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ADMINISTRATIVE LIABILITY : A COMPARATIVE
STUDY OF FRENCH AND ENGLISH LAW

by

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The argument of this thesis is that the legal liability of the administration in France and England, at first sight very different, is actually very similar. In France, the existence of a separate system of administrative courts with jurisdiction in delictual actions against the administration has led to a division between public and private law. In practice, however, the distinction is less clear than might be supposed because the substantive rules of public and private law are very similar. While in some cases the State is answerable to the civil courts.

Although French law is drafted in terms of general principle in contrast to the English common law, the existing rules of liability are not in practice dissimilar. Two theoretical bases of liability are, however, relatively novel: the risk principle (which, applied to the administration, can be used to impose liability for all unlawful or invalid administrative acts) and the principle of Equality before Public charges (which can be used as a theoretical basis for a system of administrative compensation). On examination, the adoption of these principles into English law is seen to necessitate a change in our traditional constitutional balance of power. Nor, in any event, are they actually the basis of the French system.

Neither French nor English law is, at the end of the day, coherent and all-embracing. Both need to be buttressed by statutory and extra-statutory administrative compensation schemes. These should be seen as an acceptable and efficient substitute for civil liability and their development, co-ordination and rationalisation encouraged accordingly.

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INTRODUCTION

My intention in undertaking this study of administrative liability was to evaluate the English system, of which there has been from time to time much criticism, and perhaps to suggest how it could be improved. I did not intend a straightforward comparison of two opposed systems of administrative liability. Indeed, to read the study in this way might be misleading. The comparison with France is only a means to an end. It did, of course, at the outset seem a logical point of departure. Surely if one were to sit down and plan an ideal system of government liability, the English and French systems represented the obvious alternatives? At the theoretical level, they seemed to reflect divergent political traditions: on the one hand, a paradigm of the checks and balances theory of government in which the State is subjected to control by the ordinary courts of the land and liability imposed according to the normal rules; on the other, a classic example of Separation of Powers in which the Executive is immunised from "harassment" by the judiciary and can be sued only in special administrative courts staffed by administrative officials, the best known and most prestigious of which is the Conseil d'Etat. Modern writers had suggested that this French model had led to a synthesis between the two great administrative law actions (le recours pour excès de pouvoir and le recours de pleine juridiction) which had fused into a coherent system of administrative law with great potential for control of executive abuse of power.

At a technical legal level, too, the systems seemed to afford a sharp contrast. England emphasised the personal liability of individual public servants, while France stressed the corporate liability of the

State, which finds expression in the idea of maladministration or 'faute de service' (fault in the administrative system). Previous writers had suggested that this concept was better tailored to the needs of government liability and afforded the subject a better chance of compensation. A second difference was the greater willingness of French administrative courts to impose strict liability which, it was suggested, had in some areas virtually superseded fault as a basis of liability, again affording a better chance of success. It seemed logical to suppose, therefore, that the two systems would prove, in practice and in theory, very different; that a clear preference would emerge; and that a straight choice could be made between the two systems. At a time when English administrative law was noticeably introspective and searching feverishly for new solutions, merely to establish the facts seemed useful. The first three chapters contain the results of my comparative study, including an account of the historical development of the French system without which any comparison is unintelligible.

The results of my study, however, were not quite what I expected. At both the organisational and doctrinal level, the differences turned out to have been exaggerated. The autonomy of the French system is not very complete nor do individual public servants possess greater immunity than their English counterparts. They may today be found liable for personal faults in civil courts. They may also be prosecuted for criminal offences in criminal courts. If the victim is joined as civil complainant, (partie civile) civil compensation may be awarded by the criminal courts. In both these cases, a recursory action is available against the State. On the other hand, where the victim proceeds in the first instance against the State, the latter may recoup its losses by ^a recursory action against the wrongdoer personally. Again, many public bodies which we

would normally think of as "administrative", (including state-owned commercial services and those police engaged in the work of criminal investigation (police judiciaire)) are subject to the jurisdiction of the civil courts. Their liability is then governed by the principles of the Civil Code and the normal civil rules of vicarious liability apply.

At the doctrinal level, too, the systems are more similar than dissimilar. Both are in fact predominately fault based. Where differences emerge - as, for example, in the important case of risk liability - these differences turn out not to be features peculiar to French public law, which in fact closely resembles French private law. The differences are not, therefore, necessarily attributable to any inherent difference in the nature of 'public' and 'private' liability; they may equally spring from differences between the French civilian system and the English common law system of civil liability.¹

As this became increasingly clear to me, I began to doubt the 'separate' nature of government liability. The French insistence on autonomy seemed explicable in terms of political theory. Theories of government liability traditionally have more to do with government than with liability. They tend to embody liberal dogmas concerning the relationship of State and individual and of the Sovereign with the Rule of Law. In this sense, all are variations on a single theme which is more concerned with curbing authority and establishing human rights than with accident compensation. Sometimes this political perspective is explicit. Dicey's insistence on the personal responsibility of all public officials, "from the Prime Minister down to a constable or a collector of taxes", and their subjection to the ordinary courts is the lynch pin of his theory

1. See chapter 4.

of the Rule of Law. His preference for rule by the law courts and his exaggerated antipathy to the droit administratif - an attitude which he later modified - is no more than a statement of his political creed. Dicey does not even pretend to provide a complete picture of the existing English law. He passes over without comment many obvious deficiencies, including the doctrine of Crown immunity, at that time a serious lacuna in the Rule of Law.¹

Other writers make their political preferences less explicit, on the surface addressing their criticisms to the mechanics of the system. Their implicit assumptions do nonetheless colour their theories. When, for example, Professor Mitchell tells us² that maladministration is not political in character, he is advocating a preference for legal liability over parliamentary control or the Ombudsman technique. Similarly, when Professor Wade implies³ that Parliament, if its attention had been drawn to the problem, would, in the nineteenth century, have favoured compensation of landowners for intangible losses such as loss of amenity or depreciation in value of the land, and blames the courts for their failure to fill this apparent "gap," he is making a controversial political judgment. Such value judgments are unavoidable. Government compensation is a Pandora's box filled to the brim with difficult evaluations of this kind. The danger is that we may fail to acknowledge that the argument for an autonomous system of administrative liability is really a political argument of the same kind.

1. See chapter 1.

2. See chapter 6.

3. See chapter 6.

Commonsense suggests that a dual hierarchy of courts would inevitably exact a high price in the shape of jurisdictional disputes.¹ Only if a separate jurisdiction could make a unique and distinctive contribution to the law of liability could such an innovation justify itself. Of course, if a theoretical basis more suitable for administrative liability than the fault liability of civil law really did exist, a separate system of courts and separate rules of liability, with all the complexity that this implies, might become worthwhile. Turning to the French system once more to see whether a radical new start could be based on an idea from their distinctively public law system, two approaches seemed to present possibilities. The first was to equate liability with illegality by constructing a new system of administrative liability based on the *ultra vires* concept and linked with judicial review. The philosophical support for this solution would lie in the idea that the risk of loss caused by illegal or invalid administrative action falls rightly on the administration. This proposition is discussed in Chapter 5.

A second approach was to extend the existing jurisdiction of our courts by allowing them jurisdiction also to award compensation in cases where loss had been caused to individuals by administrative action but where the existing rules of civil liability seemed inadequate to the case. This approach is broadly comparable to the principle of French administrative law that abnormal losses or charges borne in the public interest should not be allowed to rest on individuals (le principe d'Egalité devant les charges publiques). This idea is discussed in Chapter 6.

Attractive as each idea seemed at first, neither proved on examination to be any more logically satisfying than our present fault-based system.

1. See Chapter 4.

Ironically, the link with the ultra vires concept might actually restrict administrative liability if introduced into the English system, while the effect of such a link on judicial review seemed unpredictable. The second idea involved a transfer of power from politically controlled institutions into the hands of the judiciary which seemed to me incompatible with our traditional political structures.

I concluded therefore, that the idea of administrative liability as 'special' in character is an untenable one. We ought to admit that administrative liability is in fact nothing more than the civil liability of public servants and administrative bodies. If we attempt to distinguish cases of 'public' from 'private' liability all we shall be doing is to complicate what is already too complex by sub-dividing a coherent legal category.

For the French and English systems are in all essential respects identical. Each is a system of legal liability and possesses the essential characteristics of such a system. In each system, recovery is exceptional: it is never intended that every victim should recover. For this reason, the pattern of liability is, in both countries, deliberately complex. When this is realised, the whole idea of an all-embracing and coherent system of administrative liability becomes suspect. If compensation is really to be assured to all or even a majority of those injured by administrative action, then legal liability inevitably needs to be buttressed by ex gratia payments and statutory or extra-statutory compensation schemes. The truth of this deduction is confirmed by the formidable array of statutory compensation schemes which do in fact exist in France as well as in England to shore up the already complex system of civil (and administrative) liability.¹

1. See Chapter 7.

In England, with its long established tradition of ex gratia compensation, it is perhaps surprising that this has not long been obvious. The explanation lies partly, perhaps, in the absence of information prior to the creation in 1967 of the Parliamentary Commissioner for Administration, who has, in his reports, made a great deal of material available. Partly, however, the explanation once more lies in the peculiar angle from which public lawyers approach the topic of government liability, in their image of battle incongruously staged in courts of law against serried ranks of government mercenaries. This vision encourages them in the belief that the practice of administrative compensation consolidates discretion in the hands of public servants. All ex gratia payments seem to savour of the discriminatory, while legal liability is correspondingly overrated because of its supposed deterrent and punitive value.

This is a false perspective. Ex gratia payments are found on examination to consist less in informal, exceptional payments than of highly formalised schemes which are ex gratia only in the sense of being extra statutory. Tort lawyers, who today evaluate the law of torts primarily in terms of its capacity to provide an efficient system for compensating the victims of accidents and allocating economic losses, have long been alive to the superiority of administrative schemes as a cheap and effective tool for allocating compensation. Public lawyers, somewhat surprisingly, since many would analyse the march of modern tort law in terms of a shift from 'private' to 'public' law, have failed to keep in step. This gives their theories an old fashioned look. Private lawyers, on the other hand, may have underestimated the deterrent element and the constitutional role of the superior courts. These two threads need to be tied in. I attempt to do this in my conclusions.

CHAPTER 1

The Historical Inheritance

The societies of France and England are sometimes depicted as being in sharp and unfriendly rivalry. This is far from the truth. Although from time to time we have experienced divergence and even hostility, we share in the main a common historical heritage and our social and political institutions would seem to an ethnographer more similar than dissimilar. Nor has the Channel proved a barrier to the flow of ideas in both directions. Our political theory really forms a common stock, restated from time to time with a difference of accent and emphasis. To a limited extent we also share a common legal inheritance. It is likely that we shall find these common attributes reflected in our separate experiences of government liability.

At the beginning of the modern period, which for convenience I have placed with the end of the Ancien Regime in the last years of the eighteenth century, the difficulty in suing the Sovereign or State is found at three different levels. At the procedural level, the special position of the Monarch as fountain of justice prevented the King from being impleaded in his own courts. In England, the exceptional 'petition of right' procedure had been evolved in response to this difficulty.¹ In France the theory of 'justice retenue' had always allowed the King to override the jurisdiction of the ordinary courts by summoning cases to the King's Council or attributing them to specialised, exceptional jurisdictions.² This practice is seen as the precursor of

1. Ehrlich, *Proceedings against The Crown* in *Oxford Studies in Social & Legal History*, ed. Vinogradoff 1921, vol. VI, pp. 83-89, 185-8. I Bl. Comm. 246; Hogg, *The Liability of the Crown*, 1971, p. 3; Holdsworth, *A History of English Law*, Vol. ix, pp. 8-22.

2. For a brief account, see Auby et Drago, *Traité de Contentieux Administratif*, 2nd edn. 1975, paras 322, 323.

the specialised administrative jurisdiction which today forms the characteristic feature of the French legal system.¹

At the technical level, the substantive meaning acquired by the maxim "The King can do no wrong" seemed to constitute an absolute bar to tortious liability. The very terminology of 'tort' 'trespass' and 'delict' implies wrongdoing and, during the formative years of the nineteenth century, when the prevailing theory of tortious liability was everywhere the fault principle, the maxim seemed at first an impassable obstacle.² This difficulty was later compounded when corporatist theories of the State became fashionable and it was argued that the State, being a legal and not a natural personality, was incapable of committing faults.³

At the political level, the idea of the Nation-State, whose fundamental political attribute is Sovereignty, formed a serious obstacle to the imposition of legal liability on the State. Sovereignty was conceived in terms of monarchy and majesty; it entailed power (puissance)⁴ and authority. To borrow the early and influential definition of Bodin:

"Sovereignty is the absolute and perpetual power ... of commanding in a state ... given to the prince without any charges or conditions attached ..."

The imposition of legal liability is, however, "a charge or condition". Logically, therefore, the statement of the great nineteenth century jurist Laferrière to the effect that "the attribute of Sovereignty is to impose

1. de Toqueville, *L'Ancien Régime et la Révolution*, Fontana, transl. Gilbert 1966, pp. 80-84.

2. Moreau, *L'influence de la situation et du comportement de la victime sur la responsabilité administrative*, 1956, p.4.

3. Below p.62.

4. *Six Books Concerning the State*, I.8.

itself on everyone without compensation"¹ is entirely in accordance with the traditional political view of Sovereignty.

It would be possible to describe the history of governmental liability in both England and France as a series of imperfect attempts to master this central problem.

At this point, however, a significant divergence in the English and continental legal traditions must be noted. For continental lawyers, all constitutional and administrative law must be considered to take place within the framework of a theory of the State. Some writers trace this concept of the State initially to Roman law.² It may, on the other hand, derive from the thinking of the philosophers of the Revolutionary era, which transferred Sovereignty from the Monarch to the Nation.

Even before the Revolution, Rousseau had argued that Sovereignty was an attribute of the people or the Nation rather than of the Monarch personally. It was this idea which was later enshrined in the resounding periods of Article 3 of the 1789 Declaration of the Rights of Man.

"The source of all sovereignty rests in the nation. No body and no individual can exercise authority which does not derive from it."

Whatever the truth of this, in continental legal theory the State is a legal entity, which is subject to the rule of law, i.e. it is a 'Rechtsstaat' or 'Etat legal'.³ The State has obligations, particularly

11. *Traité de la juridiction administrative et des recours contentieux*, 1st edn., 1887.

2. Merryman, "The public law - private law distinction in European and U.S. law", (1968) 17 *Journal of Public Law* 3, 5.

3. Nevil Johnson "Law as the Articulation of the State: a German Tradition seen through British Eyes" (unpublished paper). For possible origins of this doctrine, see Dowdall "The Word 'State'" (1923) 39 *L.Q.R.* 98; Borchard, "Governmental Responsibility in Tort" (1924-5) 34 *Yale L.J.* 1, 129, 229; 36 *Yale L.J.* 1, 757, 1039; G.D.H. Cole's *Introduction to Rousseau's Social Contract*, Dent's edition 1973 pp.xxiv-v.

the duty to maintain public order and carry on the work of administration. In return, the State possesses the means to carry out these obligations. For France, this means that the Executive possesses an inherent right to legislate and to take "those measures necessary for the good functioning of the administration placed under its authority" and this right is exclusive of statutory powers or of powers to legislate delegated by the Legislature.¹ The State also possesses inherent powers to act in the public interest and for the public safety known as "the police powers". These powers are not limited to the maintenance of public order but comprise also public health powers, rights to supervise public morals (e.g. by censorship or by the regulation of prostitution) and might even extend to economic measures. Indeed, the term is sufficiently vague to be capable of comprising all the powers of the State

"... to regulate by law and executive measures all aspects of the life of the Nation which, in the public interest, cannot be left to the uncontrolled whims and will of the citizen."²

In extreme cases the Executive may proceed to the execution of its decisions "ex officio" and without the necessity of obtaining a prior ruling from a court.³

These far-ranging powers must always be borne in mind when French administrative law and its theories of governmental liability are under consideration. They differ strikingly from the powers accorded to the

1. Jamart C.E. 7 Feb. 1936 Rec.172 noted Long, Weil et Braibant, Les Grands Arrêts Administratifs (G.A.) 5th edn. 1969 p.229; Sieghart, Government by Decree, 1950
2. M. Simon "Police Powers in France" (1974) IV Kingston Law Review 3,10.
3. Sté immobilière de Saint-Just C.E. 2 Dec. 1902, Rec.713 concl. Romieu, G.A. p.47.

executive by the common law in England. Indeed, it could be said that the Civil War was fought to prevent the establishment of powers such as these and that the 'police power' perished with Baconian theory. The celebrated 'General Warrant' cases of the eighteenth century¹ prevented its re-establishment, curtailing executive power by confining the government to those powers of arrest, search and seizure permitted by the common law to individuals. The tide of the common law has always flowed strongly in this direction. It is this tradition which Dicey praised and to the support of which he lent his powerful voice.²

The repudiation of the concept of 'police power' is paralleled by the refusal of English legal theory to develop a coherent doctrine of, or even to admit the existence of, "the State". Maitland believed this omission to be due to a confusion between "the King" and "the Crown", a confusion initially derived from medieval law. The State was "a late-comer ... slow to find a home in English lawbooks", concealed behind the concept of the Crown. Maitland concluded that English law was inadequate:

"We cannot get on without the State,
or the Nation, or the Commonwealth,
or the Public, or some similar entity,
and yet this is what we are professing
to do."³

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1. Wilkes v. Wood (1763) 19 St.Tr. 1153; Leach v. Money (1765) 19 St.Tr. 1002; Entick v. Carrington (1765) 19 St.Tr. 1030.
 2. The recent decision in Malone v. Commissioner of Police for the Metropolis [1979] 2 W.L.R. 700 where the plaintiff sought to challenge the legality of telephone tapping, carried out by the Post Office at the request of the police, runs against the stream. It legalises government action unless specifically precluded by statutory provisions or the common law. This allows the government something in the nature of a police power.
 3. "The Crown as Corporation" (1901) 18 L.Q.R. 131. See also Lévy, *La Responsabilité de la Puissance Publique et de ses Agents en Angleterre*, 1957 p.84.

I shall return to this point.

A second important difference between the two countries lies in the nature of their legal systems. It may not be strictly true to assert that the English Revolution was not directed at lawyers; nevertheless, lawyers seemed at all times to emerge miraculously on the winning side. The Common law too survived unscathed.¹ Reform of the common law came to be associated with two unpopular political platforms. At the start of the seventeenth century, Bacon proposed a restatement of both case law and statute which would, as he thought, prune the law of prolixity and of obsolete rules. This proposal, which won the support of James I and was bitterly opposed by Coke, came to be associated with the doctrine of absolute monarchy.² The second attack was launched during the Commonwealth by Levellers, but their reforms did not survive the Revolution and Harding suggests that this failure of the Cromwellian Parliament to achieve legal reform "condemned English law to years of incompleteness and improvisation, until the job of comprehensive reform was taken up again in the nineteenth century."³ The result in the area of government liability was considerable, because the law of torts was left, in the absence of codification or even restatement, almost entirely for the judges to develop, with only occasional, sporadic legislative intervention. Furthermore, the unreformed common law system was a poor instrument for development, based as it was on a medieval system of causes of action.⁴ Throughout the crucial period of the nineteenth century,

1. D. Veall, *The Popular Movement for Law Reform 1640-1660*, 1970.

2. *Op.cit.*, pp.65-74.

3. A. Harding, *A Social History of English Law*, 1966 p.267; contra Veall, *op.cit.*, p.228.

4. C. Harlow and M. Distel, "Legalité, illégalité et responsabilité de la puissance publique en Angleterre", (1977-78) 29 *E.D.C.E.* 335.

England was dominated by 'pigeon-hole' theories of tortious liability which led some authors to deny the very existence of a 'law of torts'.

In 1886, for example, Pollock felt able to comment in these words:

"... a complete theory of torts is yet to seek, for the subject is altogether modern ... The really scientific treatment of the principles begins only with the decisions of the last 50 years".¹

As late as 1927, Salmond dogmatically assured us that:

"Just as the criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability".²

It is not surprising that with the doctrine of strict precedent a hindrance rather than a help, the judges showed hesitancy in coping with some of the difficult and novel points which arose.³ I do not wish to suggest that the cases would have been differently decided if, for example, the nature of vicarious liability had been more perfectly understood, nor that the reasoning of the common lawyers was always inadequate - the reasoning of the Mersey Docks case⁴ is sufficient to show the contrary. The instrument at the disposal of French judges and writers of doctrine was, however, a very different instrument. Without pushing

1. Pollock, Torts, 1886, p.vii.

2. Salmond, Law of Torts, 7th edn. 1928, p.7; but see for a contrary view Winfield, The Province of the Law of Tort 1931, p.33.

3. In Viscount Canterbury v. A-G, (below), for example, Lord Lyndhurst expressed relief that writ of error was available to quash his decision if he had gone wrong in dealing with so many new and difficult points of law.

4. Below, p. 43.

the point too far, one could say that the reasoning of the Government Commissioner in the Blanco decision belongs to the modern world: that of Lord Lyndhurst or Chief Justice Erle in the 'petition of right' cases belongs to a long-dead medieval world, begotten in the Year Books.

The unpopularity of the pre-Revolutionary parlements had helped to ensure that the French legal system did not survive the Revolution unscathed. These parlements possessed a curious combination of legislative and judicial powers not entirely dissimilar in character to those once possessed by our own High Court of Parliament. These powers were used not only to frustrate all attempts at administrative and financial reforms, however moderate or desirable, but also to render impossible all reform of the antiquated legal system and to administer a harsh, criminal justice in an unenlightened and even barbaric fashion.¹ Like its Cromwellian counterpart, the Revolutionary Constituent Assembly devoted much time to reform of the legal system, starting with the abolition of the execrated parlements. The task of codification was, however, never completed and was finally finished in characteristically impetuous style by Napoleon who allowed his committee of distinguished lawyers 5 months to draw up the Civil Code.

The delictual liability of the Civil Code was unambiguously based on fault. Article 1382 provided simply that:

"Any act of a man, which causes damage to another, obliges the person through whose fault it occurs to repair it".

and by Article 1383:

"Everyone is responsible for the damage he causes, not only by his act, but also by his negligence or his imprudence."

1. Cobban, "The Parlements of France in the Eighteenth Century" in Aspects of the French Revolution, 1968; Lefebvre, The French Revolution from its Origins to 1793 (transl. E. J. Henson 1962) pp. 98-101.

Article 1384 provided for vicarious liability in the following terms:

- (1) A person is liable not only for the damage which he caused by his own acts, but also for that caused by the acts of persons for whom he is answerable.
- and
- (2) Masters and principals [are liable] for damage caused by their servants and agents in the execution of the functions for which they have been employed.

There was at first a divergence of opinion, revealed in the travaux préparatoires¹ as to the basis of Article 1384. Some preferred a 'master's tort' explanation of vicarious liability, believing that a master ought to "reproach himself with having trusted in men who are unsatisfactory, unskilful or incompetent". Others, more modern in their outlook, believed vicarious liability to be in the nature of a guarantee. At a later date this view prevailed and the French judiciary were able to construct on this fragile base complex rules of strict liability both for servants and for dangerous chattels (including motor vehicles).²

In this work of lawmaking through interpreting the text of the Code the judges were helped - somewhat ironically - by the declaratory theory of the judicial function which found favour with the Revolutionaries, inspired by the doctrine of Separation of Powers and mindful of the previous experience of judges (parlements) as lawmakers.³ By constituting the text of the Code as the groundrule of liability, the shackles of precedent were broken. To illustrate this by a simple comparison, the judge-made doctrine of common employment, although it had long outlived

1. Chapus, Responsabilité publique et Responsabilité privée, 1954, p.260.
pp.43-50, 69-73

2. Lawson, Negligence in the Civil Law, 1950 contains a good account; see also International Encyclopedia of Comparative Law, vol.XI (Torts)^{Chaps. 1,3,5.}

3. On the syllogistic theory of justice in the Revolutionary period see Troper, op.cit. below, pp.50-51.

any usefulness it might have possessed, lingered on unreformed by the English judges and was ultimately repealed by the legislature.¹ In France, on the other hand, when the Civil Courts repented of their choice of fault as the basis of employers' liability, they were able to reverse (revirer) their previous decisions and ^{to} change the direction of the law.²

In this context, it is now appropriate to examine the characteristic feature of French law, namely the existence of separate administrative courts with jurisdiction in contract and tort.

