (2nd edn)
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15. Other Systems

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Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter considers other schemes which are designed precisely to ensure that a victim of a wrong receives compensation. Many persons are injured or killed by motorists who do not have the insurance required by law against their liability. If a victim obtains a judgement against such a motorist and it is not paid off in seven days, it will be met by the Motor Insurers Bureau, representing the that branch of insurance firms in the UK. The Criminal Injuries Compensation Authority makes awards for personal injury directly attributable to a crime of violence. The Vaccine Damage Payments Act 1979 makes payments for those damaged as a result of vaccination against specified diseases.

Keywords: Motor Insurers Bureau, negligent driving, criminal assault, compensation, personal injury, Vaccine Damage Payments Act 1979

The law of tort is by no means the only source of alleviation for harm suffered by individuals. We have already glanced at private insurance and social security, and their interaction with the law of tort, and we should briefly note that a criminal court, on convicting the perpetrator of a crime other than a motoring offence or one resulting in death, is required by law to order him to pay a sum by way of compensation to his victim. The crime need not be a tort, though it usually is, and the sum will not be the equivalent of damages in tort, since it takes account of the convict's resources. The civil courts are antipathetic to this jurisdiction, established by statute though it is, and the victim may never get the compensation ordered (though £22 million was

collected in a recent year). There are, however, two other schemes which are designed precisely to ensure that a victim of a wrong actually receives compensation. The wrongs in question are, respectively, negligent driving and criminal assault.

Motor Insurers Bureau

Many persons are injured or killed by motorists who do not have the insurance required by law against their liability. Such a motorist is usually penniless, but if the victim obtains a judgment against him and it is not paid off in seven days, it will be met by the Motor Insurers Bureau, representing the firms doing such insurance business in England. This follows from an agreement made with the Minister for the Environment and Transport as long ago as 1945, long before the EC Directive which required Member States to have some such fall-back system in place. The British scheme is peculiar in that it has no formal legal basis—the Motor Insurers Bureau is a stranger to the statute book, so the terms of the agreement are not easy to find, and it figures in the law reports only because the courts subject its decisions to judicial review. Even so, it is not clear how a mere agreement between the MIB and the Minister can give any rights to third parties such as the victims: 'The MIB has never put to the test whether its liability... is enforceable against it by the injured third party'[1], but in a typically British way the scheme works well enough.

Its operation was, however, scrutinised in Luxembourg for compliance with the Second Motor Insurance Directive (of five!) and although the Advocate General lambasted our scheme as inadequately formalistic, the Court itself cavilled only at its failure to provide that interest be payable on awards to victims of unidentified, as opposed to uninsured, vehicles (a point on which the Directive was silent).[2] The Directives themselves do, however, distinguish the victims of unidentified and uninsured vehicles respectively, for the former can recover for property damage, subject to a deduction of €500, only if significant personal injury was also suffered, whereas it is no longer permissible to apply any deduction in the case of the latter.

A decision of the Luxembourg Court in 2005 is, however, rather worrying. While observing that 'as Community law stands at present, the Member States are free to determine the rules of civil liability applicable to road accidents', and notwithstanding the fact that the Directives themselves permit the denial of an award to passengers who were aware that the vehicle was stolen or uninsured, it proceeded to invalidate as inconsistent with the purpose of the Directives a Finnish statute which provided that no award be normally made to a passenger who knew that the driver was drunk or drugged. Some role as regards such contributory negligence is apparently left to national courts, but it is not certain how much.[3]

The most striking effect of the Directives has already been mentioned: in traffic accident claims (only) suit may be brought directly against the tortfeasor's insurer or the Motor Insurers Bureau.

Criminal Injuries

The Criminal Injuries Compensation Authority is unlike the Motor Insurers Bureau in that it makes awards out of public funds and eventually managed, after 31 years in legal limbo, to achieve a statutory basis. One will, however, scrutinise the Criminal Injuries Compensation Act 1995 in vain for the details, for it merely empowers the Minister to draw up a Scheme subject to Parliamentary approval. Even the 2001 Scheme is not in the form of a statutory instrument, and it is therefore no easier to find than the terms of the agreements with the Motor Insurers Bureau.

The Authority is a very important source of reparation. In a recent year it received over 66,000 applications and made about 38,000 awards totalling £170 million: most awards are of between £1,000 and £2,000, and the cap of £500,000 is very rarely reached. Whereas in tort cases the award for pain and suffering and loss of amenity is tailored to the precise situation of the claimant, in the light of Judicial Guidelines and conventional figures, the award made under the Scheme depends strictly on a tariff: each of the 400 types of injury listed attracts one of the 25 levels of award, which range from £1,000 to £250,000.