So potent is the mythology of Separation of Powers that the French as well as the English have been led into believing that the establishment of administrative courts was, in France, a deliberate choice. It seems more correct to call it an accident of history or perhaps a series of accidents. The pre-Revolutionary tradition of 'justice retenue' may have been one factor. The law courts (parlements) of the Ancien Régime were, as we have seen, discredited both by their adherence to the aristocratic cause and by their consistent opposition to administrative reform. It was natural that the Revolutionaries should seek to ensure that nothing similar should ever recur. The parlements were abolished; and amongst other similar texts the Constituent Assembly enacted Article 13 of the Law of 16th-20th August 1790, which provides:

"Judicial functions are distinct and will always remain separate from administrative functions. The judges may not, on pain of forfeiture, interfere in any way with the operation of the administration, nor summon administrators before them in respect of their official duties."

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1. Priestley v. Fowler (1837) 3 M & W.1 repealed by the Law Reform (Personal Injuries) Act, 1948. On the way round by way of breach of statutory duty, see Fleming, Law of Torts, 5th edn., 1977, p.484.
 2. Discussed below, p. 83.

All complaints against administrators were to be made through administrative channels and directed to the King. The prohibition was repeated by the Constitutions of 1791 and 1795, and a decree of 16 fructidor of that year stated:

"The prohibition is repeated against the courts taking cognisance of acts of administration of any kind whatsoever".

The underlying motivation for this legislation is a matter for dispute amongst French constitutional theorists.¹ The writers of the 19th century tended to see an embodiment of the classic "specialist" or "tripartite" theory of Separation of Powers in which each organ of Government is totally separate from and free from harassment by the other organs, a position summarised in the celebrated dictum "Juger l'administration est aussi administrer". It seems probable, however, that, in line with Montesquieu, the constituents preferred the "dualist" theory of the "balanced Constitution" in which the judiciary is permitted to control the administration. The question of an administrative jurisdiction was postponed by the Constituent Assembly to a later stage in the discussion and, although various proposals for a series of special administrative tribunals were at one point discussed, the matter was never thoroughly settled. That not all the participants in the debates favoured an administrative jurisdiction is clear from the debates and projets de loi. One speaker, indeed, remarked that the establishment of separate courts would "cover France in judges, overburden the people with costs and also torment ^{them} with jurisdictional questions."²

1. For an excellent account, see M. Troper, *La Séparation des pouvoirs et l'histoire constitutionnelle française*, 1973. See also Gaudemet "La Séparation des Pouvoirs: Mythe et Réalité" D.1961 Chr. XXIII.

2. Cited Troper, *op.cit.*, p.56; and see for a general account pp. 44-57; Auby et Drago, *op.cit.*, pp. 293-326.

The French Revolution, dedicated to Liberty and Equality, had, partly by accident, confirmed the immunities enjoyed by the executive under the Ancien Régime. The Napoleonic settlements extended them. Article 75 of the Consular Constitution of 1800 provided that

"Government agents other than Ministers, can only be pursued for acts relating to their official duties with the permission of the Conseil d'Etat; in that case the action takes place before the ordinary courts."

The Penal Code provided severe penalties for judges who breached the provision. Thus the French executive came to enjoy an immunity from civil liability far wider than that possessed by the Crown in England, where personal liability was always the rule. It was fortunate for France, therefore, that in the Conseil d'Etat Napoleon bequeathed to France an institution accustomed to make policy decisions and enthusiastic for reform, sufficiently prestigious to survive almost every change of political regime and capable of supplying these lacunae in the constitutional arrangements.¹

The creation of the Conseil d'Etat and, at departmental level, the Conseils de Préfecture,² allowed the administrative jurisdiction to be formalised. From an early date, the Napoleonic Conseil received many complaints; these gradually acquired "a judicial character which they had not previously possessed".³ But there were limits. The Conseil d'Etat was not a court but an advisory body. Only in 1872 was its 'Section du Contentieux' or judicial section permitted to hand down binding judgments. Furthermore, its tentative jurisdiction, derived from the fragmentary

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1. For a historical sketch see Letourneur, Bauchet, Méric, *Le Conseil d'Etat et les Tribunaux Administratifs* 1970, pp.9-46. For a more complete study see *Le Conseil d'Etat: son histoire à travers les documents d'époque (1799-1974)* Paris 1974.
 2. Later to evolve into today's departmentally organised tribunaux administratifs.
 3. Auby et Drago, *op.cit.* Vol.2 p.469; for a general historical outline see pp.468-476.

texts, was always regarded as "exceptional" - that is, as an exception to the "normal" jurisdiction of the civil courts. This attitude disappeared only after the establishment in 1848 of the Tribunal des Conflits to settle jurisdictional disputes. The new court, consisting in an equal number of judges from each jurisdiction, tended to view the two hierarchies as 'separate but equal' and the result was a generous interpretation of the term "acts of administration", the evolution of sophisticated jurisdictional criteria and an expansion of the jurisdiction of the administrative courts.

During this early period, too, there was hostility to the imposition on the administration of a duty to compensate. Annulment was one thing; it promoted administrative efficiency. Compensation was quite another matter. It was construed as an "interference with the work of the administration" which savoured of the Ancien Regime. It was seen as

"... an impingement upon the necessary freedom of the service(s), a source of stagnation and a cause of embarrassment which, at the end of the day, would result in harm to society as a whole". 1

Moreau states that, until the second half of the nineteenth century, state liability was exceptional.² Nor was the Conseil d'Etat generous in granting permission to proceed in the civil courts. It has been suggested that the primary consideration here was the "loyalty" of the public servant and his attitude to his superiors. Very early the habit developed of using the immunity to stifle administrative scandals. Throughout the period, therefore, there was a background of dissatisfaction and discontent. Many attempts to introduce legislation abrogating the

1. Delbez, "De l'Excès de pouvoir comme source de Responsabilité" 1932, R.D.P. p.441, 456.

2. Op.cit., p.3.

the personal immunity were made.¹

This being the case, it is less of a surprise to learn that the provisional Government of 1870 which followed the collapse of the Second Empire found time, even with the enemy at the gates of Paris, to rescind the provisions of Article 75 of the 1800 Constitution, "together with all other dispositions of law, general or special, having for their object the prevention of proceedings against all kinds of public officials." (Decree of 19 September 1870). At a later date, an interesting explanation was given for this action by the distinguished Government Commissioner, later Prime Minister, M. Leon Blum.² Even if his words are no more than a mythologisation, an unconscious attempt to read back into the world of the Second Empire the Anglophile and liberal sentiments of a later age, they are of interest. It is after all, intriguing to find a Diceyan apologist in the temple of the Conseil d'Etat.

M. Blum opened his opinion by comparing the prevailing French system of State liability with countries in which, in his words,²

"... the constitutional regime has not been smothered by a too invasive administrative regime. The roles are reversed. Personal liability of the official becomes the rule, and the liability of the administration, where it exists, is exceptional."

The aim of the legislators of 1870 was, in the opinion of M. Blum, to reverse these roles. He explained:

"Today, when these polemics and controversies have a purely historical flavour, we can say that the intention of the authors of this decree - an

1. Maestre, La Responsabilité Pécuniaire des Agents Publics en Droit Français, 1962 pp.33-34.

2. Lemonnier C.E. 26 July 1918, S.1918-19. III.41 Concl. Blum n. Hauriou.

intention clarified by the debates surrounding Art.75 under the imperial regime - was to confer normal jurisdiction on the civil courts in all civil actions for liability founded on a fault of the public service. This normal civil law jurisdiction seemed to afford the best guarantee of individual liberty. It was hoped that, as in England, in the case of arbitrary arrest, illegal seizure, or any kind of wrongful abuse of power, the official who had given or executed the order would suffer a personal sanction. Fear of personal sanction is, for a public servant, assuredly a much more powerful brake than the ultimate liability of the service by which he is employed."

In fact, as M. Blum went on to point out, the legislative intention was frustrated.¹ The Napoleonic tradition was too strong and the mythology of Separation of Powers possessed too great a magic. The Tribunal des Conflits intervened to stultify the operation of the 1871 decree.

In the famous Blanco case,² a small child was run over and injured by a wagon belonging to a state tobacco factory. The parents sued the workers personally and the State as vicariously liable in the civil courts. The Prefect demurred to the jurisdiction,³ and the Tribunal des Conflits therefore had to decide, in the light of previous conflicting decisions of the civil and administrative courts, which courts were competent. Previous decisions had suggested that the State, when acting in a private capacity or entering into relationships normally regulated by private law,

1. Bertrand points out ("Edouard Laferrière", (1956)/E.D.C.E.145, 154-5) /10 that citizens were quick to avail themselves of the relaxation and attributes the re-establishment of the authority of the administrative courts to Laferrière.

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2. T.C./Feb. 1873, D 1873.3.71 concl. David. G.A. No. 1.

3. Ordinance of 1 June 1828 (as amended) allows the Prefect, whenever he believes that a civil court has been seised of a question solely within the jurisdiction of an administrative authority (court), "to raise a conflict of jurisdiction." Since 1849, such questions have been referred to the Tribunal des Conflits. A conflict of jurisdiction may not be raised before a criminal court: Brown & Garner, French Administrative Law, 2nd edn.1973 pp.77-8. This procedure is throughout referred to as a "demurrer".

was amenable to the jurisdiction of the civil courts. The operation of a tobacco factory, a normal commercial undertaking, should have come within this definition. But, on the advice of the Government Commissioner, M. David, the Tribunal des Conflits changed course, holding that the administrative courts were in principle competent in any case which concerned the operation of a public service; any other provisions constituted a derogation from the general principle of Separation of Powers and were to be narrowly construed.

The reasoning is redolent of administrative privilege. The judgment stated that the relationship between the State and its employees differed from private law relationships, their terms of employment being governed by special rules which "did not always leave any freedom of choice to the administration." The liability of the State could therefore be "neither general nor absolute" and special rules were applicable. To allow the civil courts to develop these rules would entail application of the general principles of delictual liability contained in the Civil Code, besides permitting the civil courts to "interfere with the operation of administration or "take cognisance of acts of administration." Finally, the essential task of the administrative courts for which they, and they alone, were qualified, was the development of such rules, the consideration of the needs of the administrative services and the reconciliation of public needs with private interests. On these grounds the previous jurisdictional division between act of authority (acte de puissance publique) and operational acts (acte de gestion privée) was replaced by a new test, the criterion of "public service".

The second key decision, Pelletier,¹ involved an action for damages and restitution in respect of illegal seizure of copies of a newspaper by the Prefect and Commissioner of police. The action was brought in the civil courts, but was referred to the Tribunal des Conflits, which was forced to consider the ambit of the 1870 decree. This was construed as narrowly as possible, and it was held that it merely abrogated the need for permission from the Conseil d'Etat before proceedings could be brought against public officials personally in the civil courts. No change had been effected in the basic division of jurisdiction; the citizen was not free to choose whether to sue the agent in the civil courts or the State in the administrative courts. Government officials could be pursued in the civil courts only where their actions did not involve any consideration of an "act of administration", i.e. in the case where the agent was not acting in the course of duty and had committed a "personal fault". In the present case it was the official conduct of the defendants which was the subject of complaint and no specifically personal acts had been pleaded. It followed that the administrative courts were alone competent. Thus the new jurisdictional demarcation line was between "personal acts" for which the agent would be liable in the civil courts, and "fautes de service" for which the State, and not the author of the acts, was liable in the administrative courts.

These two decisions created the foundation for a system of "public service" liability administered by the administrative courts, although the final stone was only placed when, in 1908,² the Tribunal des Conflits extended the jurisdiction of the administrative courts to local authorities,

1. T.C. 30 July 1873, **S** 1873.3.5. concl. David, G.A. No. 2.

2. Feutry T.C. 29 Feb 1908 **S** 1908.3.97. concl. Teissier n. Hauriou, G.A. No.20; de Fonscolombe T.C. 11 Apr. 1908 Rec 448; Jouillié T.C. 23 May 1908 Rec. 509.

giving as a reason that "the State is a unity, and the nature of its acts and operations does not change according to the geographical size of the administrative authority in point." This self-evident truth had not revealed itself at an earlier date, explained the Government Commissioner in the Feutry case (the great French jurist Teissier), because the restrictive attitude of the Conseil d'Etat towards governmental liability had rendered it desirable to leave local authorities to the mercy of the civil courts. This admission is a revealing one.

But the celebrated arrêt Blanco introduced into French law a logical contradiction. Laferrière admitted¹ that liability, whenever it derives from the Civil Code, is naturally the concern of the civil courts. The Blanco decision is open to the objection that it distinguishes in random fashion between public and private enterprise and fails to confine the "special" rules of administrative liability to those situations to which, because they involve the use of sovereign power, the special rules are more appropriate. However essential the decision for the development of French public law - and many public lawyers believe that its significance has been retrospectively overrated and inflated - it was not entirely rational. This was tacitly admitted by the Conseil d'Etat at a later date when, amidst a storm of doctrinal dissent, they returned jurisdiction in cases concerning the liability of publicly owned commercial enterprises to the civil courts. By this time, however, the harm had been done; the Blanco decision had persuaded generations of French public lawyers of the need for "special" rules of administrative liability. Ignoring the fundamental similarities of the two systems, they were driven to seek an all-embracing theory of administrative liability, wholly original and different in kind to the rules of civil liability.

1. Vol. I, p.674.

During this period, (1789-1870) categorised by many of the authors as "the age of irresponsibility," jurisdiction, and not the substantive rules of liability, was the main preoccupation of the Conseil d'Etat. Indeed Moreau remarks that judgments dealt "mainly with questions of jurisdiction and [were] mainly inexplicit as to the basis of liability or the system of compensation."¹

Even if liability was 'exceptional', it covered a surprisingly wide area of public life;² ranging from War Damage compensation, (a principle which dates from the Napoleonic wars), to compensation for loss caused by public works, as e.g., by road, canal or railway construction, and covering also liability for loss caused for public services such as the postal service, the ports authority and the tobacco monopoly. The reason why liability was said to be 'exceptional' was that it was derived from statute and not based on the general principle of liability contained in the Civil Code. The statutory provisions dated to the Revolution and had their roots in hostility caused by the failure during the Ancien Régime to repair damage to individual property. The schemes, in the main, stipulated a right to compensation irrespective of any fault. These no-fault schemes thus provided the germ of the later theories of liability regarded as characteristic of public law. They were also helpful in familiarising people with the idea of State liability.

Koechlin argues,³ however, that none of the schemes was "capable of providing a general principle of liability" and that "only the fault concept was able to fulfil this task." As a description of what actually

1. Op.cit. p.4.

2. Koechlin, *La Responsabilité de l'Etat en dehors des Contrats de l'an VIII à 1873*, 1957.

3. Op.cit. p.106.

happened this statement is correct. As an explanation of why it occurred, it is defective. Risk or Equality before Public Charges were rational choices as a basis for State liability. Other factors must have led to the choice of fault. No doubt, in France as in England, the prevailing moral and political climate favoured fault; but the decisive factor was in all probability the gravitational pull of the fault based liability of the Civil Code.

Moreau describes the second half of the century as "the golden age of liberalism". It was also a period in which state interventionism increased sharply. At the same time, the stabilisation of the French Revolution had created a bourgeois society heavily weighted in favour of a minority of property owners¹ - from which class the members of the Conseil d'Etat were naturally recruited. All this created a favourable climate for systematisation of government liability, and the Conseil d'Etat was well placed to cater for the demand.² It is worth repeating that its members formed a self-confident elite well disposed to reform. They also numbered some of the most eminent lawyers of the day among their ranks.

The Conseil d'Etat now advanced on two fronts: from a jurisdictional viewpoint, rapid strides were made in undercutting the sacrosanct area of governmental action previously sheltered by the theory of Sovereignty; from the doctrinal point of view, general principles of administrative liability were evolved and developed.³

1. See Kamenka and Hah-Soon-Tay "Beyond the French Revolution: Communist Socialism and the Concept of Law", (1971) 21 Univ. of Toronto L.J. 109, 114; Bertrand, "Edouard Laferrière", op.cit., p.145.

2. Loschak, *Le rôle politique du juge administratif français*, 1972 esp.p.16; Waline, "L'action du Conseil d'Etat dans la vie française", *Livre Jubilaire du Conseil d'Etat*, Paris 1950 p.131.

3. See further Ch. 2, below.

At the turn of the century, the main problem which faced the Conseil was the imposition of liability for misuse of the 'police power'. In Tomaso Grecco¹ the Conseil for the first time admitted that there might, in certain circumstances be liability for the use of the police powers. The government commissioner pointed out that to permit immunity for 'acts of authority' or for use of 'police powers' was to shelter a dangerously indefinite area of governmental activity; the second term might even legitimately be interpreted as encompassing the whole field of administrative law. But the Conseil did not feel able to concede that liability could be general or absolute, and, although the civil law concept of fault was chosen as the basis for liability, the standard imposed was that of gross fault (faute lourde). In Olivier and Zimmerman² the State was again held liable for "acts of authority" and abuse of governmental powers this time by a Prefect. Unlawful quarrying activities had been carried out on the plaintiffs' land, and in an attempt to disguise this fact the Prefect purported to legalise the trespass retrospectively by a declaration that the land had always been public property (domaine publique). So to use his discretion was a clear abuse of power. The Conseil felt the parallel with the civil law principle of abuse of right and the State was held liable. The way was now open for a more general conquest of Sovereignty.

It is convenient to leave the developing caselaw of the Conseil d'Etat at this stage to notice one important consequence flowing from the jurisdictional arrangements. The two great administrative law actions, the petition for annulment of illegal administrative action (le recours pour excès de pouvoir) and the action for indemnity (le recours de pleine

1. C.E. 10 Feb 1905, D 1906.3.81 concl. Romieu. This was an action for negligence by a policeman who had fired a shot when a bull ran amok amongst a frightened crowd.

2. C.E. 27 Feb 1903, S 1905.3.17 n. Hauriou. Discussed below Ch.6

jurisdiction) were developed in tandem and came to be seen as pendants.

This link had several consequences. From an early date the action for indemnity was seen in the light of a sanction. To quote Moreau again,¹ in the early period

"... The limited liability of the policeman - State is more like a punishment imposed on a guilty party than compensation awarded to a victim."

Once the Conseil d'Etat abandoned its early practice of issuing instructions or orders to administrative authorities² the idea of sanction became more important. The action for indemnity could also be used as a means of collateral review to bypass the extremely short time limit of 2 months in cases of annulment. This practice, again for punitive reasons, was encouraged by the Conseil d'Etat and received an accolade of approval when joinder of the two actions was first allowed in 1911. In a note³ approving the Conseil d'Etat's change of heart, Hauriou emphasised the punitive nature of the action for indemnity, pointing out that annulment on its own was, in the absence of mandatory remedies, powers to order reinstatement or to redraft regulations, meaningless. An order for indemnity gave meaning to annulment and joinder of the two petitions allowed this to be easily achieved.

There is no doubt that this attitude towards the indemnity as a sanction rather than a means of compensation endures today, and forms the principal rationale for awards of damages against the administration.

1. Op.cit. p.7.

2. A. Mestre, Le Conseil d'Etat Protecteur des prérogatives de l'Administration, 1974 pp. 59-61 tells us this practice endured throughout the 19th century.

3. Blanc C.E. 31 March 1911, S 1912-III-129 n. Hauriou. The case represented a "revirement".

Nothing has been of such influence in shaping French theories of government liability as the existence of a separate jurisdiction.

One can see in every major theory of administrative liability in France, at least prior to Eisenmann, an apology for the administrative jurisdiction. One might also observe that, thanks to Dicey, the existence in France of a separate administrative jurisdiction has not been without influence in shaping the governmental liability of England.

It is fair to single out of a distinguished school of French theorists, the masterly and influential writings of Leon Duguit. The first point to notice is that Duguit's theory, like that of Dicey, is embedded in a theory of the Constitution.¹ Unlike Dicey, however, Duguit expounded his theory in detail and at considerable length.²

Duguit's theory takes shape within and forms part of his "General Theory of the State" (Vol.2 of his work). Duguit calls his theory "objectivist" and believes he can discern at the time of formulation of his theory, a disappearance or transformation of the doctrine of sovereign power (puissance publique). His work is therefore an attack not on authority itself, but on the traditional conception of authority. This transformation has been worked for Duguit by a new and undoubtedly socialistic concept of "public service". Particularly characteristic of the transformation are "the organisation of the public services, the relationships of the government with its agents entrusted with the implementation of

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1. *Traité de Droit Constitutionnel*, 1st edn. 1911 (5 vols.). My references are to the 3rd edn. 1928.
 2. See especially Vol.4 p.460 et seq and *Les Transformations du Droit Public*, 1913.

public services and above all else, the ever increasing responsibility of the State, recognised in settled caselaw on the subject of the execution of all the public services."¹ In this way, sovereignty comes to be limited by the notion of "public service" since the State is no more than a collectivity established for the implementation of public services.²

From this initial premise, Duguit draws two deductions: first, he argues that, since the Revolution, the paramount principle is protection of private property. It is therefore proper for the property attributed to the State for the operation of the public services to be used for the purpose of compensating individuals injured by their operation.³ Both fault liability and liability without fault derive from this principle. Secondly, Duguit argues that the basis of State liability is never fault - the State, being a corporate entity, is incapable of fault.⁴ The basis of State liability is always the Revolutionary principle of equal treatment or Equality before Public Charges. In this way Duguit is able to explain the development by the Conseil d'Etat of liability without fault which is derived from the statutory procedure for compensation in case of expropriation of property and loss caused by the execution of public works. He says:

"These two lines of caselaw are in no way based on the idea of the general liability of the State, but on the inviolability of private property. Despite this, these precedents have certainly opened the way to the present

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1. *Traité*, Vol.2 p.40. It is difficult to render Duguit's style in English. Sometimes I have chosen excessively liberal renderings.
 2. See further C. Pisier-Kouchner, *Le Service public dans la théorie de l'Etat* du Léon Duguit, 1972.
 3. *Traité*, pp.68-69.
 4. *Ibid.*, Vol.IV p.468, *Transformations*, p.230.

caselaw, which tends to recognize the liability of the State on every occasion when State intervention, although legal and without fault, imposes on an individual or group of individuals a charge heavier than that which rests on others.¹

Duguit has now argued himself into a position where the jurisdiction of the administrative courts has been justified by his theory of the unique nature of State liability. He is able to say with conviction that the administrative jurisdiction is properly "the court competent to decide if ... [a given set of facts] reveals a defect in the operation of the public service sufficient for the public funds to repair the damages which results from it."² It remains only to isolate the cases to which the special theory applies: in other words, to devise jurisdictional criteria.

Duguit favours an expansionist theory of the administrative jurisdiction. He criticises at length³ the original demarcation line drawn between 'acts of authority' and 'operational acts' (acte de puissance or acte d'autorité and acte de gestion) in which he professes to see no sense. Indeed, Duguit could hardly allow such a distinction without conceding his original point that the State is no more than an arrangement for the organisation of public services. Instead, Duguit, completing his circle, necessarily concludes in favour of the 'public service' criterion of jurisdiction inaugurated in the Blanco decision, though he notes sadly in passing that the Conseil has, of late, erred and strayed from the way

1. Ibid. p.228. The Equality principle is analysed below, Ch.6. Duguit's ideas are more fully developed in Traité Vol. IV p.460.

2. Ibid. p.498.

3. Traité, Vol.2 pp.78-81.

of truth, veering once more towards the earlier, operational criteria of autorité and gestion.¹

It would be symmetrical to oppose to Duguit his great contemporary Hauriou.² It is more convenient, however, to mention the critique of Charles Eisenmann who at a much later date, in a striking and influential article,³ exposes the fiction of the theory of administrative liability as unique and therefore, autonomous. Eisenmann argues that administrative liability can be shown to be 'unique' or special in character only if the great majority of its rules are wholly different from those of private law. Similarly, it can only be 'autonomous' if all public authorities are subject to the jurisdiction of the specialised courts.⁴ Eisenmann goes on to demonstrate how, in the system as it has developed, both propositions are false. He concludes that the theory of the 'unique' nature of administrative liability is a myth.

"... It is an abstract idea, a position of principle which treats 'the autonomy' of the regime of public liability as the natural and logical solution. The theory starts from the very general idea, that, normally, the life and all the activities of the State machinery, and in particular of the Administration, are and ought to be, regulated by rules which are 'special' 'autonomous' and 'outside the ordinary law',⁵

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1. He cites (p.81) the conclusions of M. Cahen-Salvador in Mestral C.E. 3 July 1925, D1926.III.18 and of M. Rivet in Sté des Affréteurs Réunis C.E. 24 May 1924 D 1924.III.26.
 2. Hauriou's notes are collected and published as *La Jurisprudence administrative de 1892 à 1929* (3 vols) 1929.
 3. "Sur le degré d'originalité du régime de la responsabilité extra-contractuelle des personnes (collectivités) publiques", J.C.P. 1949.I. nos. 742 and 751.
 4. Below, Ch.4.
 5. Exorbitant de droit commun. The French expression 'droit commun' refers to 'normal' as opposed to 'special' rules. It is thus sometimes used (as in this passage) to contrast the civil law with administrative law. Equally the caselaw of the Conseil d'Etat is often referred to as the 'droit commun' of administrative law and contrasted e.g. to statutory exceptions.

by which we mean private law. The classic thesis of the separate nature of public liability is simply one of the corollaries, or one specific application of, the general theory of the autonomous nature of public law - by which I mean here the law which regulates the machinery of the State - and, more particularly of administrative law. It is an indissoluble part of this thesis."¹

This passage does expose the doctrine of the "specialness" of government liability. Like most myths, it is founded on fact: i.e. the theory simply explains and justifies the existing institution of the administrative jurisdiction. But the myth has a secondary purpose: like theories of fundamental rights, it seeks to secure civil liberties. If the State is not to be governed by the rules of private law, there is a danger that it will escape altogether from legal controls. The myth that the State is subject to 'special' rules is designed to ensure that this shall not happen. Thus Eisenmann points to a feature obscured by the structure of English law but evident from the parallel nature of the two grand recours in France: that the rules of government liability may be visualised 'as part of the apparatus' of administrative law.

If the keynote of the French system of administrative liability is the emphasis on the State, then nineteenth century England presents a very different picture. I have already referred to Maitland's suggestion that the absence of any legal theory of the State may have contributed to the absence of ^a corporate system of governmental liability. I have tentatively suggested, too, that the absence of a formal 'police power' may have been a contributory factor; if powers are framed in individual terms it seems logical that individuals should be personally responsible for them.² A third factor of significance was - fairly obviously - the

1. No. 742 para 10.

2. For confirmation, see Dicey, Introduction to the Study of the Law of the Constitution, 9th edn. by E.C.S. Wade, 1939 p.265. References throughout are to the 9th edn.

possibility of personal liability.

It has been suggested that the fact of real, personal liability may have actually impeded the growth of tortious liability in England, at least in the case of public officials.¹ During the eighteenth and nineteenth centuries, in contrast to France, many public offices were filled by unremunerated volunteers. To submit their private incomes to the threat of awards of damages was harsh and might necessitate reform of this system - a change stubbornly resisted. Several cases make reference to this risk. In an early American case, for example, it was suggested that

"No man would accept the office of judge, if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigation, with every man, whom his decisions might offend."²

Too much should not be made of this, because the judges were not noticeably more generous with public funds. Fiscal frugality was a Victorian characteristic. "Victorian budgetary policy had the single aim of balancing the annual account at the lowest possible figure."³ And there is a long established tradition of judicial parsimony with the rate funds. Again, it is generally accepted that the judiciary during the period of industrial expansion was inclined to protect burgeoning industry by allowing the cost of accidents to fall on individual victims.⁴

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1. E.g. Jennings, "The Tort Liability of Administrative Officers", (1936) 21 Minn.L.R. 263; Borchard, op.cit. above.
 2. Phelps v. Sill (1804) 1 Day's Cases in Error (Conn) 315, 329 cited loc. cit. above p.271. For English examples see R. v. Commissioner of Sewers for Tower Hamlets (1830) 1 B.and Ad.232, 109 E.R.773; Everett v. Griffiths [1921] 1 A.C. 631.
 3. Taylor, *Laissez-faire and State Interventionism in 19th Century Britain*, 1972, p.60. See also Dicey, *Law and Opinion in England*, 2nd edn. 1914, Introduction p.lxxxvi.
 4. For example, Green, "The Individual's Protection under Negligence Law: Risk-Sharing", (1953) N.W.Univ. L.R. 751; but the point is generally accepted today.

These themes come together and can be traced through many of the cases.

Duncan v. Findlater¹ is but one example.

This was an action against turnpike trustees for the negligence of their workmen in leaving piles of earth in the road and causing an accident. The empowering legislation provided that the trust funds were to be applied to certain specified purposes and no other purposes whatsoever. The reasoning of the House of Lords is confusing and the judgment of the Lord Chancellor contains a complex equation of 'legality' with 'liability', designed apparently to justify the prejudgement against compensation implicit in the first line of the following passage:²

"It is impossible to suppose that the framers of this statute contemplated that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the Trustees. If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption that the act creating the damage being within the statute must be lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by the statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct?"

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The case is interesting, too, because the judgment of Lord Brougham contains a classic exposition of the doctrine of vicarious liability as it was understood at the period. Lord Brougham said:³

1. /6 Cl. and F894, 7 E.R. 934.

/(1839)

2. At p.939.

3. At p.940. Glanville Williams, "Vicarious Liability: Tort of the Master or of the Servant?", (1956) 72 L.Q.R. 522.

"The rule of liability, and its reason, I take to be this: I am liable for what is done for me and under my orders by the man I employ, for I may turn him off from that employ when I please: and the reason that I am liable is this, that by employing him I set the whole thing in motion; and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it."

This conception of vicarious liability as based on the personal negligence of the master, which can be contrasted with the 'servants tort' or 'guarantee' theory, (already under consideration by the framers of the French Civil Code), was to cause much trouble in the context of Crown Proceedings. It is worth noting, though, that Lord Brougham, had he followed his own reasoning, ought to have imposed liability on the trustees who had both employed the negligent workers and instructed them to mend the road. But even if the reasoning in the case leaves something to be desired, it is unwise to attribute this either to sympathy for the individuals found personally liable or to imperfect understanding of the doctrine of vicarious liability. The most that can be said is that these may have been contributory factors in producing a decision which was satisfactory to the House-probably because it accorded with previous English precedents.

The central piece in the puzzle of governmental liability was, however, the doctrine of Crown immunity. Had this issue been formulated in abstract terms and inside a theory of the State, as in France, the issue would have been sufficiently difficult. As it was, the courts were left to fumble from case to case with the authority of precedent and the Year Books to help them.

The idea that vicarious liability involved "fault" at once brought the courts squarely up against the ancient maxim that "the King can do no wrong". In Viscount Canterbury v. Attorney-General¹ the Speaker of the Commons brought a petition of right against the Crown to recover compensation for the loss of his goods in a fire caused by negligent workmen which consumed the Speaker's house (and incidentally the House of Commons). The court held that petition of right did not lie in the case of a pure tort, partly on the ground that no previous precedent could be traced. But Lord Lyndhurst L.C. found difficulty with the law of master and servant, saying:²

"It is admitted that, for the personal negligence of the Sovereign, neither this nor any other proceedings can be maintained. Upon what ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle that qui facit per alienum, facit per se, this would not apply to the Sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the Sovereign, to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy."

This reasoning was amplified in the subsequent case of Tobin v. The Queen,³ an action for damages in respect of a ship seized by a naval officer on suspicion of slaving and burnt. In this case Erle C.J. distinguished the ordinary case of master and servant on the ground that the relationship was not analogous to the relation of the Sovereign with a

1. (1843) 1 Ph 306, 41 E.R. 648.
2. At p.654.
3. (1864) 16 C.B.N.S. 310, 143 E.R. 1148.

naval officer. The Queen does not appoint the officer personally; nor does the Sovereign "control the conduct of the captain in his movements, but a sense of professional duty"; nor was the particular act of seizure ordered or authorised by the Queen.¹ The reasoning here parallels in an interesting way the remarks of the Government Commissioner in the Blanco case² concerning the special nature of the relationship between the State and its public servants; but, at the same time, it fully bears out the strictures of Maitland as to the ill effects of 'personalising the Sovereign'.³ And the judge went on to create a watertight doctrine of Crown Immunity, arguing, on the authority of Hale (L.C.43) and Coke (2 Inst.86) that:⁴

"The maxim that the King can do no wrong is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally, the law presumes will not be wrong: that which the Sovereign does by command to his servants, cannot be a wrong in the sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command."

This reading of vicarious liability would have been more tolerable if those who did employ and control the officials, i.e. Ministers or the Board of Admiralty, could have been held liable for the wrongful acts of their subordinates in the service. This solution, was unfortunately precluded by an established line of cases.⁵ Thus the plaintiff was left with

1. At p.1164.

2. Above p.25

3. Op.cit. above p.15.

4. At p.1165.

5. Lane v. Cotton 1 Ld.Raym. 646 cited and confirmed Whitfield v. Lordle Dispenser (1778) 2 Cowp. 753; Duncan v. Findlater (above); Raleigh v. Goschen [1898] 1 Ch.73; Tobin v. R. (above).

his remedy against the individual tortfeasor. And the third case in the trilogy expresses complete satisfaction with this arrangement.¹

however

"Let it not be supposed", explains Chief Justice Cockburn,
 "... that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. As the Sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown ... a position which appears to us to rest on principles which are too well settled to admit of question and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other."

All that was left was for the courts to curtail as far as possible the effects of Crown immunity. In Mersey Docks and Harbour Board v. Gibbs,² the House of Lords made a bold step forward by depriving of the shield of Crown immunity a large number of public corporations which offered to the public ordinary commercial services. The case concerned the negligence of a harbour authority, incorporated by Act of Parliament as a Committee of trustees, in maintaining their dock in such a way that the plaintiffs' ship hit a mud bank and his cargo of guano was damaged. The judges were consulted, and Blackburn J. replied on their behalf.

The existence of a fund from which compensation could properly be paid was an influential factor in this decision. Blackburn J. cited with approval an earlier dictum that, where Act of Parliament authorised payment from the public funds, it was "inconsistent with actual justice and not warranted by any principle of law" that the loss should fall on individuals.³ Blackburn J. also felt able to explain away earlier precedents

1. Feather v. The Queen (1865) 6B and S 257, 122 E.R. 1191, at pp.1205-6. See for criticism, Holdsworth, H.E.L. Vol. IX, p.44.

2. (1866) L.R. 1 H.L. 93. (1858)

3. Bramwell B. in Ruck v. Williams/3 H & N 308, 157 E.R.488, 493, cited by Blackburn J. at p.118.

concerning the liability of hierarchical superiors for their subordinates, saying:¹

"All that is decided by this class of case is, that the liability of a servant of the public is no greater than the servant of any other principal, though the recourse against the principal, the public, cannot be by an action."

But the case is most remarkable for its robust and modern discussion of public policy. In the words of Lord Cranworth:²

"It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation and in others they will not; such a distinction arising, not from any visible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by whom the docks are managed."

It is always deceptive to read history backwards. Some might be tempted, however, in the light of the nearly contemporaneous Blanco decision, to see the Mersey Docks case as a missed opportunity to create for England a theory of 'the public service'. In fact the case contains a curious anticipation of the later reasoning of French administrative courts when, in the 1920s and 1930s, they retreated from the exposed Blanco position and returned jurisdiction in case of tortious loss caused through the activity of the 'commercial' or 'industrial' public services to the civil courts, on the grounds that such services operated in circumstances similar to private commerce and industry.³ History seemingly repeats itself.

1. See note 5p.42 above. At p.111.

2. At pp.122-3; see also per Blackburn J. at p.107.

3. L'Ouest Africain (Bac d'Eloka) T.C. 22 Jan.1921, D.1921.III.1 concl. Matter; Verbanck et Mabilie C.E. 9 Feb.1934, D 1934.III.9 n. Waline; Melinette T.C. 11 July 1933, D 1933.III.65 concl. Rouchon-Mazerat n. Blaevoet.

A tentative synthesis of this English caselaw with the later writing might go as follows. Maitland was correct in his belief that the personalisation of the Monarch had led to an extension of the doctrine of Crown immunity. Borchard, too, was correct in thinking that the continental theorising over the real nature of corporate liability had been helpful in persuading lawyers that the State "could and should be liable for its torts like any animate 'person'".¹ Laski was correct again when he tersely argued that in England "The State cannot be sued because there is no State to sue."²

On the other hand, the very absence of a precise legal definition of the State left the courts with some room for manoeuvre because they could, and sometimes would, deprive some public authority of the benefit of immunity by denying its link with the Crown. The reasoning in the Mersey Docks case is significant here. It could have crystallised into a French-style distinction between 'autorité' and 'gestion' but, perhaps because common lawyers are hostile to abstractions and this is an abstract idea, this distinction never materialised.

It was Dicey, who sanctified the idea of personal liability at the theoretical level. It is tempting, though in view of his wide reading and his later recantation,³ unfair, to visualise the great writer, pen in hand, at the window of his Martello tower, testily watching for the impending Napoleonic invasion. For Dicey's theory, like Duguit's is political. Unlike Duguit's it is short and inexplicit.

1. Op.cit. above, p.775.

2. "The Responsibility of the State in England", (1919) 32 Harv. L.R. 447.

3. Wade, Appendix to 9th edn. of Dicey's Introduction, p.476; Lawson, "Dicey Revisited" (1959) 7 Pol.Studies 109, / Dicey, "Droit Administratif in Modern French Law" (1901) 17 L.Q.R. 302.

Centred round the idea of legal equality the theory "pushes to its utmost limits", the ideal of the "universal subjection of all classes to one law administered by the ordinary courts". The essence of the theory is that:¹

".... every official from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justifications as any other citizen ... all men are in England subject to the law of the realm; for though a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen."

The absence in Dicey's theory of all reference to the malign topic of Crown immunity has given rise to much criticism.² It is, however, understandable. Dicey was not primarily interested in tortious liability as a vehicle for compensation. His was a theory of civil liberties in which tort law was viewed in the light of a deterrent directed at people rather than institutions. For, just as the impersonal State cannot personally commit a fault, so it cannot be deterred. But later writers did not miss this point. Like Maitland, they viewed with concern the accretion to the government of powers for which, because the Crown could not be sued in tort, "the Government" was not legally liable. These developments were the more pernicious for being unarticulated and unrecognised. Authors like Borchard and Laski, familiar with continental political theory, found much that was admirable in continental law. Personal liability Anglo-American style increasingly seemed not enough. The

1. Dicey, op.cit., pp.193-4; see also p.287.

2. See, typically, Wade, Introduction p.lxxviii; Appendix p.527 et seq. Contemporary judgments express no dissatisfaction or anxiety. It may be, therefore, that the practice of ex gratia payment was already established.

interest in continental solutions stoked the developing fire of the reform movement.

More telling is the criticism¹ that Dicey chose to ignore the growth of statutory governmental powers. These were vested haphazardly in public authorities; in individual officials for whose acts there was no vicarious responsibility; or sometimes in the Crown, which could not be sued. Their growth turned the law of liability into a tangled undergrowth of special exceptions and incomprehensible rules of statutory interpretation apparently devoid of general principle.² The search for systematisation and rationalisation was to lead in time to a second movement for reform, whose sponsors also demanded a re-evaluation of the public law solutions of civilian systems. Discussion of this movement is postponed until the next chapter.

The movement for reform of the law of Crown Proceedings, although powerful and waged on both academic and political terrain,³ was not crowned with success until 1947, allegedly because of systematic opposition from the civil service and from the law officers of the Crown.⁴ Reform when it came followed the traditional, English pattern.⁵ The legislation

1. Wade, *ibid.* Discussed fully in Chap. 5 below.

2. E.G. Robinson, *Public Authorities and Legal Liability*, 1925.

3. Borchard, *op.cit.*; Laski, *op.cit.*; Morgan in the Introduction to Robinson, *op.cit.* Report of the Committee on the Crown Proceedings Bill, Cmnd. 2842 (1927); Report of the Committee on Ministers' Powers, Cmnd. 4060 (1932); Wade, Introduction.

4. Wade, Appendix to Dicey pp.534-6.

5. Hogg, *op.cit.*, p.63 points out that earlier Commonwealth legislation would have provided a better precedent.

did not attempt a codification nor did it abolish the rules of common law entirely; it simply set out to rectify the most obvious defects in piecemeal fashion.

I do not propose a textual analysis of the Crown Proceedings Act, 1947, largely because this has already been done more proficiently than I could hope to do it.¹ I propose at this stage to make only a few general points which seem to me relevant to the synthesis I am attempting.

First, the Act is, at the theoretical level, weak. It makes no attempt to settle the difficulties of definition already discussed by incorporating a definitive definition of the Crown - surely an extraordinary omission? Just as in France the term 'public service' had to be filled by judicial definition, so in England with 'the Crown'. Not surprisingly the courts have shown themselves reluctant to attempt any authoritative definition, with the result that we are still, seventy years after Maitland wrote, without a legal concept of the State. It is still possible to say that, in English law;

"... The administration does not exist. Instead the law contemplates two things: 'the Crown' which is very broadly the central government, and other/authorities - largely local authorities, with public corporations existing in an uncanny half-world."²

/public

Secondly, and quite deliberately, the Act simply reserves the prerogative powers without attempting either to enumerate them or to classify them (Section II). This has the effect of preserving, even arguably extending, all existing immunities without consideration being given either

1. Notably Glanville Williams, *Crown Proceedings*, 1947; Street, *Governmental Liability*, 1953; Hogg, *op.cit.*, Ch.4.

2. Mitchell, "The causes and effects of an absence of a system of Public Law in the United Kingdom" [1965] P.L. 95, 113. But see, now, Town Investments v. Minister of Environment [1977] 2 W.L.R. 450; D. v. N.S.P.C.C. [1977] 2 W.L.R. 201; Harlow "The Crown: Wrong once Again?" (1977) 40 M.L.R. 728.

to their real usefulness or to a possible French-style distinction between 'governmental' and 'commercial' functions.¹ Several examples of this confused thinking were given during the debate. For example, the immunity of the Post Office was confirmed despite protests that the Post Office was an ordinary commercial service comparable to other public services such as the railways which did not possess such immunities.² Again, the Attorney-General told the House³ that

"The private citizen does not have the same kind of responsibility for protecting the public, such as the Crown possesses; he does not have the care of the public safety; he does not have the defence of the realm to consider; he is not responsible for the organisation of such great services as the Post Office."

The last remark was glaringly false - unless of course, one chooses to see the Post Office as a manifestation of the 'police power' providing opportunities for the opening of mail, for telephone tapping and for censorship generally.⁴

Illogically, however, the Act does follow the traditional pattern by equating the Crown with a private person of full age and capacity. (Section 2(1)). For two reasons this is an unhappy formula: first, it fails to make general provision for primary duties which may rest on the Crown except those, such as Occupiers' and Employers' Liability, which are specifically enumerated in the Act (Section 2(1)(b) and (c)); secondly, it fails to anticipate the move of the common law towards primary liability thus tying the courts to an outdated conception of personal and vicarious

1. Moore, "Law and Government", (1905) 3 Comm.L.R. 205. See also H.C. Deb. Vol. 439 col.1723.

2. H.C. Deb. Vol. 439 col. 2612 et seq.; col.1744.

3. Ibid., col.1674

4. Bunyan, The Political Police in Britain, 1976, pp.211-212.

liability for the torts of servants or agents (Section 2(1)(c)). In sharp contrast to France, this formulation hampers the growth of an abstract idea of 'fault in the administrative system'.¹

The Act left many injustices unremedied. The exception for the armed forces, for example, created serious inequality between officers and members of the public;² and the failure to deal with malfunctioning of the judicial process (Section 2(5)) was attacked by Members.³ Nor did the Act attempt to fill gaps in the existing law. It was easily accepted that it was not designed to extend liability for typical acts of what today would be called maladministration. It would not for example, create Crown liability for a wrong certificate by the Land Registry or negligent failure to pay a pension.⁴ Thus the Act left a gap which finally necessitated the Parliamentary Commissioner Act, 1967. It did not bring to an end the long tradition of ex gratia payments. Nor, inevitably, could it satisfy those who wanted reform of the substantive rules.

During the nineteenth century, the courts of England and France had to deal with a major expansion of the law of tort or delict. If the liability of the government and administration was to keep in step the major obstacle of Sovereign immunity had to be surmounted. While England was free to develop personal liability, the law of 1790 drove French law into another channel. Both methods were really surprisingly successful

1. Street, "Liability of the State for Illegal Conduct of its Organs", Max Planck Institut 1967 230, 237-8.
2. H.C. Deb. vol. 439 cols.1713-4.
3. Ibid.
4. Ibid., col.1706 (Mr. Asterley Jones).

in dealing with the problem which confronted courts, although never entirely successful. Both systems have had to acknowledge certain areas of residual monarchical privilege where there is, even today, no liability. These areas are always closely linked to the traditional conception of the police power or the prerogative power or the governmental power of the State. Tradition rather than logic justifies the immunity. As a President of the French Republic has said:

"All our law stemmed from the conception of a strong state, stronger perhaps for limiting its intervention to the most characteristic functions of public power: justice, defence, order."¹

Inside these areas of 'high policy', courts dare not trespass and a measure of immunity seems generally acceptable - more so in England than elsewhere in the world, perhaps. Thus, the Crown Proceedings Act preserves immunity from liability in respect of the judicial function (Section 2(5)) while the courts, too, jealously guard judicial immunity.² In France, the judicial function also resisted the systematic imposition of liability and the legislature finally intervened.³

Similarly, the courts of both countries acknowledge a residual category of cases in which the courts will not intervene because of the supposed need to leave the government free to conduct foreign affairs or the defence of the realm. The category is usually definable only in terms of the absence of jurisdiction. In France, where the category of Acte de

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1. President Pompidou, addressing the Conseil d'Etat, cited Hayward, *The One and Indivisible French Republic*, 1971, p.116. (See also Borchard, *op.cit.*, (1925) 34 Yale L.J. at p.240).
 2. Sirros v. Moore [1974] 3 WLR 459; Brazier, "Judicial Immunity and the Independence of the Judiciary" [1976] P.L. 397.
 3. Law of 5 July 1972 discussed Lombard, "La responsabilité du fait de la fonction juridictionnelle et la loi du 5 Juillet 1972", 1973 R.D.P. p.585; Auby, A.J.D.A. 1973 p.4. See further below p.303

Gouvernement has been pared to the minimum there are still acts which, in the words of a leading author, escape from control and cannot be reviewed, but which cannot be classified either. "Their only common characteristic is that one cannot question the legality of these acts or impose liability on the State in respect of them although the normal legal rules are powerless to explain this situation."¹ A typical example is the case of Société Ignazio Messina.² A ship was stopped outside territorial waters by the French navy and searched for arms on the suspicion that she was carrying weapons to the insurgents in the Algerian uprising. The owners claimed compensation in respect of the delay. The Government Commissioner found it hard to classify the act as a 'mesure de police'; on the other hand, she thought the act could not be an Act of State as no foreign State was involved. But the Conseil d'Etat was not willing to impose liability. The court contented itself with the formula that:

"the measures taken ought to be regarded as attaching, taken as a whole, to military operations which, by their nature, are not capable of entailing the liability of the State."

If legal rules cannot explain the absence of jurisdiction, the answer is in fact quite simple.)

(The acts in question lie too near the centre of political power, concerning as they do, the defence powers or the relationships of government with government or of government with Parliament. If the courts were to meddle they would risk retaliation. On the other hand, they are not anxious to admit their impotence by defining the 'no-go' area too precisely. Thus a judge noted normally for his verbal precision has

1. Vedel, *Droit administratif*, 5th edn. 1973 p.307.
2. C.E. 30 March 1966, 1966 R.D.P. p. 789 concl. Questiaux, 1967 p.143 n. Waline.

defined an Act of State in the following hazy terms:

"I think we must say either that all acts of the executive are acts of State, or that acts of the executive should only be called acts of State in cases where the court will not enquire into them or give relief in respect of them but should not be called acts of State when the court's jurisdiction is not ousted."¹

It is not that Acts of State cannot be defined, it is that courts do not wish to define them. Even today there is tacit acceptance that some acts partake so strongly of the attributes of Sovereignty, as to be wholly "governmental" in character. Such acts by their very nature cannot attract the liability of the State. The only difficulty is that there is no agreement as to which functions merit immunity and which activities are governmental. It follows that they cannot be precisely defined.