An award is payable only where personal injury is directly attributable to a crime of violence, but it is not necessary for the criminal to have been convicted (or there would have been problems after the terrorist bombings in London on 7 July 2005). In cases of domestic violence, however, the assailant must in general have been prosecuted and the parties must have ceased to live together.

There are interesting differences between the Scheme and the rules of tort law, most of the deviations from which seem quite justifiable. The Scheme makes a very extensive application of the *ex turpi causa* idea, for an award may be denied or reduced if a full award would be 'inappropriate' in the light of the claimant's conduct in relation to the event, including whether he was affected by drink or drugs, or even his bad character as evidenced by previous convictions unrelated to the event. The 'thinskull' rule also seems to be modified: if the claimant had a pre-existing condition, the award covers only the exacerbation due to the crime. As to psychiatric harm, while the conditions of an award to those who witness a criminal assault on a loved one are generally in line with the tort rules, a stranger must show not only that he was in the area of physical risk but that he actually feared for his own safety.

As to lost earnings, no award is made for the first 28 weeks or for net lost earnings in excess of 150% of gross average earnings in industry. A disablement pension will be taken into account (contrary to *Parry v Cleaver*).[4] Outgoings may attract an award, but not the cost of private medical treatment unless it was reasonable to incur it (contrary to the statutory rule applicable in tort cases).[5]

If the victim dies, his claim to the basic award dies with him, whereas in tort cases his estate can sue for pain and suffering prior to death. His lost earnings may be claimed by his dependants. The Scheme was more generous as regards 'bereavement damages' than the Fatal Accidents Act. Unmarried partners, even of the same sex, and children may claim as well as parents and spouses. The lump sum is £11,000 as opposed to £10,000, if only one person is entitled, £5,500 each if more than one. In addition, a child under 18 will receive £2,000 per year in respect of the loss of the parental services of either father or mother. As regards financial

loss suffered by dependants, their own resources are taken into account and the limits on lost earnings claims by living claimants apply. In particular, pensions and social security payments are deducted, contrary to the rule in the Fatal Accidents Act, s. 4.

The Home Office is considering amending the Scheme by making higher tariff payments to those with serious injuries (only 11% at present receive more than £5,500) removing the £500,000 cap, and doing away with payments for lost earnings and care costs. Those less seriously injured would find their payments replaced by benefits in kind (and kindness), but no change would be made in cases of sexual violence or fatality. The result would be to speed up the processing of applications and reduce the overall cost—at present Britain pays out more than all other EU countries put together.

Other Schemes

There are other more specific schemes in the statute book, as well as particular schemes operated *ex gratia* by government departments. For example, under the Vaccine Damage Payments Act io,79 money is available for those damaged as a result of vaccination against specified diseases: it has not worked very well because the disablement must be at least 60%, the maximum lump sum payment is £60,000 and the claimant must prove that the injury was actually attributable to the vaccination, just as in a claim of tort. Then in 2001 a trust was set up with a fund of £67.5 million (reviewable when the deaths reach 250) to provide payments in respect of those afflicted with vCJD, the human variant of mad cow disease. There has been some dissatisfaction with the operation of the trust, though nothing like the scandals attaching to the formation and operation of the Coal Health Compensation Schemes, the largest government-run personal injury compensation scheme in the world. When the courts held that the British Coal Corporation was liable for failing to protect its employees from respiratory ailments and vibration white finger, so many persons became entitled to damages that in 1999 the Department of Trade and Industry entered Claims Handling Agreements with the two major trade unions (sworn enemies), proceedings under which must be exhausted before resort to the courts is allowed. The cost is expected to reach £6.9 billion, two-thirds of which will go in compensation. According to a Report in late 2005, the scheme has generated ‘an astonishing degree of suspicion, animosity and recrimination’— certainly both the Serious Fraud Office and the Law Society are investigating the way claims have been handled—and the Report concluded that the government should not go down this path again, since the scheme is costly, productive of conflict, difficult to plan, insusceptible of formal Parliamentary oversight, and neglectful of value for money.