Even if we can see important parallels in the experience of the English Supreme Court and the French Conseil d'Etat in coming to grips with the difficult subject of sovereignty, their styles were, at least during the nineteenth century, very different. The Conseil d'Etat was an overtly political court, very confident in its role as arbiter and censor of the morality of "the administrative and governmental scene". A strong link was forged at an early date between illegality and liability and the latter was viewed primarily as a sanction for the former. In England, on the other hand, the courts were very distinctly private law courts, confident in their private law role of administering the common law of England, but eschewing the political whenever possible. The solution of personal liability which was adopted does in fact seem well adapted to the courts' own assessment of its role.

1. A-G v. Nissan [1969] 1 All E.R. 629, 638 (Lord Reid).

CHAPTER 2

Legal Liability

A country which possesses no separate administrative jurisdiction must inevitably define administrative liability in terms of the general rules of legal liability. Administrative courts might do otherwise, and exaggerated claims have been made for the originality of French administrative law in this respect. In practice, however, the origins of the system during the nineteenth century, the struggle of the administrative courts to establish themselves as a "jurisdiction", and the legal training of many of the greatest of the early public lawyers tended to inaugurate the civil law as a starting point. For administrative lawyers,

"the rules of liability translate into legal language the obligation which falls on every person to repair loss suffered by another person. This definition is as valid in respect of civil liability as it is for the liability of public authorities."¹

So strongly does "liability" suggest "legal liability" that it is doubtful whether the position could ever be otherwise.

My plan in this chapter is to give detailed illustrations of the operation of the legal rules of liability in certain limited areas. I have chosen areas in which English law has been criticised on the ground that it is inferior to that of France or in which French public law has been said to differ radically from French^{civil} law. This is a deliberate choice. To enumerate all the rules in sufficient detail to permit a genuine comparison with English tort law would need a volume; a comparison with French

1. Odent, Cours de Contentieux administratif, 3rd edn, 1971, p.1042.

civil law would be beyond my capacity. On the other hand, if such sketches are too greatly compressed they become misleading because^a/false impression of coherence and simplicity is given which could not be sustained if actual cases were examined. In other words, one is in danger of comparing the broad general provisions of a code with a case law system an account of and the operation of the code is more revealing than a terse statement of its provisions.

Before embarking on this course, however, it is convenient to give a brief summary of the rules of liability in French administrative law by which the reader may orientate himself.¹

Before any liability can arise in French administrative law, two conditions must be fulfilled: (i) there must be quantifiable damage and (ii) there must be an act attributable (imputable) to an administrative body. For the act to be attributable it must be committed by a person or body for whom the public authority impleaded is responsible. Here the test is usually that of agency employed by the civil law. The act must also be one committed 'in the course of duty'. The distinction here is that drawn by the Pelletier case between a 'personal' act and an 'act of the service'. On closer examination this distinction also resembles the civilian idea of 'course of duty' and this is one of the areas which I have chosen for more detailed analysis.

The general principle (droit commun) of liability in French administrative law is that of fault and more particularly of faute de service (or fault in the administrative system). This will be more fully defined at a

1. For an excellent short account see Fromont, "La responsabilité de l'Etat pour le comportement illégal de ses organes", Max Planck Institute, 1967; or see Brown and Garner op.cit., pp.92-115.

later stage. The standard expected is always objective but is variable. In some areas of administrative activity (notably the case of the police, the fire services, mental hospitals and clinical negligence, and supervisory activities of the State in using its powers of 'tutelle' over local authorities and other public bodies) the standard used is gross fault (faute lourde). The general standard in cases of faute de service is, however, simple fault.

Although French law does not use the duty concept, it does employ causal tests. There must always be a causal link between the fault and the damage. The victim's own fault or the fault of a third party are in theory sufficient to break the causal link and exempt the administration from liability, although, where the fault is that of a third party, it is more usual to hold that both wrongdoers are joint tortfeasors whose acts have contributed concurrently to the damage.

The second main head of liability in French administrative law concerns public works (travaux publics), today defined as works or operations carried out on land either by a public authority in the general interest or carried out by a public authority in the course of an administrative function (mission de service public).¹ Liability is without fault and derives originally from a law of 28 pluviôse of the year VIII (1799) which is in fact the genesis of risk liability in French administrative law.

1. Commune de Monségur C.E. 10 June 1921, S.1921.3.49 concl. Corneille n. Hauriou; Effimieff T.C. 28 March 1955 Rec.617. See Vedel, op.cit. pp.127-8, pp.400-405 for an excellent short account. The term 'travail public' is apt to cover not only the operation concerned e.g. the building of a road, but the edifice constructed e.g. the road itself, more properly termed 'ouvrage public'.

The rules of liability in respect of public works are exceptionally complex and difficult to summarise. A first distinction is drawn between permanent damage caused to the owners of land (such as depreciation in value, loss of amenity and nuisances generally) which are compensated for on the basis of risk but only if the damage is considered 'abnormal and special'. Liability in the case of accidental loss - as for example loss which springs from a failure to maintain a road or a building - is governed by the status of the victim. A complex division exists between 'third parties' (tiers), who claim on the basis of risk, and 'consumers' (usagers) who must show failure to maintain the public works in question. For example, an athlete injured in a sports stadium or a motor cyclist injured by a badly maintained highway would have to meet this standard of proof equivalent to fault.¹ This rule gives rise to much difficulty.

The defences open to the administration in case of public works liability are limited to 'force majeure' (roughly equivalent to our common law concept of inevitable accident)² and the victim's own default. Act of a third party is not a defence (except where the third party is also the victim). This rule, which differs from the rule operating in the area of fault liability, also causes difficulty and, on occasion, injustice.

A sociological survey of the cases entered in the Versailles tribunal in 1967-8³ illustrates the respective importance of fault liability and

1. Vedel op.cit., pp.404-5.
2. Drago, Etude relative aux décisions rendues par le tribunal administratif de Versailles au cours de l'année judiciaire 1967-8, (1968) 21 EDCE p.163 at 180.
3. Odent op.cit., pp.177-178 deals succinctly with this head and 'cas fortuit' or accidents whose cause cannot be discovered.

work ↗

liability for public works. There were in all 148 claims of which 87 (58.7%) succeeded. In the 82 cases where the grounds could be determined the grounds of the claim were: 36.58% fault (7.32% gross faults); and public works 35.36%. The authors estimated that about $\frac{2}{3}$ of the cases actually depended on fault. By way of contrast only 14.64% depended on liability without fault, of which 11 were cases of Equality liability and one of unspecified liability without fault.

Originally derived from this liability of the administration for injury caused to third parties by public works, a limited incidence of risk liability was created by the caselaw of the Conseil d'Etat. The main heads today are: liability caused to third parties by the use of firearms by the police; and injury caused to those living in the neighbourhood by a dangerous activity or operation.¹ The last head rather surprisingly covers also the case of damage caused by delinquents escaping from approved schools and is discussed in greater detail below. The administration is also liable without fault in the case of riot damage (although this originates in a statutory scheme)² and in the curious case of liability to a person who is collaborating temporarily and on a voluntary basis with the administration in carrying out the functions of the public service. This liability originates in the more general obligation of the administration imposed by the celebrated Cames decision to compensate employees injured in industrial accident without proof of fault, today superseded by industrial injuries compensation. It is, therefore, only a residual liability, justifiable largely by the fact that a general

1. Fromont, loc.cit., p.154 limits this class to explosions. This seems to be incorrect.

2. Waline, op.cit., pp.867-8.

statutory duty exists under Article 63 of the Penal Code to render assistance to all those in need of help. Moral duties exist also to respond to requests for assistance by the administration e.g. in arresting Criminals, fighting fires or, where necessary, shooting wolves and letting off fireworks.¹

One final head of liability derives from the principle of Equality before Public Charges. Two classes of case are comprised: liability for loss caused by the unequal operation of a statute (responsabilité du fait des lois) and loss caused by the application of a legal governmental decision in a particular case. Both classes derive originally from one decision, and in both classes only special, abnormal damage can be claimed. The rules of liability are complex and the caselaw is seldom applied. This category of liability is not treated in this chapter but is considered at length in Chapter 6.

It is convenient to finish by summarising the cases of immunity already mentioned briefly in the first chapter. A category of Act of Government exists although it is extremely limited. Relationships between Parliament and the Executive are immune, as are important governmental policy acts (as e.g. the exercise of the prerogative of mercy). There is a limited immunity for the defence power and for acts done in the course of relationships with a foreign State. War damages are dealt with by statute, as are industrial injuries to public servants. This statutory liability, as we shall see, exhausts the common law liability of the State.

1. Commune de Saint-Priest-de-Plaine C.E. 22 Nov.1946, Rec.279. See G.A. No.69 for a useful explanatory note. The difficulties in which this rule involves the court are manifold and some of the cases are discussed in Chapter 4. For particularly awkward cases see Min. des Finances c. Lemaire C.E. 24 June 1966, AJDA 1966 p.637 concl.Bertrand and Dame Muesser, Veuve Lecompte C.E. 3 March 1978 AJDA 1978, pp.210, 232.

As a normal rule, also, there is no liability for loss caused by a judicial act whether an administrative or civil court is concerned.¹

1. Fault:

Turning to more detailed consideration of certain areas, it is convenient to begin with the relationship of personal liability with that of the administration.

Modelled in both countries on the civil law, liability is inevitably based on personal and individual liability. This has resulted in the dominance of the fault principle, favourite of nineteenth century legal theory, ^{where} individual responsibility was an article of faith embodying, as it did, the notion of free will. Fault liability was considered to be just. As Holmes said, it allowed a man "a fair chance to avoid doing the harm before he is held responsible for it."²

In France, the start of the nineteenth century saw fault elevated to the general principle of civil liability by Articles 1382 and 1383. This was coupled with the vicarious liability of Article 1384 which, as we have seen already, was capable of alternative explanations in terms of fault or guarantee.³ The Blanco decision adopted this same pattern. The judgment referred to the liability "which devolves upon the State ... through the act of persons who are employed in the public service." But in contrast to early decisions, where state liability was said to depend on whether the act complained of was "committed in the

1. Fromont, op.cit., contains a convenient summary of the heads of immunity.

2. Holmes, *The Common Law*, 3rd edn. 1923, p.112.

3. See above p.14.

exercise of the functions which the employees of the administration had been appointed (préposés) to carry out",¹ the Blanco formula cast doubt on the relevance of the civil law relationship of agent/principal to public law. It was said that the relationships of public servants with the administration, not being derived from contract, were unlike those of master and servant in private law. This development drove apologists of the system increasingly to deny the private law origins of administrative liability. A further step towards separateness was taken by the Pelletier decision, which substituted for the civil law notion that the master is quit of liability where the servant/agent is acting outside the "course of his duty" or the "exercise of his functions", a distinction between "personal acts" and "acts of the service". This had the effect of recasting administrative liability in an impersonal and corporate mould. Liability was still fault liability, but the fault was a fault of the system, a fault resulting "from the bad organisation or bad operation of a public service, together with those anonymous faults which cannot be attached to the personal actions of any specific official or group of officials."² Even today the standard definition of faute de service is "a malfunctioning of the public service."³ Only at a later stage when the concept of faute de service was expansively interpreted to overlap with personal fault, did the actor once more assume importance inside French administrative law.

1. Manoury T.C. 20 May 1850, S1850.II.618.

2. Odent, op.cit., p.1083.

3. Vedel, Droit administratif 5th edn. 1973 p.366.

At an early stage, therefore, French administrative law became vulnerable to the positivist objection that fault liability, being wholly personal in character, was inapplicable in the case of the State which, being a corporation, possessed no personality.¹ This highly artificial argument ignores the existence of "vast government offices full of human, and, therefore, fallible men."² It is also open to the objection that it is not specific to the State nor, for that matter, to systems of public law. In fact a very similar doctrinal argument recurs in English law as the basis of the ultra vires tort doctrine which precludes the criminal or tortious liability of corporations (public or private) for acts committed in the course of an ultra vires activity.³ Theoretically pure though this doctrine may be, it ignores both the underlying purpose and the nature of vicarious liability, for which reason, no doubt, the English courts have shown little affection for it.⁴ The French administrative courts have shown themselves equally unwilling to abandon fault liability on purist theoretical grounds.

The corporate character of French administrative law may present a contrast to the civilian concept of vicarious liability; but the two systems have in common their objective definition of fault. 'Fault' is a departure from a standard of conduct, a failure to take that care which a reasonable man would take in the circumstances, or, in administrative law, departure from the standard set by "an officer of average competence."⁵

1. Duguit, *Transformations*, p.231. Contrast Michoud, "La responsabilité de l'Etat à raison des fautes de ses agents", R.D.P. 1895 p.401. And see Waline, *Droit Administratif*, 9th edn., 1963, No. 1530.
2. Laski, "The Responsibility of the State in England", (1919) 32 Harv. L.R. 447, 451.
3. Atiyah, *Vicarious Liability in the Law of Torts*, 1967, p.383; Street, "The Liability of the State for Illegal Conduct of its Organs (Great Britain)", *op.cit.* above, pp.235-6.
4. See Campbell v. Paddington Borough Council [1911] 1 K.B. 869.
5. Bénéoit, *Droit administratif*, 1968, p.710.

The subjective 'duty of care', on the other hand, is specific to English law. It may or may not be a weakness, but if it is, it is a weakness in the English system rather than one attributable to the absence in England of a system of public law.¹

On the other hand, specific to French administrative law is the creation of variant standards of liability. There are certain activities, such as medical care, where courts will always demand negligence to be clearly shown, and occasionally epithets such as 'grave' or 'gross' fault and 'flagrant' or 'culpable' error appear: but in general neither French nor English civil law admit variations in the degree of fault or negligence.²

At the turn of the century, the Conseil d'Etat felt impelled to introduce a scale of liability. This ranged from 'faults of exceptional gravity', required e.g. in the case of wrongful detention in a mental hospital; and 'grave faults', defined as "those which ought never to be committed by an officer of average competence"; to 'simple fault' which "exceeds small, tolerable imperfections".³ Initially the motive was to soften the shock to government of the imposition of pecuniary liability for the exercise of functions traditionally regarded as discretionary or political in character and forming part of the police power which had previously been sheltered by the doctrine of Sovereign immunity. When

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1. Buckland "The Duty to/Care", (1935) 51 L.Q.R. 637, 639; Millner, Negligence in Modern Law, 1967, pp.27-28.
2. Mazeaud et Tunc, *Traité théorique et pratique de la Responsabilité civile*, 1965, vol. 1 p.504. Cornu, *op.cit.*, pp.235-242, denies that the concept of 'faute professionnelle' has reintroduced the distinction. See also Marshall, "Liability for pure economic loss negligently caused - French and English Law compared", (1975) 24 I.C.L.Q. 748, 783. For English law see Herrington v. British Railways Board [1972] 2 WLR 537, 568 and 574 and Southern Portland Cement Ltd. v. Cooper [1974] 2 WLR 152. For comparison see Harlow, "Fault Liability in French and English Public Law", (1976) 39 MLR 516.
3. Bénéoit, *loc.cit.*

liability was first introduced in 1905, gross fault was chosen as the standard of liability.¹ A secondary motive was to avoid the risk of paralysing the operation of certain services whose work, like that of the police or fire services, was difficult and onerous.²

However laudable the motive, the practical effect was the gradual construction of an immensely complex system of liability. The introduction of risk liability has served only to increase the complexity.

In England the law has been greatly complicated by the absence of any attempt at codification. As we have remarked already, English law, in sharp contrast to French, consisted at the end of the last century of a limited number of disparate torts rather than of general principles of liability. Scholars were actually unable to agree whether the common law should be termed a law of "tort" or of "torts".

The courts, influenced no doubt by the views of scholars of the calibre of Austin, Holmes, and Salmond, favoured fault liability. Academic legal writing was, however, descriptive and classificatory rather than critical and creative,³ and the continental practice of analysing important decisions in critical notes (arrêtisme) had not yet arrived. A gap opened between the practitioners and the academics, and the latter must accept some blame for their failure to offer any constructive prospectus for the law of tort. Ultimately, negligence became the rallying point for a modern law of tort, but the rigorous doctrine of precedent made progress

1. Tomaso-Grecco C.E. Feb.10, 1905 Rec. 139 concl. Romieu.

2. Clef C.E. Mar 13, 1925 R.D.P. p.274 concl. Rivet.

3. See Harari, *The Place of Negligence in the Law of Torts*, 1962 p.21. See also Winfield, *The Province of the Law of Torts*, a purely classificatory work. 1931,

painfully slow and uneven. False starts and blunders could only with difficulty be removed from the law. Indeed, as late as 1970, when a leading member of the House of Lords referred to the rule in Donoghue v. Stevenson as a general principle of liability to be applied unless compelling reasons to the contrary existed, one of his brethren contested the point on the ground that there could be no liability in the absence of a precedent bearing on the same or a readily comparable fact situation.¹ A system which regarded precedent as merely illustrative of general principle could have circumnavigated such difficulties with greater assurance.

The fragmentary nature of the law of torts and the grave lacunae which existed in the law of negligence naturally had its repercussions on the liability of public authorities. An attempt to classify the legal liability of public authorities as it existed in the early years of the century revealed that this was virtually an impossible task as the rules lacked both rhyme and reason.² Amongst the graver deficiencies which went to make up ^{the} general disarray one might stress; the absence of any general liability for negligent mis-statements;³ the unsatisfactory rule by which liability could not normally be founded on an omission to act (nonfeasance) or a failure to exercise a statutory power;⁴ the general complexity of the law in respect of breaches of statutory duty and the general

1. Dorset Yacht v. Home Office [1970] 2 WLR 1140, 1146 (Lord Reid) confirmed Anns v. Merton L.B.C. [1977] 2 WLR 1024, 1032 (Lord Wilberforce); See contra, Viscount Dilhorne loc.cit., at p.1160 e.s. For a general account of the evolution of negligence, see Millner, op.cit. above.

2. Robinson, The Legal Liability of Public Authorities, op.cit., above.

3. Candler v. Crane, Christmas & Co. [1951] 2 K.B.164 was reversed by Hedley Byrne v. Heller [1964] A.C. 465.

4. Moore, "Misfeasance and Nonfeasance in the Liability of Public Officers" /415; (1914) 30 L.Q.R.276, /East Suffolk Rivers Catchment Board v. Kent [1941] A.C. 74 partially disapproved in Anns v. Merton L.B.C. [1977] 2 WLR 1024.

unwillingness of the courts to allow that a common law duty of care might be superimposed on statutory duty.¹ One must add that, until recently, purely economic interests were poorly protected by the law of torts.²

2. Vicarious Liability

I have already stated that the first movement for the introduction of public law rules of liability to cure existing deficiencies in the law of tort was triggered off by Crown immunity and that the passage of the Crown Proceedings Act did not cure all these defects. I have also remarked that the equation of the Crown with a "private person" (s.2(1)) is a fundamental misconception since the Crown is a corporate entity, and, by limiting liability to the case where a good cause of action exists against an identifiable individual, the Act distinguishes the Crown from other corporate bodies who can be, and are increasingly, held responsible for breaches of primary duties of care originating (for the most part) in statute. Liability for a defective "system"³ might therefore be precluded in the case of the Crown⁴— although, by the device of fixing liability on an individual or group of individuals in the public service, (as was done, for example, in the Vehicle and General Affair)⁵ this difficulty could be circumvented, even if the solution seems somewhat inequitable.

1. Street on Torts, 6th edn. 1976 Ch.14 gives a general account.
2. S.C.M. (U.K.) Ltd. v. Whittall [1971] 1 QB 337; Spartan Steel & Alloys Ltd. v. Martin [1973] Q.B. 27; Craig, "Negligent Misstatements, Negligent Acts and Economic Loss", (1976) 92 L.Q.R.213; Fleming, James "Limitations in Liability for Economic Loss caused by Negligence", (1972) 12 J.S.P.T.L. (N.S.) 105.
3. As in Read v. Croydon Corp. [1938] 4 All ER 633; Ministry of Housing and Local Government v. Sharp [1970] 2 WLR 802.
4. Street, op.cit., 1967 pp.233-5, 238. But the position of the Crown with regard to Statute is itself very confused; see Street, "The Effect of Statutes upon the Rights and Liabilities of the Crown" (1948) 7 Univ. of Toronto L.J. 357, Town Investments v. Min. of Environment [1977] 2 WLR 450.
5. Report of Inquiry into the Collapse of the Vehicle & General Insurance Co. H.C.133 (1971-72), discussed below p.139.

The relationship of master and servant is defined by s.2(6) in terms of payment from the Consolidated Fund combined with appointment by the Crown; this again is a test less generous than those applied to less exalted employers and one which is capable of causing difficulty. It can be criticised, because it leaves unresolved the relationship between the Crown and other, quasi-independent public corporations;¹ although, since no such corporation has as yet proved incapable of meeting its financial liabilities, this problem may be academic rather than real. Indeed, all these are trivial points.

But vicarious liability does pose one serious, theoretical problem in the case of public authorities. According to the so called "independent discretion" rule, there can be no vicarious liability for torts committed in the exercise of statutory or common law duties or powers vested specifically in the servant and not the master.² This fundamentally mistaken proposition may originate in "master's tort" theories of vicarious liability which depend on the fiction of implied command and therefore base vicarious liability on the master's right to control the servant.³ Alternatively, the rule may be an illustration of a more general, though equally fallacious, line of reasoning which denies that there can ever be vicarious liability for a breach of statutory duty.⁴ Whatever its origins, the rule has been responsible in its time for some extremely hard cases.

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1. Griffith, "Public Corporations as Crown Servants", (1952) 9 Univ. of Toronto L.J. 169; Tamlin v. Hannaford [1950] 1 K.B.18.
 2. Hogg, op.cit., p.102 e.s.; Atiyah, op.cit., p.76; Stanbury v. Exeter Corp. [1905] 2 K.B. 838.
 3. Glanville Williams, "Vicarious Liability: Tort of the Master or of the Servant?" (1956) 72 L.Q.R.522; Turberville v. Stampe (1698)Ld. Raym.264; Tobin v. R. (1864) 16 B.N.S. 310; Fowles v. Eastern and Australian Steamship Co. [1914] 17 C.L.R. 149.
 4. Darling Island Stevedoring & Lighterage Co.Ltd. v. Long [1957] 97 CLR 36; Harrison v. National Coal Board [1951] A.C.339; National Coal Board v. England [1954] A.C. 403; I.C.I. v. Shatwell [1965] A.C.656; Hogg (op. cit. pp.102-4) believes the rule can no longer be removed from Australian law, but the case is not the same for England where the reasoning is contained in obiter dicta.

Prior to the Police Act 1964 (Section 48(2)(b)), for example, a police constable for the purposes of the law of tort was a "servant without a master": the Crown, to which his primary allegiance lay, did not pay or appoint him; the local authority had no right to "control" the independent exercise of his discretionary powers; and the chief constable was merely a fellow servant, albeit a hierarchical superior, who could not be vicariously liable.¹ In cases of wrongful arrest or malicious prosecution, therefore, both plaintiff and defendant were placed in an untenable position; the former faced the possibility of an insolvent defendant, the latter the possibility of a very real financial responsibility which he could not shuffle off by a plea of superior orders.² Only the arguably unlawful³ practice of the police authority in standing behind its servants mitigated this dilemma.

That the difficulty might occasionally prove a very real one capable of causing genuine hardship is illustrated by a queer Canadian case.⁴ Here an action was brought against the municipality as employer of a certain 'Noxious Weeds Inspector', who, in the exercise of his functions, had somehow managed to start a fire which spread to the plaintiff's land. The municipality was found not to be liable for the damage caused by the fire on the ground that the inspector was carrying out statutory functions

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1. Fisher v. Oldham Corp. [1930] 2 KB 364; A-G for New South Wales v. Perpetual Trustee Co. [1955] A.C.457; Enever v. R. (1906) 3 C.L.R. 969; 1 Ch.73. See generally Marshall, *Police and Government, the status and accountability of the English Constable*, 1965, Ch.7.
 2. Glinski v. McIver [1962] A.C. 726.
 3. Pollard, "The Police Act, 1964" [1966] P.L. 35, 56.
 4. Mead v. Marquis Rural Municipality (1928) 2 D.L.R.524. See also Raleigh v. Goschen [1898] 1 Ch.73.

imposed by the legislature in the general public interest from which the municipality derived no special benefit. The duty rested on himself personally and it was immaterial that he was employed by the municipality. The plaintiff therefore failed in his action against the only solvent defendant, the employer.

These are, of course, exceptional cases, the effect of which is likely to be minimised in practice by the good sense of public authorities and insurers alike. In a leading modern case,¹ for example, an action for negligence and breach of statutory duty was brought against the local Registrar of Land, together with one of his clerks and the local authority as employer. Lord Denning M.R. suggested that the local authority might not, on the facts, be vicariously liable. The clerk had been, for the purposes of maintaining the register, seconded to the staff of the Registrar. The Registrar himself was probably covered by the 'independent discretion' rule and the council was therefore not liable:

"The local land registrar is their clerk, but he is not, in this respect, under their control. In keeping the register and issuing the certificates, he is not acting for the council. He is not carrying out their duties on their behalf. He is carrying out his own statutory duties on his own behalf. So he himself is responsible for breach of those duties and not the council: see Stanbury v. Exeter Corporation [1905] 2 K.B. 838."

The council and its insurers, however, refused to take this point. Lord Denning M.R. congratulated them for their good sense and generosity, which leaves one wondering why he himself chose to breathe new life into

1. Minister of Housing and Local Government v. Sharp [1970] 2 W.L.R. 802, 815 (Lord Denning M.R.).

this unloved principle rather than to leave it buried in decent oblivion, as his fellow judges preferred to do.

For a number of reasons, neither public authorities nor the Crown nor insurers are likely to stand on the letter of the law here. Legal rules seems to have once more lost touch with reality. In the case of the public service, staff regulations (S.C.paras 2701-2711) provide that officers against whom writs are issued must report the proceedings to the departmental solicitor to ascertain the Department's views. If the Department believes that the act complained of fell within "the scope of the officer's employment", the Department takes over the defence. But the Treasury Solicitor's department, which is usually consulted, does not take the line that the Crown should stand strictly on its legal rights and I am informed that it has often stood behind civil servants in cases which were not strictly covered by the legal rules of vicarious liability.

Similar regulations govern local authorities. The standing regulations of the Greater London Council, for example, provide that actions "brought against a member of staff arising out ^{of} the discharge of his official duties" are to be reported. The employees of local authorities are insured by their employers who form a powerful consumer group and any attempt by insurers to stand on a technical point such as the 'independent discretion' rule would no doubt be considered a departure from the "gentlemen's agreement" which governs recursory actions against employees.¹ In any event, the interested unions have told me that they have no experience of such cases, a statement which is confirmed by the actions of insurer and employer in the Sharp case.

1. Discussed below, Ch. 3.

Commentators, however, judge the efficacy of a legal system by the formal rules rather than the informal practices which lie behind it and the 'independent discretion' rule is open to criticism. It leaves the employee in an exposed position while at the same time allowing too much discretionary latitude to public authorities. This is particularly dangerous where the court is not properly informed about, and cannot take notice of, insurance practice. It has been suggested that public authorities may shelter behind their officers and that the officer's lonely position may attract judicial sympathy causing loss to be allocated to the victim instead of the public authority. Thus the rule, which is theoretically unsound because of the hardship which could be caused, has fuelled a protest movement - stronger in the United States and the Commonwealth than in the United Kingdom - against exceptional cases of personal liability such as we have been discussing.¹ The problem with Anglo-American law is said to be that we have an unhappy compromise between personal and corporate liability. The real alternatives are (i) true personal liability, where liability rests on the employee who must, like any car owner, insure against it; or (ii) a system of institutional or corporate liability in which the employer pays and is responsible for insuring his employees.² For those who prefer the second solution - which is in many ways less logical - the French principle of faute de service seems attractive.³ Certainly it is true that the reasoning of the 'independent discretion rule' would not appeal to a French public lawyer as the following passage indicates:

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1. Pannam, "Torts under Unconstitutional Statute", (1966) 5 Melb.Univ.L.R. 113. The problem has been much greater in the United States; see Jennings, "The Tort Liability of Administrative Officers" (1936) 21 Minn. L.R. 263; Davis, Administrative Law Treatise Ch. 26.
 2. Pannam, *op.cit.* above.
 3. Schwarz, French Administrative Law and the Common Law World, 1954, pp.287-8.

"The measure of independence enjoyed by an official in the exercise of his functions does not prevent the authority on whose behalf he exercises his functions from being liable for his acts. The State is responsible for a modest subaltern in the same way as for an academic or a research scientist who are virtually independent in the organisation of their teaching or research ... The State is after all liable for the acts even of Ministers of State. But Ministers are not subject to control by superiors, it is they who exercise it."

But this is hardly the end of the argument even on this limited point of 'independent discretion', because, as I have suggested above, the 'independent discretion' rule is not a foregone conclusion even in English law. It springs really from a misguided use of the 'control' test of vicarious liability according to which the master is not liable where he cannot exercise control over the way in which the servant performs his duties. This in turn derives from the 'master's tort' theory of vicarious liability.

A series of cases on hospitals show that the common law can circumvent this particular difficulty in two ways: first, by allowing the 'control' test to be superseded by more modern tests, such as the 'integration test' (explained below) or the distinction between a 'contract of service' and a 'contract for services'. This is in fact the trend of modern English law.² The second way round is to impose liability for a defective system. This, of course, is the solution seemingly adopted in the concept of faute de service. What the hospital cases show us is that English law can reach this second solution as easily as French administrative law. They show us also that the French distinction between personal faults and

1. Chilloux et Isaad-Slimane T.C. March 25, 1957, S 1957.196 concl. Chardeau.

2. Street on Torts, pp.418-9.

'fautes de service' does not automatically solve the problems posed by the 'control' test. Indeed, the historical development of the hospital cases in France and England shows striking parallels.

The 'control' test of vicarious liability proved, from the outset, unsuitable for the area of medical liability because of the exalted view of their own clinical independence taken by medical practitioners. At first, however, this was not appreciated by the courts. In France, it may be largely an accident of history that acts of clinical judgment came to be defined as personal acts;¹ in England, the original motive of the courts appears to have been to spare the funds of charitable organisations (an idea which takes us back in time to the turnpike trustees).

In Hillyer v. St. Bartholomew's Hospital² an action was brought against the trustees of a charity hospital in respect of the negligence of a visiting surgeon. The action failed on the ground that the surgeon was neither employed by the hospital nor subject to the control of the trustees. But such a solution effectively confined the liability of hospital authorities for medical staff to cases of peripheral accidents such as the carelessness of a nurse in spilling a cup of tea. It was rejected, therefore, as absurd and unjust.³ A new test of 'integration

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1. The caselaw is collected in Chilloux et Isaad-Slimane (above). Much of the original caselaw antedates the growth of State hospitals. Furthermore, the cases were being used for two purposes. One line of cases dealt with the boundary between the civil and administrative jurisdiction. The caselaw of each jurisdiction tends to be at variance, as each hierarchy stretched the law in order to alleviate the position of the plaintiff, who might otherwise be nonsuited and have to start again in the other jurisdiction. The second line of cases in the civil courts deals with the vicarious liability of the hospital authority. The two lines of caselaw therefore diverge. This is a recurrent problem in this area: see generally, Douc-Rasy, *Les Frontières de la faute personnelle et de la faute de service en droit administratif français*, 1963.
 2. [1909] 2 K.B. 820.
 3. Credit is usually given to an extremely influential article by Professor Goodhart, "Hospitals and Trained Nurses" (1938) 54 L.Q.R. 553.

into the service' was substituted. Where the patient finds "a department equipped with suitable apparatus and a whole-time employee engaged to give the treatment", independent clinical judgment is irrelevant and there will be vicarious liability.¹ Today it is probable that only in the case that the patient selects or employs the consultant will the hospital escape liability.²

An exactly similar progression has been seen in France. Clinical negligence was at first seen as a personal fault for which the practitioner was alone answerable. But the caselaw was not entirely consistent. In 1957, the Tribunal des Conflits made a thorough examination of the question to resolve the jurisdictional issue. The Government Commissioner, M. Chardeau, discussed the nature of clinical judgment at some length.³ He concluded that the 'independent discretion' of a doctor was not different in kind from that of a Minister or any other senior administrative official. An error of clinical judgment was not a personal fault. Indeed, if it were to be considered as such, then

"... the liability of the hospital service would operate only in case of the administrative formalities of admission of patients; diet; maintenance of buildings and equipment; and the acts of the auxiliary staff to the exclusion of all medical staff. That is to say, only the ancillary, inessential aspects of the hospital service would be covered. Yet the essential purpose, indeed, the

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1. Gold v. Essex County Council [1942] 2 K.B.293, 303 (Lord Greene M.R.).
 2. Cassidy v. Minister of Health [1951] 2 K.B.343, 362 (Denning L.J.). The consultant, who will obviously be insured, will here be contractually liable. See Street on Torts, p.419.
 3. Chilloux et Isaad-Slimane T.C. 22 Mar, 1958, S 1957.196 concl. Chardeau, quoted above, p.72.

very object of the hospital service
is the treatment of patients: ..."

The error of clinical judgment was held to be a fault for which the hospital service was liable and the jurisdiction of the administrative courts confirmed.

This is not the end of the line of cases, because in France, too, the private practitioner may avail himself of the facilities of state owned hospitals and the liability of the hospital authorities must end somewhere. At the present moment, the line seems to be drawn in the same place as by English law, i.e., where the private patient selects and employs his own consultant. This is discussed in a very interesting case in which the Government Commissioner wished to go farther than the Conseil d'Etat would allow.¹

The plaintiff had suffered injury during treatment in the 'clinique ouverte' of a public hospital, in which patients were free to choose and pay their own practitioner, who utilised the hospital facilities. The Government Commissioner favoured imposing liability on the State. He argued that the clinic was an "indissoluble part" of the public service; the 'clinique ouverte' system was merely the most effective way of organising the public hospital service. The court rejected this argument, confining the liability of the State to cases in which either the premises or equipment were shown to be defective, or where a member of the permanent hospital staff was shown to be negligent. In such a case "a malfunctioning of the public service" would be shown. In the instant case, however, the consultant had been both selected and employed by the patient and could not be shown, in the English terminology, to be "integrated into the work of the hospital."

1. Hôpital de Pont-à-Mousson C.E. 4 June 1965, D.1965.746 n. Piquemal; AJDA 1965.II.410 concl. Galmot.

To turn to the second way around the difficulties of the control test, this should pose no theoretical difficulties for French law where faute de service is defined as 'a malfunctioning of the public service'. The idea of a 'fault in the system' has two advantages in the area of medical liability. First, it exonerates the doctor from a finding of gross fault which will damage his professional reputation. Secondly, it helps the plaintiff who will not have to work through the medical hierarchy to identify (i) the wrongdoer and (ii) the person able to control the wrongdoer's acts, : : : at law the person vicariously liable. In the Isaad Slimane case, the Government Commissioner said of this difficulty:

"From a practical standpoint, with the complexity of modern medicine, particularly surgery, the liability of the medical 'team' forms a whole. Often it will be impossible to find the author of the fault. If a patient dies in the course of an operation, is the fault to be imputed to the intern who operates, the consultant who is present or the 'boss' who has given permission for the operation in the first place?... If a duty surgeon in refusing to operate is guilty of a clinical fault (i.e. a personal fault) is he to take on his back the error of the medical student who agreed to operate in his place? Because that is virtually the position here; the widower has impleaded the chief medical officer, the surgeon and the midwife; if the civil court had proceeded to a decision on the merits, how would they have divided liability between these three ...?"

By basing liability on a faute de service, a primary duty to provide an efficient system was laid on the hospital authorities. It was not necessary to work out exactly how the patient, a young woman who had died in childbirth, had come to die nor to identify the medical officer primarily responsible.

In Jones v. Manchester Corporation¹ an English court faced with a similar problem reached an identical conclusion. A young and very inexperienced anaesthetist caused an accident during an operation and the hospital claimed an indemnity from her. The Court of Appeal held that the hospital which had permitted such an inexperienced doctor to operate was a joint tortfeasor and could claim only if the court thought it equitable. In the instant case the court thought the hospital wholly to blame for its defective service. The indemnity action was therefore disallowed. In Collins v. Herts County Council,² Hilbery J. spoke of a hospital's "own responsibility for its own negligent system" and based liability on the fact that it had permitted "a system to be in operation which was dangerous and negligent." This is in effect to substitute for vicarious liability a non-delegable duty of care, a development by no means confined to this area of medical liability, but gaining ground throughout the law of tort.

I have not intended in citing these medical cases to state the most recent law on the liability of doctors and hospitals but simply to illustrate the proposition that vicarious liability and faute de service, however different they may seem at the theoretical level, in practice yield rather similar results. There is a simple reason for this which becomes clearer if we examine a passage from the conclusions of M. Blum in the Lemonnier case,³ the classic decision on the concurrence of a

1. [1952] 2 All E.R. 125.

2. [1947] K.B. 598. See now Barnett v. Chelsea and Kensington Hospital Management Committee [1969] 1 Q.B. 428. And see the report of an inquiry into the death in hospital of a child through an overdose of drugs settled by the hospital and the Medical Defence Union for £500. The report stated that the blame for the mistakes could not be attributed to any one individual but that the paediatric team as a whole must bear the responsibility. The Times, June 9, 1975.

3. C.E. 26 July 1918, S 1918-19.III.41 concl. Blum n. Hauriou.

personal fault with a faute de service. The Government Commissioner said:

"Public bodies are not vicariously liable. Vicarious liability is a secondary, guarantor's liability which presupposes the primary liability of the agent, author of the damage. But this is precisely what the combined caselaw of the Conseil d'Etat and the Tribunal des Conflits excludes. The State is liable, not secondarily as employer, but in its primary capacity as director of the service."

Why does this have to be so? After all, the civil law and the common law of England have no difficulty in casting the State in the role of employer. The reason is jurisdictional:

"The jurisdiction of the civil courts can only be exercised in exceptional cases where the personal fault can be isolated or completely detached from the service; and the administrative fault, which can only be a faute de service, lies ordinarily in the jurisdiction of the administrative courts."

Any admission that the liability of the State is vicarious in character might imperil this jurisdictional demarcation. The Government Commissioner therefore blandly assures us that the liability of the State "is in no way based on Article 1384 of the Civil Code."

Here M. Blum is not being entirely honest because, as we have seen, administrative liability was initially derived from the Civil Code. More important, the corporate liability of the State resembles vicarious liability because it too is a legal fiction which masks a "guarantor's liability". "The hospital authorities", in Denning L.J.'s phrase, "have no ears to listen through the stethoscope, and no hands to hold the surgeon's knife."¹ State hospitals are not manned by robots; they are manned like

1. Cassidy v. Minister of Health [1951] 2 K.B. 343, 360.

Laski's government offices, by human and fallible agents. Vicarious liability has another and more fundamental purpose than that which M. Blum was considering. Vicarious liability exists to mark the limits of liability of the employer or the State for its agents. In other words it informs the State for whose actions it is liable and in what circumstances it is liable for those actions. Had M. Blum been addressing his mind to this aspect of the question, he would have seen that vicarious liability and faute de service were both fulfilling the identical function of guarantee.

Implicit in the argument that vicarious liability is unsuited to public law and should be replaced by the concept of faute de service, is the suggestion that these two concepts differ substantially. Yet Waline feels it safe to conclude that, today,

"Each public body (collectivité) is liable for those persons in respect of whom a relationship similar to that of principal and agent exists."¹

This is the relationship required for vicarious liability in French civil law.

In doubtful cases the "control" test of civil law constantly recurs. A lorry used for departmental business but driven by an (unlicensed) employee of central government causes an accident. The State can be liable only if the driver deliberately disobeys an instruction or is in flagrant breach of duty.² Otherwise, the department which issues instructions

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1. Droit administratif, 9th edn. 1963, pp. 828-9; for a more detailed account which reaches the same conclusion, see Chapus, op.cit., pp. 256-7.
 2. Ministère des travaux publics c. Cie des Assurances "La Providence" et Dept 1^{er} Allier C.E. 21 Dec 1966 Rec. 683 concl. Galabert. Compare Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool) Ltd. [1947] A.C.1.

as to what work is to be done and how it is to be carried out is liable. Again, a municipality cannot be held liable for the acts of a member of the public assisting in fighting a fire if he causes a car accident on his way to the scene before he has taken any effective part in the firefighting activities. At this stage he has not submitted himself to the 'direction' of the fire service.¹

One series of cases did suggest that the Conseil d'Etat had veered away from the test of "exercise of functions" or "course of duty", substituting an allegedly wider test of "link with the service" or "act severable from the service". The probable motive was to circumvent the difficulty that crimes and deliberate wrongdoing had originally been classified as personal faults for which the State could not be liable.² The new test was used successfully to establish that the State could be liable for the driver of a public service vehicle who was inebriated or unlicensed (both criminal offences); or who deliberately deviated from the route or used his vehicle for private purposes.³ Obviously, however, there is nothing fundamentally novel in such a proposition. The common law too has had gradually to adapt itself to the realisation that criminal acts may simply be wrongful ways of carrying out one's duties and to accept that there may be vicarious liability for deliberate wrongdoing.⁴ Once this point had been established by the administrative courts in France, the Conseil deliberately allowed the law to drift back to the civilian test⁵ a trend accelerated no doubt by the transfer of large blocks of

1. Cie d' Assurances "L'Urbaine et la Seine" C.E. 22 Mar 1957 Rec 200.

2. Douc-Rasy, op.cit., above, pp.29-56.

3. Mineur Defaux et Besthelsemer C.E. 18 Nov 1949 Rec 492.

4. Compare, for example, Lloyd v. Grace Smith [1912] A.C.716, with Quesnel C.E. 21 April 1937 Rec 413. See also Century Insurance Co.Ltd. v. Northern Ireland Road Transport Board [1942] A.C. 509 and Williams v. Hamp hill 1966 S.C.(H.L.) 31. For fuller discussion see Atiyah, op.cit. pp.262-5.

5. See the useful note in G.A. pp.319-323.

jurisdiction to the civil courts and the obvious preference of the legislature for the civilian terminology.¹ Today it is even possible that the test of "link with the service" is wholly superseded.²

The Lemonnier conclusions raise another point. M. Blum calls vicarious liability "a guarantor's liability". We have seen, however, that vicarious liability originated in the idea of the 'master's fault' and English law was slow to depart from this conception. At a period when this idea dominated the common law one would expect to find that 'faute de service' was more extensive than the corresponding common law concept. But the guarantee theory has long ago carried the day. Today vicarious liability is more often than not seen as a vehicle for allocation of losses to those with 'deep pockets' not to say a bridge between fault and risk. The administration with its apparently bottomless purse comes increasingly into the firing line. The frontiers of vicarious liability are pushed forward and it blends into corporate liability for breach of primary duties. This is precisely the trend which we are witnessing in England today.

Fault and Risk

Fault liability satisfied nineteenth century jurisprudential criteria and embodied the prevailing moral values of the community; the practical results of the system were, however, far from universally commendable. Strict liability, rejected as an anachronistic archaism, might at times produce results unduly harsh to defendants: fault liability, on

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1. A case which illustrates the difficulties caused by the interplay of these various factors is Société hospitalière d'assurances mutuelles c. Heritiers Assemat C.E. 5 Feb 1975, AJDA 1976, p.100 n. Moderne.
 2. See Min. des Armées c/Cie d'assurances "La Prévoyance" et Sté des laboratoires Berthier-Derol, C.E. 5 Nov 1976, AJDA 1977.365 Chr. Nauwelaers et Fabius.

the other hand, frequently resulted in the cost of accidents resting on individual victims, an equally inequitable result.

Industrialisation, together with the development of railways and later the petrol engine, rapidly transformed the law of tort into a vehicle for the compensation of accident victims. The growth of corporate enterprise (and at a later date of liability insurance) emphasised the inequality inherent in allowing the individual victim to bear the full cost of accidents. The natural consequence was a doctrinal movement which demanded strict liability, at least in the case of industrial accident. The risk of accident was a loss which should be offset against the profits of the enterprise responsible for the accident; corporate enterprise should no longer be permitted to harvest the rich profits created in some cases by individual suffering.¹

It is important to stress the international character of this movement. The Conseil d'Etat, relatively unencumbered by accretions of caselaw or by strict doctrines of precedent, was well placed to give expression to the "doctrinal movement created by the unceasing development of mechanisation"² but it was by no means alone in wishing to do so. Indeed, at the time of the celebrated Cames decision, Workmen's Compensation legislation was already before the Senate, and the Conseil d'Etat merely anticipated the legislation.

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1. See Ballantine, "A compensation plan for railway accident claims", (1916) 29 Harv. L.R. 705; Laski, "The basis of vicarious liability", (1916) 26 Yale L.J. 105; Lawson, Negligence in the Civil Law, p.44 es.; Douglas, "Vicarious Liability and Administration of Risk", (1928) 38 Yale L.J. 584. See also De Sitter c. L'Etat belge S1890.4.18 n. Labbé.
 2. Report of M. Le Marc 'hadour in Jand'heur 13 Feb 1930 D.P. 1930.I.57; Lawson, loc.cit., gives a full account.

In Cames¹ a workman injured by an accident in a State arsenal claimed damages for personal injury. The civil courts had recently stipulated that, to succeed, the worker must prove fault.² In Cames the cause of the accident was not clear, though by a presumption of fault, irrebuttable or rebuttable, the Conseil could have circumvented this obstacle. But the Conseil refused to equivocate; It declared boldly for liability without proof of fault and on the basis of risk.

The case seemed the precursor of a general move in administrative law from fault to risk which, had it materialised, would have been truly innovatory. The precedents seemed to exist in the shape of legislation: a law of the Revolutionary period designed to provide compensation for losses caused to private property by the execution of public works; laws of 1831 and 1853 providing for military and civilian invalidity pensions and the new Workmen's Compensation legislation of 1897. Moreover, the climate was favourable. In a note praising the Cames decision, Hauriou made two points. First, the decision in Hauriou's view justified the existence of the separate administrative jurisdiction because the court had pushed the legislature down a path which it had hesitated to take. This point is interesting because several later cases in which the Conseil d'Etat has imposed strict liability have been quickly followed by government intervention. This reminds us of the genesis of the Conseil d'Etat as a forcing house for administrative reform, a role in which our English courts would be anxious not to cast themselves, though individual judges from time to time have accepted the challenge. Hauriou's second point

1. C.E. 21 June 1895, S1897.3.33 concl. Romieu n. Hauriou.

2. 19 July 1870, D.P.1870.1.361. In 16 June 1896 D.P.1897.I.433 the civil courts created a presumption of fault subject to strictly limited defences; in Jand'heur (above) they moved to strict liability.

is theoretical. He calls the decision

"an illustration of the general theory of administrative risk which seems to be the basis of State liability in every case of injury resulting from the operation of the public administration."

That the Conseil d'Etat may also have been thinking along these lines was suggested by the case of Olivier et Zimmerman¹ (discussed in the previous Chapter) in which it was stated that the Prefect's decision to invoke the administrative privilege of executing a decision without awaiting the outcome of a judicial hearing (la décision préalable) was of such significance that it could be taken only "at the risk and peril of the administration." Although Hauriou approved this decision, calling the power "the great prerogative of the State", he seems to have analysed the abuse of power as a faute de service. When the Conseil d'Etat reverted to fault liability in the subsequent case of Tomaso Grecco,² Hauriou approved this decision, too:

"We are very struck ... by the fidelity of the Conseil d'Etat to the fault concept and we are tempted to wonder whether, in fact, the caselaw is not in better case than the doctrine and whether the writers have not been a bit too much influenced by a wish to brush to one side a civil law theory [i.e. fault] which seemed to carry with it the implication that the civil courts were the competent jurisdiction."