Not very different from actual litigation, one might think, which is characterised in the Explanatory Notes to the NHS Redress Bill 2005 as complicated, unfair and slow, costly both in fees and the time of health professionals, prejudicial to morale in hospitals, and productive of defensive and secretive attitudes when patients really want an explanation and apology. The Bill accordingly envisages a scheme, the details of which are to be contained in a statutory instrument, whereby compensation, limited in amount as regards pain and suffering, would be provided without recourse to litigation whenever in the view of a specified person an NHS unit would be liable in tort for medical fault. The applicant would lose her right to sue by accepting compensation under the scheme, but not by applying for it.

Ombudsmen

These schemes deal with harms which could well figure in tort claims, but as we have seen, there is no 'general right to indemnity by reason of damage suffered through invalid administrative action'.[6] However, those who suffer injustice as a result of poor administration by public bodies may seek the help of an Ombudsman, even if judicial review might be possible. The position of Parliamentary Commissioner for Administration was created in 1067 and an analogue for local government seven years later. These are the principal Ombudsmen. The Parliamentary Ombudsman can accept complaints only if they are referred to him by a Member of Parliament, unless they arise from the National Health Service. In addition to health authorities, the Parliamentary Ombudsman can inquire into the activities of over 200 bodies including government departments, the Inland Revenue, Customs and Excise and the Criminal Injuries Compensation Authority, and receives over 4,000 new complaints each year, about half of which are on the health side. The Ombudsman's investigations were largely responsible for forcing the government to find £150 million for the 18,000 depositors in Barlow Clowes, whose affairs the Department of Trade and Industry had been slothful in monitoring, and an investigation is current into the failure to tackle the difficulties of the Equitable Life Assurance Society. Those who should be grateful for the intervention of the Ombudsman include the farmers whose poultry was slaughtered during the salmonella scare, those distressed by the deplorable comportment of the Child Support Agency, those misled by information about the State Earnings Related Pension Scheme, and those for whom the health service improperly refused to provide free clinical care.

The Parliamentary Ombudsman cannot inquire into maladministration in local government, which typically takes the form of delay in processing inquiries and claims, inaccurate information or poor advice, failure to adhere to a stated policy or to respect a relevant Code of Conduct, and so on. Local government falls under the jurisdiction of the three Local Government Ombudsmen, who can receive complaints directly once the complainant has complained to the council in question. Over 18,000 such complaints were received in 2004–2005, most concerning planning and housing matters. There has been a progressive diminution in the number of findings of maladministration causing injustice, down to 121 in 2004–2005. Although there is no method of compelling a recalcitrant council to accept the proposal of a Commissioner, they can require the insertion into a local paper of their findings, along with the council's reasons for doing what it did. Very often, however, the councils can be nudged into making a payment: before long social services will have paid about £45 million in restitution to those whom they improperly charged for accommodation on their release from compulsory detention in a mental hospital.

Although these Ombudsmen do not have a very high profile, the institution is clearly a success. Their proceedings have advantages over litigation in tort: there is no cost to the parties, the proceedings are informal and private, inquisitorial rather than adversarial. The government has thoughts, perhaps not wise thoughts, about amalgamating the two principal Ombudsmen. One such amalgamation has resulted in a super-Ombudsman in the financial field. The Financial Ombudsman, created by the Financial Services and Markets Act 2000 (s 225 ff) as a result of combining eight other ombudsmen, has a powerful remit, and received 110,963 complaints in 2004-2005, relating, among other things, to banking, credit cards, insurance, endowment mortgages, investments and pensions. He differs from the governmental ombudsmen in that he deals with disputes between customers and the firms they dealt with, and his monetary awards are capable of enforcement through the courts, which can subject his decisions to judicial review.

Some professions in the private sphere have set up schemes of their own for the resolution of disputes with customers and clients, analogous to arbitration but without the need for a special arbitration agreement. There is thus an Ombudsman for Estate Agents. Not all estate agents are members, and though the Minister has power under the Housing Act 2004 to require certain estate agents to join some such redress scheme, he has not yet exercised it. The Removals Industry Ombudsman and the Funeral Ombudsman, in comparable lines of business, are completely private.

Notes

1 *White v White* [2001] 2 All ER 43, 53 (HL).

2 *Evans v Secretary of State* (Case C-63/01) [2004] 1 CMLR 47.

3 *Candolin v Pohjola* (Case C-537/03) [2005] 3 CMLR 17.

4 [1969] I All ER 555.

5 Law Reform (Personal Injury) Act 1948, s 2(4).

6 *Factortame v Secretary of State (No 2)* [1991] 1 All ER 70 at 119.