Thus, the swing from fault to risk projected by the theorists never took place and by the time the Conseil d'Etat in 1919³ made a further foray into the field by introducing the principle of "abnormal risk falling

1. C.E. 27 Feb 1903, S 1905.III.17 n. Hauriou (and above p.34).

2. C.E. 10 & 17 Feb 1905, S 1905.III.1113 n. Hauriou.

3. Regnault-Desroziers C.E. 28 Mar 1919, S 1918-19.III.25 n. Hauriou (discussed more fully below).

upon those who lived in the neighbourhood of a hazardous enterprise," Hauriou castigated the decision as twenty years out of date. His reasoning is once more of interest. Hauriou believed that the decision was a cross between the nuisance liability of civil law, which - like strict liability in administrative law for travaux publics - catered for damage to property but not personal injuries;¹ and the industrial injuries cases. This hybrid could be justified only if the Conseil d'Etat would adopt risk liability generally. But Hauriou did not recommend this. Risk liability was a slippery slope and it was unfashionable. "We are bored with new schools of legal theory and realist schools and new philosophies and objective theories." In Hauriou's view, the imposition of risk liability was a legislative, not a judicial, prerogative; it was justified only when the risk ^{was} exceptional; when the victims needed exceptional protection; or when the enterprise in question could afford to insure. Hauriou never again changed his view² and I have cited his note at some length because there is so much good sense in it and because it seems so modern.

Nor did the Conseil change its view, although the leading commentators never ceased to urge (i) that it had done just this and that risk was now the general principle of liability, or (ii) that it ought to do so.³ But to summarise very briefly, risk liability is still exceptional in French public law. To repeat the cases in which it exists today, these comprise certain cases of loss caused by public works; the wholly exceptional case of injury to a member of the public who is assisting on

1. Compare the extension of the rule in Rylands v. Fletcher to personal injuries discussed Street, p.255 where the conflicting authorities are listed.
2. Sfez, *Essai sur la contribution du doyen Hauriou au droit administratif français*, 1966 pp.147-154.
3. E.g. Berlia, "Les fondements de la responsabilité civile en droit public français", 1951 RDP, p.685; Eisenmann, *op.cit.* above.

a temporary and voluntary basis in the execution of a public service; the case of riot and civil disorder; and finally, strictly enumerated and limited cases of hazardous activity. In addition there may occasionally be liability without fault in the case of abnormal losses following from the lawful use of power, notably loss caused by new legislation or regulations or from the lawful exercise of discretionary power.¹ Liability without fault is quite exceptional and fault remains queen of the administrative law board. Before discussing this further, it is useful to turn to England.^{P//}In the struggle towards general principle the English courts had discounted the possibilities of strict liability. The rule in Rylands v. Fletcher,² theoretically as capable of generalisation as the parallel rule in Donoghue v. Stevenson,³ was treated by the courts as an archaism, wholly inappropriate to a modern industrial society, and its impact was deliberately blunted by a series of restrictive rulings.⁴ To constitute property owners or manufacturers insurers was to a majority of the judiciary, "contrary to the rules of natural justice."⁵ The inequality involved in throwing on to individuals unable to insure against them the incalculable and unforeseeable risks involved in technological development escaped the attention of all but a minority of judges.⁶

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1. Waline, op.cit., para 1530 et seq; Odent, op.cit. pp.1136-1170, 1122-1134 give extended accounts.
 2. (1866) L.R. I Ex 265, 279 (Blackburn J.).
 3. Markesinis, "The Not so Dissimilar Tort and Delict" (1977) 93 LQR 78.
 4. Rickards v. Lothian [1913] A.C.263; Read v. Lyons [1947] A.C.156 British Celanese v. Hunt [1969] 2 All E.R.1252. For discussion see Harari, op. cit., generally and Ch.12; Friedmann, "Modern Trends in the Law of Torts", (1937) 1 MLR 39; Bohlen, Studies in the Law of Tort, 1926, p.344; Newark, "Non-natural user and Rylands v. Fletcher", (1961) 24 MLR 557.
 5. Hammond v. Vestry of St. Pancras (1874) L.R.9 C.P.316, 322 (Brett J.).
 6. But see Midwood v. Manchester Corp. [1905] 2 KB 597; Charing Cross Electricity Supply Co. v. Hydraulic Power Co. [1914] 3 KB 772; Pearson v. N.W. Gas Board [1968] 2 All ER 669.

The different approaches can be neatly illustrated by a pair of very well known cases. In Read v. Lyons,¹ the plaintiff, an inspector in a munitions factory, was injured during an inspection of the premises through an explosion, the cause of which was, as in the Cames case, never properly established. The House of Lords was asked to rule on the preliminary point whether in the absence of negligence there could be liability. Although the reasoning was not uniform, the House of Lords agreed that the rule in Rylands v. Fletcher was not applicable and that there could be no liability without negligence. The court was prepared to admit the need for a very high degree of care; but all drew the line at liability without any proof of negligence. In reaching this conclusion the House was clearly concerned to secure a measure of uniformity in the rules of tortious liability; to secure the position of negligence as a general principle of liability; and to avoid the creation of separate categories of claimants, some with better chances of success in the forensic lottery than others.

In Regnault-Desroziers,² an action for damages was brought against the French State in the administrative courts by those people resident in the neighbourhood of the fort of Double-Couronne in Paris who, during the 1st World War, had suffered damage through a violent explosion inside the fort. The circumstances suggested fault:—indeed, the judgment makes reference to "sketchy organisational measures"—but the Conseil d'Etat preferred to base liability on abnormal risk. This was defined as that risk which "exceeds the limit of risks normally resulting from proximity." The similarity of this principle to the Rylands v. Fletcher principle is very marked.

1. [1947] A.C. 156.

2. Above, p.84

It is somewhat profitless to speculate why the rule in Rylands v. Fletcher found no favour with the judges while, on the continent, strict liability was acceptable. One answer given is that the case was decided too late.¹ It came to be associated, therefore, with a landowning class of limited influence and with an obsolete, medieval law. Negligence, on the other hand, was the rule adapted to the century of industrial and commercial activity. This seems an incomplete answer and I repeat my tentative suggestion that the answer may have something to do with a desire to escape the law of separate actions and replace it by a general principle of liability. Strict liability is more conveniently represented in English law by vicarious liability, by reliance on statutory duties, by presumption of fault.²

From the point of view of public law, the most unsatisfactory result has been to insulate from liability public enterprises such as gas, water and electricity authorities where, in case of serious accident, the plaintiff is often at an intolerable disadvantage in proving fault.³ In England, in the last resort, recourse must be had to public inquiries, ex gratia settlement, or statute. The Law Commission has expressed concern at this and has suggested spreading the burden of risk "as widely as possible, whether over the general body of taxpayers or at least, through adjustment of the tariffs, among those members of the community who enjoy the service supplied."⁴ The present position is

1. Friedmann, op.cit., pp.51, 63.

2. Millner, op.cit., 1967, p.89 et seq; Glanville Williams, "Vicarious Liability and Master's Indemnity" (1957) 20 M.L.R. 220; Friedmann "Social Insurance and the Principles of Tort Liability" (1949) 63 Harv. L.R. 241.

3. Dunne v. N.W. Gas Board [1964] 2 Q.B.806; Pearson v. N.W. Gas Board [1968] 2 All E.R.669; Benning v. Wong [1970] A.L.R.595.

4. Law Com. No. 32 Civil Liability for Dangerous Things and Activities, 1970, para.15.

certainly indefensible.

There is one rather interesting theoretical argument here. One reason why the rule in Rylands v. Fletcher is not applied to statutory undertakers is a judicial sentiment that it applies only to activities undertaken for private profit. In Lord Moulton's phrase, "It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."¹ Bohlen has argued that this is an illustration of a common law tradition that "one whose person or property has been injured for the public benefit must himself bear the loss."² Bohlen goes on, therefore, to stress the possibilities of the Rylands v. Fletcher principle as an alternative to the civilian idea of "Equality before Public Charges". An exceptional or abnormal loss which falls on a single member of the community and which is suffered in the public interest is a charge which ought to be divided amongst the community. Loss caused by a hazardous activity is exceptional and abnormal and by applying the Rylands v. Fletcher rule to statutory undertakers the charge is laid on the community. An alternative explanation is that of 'profit and loss'. The community which enjoys the benefit of the services must also support the charges. These are the two favourite explanations of the basis of risk liability in French administrative law.³

1. Rickards v. Lothian [1911-13] All E.R. Reprint 71, 80.

2. Op.cit., p.430.

3. Blaevoet, "De l'anormal devant les hautes juridictions civile et administrative" 1946 JCP 560; Eisenmann, op.cit., Chapter 4.

The courts have shown no interest in Bohlen's idea but have clung tenaciously to a limited notion of Ryland's v. Fletcher which links it firmly to the law of nuisance. It is interesting to find the Conseil d'Etat also preferring a principle of liability based on (i) abnormal risk (ii) to neighbours (iii) created by hazardous activity/which is clearly based on the civilian principle of nuisance.¹ It is interesting, too, to see that the principle is entirely residual and applicable only where fault cannot be proved.² The essentially conservative nature of the Conseil d'Etat is plain to see.

Before leaving the subject of risk liability, it is well worth considering some of the difficulties which flow from a mixed system of liability. These, too, are most easily illustrated from a detailed comparison of a strictly limited area. In the well known case of Dorset Yacht v. Home Office³ the House of Lords ruled that it would be possible for the Home Office to owe a duty of care to those who suffer loss to person or property at the hands of escaping Borstal boys or prisoners where the escape is occasioned by obvious negligence and where there is an obvious risk that the escape will occasion the loss which occurs. This decision was received somewhat grudgingly by Professor Hamson who, in a note on the case (at the Court of Appeal level),⁴ compared the Conseil d'Etat decision of Thouzellier,⁵ in which the State was held liable for

1. Cornu, op.cit., pp.69-90.

2. Picard et Goux C.E. 18 Nov 1970 Rec. 687; Entreprise Lefebvre C.E. 9 June 1971 Rec. 424.

3. [1970] 2 W.L.R. 1140.

4. Hamson "Escaping Borstal Boys and the Immunity of Office" [1969] Cam. L.J. 273; Semar [1969] P.L. 269.

5. Min. de Justice c. Thouzellier C.E. 3 Feb 1956 Rec 49, D 1956.597 n. Auby.

damage caused by juveniles who escaped from an approved School with a liberal regime, on the basis that the very existence of the institution created "a special risk to third parties resident in the neighbourhood". Somewhat extravagantly, Professor Hamson concluded that, in France

"... a remarkably developed and developing body of caselaw has been created by a court which knows how to, and does, adapt an appropriate liability to the constantly changing demands of society. Here [in England] the court has not yet begun to give consideration to the extremely complex problems of how a true balance is to be struck between the necessary requirements of a public service and the just rights of the citizen."

A more realistic assessment might be that these decisions are similar rather than dissimilar. Each manifests a cautious and restrictive attitude towards the imposition of liability in situations for which private law provides no obvious precedent. The English judgment achieves this end by confining liability to cases in which negligence is "clearly proved" and the risk of damage "manifest and obvious". But the French formulation is equally restrictive since it defines the 'special risk' as that created by the existence of an institution operating "a liberal regime", i.e. an open prison or Borstal, and limits damage to the "immediate neighbourhood". So obviously restrictive was the latter requirement that it was almost immediately replaced by the test of "direct causal link",¹ precisely the formula preferred by Lord Reid in the Dorset Yacht case.²

1. See Waline in a note on Thouzellier RDP 1956 p.854 cited Hamson loc. cit., and Trouillet C.E. 9 Mar 1966 Rec 201.

2. At p.1146.

The former requirement has always been strictly adhered to, with incongruous results.¹ For example, the State is liable under the risk principle for juvenile delinquents; but it cannot be liable for loss caused by juveniles who are entrusted by the State under the equivalent of a care and control order to a private institution, because here the only link with the State is in the choice of institution and this is not something which entails a 'special risk'. This distinction has been defended by French commentators in terms somewhat less glowing than Professor Hanson's.² They admit that it is somewhat arbitrary, when juveniles are committed under two forms of court order to the same institution where they mix freely, to hold the State liable for loss caused by an escaping delinquent but not by an escaping non-delinquent. On the other hand, to hold the State liable "would lead to an endless extension of non-fault liability at a time when all attempts to rehabilitate social inadequates rest theoretically on the rejection of all forms of isolation." The arbitrary line is therefore justified because it has the merits of clarity.

It is true, of course, that the Dorset Yacht decision requires the proof of negligence by the plaintiff while the Thouzellier decision does not. At first this does seem restrictive, especially when the somewhat discouraging dicta in the Dorset Yacht case itself are considered. To the English lawyer risk liability comes to be seen as a means of easing the plaintiff's burden of proof. But this is only one of its functions and experience shows that it is the initial victory which is the hardest. Once the courts have admitted that a given activity can, in principle, give rise to liability, the claims pour in and are usually

1. Garde des Sceaux (etc.) c. Sté de constructions et de fabrications pour le bâtiment (etc.) and Garde des Sceaux (etc.) c. Mutuelle générale française Accident et Garage Caron et Dodon C.E. 14 June 1978, AJDA 1978 pp. 590-592.

2. Dutheillet de Lamothe et Robineau, *ibid.* p.557.

met by a compensation scheme. Should liability be denied and an action come to court, the proof of negligence may, in this particular area, be less difficult than imagined. Negligence can usually be read backwards from the damage which results. In a recent English case, for example, a local authority was found liable for fire damage amounting to £99,000 caused by a 12 year-old boy who escaped from a council community home while in the care of the council. The judge found that closer observation and a "strict watch" would have prevented the escape. Since in practice such precautions are not only impossible but intolerable - as our French commentators noticed - what we are really looking at is a concealed form of risk liability.¹ To put this slightly differently, legal classifications are not always definitive. Behind the conceptual facades, there is much room for manoeuvre and judges frequently bend the rules to arrive at equitable decisions.

Risk liability in French administrative law often serves the secondary purpose of enabling the Conseil d'Etat to raise the standard of care expected of an administrative authority by circumventing an established rule that liability is for gross fault alone.² (This was in fact the requirement in the case of escaping prisoners or mental patients prior to Thoussellier.)

The introduction of risk liability is not a magic formula which will automatically resolve "the extremely complex problems" of public policy which arise. The concept of risk is open to manoeuvre in the same way as the fault concept. Because tortious liability has many purposes besides compensation, the court may be tempted to vary the formula

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1. Potter v. Essex County Council, The Guardian, April 3, 1979. And see below p.179.
 2. Stain C.E. 21 Jan Rec.29, Dept. de la Moselle C.E. 13 July 1967 D.1967. 675 n. Moderne; Ville de Paris c. Epoux Pion et Caisse de Coordination des Assurances Sociales de la RATP C.E. 1 Oct 1969 Rec 415.

for liability in any given case to achieve one or more of the subsidiary goals (e.g. sanction or deterrence). The law then becomes complex and uncertain. A series of recent Conseil d'Etat decisions on escapes from psychiatric institutions illustrate the difficulties which the court has to face as well as the multifarious solutions available.

In the first of these cases,¹ psychiatrists decided, after careful consideration, to release from hospital a dangerous psychotic with a long criminal record. The decision had to be confirmed by the departmental prefect, who not unnaturally accepted the advice of the specialists concerned with the case. Unfortunately, the ex-patient shortly afterwards committed a homicide. Both the hospital and the department were found/liable on the basis of gross fault.

In a well reasoned note, *Moderne* points to the illogicality and injustice of this decision. The specialists and the Prefect acted perfectly legitimately, taking into account all the known facts. The ruling stigmatised their decisions as gross faults merely because they had taken a calculated risk and turned out to be wrong. Why did the Conseil d'Etat not substitute risk liability? The answer is a general one. The courts are afraid to go too far in imposing risk liability on the medical services. They find it hard to balance the need

"to assure to victims who have suffered loss in such circumstances the just reparation which is their due with the need not unnecessarily to overburden the public services".²

1. Hôpital psychiatrique de St. Egrève C.E. 31 Dec 1976, D 1977.191 n. *Moderne*; AJDA 1977.135 Chr. Nauwelaers et Fabius.

2. *Moderne*, *ibid.*

As Denning L.J. ^{once} said:

"... we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken."¹

A further factor is, no doubt, that the imposition of enterprise liability would have the effect of extending protection beyond the innocent victim to the doctor's insurers. Doctors and medical staff are well-known to be insured and hospital authorities do come to private agreements with the insurers as to the respective shares of responsibility to be assumed.² The function of vicarious liability in allocating financial loss to a suitably deep pocket is secured. In this way it comes about that the transfer to risk liability seems superfluous and the courts of both countries still struggle to balance the competing interests in individual cases inside the fault principle.

A second decision³ with almost identical facts lends point to Moderne's criticism of the Saint-Egrève case. A patient was the subject of a rehabilitative regime known as "night hospital" in which he was totally free to come and go during the daytime but slept in the hospital at night. While at liberty he one day committed a serious assault. The plaintiff sued the hospital authorities for damages in the administrative courts.

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1. Roe v. Minister of Health [1954] 2 Q.B. 66, 86 (Denning L.J.). *And see now Whitehouse v. Jordan, The Times, Dec. 6 1979*
 2. See the note by Dutheillet de Lamothe and Robineau cited above; for the English practice see Hepple and Matthews Cases and Materials on the Law of Tort, 1974, p.666.
 3. Hôpital psychiatrique départemental de Rennes c. Dame Clotault C.E. 30 June 1978, AJDA 1978, pp.598 and 556 Chr. Dutheillet de Lamothe et Robineau. The Government Commissioner was M. Morisot.

The Government Commissioner argued for risk liability on the basis of the earlier caselaw. The Conseil d'Etat however refused to accept that "night hospital" was a method of treatment creating a special risk for third parties capable of creating liability without fault. Logically, the answer was . . . to demand a gross fault or refuse liability. The Conseil d'Etat avoided this answer by holding that this was not a "diagnostic fault", since "night hospital" was not "a method of treatment". The hospital's responsibility was really limited to the provision of shelter and certain facilities to someone not able to adapt to a normal social life. The Conseil d'Etat therefore based liability on simple fault. The public service had functioned inadequately because the hospital ought to have foreseen that in leaving a person with known aggressive tendencies free all day with no occupation or employment he might get into trouble. (Paraphrasing this finding, one might say that the hospital had diagnosed the case incorrectly).

The cynic might read this casuistic reasoning as a bargain between those who, like the Government Commissioner, favoured risk liability, and those who preferred to maintain the traditional ground.¹ The compromise position does, however, represent a distinct trend in French administrative law. The requirement of gross fault, designed to protect the State from excessive liability, may result in a serious slur being cast on the doctor's reputation. The courts have responded by substituting liability for the defective operation of the medical service. As one expert has said:²

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1. This cannot be confirmed because judgments are collegiate in French courts and no dissenting judgments are recorded. The deliberation is private and the Government Commissioner, although present, is not a member of the court.
 2. M. Guinet, President of the administrative tribunal at Lyon, 22 Oct 1971, quoted *Revue hospitalière de France* Feb 1972 p.41; Sec. d'Etat à la Santé Publique c. Dejous C.E. S 1958.182. Compare Jones v. Manchester Corp. [1952] 2 Q.B. 852.

"It is certain that the judge, knowing the consequences for the practitioner of a decision based on medical fault, tends to appeal to the concept of poor organisation of the public service, which also makes it easier to justify compensation".

Why then, did the specialists of Saint-Egrève not get the benefit of this principle? Was it, perhaps, because the Conseil d'Etat, in common with the public at large and the judiciary in many other countries, refuses to believe in the rehabilitation of dangerous criminals and deplores their release on any occasion? By holding the hospital liable in this case, the Court was able to express its doubts about the practice and even discourage it. But by classifying the release as a 'gross fault' and refusing to move on to the terrain of risk, the court was able to warn the psychiatric experts that release is to be narrowly scrutinised and allowed only in exceptional cases. In short, in the Saint-Egrève case, a deterrent element was allowed to creep into the rules of civil liability which will, no doubt, do nothing to inhibit the victim's recovery in such cases.¹

Although I have been critical of some of these decisions, I do not wish in any way to suggest that the Conseil d'Etat is not a court which considers the needs of public policy or that the solutions which it has adopted are in any way inadequate. Allegations that the courts have allowed themselves to become "the prisoners of their own formulae"² or betray an "underlying uncertainty as to the purpose of the tort remedies in particular cases"¹ contain a measure of truth, but fall short of the whole truth. To balance "the necessary requirements of a public service

1. On this point see further op.cit. Harlow (1976) 39 M.L.R. 516, 520-521 where the French authorities are cited.

2. Moderne D.1977.191 and Millner, loc.cit. below.

and the just rights of the citizens" in any given case is not only difficult but verges on the impossible. The Conseil d'Etat has made a very reasonable attempt at solutions and is not to be blamed if it fails to please every commentator on every occasion. But similarly the judges in the Dorset Yacht case were by no means blind to the issues and made a very good shot at resolving them within the framework of the law of negligence and without recourse to the risk principle.¹ I believe that they should receive credit for the following reason:

The introduction of a system of gradation of fault combined with limited areas of risk liability has produced in France extremely complex rules in which any change is likely to produce serious anomalies. For example, the risk principle applies to cases in which the police use "arms or engines creating exceptional risk to persons or property." This principle covers only the use of firearms and does not cover the use of teargas.² Again, a sudden maverick decision³ means that a schoolboy injured during rugby football champions is compensated on the basis of risk. To find out whether the rule applies to football or tennis or can be extended to all legitimate sporting activities in defiance of the existing caselaw, there will have to be litigation. Increasingly, the rules of liability become dependent on the status of the victim and depend on the relationship between the victim and the tortfeasor. In English law, factors such as the 'escape' rule in Rylands v. Fletcher or the duty of care in negligence are used to restrict liability. In France,

1. Millner, "Growth and Obsolescence in Negligence" (1973) 26 CLP 260.

2. See for criticism, Nicol C.E. Apr 27 1953, J.C.P.1953.I.113 n. Gazier.

3. Gauthier T.A. Lyon 1 July 1976, AJDA 1978 p.53 n. Plouvin.

factors such as the victim's status as a 'user of the facilities of the public service' or an 'occasional collaborator of the public service' serve the same classificatory purpose.¹

It is just as well that at this juncture, we should clearly grasp this point. Risk liability no longer has to be imported by public lawyers via the caselaw of the Conseil d'Etat. It is the ideas of private lawyers which have been influential in persuading the Pearson Commission to consider no-fault liability and which ^{have} resulted in the curious compromise mixture of fault, risk and extra judicial statutory compensation which the ^{Pearson} Commission recommended.² It is private law, this time imported from Europe via the EEC, which has recommended limited areas of strict liability interwoven with fault as the basis of a system of liability for defective products.³

However, just as the advocates of scientific allocation of losses to those enterprises and activities which cause the losses seem to have won the day for strict liability,⁴ the pendulum seems to be swinging in the opposite direction.⁵ The scientific basis of the new theories is

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1. See Lucchini D.1957 p.770 and Dame Muesser et Veuve Lecompte C.E. 3 Mar 1978, AJDA 1978, 210 Chr. Nauwelaers et Dutheillet de Lamothe.
 2. See as particularly influential in influencing public opinion, Atiyah, *Accidents Compensation and the Law*, 1st edn. 1970. See also the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, Cmnd. 7054, (1977-78). And see J.C. Fleming, "The Pearson Report: its 'strategy'" (1979) 42 M.L.R. 249; Ogus, Corfield and Harris "Pearson: Principled Reform or Political Compromise" *Industrial Law Journal* 143 (1978).
 3. *Liability for Defective Products*, Law Com. No.82, Cmnd.6381 (1976-77).
 4. See Coase, "The problem of Social Cost" 3 *Journal of Law & Economics* (1960), p.1; Posner, "A Theory of Negligence" 1 *Jnl. of Legal Studies* (1972) 29; Calabresi, *The Costs of Accidents: a legal and Economic Analysis*, 1970.
 5. See, for example, on the effects on the pharmaceutical industry, (1978) 128 N.L.J. 274 and *New Society*, Mar 1st, 1979. The Medicines Commission has also expressed doubts on the Pearson Commission's proposals.

itself in doubt. As Posner, himself an advocate of fault as the optimum criterion for loss allocation, has remarked:

"The question whether a general substitution of strict for negligence liability would improve efficiency seems at this stage hopelessly conjectural; the question is at bottom empirical and the empirical work has not been done."¹

The experience of the risk principle in French administrative law does clearly demonstrate that risk liability is not, as its advocates often claim, a universal panacea. It does not result in all victims being compensated nor even in a significant lowering of the burden of proof. It may even complicate the law by producing variant standards of liability. Its relationship with accident prevention is unclear and unproven. The question of which risks are to be allocated to whom is a difficult one and, though models abound, none seems particularly convincing.

In this ambivalent situation, the adherence of the English courts to the fault principle is not particularly blameworthy. There is much to be said for Hauriou's argument that risk liability is the responsibility of the legislature. In France, indeed, it must never be forgotten that risk liability derives originally from legislative provisions and that the Conseil d'Etat in utilising the principle have merely embroidered a legislative pattern. If the legislature were to give the lead, the English courts would no doubt prove capable of embroidery. Until then discretion is undoubtedly the better part of valour.

1. "Strict Liability: A Comment" 2 J. Leg. Studies (1973) 205, 211-2. See also "A theory of Negligence" (1972) 1 J. Leg. Studies 29; Economic Analysis of Law, 1972, p.78.

Conclusions:

By limiting my comparison of the legal rules to two main areas of vicarious liability and risk liability and by presenting only a limited number of examples, I am aware that I open myself to a charge of distortion. It could be said that, if I had chosen different examples and widened my range, the answer might have been different. I am not pretending, however, that the two systems resemble each other point for point: obviously they do not. (There is, for example, no real equivalent in English law to the special liability in France for public works; and other examples, apart from the example of risk liability which was my own choice, could be given). But a detailed study already exists,¹ the author of which, writing at a period before the law of negligence had flowered into the general principle of civil liability, was, like myself, struck by the fundamental similarity of the two systems. Divergence at the theoretical level had led people to expect divergence in practice, but such was not the case. "The differences are only secondary. In practice the two systems are equivalent."² Professor Lévy was not surprised by this discovery. He felt that, where two countries with a similar administrative structure set out to solve the same problem, - in this case, the problem of how to compensate the victims of administrative activity - they were likely to come up with the same answers. Adopting this conclusion, I would add a rider. The solutions would not in all probability be so similar if the legal principles of civil liability were not broadly alike. There are, of course, areas of difference, but the parallels are striking and the common lawyer coming fresh to the French

1. Lévy, *La Responsabilité de la Puissance Publique et de ses Agents en Angleterre*, 1957, pp.348-352.

2. At p.350.

civilian system will quickly orientate himself and feel entirely at home. Even the legal vocabulary is relatively familiar.

By confining oneself to outlining the broad general principles one actually risks maximising the differences between the systems, because, as Professor Lévy observes, the differences of approach lie mainly at the jurisprudential level. Common lawyers are used to deducing principles from decided cases, an attitude largely responsible for giving the common law its characteristic, disordered appearance. Civilian lawyers reason from principle to the facts. If, therefore, one stops without examining the way in which the principle has actually been applied in the caselaw, the civil law may seem deceptively simple. What is surprising is not that the systems of administrative liability should differ in England and France, but that they should be in all essential respects so similar. It is this surprising correspondence which emerges so clearly from the cases.

To what, then, should we attribute the continuing fascination of the French system? I have suggested that the initial attraction lay in the apparent success of the Conseil d'Etat in imposing legal liability on the State, a victory which naturally attracted common lawyers, infuriated by the unsatisfactory law of Crown Proceedings. This movement survived

the 1947 Act, partly because the commentators and critics addressed their minds to the injustices which might result from the poor drafting, rather than to the actual operation of the Act.¹ The idea grew up that there must be an inherent distinction between 'public' and 'private' liability. It was believed that the absence of this distinction in England explained the weakness of English law in dealing with the State. For obvious reasons, ^{the} French system with its wholly separate administrative jurisdiction, seemed an embodiment of the distinction between public and private law.

This view was fostered by the French publicists themselves who felt a need to emphasise the 'originality' and the 'autonomy' of the principles of administrative liability. At an early stage and in the most creative period of French administrative law, Hauriou had consistently denied the truth of this assertion. By the 1950s, detailed studies by distinguished French lawyers, representative of both systems, had conclusively demonstrated that the rules of civil liability used by the two jurisdictions were to all intents and purposes alike.² Variations in liability did not represent the dramatic theoretical distinctions which Duguit hoped he could see, but were minimal in character. Now one, now the other, jurisdiction made the running. The administrative jurisdiction was for example, more inclined to experiment with risk liability, while the civil jurisdiction was consistently more generous in awards of damages.³

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1. See, for example, Lord MacDermott, Protection from Power under English Law, 1957, pp.107-9.
 2. Chapus, Responsabilité publique et Responsabilité privée 1954; Cornu, Etude Comparée de la responsabilité délictuelle en droit privé et droit public 1951; Eisenmann, Sur le degré d'originalité du régime de la responsabilité extra-contractuelle des personnes (collectivités) publiques J.C.P. 1949 I. nos. 742 and 751.
 3. Harlow, "Remedies in French Administrative Law" [1977] P.L.227, 240.

Sometimes the differences were explicable by those temporary variations of attitude which one expects in any system of judge made law. As late as 1966, Prieur felt able to say¹ that, in the case of clinical medical negligence where injury had been caused through operative or post-operative failures, the civil courts were making the running. In his view:

".... faults of this type [i.e. medical faults] seem to be making an appearance more and more frequently both in the civil caselaw and the administrative case-law. It seems that the administrative courts are retreating when compared with the civil judges who have admitted the concept of "inexcusable" fault and who seem to be introducing into civil liability the sanction theory of liability."

Indeed, the concern of the Conseil d'Etat to preserve its jurisdiction in medical cases may have been partly dictated by concern at this civilian expansion of liability.

Had the English lawyers been more aware of this interplay, they might have noticed that many of the features which they found so enviable in French public law, particularly its basis of general principle, were actually present in French civil law.² Schwarz,³ for example, made special reference to the deficiencies of the common law with regard to negligent misstatement and liability for omissions to act. It is true that French administrative law has never found difficulty in this area, but then, neither has French civil law.⁴

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1. The study was published only in 1973; *Un exemple d'étude sociologique du contentieux administratif* (Strasbourg 1966) 1973 R.D.P. p.1489 at 1531.
 2. Lawson, *op.cit.*, makes this abundantly clear.
 3. *Loc.cit.*, above.
 4. Di Malta, "Les Renseignements Administratifs" D.1964 Chr. XXXIII 232; *Juris. Admin.* Fasc. 720 and 721. But see Cornu, *op.cit.*, p.193.

This is a useful choice of example, because it reminds us that many of the articles which are so critical of English law antedate the decade of unprecedented growth and creativity in the common law of tortious liability. The particular gaps to which I have just referred have long been filled¹ and, more generally, Rubinstein felt confident by 1964 that English law was perfectly adequate to deal with liability for what he calls 'bureaucratic negligence' and attributed the dearth of cases to lack of enterprise on the part of the legal profession.² The profession has since grown more enterprising and more attuned to "deep pocket" theories of tortious liability. These developments authorise a less pessimistic assessment of the potentialities of the common law. Were the same articles to be written today, their authors might wish to modify some of the views expressed.

Some of those who have espoused the cause of French administrative law are deeply committed to the legal control of government power through an expansion of administrative law. They are, in short, attracted by the theoretical picture of 'L'Etat légal' or the State submitted to the rule of law courts.³

When such writers talk of a need for systematisation, they refer not so much to confusion in the caselaw or its heterogenous nature, but to the absence of a special, public law system of liability, which could

1. Above, notes 3 and 4, p. 65

2. "Liability in Tort of judicial officers", (1964) 15 Univ. of Tor. L.J. 317, 328-9.

3. Especially Mitchell "The State of Public Law in the United Kingdom" (1966) 15 I.C.L.Q. 133; "The Causes and Effects of the Absence of a System of Public Law in the United Kingdom" [1965] P.L. 95; "Administrative Law and Parliamentary Control" (1967) 38 Pol. Quarterly 360.

nicely round off administrative law. The fact that the administrative liability of France is also confused, complex and heterogenous - as any experienced tort lawyer can immediately see¹ - is not relevant to their argument. What attracts these writers is the synthesis between the two 'grands recours'. Government liability is envisaged as an extension of judicial review and its primary use is as a collateral means of challenge of administrative action.

Those who do not visualise administrative law in this light must proceed with caution. It is not self-evident that a legal system must, as Professor Garner believes, possess a special law of administrative liability.² This may be an expensive and inefficient solution. Moreover, in considering a new structure for a system of administrative liability, we should be alert to possible political repercussions. After all, our constitutional traditions are essentially Diceyan in character. There is much therefore to be said for the conclusions of Professor Hogg in his study of the liability of the Crown that the ordinary law of the land can "work a satisfactory resolution of the conflict between public and private interest", and that "Dicey's "idea of equality" although it is not and never can be completely realised, still provides the basis of a rational, workable and acceptable theory of governmental liability."³

Concentrating upon our own system, the defects are bound to strike us more forcibly than the good points. We are apt to turn to France to seek particular remedies for particular defects. On some occasions we may actually find solutions. On other occasions, particularly if we

1. Street, *Governmental Liability*, p.77.

2. "Public and Private Law" [1978] P.L. 230, 237.

3. *Op.cit.*, p.2.

concentrate on broad principles without considering their application to particular cases, we may think we see solutions where in fact we ought to see parallels. A survey of the principles applied by the French administrative courts and their application to particular cases does not suggest that English law is especially deficient in dealing with government liability nor that it really needs a special law of administrative liability.

CHAPTER 3

Fault, sanction and deterrence

The last chapter shows that, in both England and France, the liability of the administration is tightly tied to fault. Even in France, where risk liability is at least respectable, fault must be proved in perhaps as many as 2/3 of all cases. At the same time, extensions of the doctrine of vicarious liability or faute de service have virtually eliminated true personal responsibility. The occasions on which an individual who is not covered by insurance will personally suffer the financial consequences of civil liability by satisfying a judgment must be numerically rare. The needs of the victim push the courts increasingly down the path of 'deep pocket' theories of vicarious liability and of 'negligence without fault'.¹ Yet this development attacks the very rationale of fault liability, by eliminating the elements of sanction and deterrence which tie it to the moral standards of the community and justify its choice as the basis of civil liability.² We soon reach the position that risk liability of corporations, seemingly the most effective method of compensation, becomes the most logical and even the fairest choice for the standard of civil liability.³

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1. Ehrenzweig, Negligence without Fault: trends towards an enterprise liability for insurable loss, 1951; "A psychoanalysis of Negligence" (1953) 47 N.W. Univ.L.R. 855. Glanville Williams, "Vicarious Liability and Master's Indemnity" (1957) 20 M.L.R. 220 and 437, 445.
 2. Holmes, The Common Law, 3rd edn. 1923, pp.112-114.
 3. See Keeton, "Conditional Fault in the Law of Torts", (1959) 72 Harv. L.R. 401 for an explanation of the move towards strict liability in terms of the community's changing ethical standards.

Yet the theories of government liability which were discussed in the first chapter contained more than a hint of sanction and deterrence. These ideas were current in the community and were generally understood. Dicey did not find it necessary to explain why individual officials should accept personal liability for their torts. Like his distinguished contemporaries, Bentham, Austin, and later Salmond, he simply accepted that "one who by his fault has caused damage to another ought as a matter of justice to make compensation."¹ Nor was it

thought necessary to prove that personal liability/actually deterred. It was assumed that "fear of personal sanction is, for a public servant, assuredly a much more powerful brake than the ultimate liability of the service by which he is employed."²

If the aim of civil liability is really to deter, however, then both English and French law might be moving in the wrong direction. Vicarious liability and state liability protect the victim's right to compensation but at the same time they protect the wrongdoer from the consequences of his wrongdoing. The incentive to refrain from wrongdoing or "to avoid doing the harm before being held responsible for it"³ is stripped away.

At the same time, as increasingly during this century tort law has become a vehicle for accident compensation and the intentional torts have declined in number and importance, it seems less clear that wrongdoing can be deterred. And even if it can, it is not always the individual

1. Glanville Williams, "The Aims of the Law of Tort", [1951] 4 C.L.P. 137, 140.

2. Lemonnier, C.E. 26 July 1918, S 1918-19.III.41 concl. Blum.

3. Holmes, op.cit., p.144.

who is in the best position to prevent accidents, but the corporate entity which employs him. Legal theorists expressed hostility to the idea that corporate entities were capable of fault; it was surely the individual employees, the "arms and legs" of the institution, who could be deterred. Now it begins to seem possible that the 'anonymous' concept of faute de service, introduced for compensatory reasons, might also depict more accurately the administrative life and provide a closer picture of how torts come to be committed.¹

Lawyers are, however, notably resistant to the idea that legal rules may be virtually irrelevant to shaping human conduct and that the prospect of civil liability may do nothing to encourage a personal sense of responsibility. They are not even willing to admit that "the question is at bottom empirical and the empirical work has not been done."² To lawyers it is not a matter of proof, but of commonsense, that liability must have a deterrent effect; if it were otherwise, the very function of law might be threatened. Courts therefore constantly seek to reintroduce into the rules of civil liability an element of sanction, which they conceive in terms of fault. This is done, for example, by the use of the contributory negligence principle where a driver who is not wearing a seat belt or protective helmet is deprived of his damages.³ Apportionment of loss in this way is particularly common in French administrative law. It may be done in another way, by permitting the actual

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1. Posner, *Economic Analysis of Law*, p.78. See also "One hundred Fatal Accidents in Construction", Health and Safety Executive, H.M.S.O.1978 which suggests that management was responsible for 68% of 100 accidents in the building industry.
 2. Posner, "Strict Liability: A Comment" (1973) 2 *Jnl. of Legal Studies*, 205, 211-2.
 3. Froom v. Butcher [1975] 3 All E.R.520; O'Connell v. Jackson [1972] 1 Q.B. 270.

wrongdoer to be pursued by the employer in a recursory action. This, too, has been tried in the courts of both countries.

The truth about civil liability and deterrence is extremely obscure and little or no empirical evidence exists by which the cherished beliefs of lawyers may be tested. Even in the area of the police function, which is better documented by sociologists than the more central area of administrative behaviour, the pattern is far from clear. Sometimes it seems that individuals possess very large amounts of discretion and exercise personal choices. Sometimes it seems that all these choices are dictated by the system to an extent that they can no longer be classified as personal. The courts, too, seem to act ambivalently, now imposing stringent sanctions, now seemingly relaxing all controls. All that can be done is to note the interaction of the various parties to the game.

If the evidence is not forthcoming it might be argued that the case is not worth making. I believe that some discussion as to the secondary, non-compensatory role of civil liability is useful for two reasons. In the first place, tort law, which was not seriously questioned at the time of Dicey, is now increasingly under attack.¹ Public lawyers seem hardly to have recognised this fact. If tort law is really functional in the area of government liability then we must not let it be dismantled in the name of cost effectiveness. It may still have a function to fulfil and we may have to tolerate its continued existence. As Professor Linden has put it:

"As the task of reparation becomes increasingly superfluous in the modern welfare state, it may well be that the Ombudsman function may dominate the

1. Veitch and Miers, "Assault on the Law of Tort", (1975) 38 M.L.R. 139.

future of tort law ... we may choose to let it live in peaceful coexistence with social insurance. By opting for such a solution, tort law could continue to serve society, alongside whatever new techniques are devised."¹

At the same time that we assess the role of tort law, we must search for and assess the "new techniques" to which Professor Linden glancingly refers. If we do not do this we may find that we have inadvertently created a caste of untouchable public servants. If disciplinary proceedings, for example, are rarely used, one cannot rely on them for deterrence. An attempt to do so will almost certainly invite a retaliatory response from the judiciary. We may, on the other hand, find that tort law itself is not fully effective, either because the judges will not make it so,² or because the courts cannot enforce their rulings. In this case tort law itself may have ceased to be functional and we may need to buttress it by new techniques.

The one point which does emerge clearly from the tangled evidence about sanction and deterrence is that the court's most severe and stringent caselaw may in practice be quietly demolished by those who have to operate it. Nowhere is this more clearly demonstrated than in the case of the employer's recursory action for an indemnity from his guilty employee.

In Lister v. Romford Ice and Cold Storage Company,³ a van driver ran into and injured a fellow employee, who happened to be his own father.

1. Canadian Tort Law 1977, p.28. See also "Tort Law as Ombudsman" (1973) 51 Can. Bar Rev., p.155; "Public Law and Private Law: the frontier from the perspective of a Tort Lawyer" (1976) 17 cahiers de droit 831.
2. For the way in which French administrative law is rendered more innocuous and palatable to the administration, see Maestre, Le Conseil d'Etat: protecteur des prérogatives de l'administration, 1974.
3. [1956] 2 Q.B.180 (C.A.); [1957] A.C.555 (H.L.); and see Atiyah, Vicarious Liability, 1967 pp.422-427; Glanville Williams "Vicarious Liability and Master's Indemnity" (1957) 20 M.L.R. & 437; Parsons "Individual Responsibility versus Enterprise Liability" (1956) 29 Aus. L.J. 714.

The van driver was found to be negligent and his employers held vicariously liable. The employers then turned against the negligent employee, claiming damages for the breach of an implied term in the contract of employment to use due care. In the Court of Appeal, Denning L.J. denied liability, pointing to the danger that the insurer might use the subrogatory action without the employer's consent, to the detriment of good labour relations. It was unfair, in any case, that the insurer should be entitled to claim from an employee in respect of the very risk which has been underwritten. But ^a/majority of the Court of Appeal held the negligent employee in breach of contract. The deterrent theory which underlies their conclusion is evident in the following passage from the judgment of Romer L.J.:¹

"It is not, in my opinion, in the public interest that workmen should assume that, whoever else may be called upon to compensate the victims of their wrongdoing, they themselves will be immune. I say this for two reasons. First it is not in accordance with contemporary thought that any section of the public should be free from any liability to which the people as a whole are subject. Secondly, such freedom would tend still further to diminish that sense of responsibility which all should feel towards one another, but which can scarcely be regarded as an outstanding characteristic of modern life."

This decision was subsequently confirmed by a majority of the House of Lords though, in a strong dissenting judgment, Lord Somervell emphasised that in his view punishment was properly ^{the}/function of criminal rather than the civil law.

1. At p.213.

The controversial Lister decision was quickly reduced to a dead letter. A committee set up to investigate¹ could discover only 7 cases in 20 years, and in 2 subsequent actions² the inferior courts showed their hostility by confining the operation of the rule as far as possible. Private insurers entered into an agreement not to exercise their rights in cases of personal injury to an employee of an insured caused by a fellow employee, unless collusion or wilful misconduct were clearly shown. The inter-departmental committee showed that, in the public service, subrogatory rights were seldom exercised. In the National Health Service, following the decision in Jones v. Manchester Corporation³ in which it was held that, in the discretion of the court, a subrogatory action might be brought by a hospital against its medical officers, a regulatory circular was issued by the Ministry.⁴ Today hospitals do negotiate with those doctors who are members of defence societies, but for tactical reasons, they do not do this in court.

Nationalised industries do not claim indemnities against their employees. The one exception revealed to the Committee was the case of the National Coal Board, which, they found, "has infrequently brought proceedings against employees guilty of gross negligence; but in these cases there was a special circumstance: it is the policy of the Board to enforce strictly compliance with Mining Safe Regulations."⁵ During

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1. Report of an Inter-departmental Committee on Lister's case reported (1959) 22 M.L.R. 652.
 2. Harvey v. O'Dell [1958] 2 Q.B. 78; Morris v. Ford Motor Co. [1973] Q.B. 792.
 3. [1952] 2 All E.R. 125.
 4. See Hepple and Matthews, op.cit., p.266.
 5. Loc. cit., at p.653.

the 1960s the policy of the Board gradually changed and today recursory actions are brought only where deterrent action to enforce the safety regulations seems essential, or where the Board suspects collusion between defendant and plaintiff. The decision is taken at board level, has only been used in a handful of cases, and is for all practical purposes superseded by the Health and Safety legislation.¹

Both the civil service regulations and the standing regulations of the Greater London Council provide that the employer shall have a discretion whether or not to defend actions brought against employees. In practice, however, this is automatic, provided only that the officer in question is acting in good faith. Neither the Treasury Solicitor's department nor the unions concerned can remember any such case arising nor, they believe, is it likely that it ever would.

The BBC differentiates between contracts of employment and freelance contracts to the extent that freelance writers are asked to warrant that their work contains no defamatory matter. Following a single case in which the BBC stood on its rights and, having settled a libel claim out of court, claimed £220 from the author, the standard contract was amended to protect writers in all cases where, in the opinion of the BBC, there has been no negligence. Each case is decided on its merits.²

To summarise the actual position, the public servant might occasionally be personally liable if he were found to be acting 'in bad faith' - a test of liability which coincides with that recommended for theoretical reasons by Professor Glanville Williams.³ In practice,

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1. Information supplied to the author by the legal department of the N.C.B.
 2. C.H. Rolph, *Living Twice*, 1974, pp. 191-194. Information as to current practice supplied by the legal department of the BBC.
 3. *Op.cit.*, p.231.

however, the public service is more generous and will stand behind the servant whenever he is acting "for the ends and purposes or in the interests of the service". To adopt a narrower test might result in the plaintiff losing his damages. To join the employee as joint tortfeasor is almost unheard of except in the case of the medical profession and this exception operates only where the employee is insured.

This does not mean that public employees who engage in dangerous practices and cause accidents escape scotfree. It is simply that employers prefer other methods of enforcement. Disciplinary regulations can be used to enforce regulatory schemes of accident prevention such as the Health and Safety Legislation and there is always the further possibility of criminal liability. For example, many serious railway accidents are attributable to drivers drinking on duty, and the rapid increase in the number of these accidents understandably concerns British Rail. In 5 years prior to 1974, 800 disciplinary cases were brought and 120 men, including 10 drivers, dismissed. A statutory offence of being drunk on duty also exists with a maximum fine of £200 or 2 months' imprisonment.¹ Thus the practice of the National Coal Board in claiming a contribution to damages in severe cases of breach of disciplinary regulations could be seen as superfluous as well as unnecessarily severe. Indeed, Glanville Williams has argued that tort law always lags far behind the criminal law as a deterrent because, being victim-oriented, in any given case, the sum awarded in damages will be too great or too small to serve as a fitting 'punishment'. He prefers the compensation order because it is "educationally superior to a fine: it teaches a moral lesson."² Today criminal courts in England do possess powers to make

1. The Times, 15 July 1977.

2. Op.cit., 4 C.L.P. 137, pp.147-9.

compensation orders - although the results are not always what Glanville Williams might have hoped for.¹

In France, with its long tradition of personal immunity, it is not surprising to find in the administrative courts from an early date a contrasting attitude to personal liability. State liability represented, first, an insurance for the victim that he would receive the sums awarded by the court, and secondly, a major weapon in the battle for control of government. The introduction of personal liability into this intense relationship between administrator and judge might have had unfavourable repercussions on the principle of legality. In Loumonnier-Garriol² the Government Commissioner, at that time the celebrated jurist Laferrière, made this clear:

"It must not be forgotten that the recours pour excès de pouvoir which has been so greatly developed by the progressive (and praetorian) caselaw of the Conseil d'Etat would suffer a serious setback if it were thought to entail, as a necessary corollary, the personal pecuniary liability of officials. The Conseil d'Etat would hesitate to annul if this were to be the consequence."

The steady expansion of the doctrine of personal fault did in fact endanger individual public servants. Once the notion of 'personal fault' ceased to mark the jurisdictional frontier and was allowed to overlap with criminal liability on the one side and personal civil liability on the other, the public servant was placed in an obscure and ambivalent position. He might be prosecuted in a criminal court, or sued in a civil court, in which case his personal funds would be at risk; on

1. Below, pp. 176-8.

2. T.C. 5 May 1877, D 1878-3-13 concl Laferrière. 'Praetorian' means 'judge-made'.

the other hand, the State might be sued in an administrative court in which case he would be protected.

Criminal liability is a real possibility today and exists in a wide variety of cases. Leaving aside the obvious example of driving offences, prosecutions of doctors for failure to render assistance to someone in trouble under Art.63 and Art. R.30 of the Penal Code or for homicide through culpable negligence, are not uncommon in France. Again, Arts. 114-122 of the Penal Code create a number of offences specifically designed to protect the citizen from abuse of police powers, and further offences punish other abuses of power by public officials including judges. Art. 136 of the Criminal Procedure Code provides that the civil courts shall be exclusively competent in such cases.¹ The existence of 'partie civile' procedure means that criminal responsibility may entail an obligation to compensate the victim.²

A need for^a/recursory action to protect public servants who had been found liable to damages in civil or criminal courts therefore arose. It is probable that a right to be covered for such damages is an implicit term of the contract of employment of public servants; it has also been called by the Conseil d'Etat one of the "general principles of law".³ However, this may be, the right to an indemnity by the State is now enshrined in statutes which provide that public authorities must cover any public servant who has been successfully sued by a third party unless

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1. De la Murette T.C. 27 Mar 1952, R.D.P. 1952-757 n. Waline; Audin C.E. 11 Jan 1978, A.J.D.A. 1978 p.329.
 2. The procedural mechanics of these jurisdictional overlaps are more fully discussed below, pp.180-184
 3. See Leroy C.E. 5 Apr 1974, D 1974 p.649 n. Duruputy for the former, and Centre hospitalier régional de Besançon C.E. 26 Apr 1963, S 1963 p.338, for the latter explanation.

he is guilty of "a personal fault detachable from the exercise of his functions."¹ Similar legislation in the private law field prevents the insurer of an employer from turning against the guilty employee.² Thus personal financial irresponsibility is really a rule and a rule sealed with legislative approval.

Some time after the Second World War a current of hostility began to manifest itself to the security and immunity of public servants. It is probable that public lawyers were representing a general public sentiment and that this resulted from very grave irregularities which had been committed by public officials in important positions during the war. In any event, the distinguished Vice-President of the Conseil d'Etat, M. René Cassin, ordinarily the most generous of men, was moved to remark that "no officials could in practice commit the most prejudicial acts ... without running the slightest financial risk."³

Disciplinary sanctions were probably perceived as inadequate to fill this gap because they had never been widely utilised except, perhaps, in periods of political crisis to mask scandal. The rules were applied sparingly and only to individuals with bad records. For some reason the authorities felt "the arbitrary power which they possess[ed] as an embarrassment rather than a source of strength" and showed "great tolerance to poor employees".⁴

1. Art.14 of the Law of 19 Oct. 1946, now Art.11 of Ord. of 4 Feb.1959, extended to local authorities by Art.9 of Law of 28 Apr.1952, now Art. 428 of the Code of Communal Administration.

2. Art. 6 para 3 of the Law of 13 July 1938.

3. (1958) 12 E.D.C.E. p.15.

4. Thuillier "Le droit disciplinaire au 19e. siècle dans les ministères" 1977 Rev. adm. 26.

The revelation shortly after the Second World War of serious fiscal irregularities exacerbated public opinion. A special court was established to try and impose fines in cases of fiscal improprieties.¹ A feeling that administrative law was 'soft' on officials led the legislature when establishing nationalised industries to insist that their directors must be personally responsible for their torts according to the rules of civil law.² The public mood found expression in an influential article by a senior public lawyer who pointed to a (wartime) case in which the State had paid out Fl45.000 in respect of a flagrantly illegal arrest and detention. He argued that the public prosecutor could never be relied upon to prosecute such malefactors and that disciplinary proceedings were too cumbersome to be generally used. He proposed personal civil liability as an alternative.³

Probably in response to these pressures, the Conseil d'Etat shortly afterwards reversed its caselaw in two important leading cases.⁴ In Laruelle an army driver borrowed an army vehicle without permission and caused an accident while using it for his own purposes. The Conseil d'Etat subsequently awarded damages against the State on the ground that the failure to prevent the driver from removing the vehicle without permission amounted to a faute de service. The State then claimed full

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1. Law of 25 Sep 1948 (D 1948.354). The criteria for prosecution of English civil servants in case of theft or fraud are contained in 3rd Report of Public Accounts Committee, H.C.321 (1953-54); H.C.124 (1955-56).
 2. Lescuyer, "La Responsabilité civile des dirigeants d'entreprises publiques", 1974 R.D.P. p.975, 977-8.
 3. Waline, "De l'irresponsabilité des fonctionnaires pour leurs fautes personnelles et des moyens d'y remédier" 1948 R.D.P. p.5.
 4. Laruelle et Delville C.E. 28 July 1951, S 1952.3.25 n. Mathiot; S 1953.3.57 n. Meurisse; R.D.P. 1951, p.1087 n. Waline. For further discussion see Théry, "Compétence et fond du droit dans le contentieux de la responsabilité pécuniaire des fonctionnaires", (1958) 12 E.D.C.E. p.73; Long, "La responsabilité de l'Administration pour les fautes personnelles commises par ses agents à l'occasion du service" (1953) 7 E.D.C.E.80; Soulier "L'avenir de la responsabilité de la puissance publique" 1969 R.D.P. p.1039 at p.1102.

indemnity from the driver who appealed from this ministerial decision. The Conseil d'Etat found him liable to repay the whole sum on the ground that "the faute de service was wholly due to the subterfuges in which the applicant had indulged with the motive of deceiving the director of the garage."

In Delville, the companion case, a ministry driver caused an accident for which he was found liable in a civil court. The accident was attributable equally to D's drunkenness and to the faulty brakes of the state owned lorry. D brought a recursory action in the administrative courts claiming an indemnity from the State. He succeeded only in part, the Conseil d'Etat holding him personally liable for the costs of his defence together with one half of the damages awarded.

From a doctrinal point of view these twin decisions are open to criticism as adding to the already complicated concept of personal fault a supplementary complication. The classic concept of personal fault is both jurisdictional and substantive. It is introduced at a preliminary stage of the action to regulate (i) the question of jurisdiction and (ii) the substantive obligations of the wrongdoer to his victim. The 'new personal fault', as it has been called, adds a secondary stage to the action and a third dimension to the concept, which arises at the secondary stage to regulate the obligations of the wrongdoer to the State or of the State to the wrongdoer. It is also regrettably imprecise. Moreau despairs of defining it, saying: "the content of this modern concept of personal fault is rather amorphous, and it is perhaps unwise to attempt too precise a classification."¹ Finally, because the 'new personal

1. "Responsabilité pour des agents publics et responsabilité de l'administration" Juris.Adm. Fasc. 705, para 47.

fault' is disciplinary rather than tortious in nature - in other words, "the fault committed is a fault against the discipline of the service" rather than against the victim - an unduly wide test of causality, which would not recommend itself to a civil court, may be employed.¹ In Jeannier² for example, six soldiers, out on a spree, borrowed an army lorry without permission and a fatal accident was caused. In a criminal prosecution, the driver was convicted of dangerous driving and damages were awarded against him. Having satisfied the judgment, the State demanded reparation from each of the six soldiers who had participated in the affair. The Conseil d'Etat held that each was liable to the extent of the loss which flowed directly from his actions.

These doctrinal difficulties could no doubt be remedied. More directly relevant to our theme is the validity of the social policy which underlies this punitive caselaw. A minority of writers supports the rule on the ground that it permits the balance, which had been tilted too generously in favour of the agent, to be re-established between administrative liability and personal liability.³ A majority, however, deplores the rule, a variety of reasons being offered. The recursory action is inequitable and risks paralysing all initiative; it creates a distinction between civil law, where the employer's insurer cannot sue the employee, and public law, where the employee can be sued; too wide a discretion is left to the administration; it is an unauthorised fine which allows disciplinary procedures to be bypassed, and so on.

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1. Huet "Observations sur le recours de l'administration contre l'agent public ou la faute du lampiste", 1970 Rev. Admin. 523.
 2. C.E. 22 Mar 1957 Rec. 1976 concl. Kahn 1957 D 748 n. Weil; see further Moritz T.C. 26 May 1954 Rec. 708.
 3. Mathiot, loc.cit., above.

Of all attacks on the recursory action, the most telling is that of M. Kahn, Government Commissioner in the Jeannier case. He objects to the imprecision of the rule, which he believes to be capable of indefinite extension from 'disciplinary fault' in Laruelle et Delville, to 'grave fault' (the civil law test), and so on down the scale of fault.¹ He objects to the wide discretions left to administrative authorities either to demur to the jurisdiction or to leave the malefactor to a civil court; to claim indemnity or forego repayment altogether. He objects because the rule penalises subordinates, creating a 'subaltern's liability'. If this liability were to be expanded, the court could expect to see before it

"... a large number of corporals and cornet players who, when all is said and done, are guilty of having done on some unlucky day what others, at the top of the hierarchy, do and get away with every day."

These predictions as to the use of the Laruelle et Delville rule proved only partially accurate. The administration has on occasion attempted to use the right to an indemnity in a repressive and arbitrary fashion. In Chedru,² for example, some young and impecunious soldiers during their period of compulsory military service caused a traffic accident in which they themselves were injured. The military authorities attempted to claim from them the amount of their medical expenses and of the sick pay to which they were entitled while in hospital. Again, all

1. Théry (loc.cit.) has suggested a test of deliberate wrongdoing for liability at the second stage which would closely resemble the test suggested by Professor Glanville Williams in the context of the Lister case

2. C.E. 6 May 1966 Rec. 310

the cases which I can discover concern humble members of the armed forces or military policemen,¹ with the exception of one unsuccessful recursory action against a fireman,² (also usually categorised as a disciplined force). This was an action brought by a local authority ordered to pay damages in respect of an accident caused when the fireman, who did not possess^a licence and who was drunk on duty, undertook to drive a private car. It can hardly be argued that adequate disciplinary measures are not available for use in such situations.

In respect of the likely numbers, however, M. Kahn's prediction was strikingly inaccurate and the French and English caselaw has met with an identical fate. The courts of each country have created an employer's right to indemnity. In each country the rule is honoured in the breach not the observance. So rarely is it utilised that its very existence creates the possibility of injustice since to use it at all is arguably discriminatory. Like the sword of Damocles, the right to an indemnity constitutes a threat; like the sword of Damocles, the threat is purely mythical.

The fate of the punitive Laruelle et Delville caselaw shows that administrative courts with a specific mandate to review and control administrative action, to check and correct abuses of power and to impose uniform standards of administrative morality, are unable to restore the disciplinary element to delictual liability. If, therefore, we find this element to be missing and believe it to be vital, it is probable

1. See Collin T.C. 22 Nov 1965, D 1966.195 concl. Lindon; Bart C.E. 23 Apr 1975 mentioned Rec 878.

2. Commune de Lusignan C.E. 9 Oct 1974 Rec. 477.

that we shall have to try alternative techniques. In the case of accident prevention the supervisory techniques of the Health and Safety at Work legislation with its qualified inspectorate seem most likely to be successful.¹ But, although a high proportion of actions against the administration does concern accidents, these are hardly the prototypes which we envisage as characteristic of administrative liability. In discussing personal liability therefore, I prefer to confine myself to the key areas of 'bureaucratic negligence' and police activity. I shall limit the discussion of accident prevention to the single case of medical negligence because it seems a special case distinguishable from traffic accidents and from industrial injuries.

The case of medical liability is an interesting one because it suggests that, unusually, the insurance industry may be making a contribution to the prevention of accidents and helping to extract the

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1. The Robens Committee Report Cmnd. 5034 (1971-72) paras 430-441; the /1974 Health & Safety at Work Act; Report of the Health and Safety Commission for 1977-78, H.M.S.O. 1978, Figures of industrial accidents reported to the House of Commons and reproduced in the table below, show a gradual decline in the accident rate after the passage of the Health and Safety at Work Act.

	Fatal Accidents in 1st 6 months of each year in hundreds	All Industrial accidents for 1st 6 months of each year in thousands
1972	340	178,576
1973	372	187,708
1974	331	169,150
1975	272	166,040
1976	236	159,657
1977(provisional)	264	161,314

H.C. Deb 26 Oct 1977 col 883.

The number of fatal accidents reported to the Health & Safety Executive also fell as did the total accidents reported.

<u>Year</u>	<u>Fatal Accidents</u>	<u>All Accidents</u>
1973	763	371,307
1974	639	336,927
1975	611	327,717
1976	569	323,933
1977	514	326,182

Report of Health and Safety Commission, Appendix 10.

consequences of tort decisions. The Medical Defence Union, an association which provides for the medical professions insurance cover and an advisory service, is well informed about recent court decisions and trends in civil liability. It circulates to more than 70,000 members in the United Kingdom and overseas, abstracts of cases in its Annual Reports. The Union does not hesitate to use the decided cases in conjunction with its own statistical records to recommend improvement in hospital and medical practices and to make recommendations as to safety precautions. The Union also promotes and circulates films on accident prevention. In 1960, a committee was set up by the Union to consider the problem of operations on wrong patients or on wrong limbs. In 1961, the report of this committee was issued in a memorandum sponsored jointly by the Union and the Royal College of Nursing.¹ This memorandum was given wide publicity in professional journals and otherwise and has been reissued several times. The advice was circulated to hospitals in the form of a film and, with the approval of the DHSS, resulted in a major review and overhaul of hospital procedures. Despite this serious effort, however, the Union in 1972 recorded 17 cases of operations on the wrong patient, the wrong side or the wrong digit, surely a very high number when the precautions to be taken are so simple. In 1978, the Union drew attention once again to a Canadian claim by a patient whose big toenail had been removed by mistake for the little toenail, a claim which was settled for £3,068. The Annual Report contains the following acid comment:²

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1. Annual Report of the Medical Defence Union for 1972, pp.31-32.
 2. Annual Report of the Medical Defence Union for 1978, p.32. At p.33, a similar dental case is recorded in which the wrong child had teeth extracted. The claim was settled for £97.

"The mistake would not have occurred if the recommendations of the revised MDU/RCN joint memorandum on Safeguards against wrong operations ... had been followed ... Despite the Union's efforts by means of films, the memorandum and an exhibition, 20 to 30 reports of operations on the wrong patient, side, limb or digit are received each year."

The Union makes no attempt at instilling caution into careless medical staff by premium loading or by demanding additional subscriptions. In this respect it may, however, be atypical, since the Union is not an insurance company properly so called but a mutual benefit association of professional people which meets claims from its own resources and reinsures some risks with commercial insurers.

The Union's experience may also be atypical in that its clientele consists wholly of professional people, highly conscious of the risk of accident. Unusually, therefore, it can be argued that liability is aimed at the people best fitted to deter accidents. The Union's experience does demonstrate very clearly that not even a high level of expertise, a staff fully alive to the consequences of error and to the likelihood of civil and criminal liability, and a carefully designed programme of re-education, are sufficient to eliminate stupid and easily-preventible blunders.

Although I am not able to parallel this information for France, one anecdote suggests¹ that medical insurers are well informed concerning the caselaw of the two jurisdictions and exercise a very similar role in trying to forestall liability by preventing accidents. Until the late 1960s, claims in respect of failure to prevent suicide or suicide attempts

1. Revue hospitalière de France, Feb 1972, p.34. The first successful action seem to be about 1967 in the administrative tribunals and 1969-70 in the Conseil d'Etat. In the period immediately before several actions failed.

by hospital patients were extremely rare. For example, in 1972, 7-10% of hospital accidents concerned suicides yet in only 2-3% of these cases was any claim made. But the sudden liberalisation of the caselaw frightened insurers, who realised that premiums could not be augmented indefinitely since hospitals were not in a position to pass on the increase to their clients. The insurers therefore mounted an intensive preventive campaign advising, for example, the installation of new windows and the replacement of lavatory chains in an effort to forestall intending suicides. Whether the campaign was successful I am not in a position to say. Cases of attempted suicide have not vanished from the reports, however.¹

Even in this unusual case where personal responsibility by skilled staff is unusually high, a query must arise whether personal or vicarious liability is best suited to accident prevention. There is, after all, a limit to what can be done by employees. It is hospital authorities who design hospital layouts and effect even minor repairs, not the staff who will later be blamed for permitting suicidal patients to throw themselves from the unlatched windows. A recent report by the Royal College of Nursing² showed how little can be achieved at the most elementary level where overworked or underpaid staff have to deal with overcrowded hospitals housed in inadequate buildings. Deterrent theories of civil law have little to offer in such circumstances, even though, as the law stands, staff might be held personally liable for unhygienic conditions and lack of adequate nursing.

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1. For discussion of the problems raised for the medical profession by the imposition of civil liability and the difficulty of preventing suicide see 2nd Report of Select Committee on P.C.A., H.C.311 (1978-79), pp.5-6.
 2. Reported in the Guardian, 24 August 1979.

To move from the area of accident prevention into the more central area of administration and maladministration is to encounter a total dearth of empirical data. This means that the argument is inevitably conducted at the level of guesswork, the danger being that prejudices may be presented in the guise of fact and so fed back into the argument and used to distort it.

Judges do express their fears quite often that the imposition of civil liability may indirectly fetter the decision-making powers of the administration or create a drain on public funds. There is very little evidence to enable us to assess this possibility.

Events which followed the two leading cases of Dutton v. Bognor Regis U.D.C.¹ and Anns v. Merton L.B.C.² do suggest some of the ways in which public authorities might react to judicial decisions. In both actions, liability was imposed on local authorities for the negligence of their surveyor in the exercise of supervisory powers under the Building Regulations. In both actions, judges largely discounted the danger that claims would escalate and result in constituting the authority an unpaid insurer for negligent builders.³ Yet the leading insurers shortly afterwards reported 350 claims amounting to £1.4 millions.⁴ The Association of Metropolitan Authorities became worried as to insurance

1. [1972] 2 W.L.R. 299.

2. [1977] 2 W.L.R. 1024 (above p.).

3. [1972] 2 W.L.R. 314, 322 (Lord Denning M.R., Sachs L.J.); [1977] 2 W.L.R. 1046 (Lord Salmon).

4. See Ganz [1977] P.L. 306.

cover and suggested a system of fees to cover the cost of premiums. Subsequently counsel's opinion was obtained as to how the advisory and supervisory schemes established under the Building Regulations could best be remodelled in such a way as to avoid tortious liability. Some architects complained, too, that it was difficult to persuade local authorities to inspect or to express any opinion as to the adequacy of the foundations of new buildings. But an absence of compelling empirical evidence is typical of the debate.

The standard academic argument against real personal liability has always been that it will result in a timid and passive civil service afraid of personal initiative and responsibility.¹ No evidence is tendered in proof of this bland assertion. It is true that it might be possible to construct rules of civil liability which would encourage inertia and inefficiency. For example, in France the refusal by a public servant to obey a legitimate order is a disciplinary fault for which he may be punished. Superior orders, on the other hand, constitute a defence to liability, because the existence of a hierarchical order may have the effect - though this is not an invariable rule - of transforming what might have been a personal fault into a faute de service.² Such rules might encourage decision taking to creep upwards. Certainly,

1. Jennings, *op.cit.*, (1937) 21 Minn.L.R. 263; Pannam, "Torts under Unconstitutional Statute" (1966) 5 Melb.Univ. L.R. 113, 124; Benjafield and Whitmore, *Principles of Australian Law*, 4th edn. 1971, p.295; Rubinstein, *Jurisdiction and Illegality*, Ch. VI, p. 146.

2. Auby et Drago, *op.cit.*, Vol. I, p.416; Osmont 28 May 1969 Rec. 189. Moreau, *op.cit.*, *Juris.Admin.* at No. 79, puts this more strongly.

in the Marseille survey Blum found¹ that the main complaints levelled by 'consumers' at the administration were of inertia, apathy, delay and impoliteness, lack of concern or interest. This he attributed to lack of real responsibility in the sense of a share in the decision making process. He advocated allowing more decisions to be taken at a lower level, but suggested that changes to the 'statut de la fonction publique' or conditions of the public service would be necessary first.

This information suggests a way in which the influence of civil liability could be tested by an objective survey.² At present however, it is important to stress that these reactions of 'consumers' have themselves never been tested and may represent no more than a commonly held prejudice concerning the nature of bureaucracy.

The Fulton Committee, also accepting unquestioningly the myth of bureaucratic inertia, concluded that lack of personal involvement might be to blame. They believed that the doctrine of ministerial responsibility played a part in promoting administrative inefficiency because

"Decisions often have to be referred to a higher level than their intrinsic difficulty or apparent importance merits; this is because they involve the responsibility of the Minister to Parliament and may be questioned there."³

What is interesting, however, is that the Fulton Committee, like other management surveys, stressed involvement rather than sanction and punishment. The trend in modern management is to foster a sense of

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1. Frayssinet, Guin et Blum, Administration et Justice administrative face aux administrés, 1972, pp.127, 132 and 167.
 2. Crozier, The Bureaucratic Phenomenon, 1964, provides a possible model.
 3. Report of the Fulton Committee on the Civil Service, Cmnd. 3638, 1966-68 Ch. 5 paras 145-191. The passage cited is from para 146.

initiative and involvement by positive means rather than to rely upon the negatives of sanction and punishment. The elaborate controls designed to eliminate corruption which were, perhaps, the outstanding features of the 19th century, are gradually being replaced by more modern techniques of personnel management. Ironically, at a time when the movement for legal control of discretionary power gathers strength, the role of discretion in promoting personal responsibility and involvement at comparatively low levels in the service hierarchy has been recognized. It is precisely this balance which might be upset by the intrusion of personal tortious responsibility. In line with this belief in the carrot rather than the stick, the Fulton Committee recommended the establishment of

"accountable units within government departments - units where output can be measured against costs or other criteria and where individuals can be held personally responsible for their performance."¹

This ideal was accepted by the Expenditure Committee in 1978, which again referred to the importance of motivation. They pointed out that the traditional approach towards civil service efficiency was negative rather than positive, the controls being designed to prevent corruption rather than promote efficiency:

"Efficiency in the civil service is dependent as in business, on motivation, and whereas in business one is judged by overall success, ... the civil servant tends to be judged by failure. This inevitably conditions his approach to his work in dealing with the elimination of unnecessary paper work, and in eliminating excessive monitoring, and

1. Ibid para 150.

leads to the creation of an unnecessary number of large committees, all of which leads to delay in decision taking and the blurring of responsibility."¹

Thus there may be a historical link between the deterrent theories of civil liability fashionable at the end of the nineteenth century and negative management techniques, fashionable at the same period and directed at the elimination of fraud and grave malfeasance in the public service. The modern bureaucratic phenomenon has, however, promoted bureaucratic vices of inertia and timidity which modern management techniques are designed to combat. Partly for this reason and partly because bureaucracies develop their own corporate life and are relatively impervious to outside influences, negative techniques have fallen into disfavour. They are revived only occasionally when some major scandal creates a demand for vengeance. This pattern is illustrated by the decline^{in recent years} in England of the practice of surcharging councillors with expenditure thought to be unreasonable, which (except for a few trivial cases) is only rarely revived as, for example, in the notorious "Clay Cross" affair.² Similarly, in France the fiscal sanctions created after the last world war are, like the Laruelle-Delville caselaw, seldom employed in practice and are generally said to be "purely academic".³

A further difficulty arises because maladministration seems to be systemic or anonymous rather than personal in character. It is best described as a sort of chronic inefficiency endemic to bureaucracy and

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1. 11th Report from Expenditure Committee, H.C. (1977) Ch.XI. The passage cited comes from the oral evidence of Sir Derek Rayner, see para 124.
 2. Redcliffe-Maud and Wood: English Local Government Reformed, 197, p.117; Austin Mitchell, "Clay Cross" (1974) Pol. Quarterly 45 165 and Asher v. Environment Secretary [1974] 2 W.L.R. 466.
 3. Colliard, D 1949 Chr.65; Maestre, op.cit., p.200. Lescuyer, op.cit., above cites one notorious case in the Paris transport authority (R.A.T.P.) and some modern cases are cited by Fabre at 1978 Rev. Adm.638.

affecting every level. For example, for many years now the departments which figure most prominently in the PCA's reports have been the Inland Revenue and the D.H.S.S. Many of the complaints have featured the Supplementary Benefits System, the administration of which has, since 1975, been regularly monitored by the Supplementary Benefits Commission.¹ Their first report showed that in December 1975, 2,793,000 people were receiving supplementary benefits which entailed 30,000 staff in local offices calculating benefits for 2,825,000 claimants (approximately one member of staff for 94 claims). In 1976, their review was expanded to include an examination of 3,687 casepapers selected by a random process. No interviews were conducted, but examination of the files showed that 17.5% of casepapers contained errors either in the calculation of the basic supplementary benefit or, in 55% of ^{these} cases, in the award of discretionary additions. 45% of all errors found were in deciding heating additions, the criteria for awarding which had recently been changed. The resultant complex instructions to staff had apparently not yet been properly assimilated. In 1977, 4,008 casepapers were selected and it was found that the rate of error had fallen to 11.6%. The reduction was attributed to a fall in the number of errors in the discretionary heating awards, perhaps because the instructions were by now fully assimilated.

The high rate of error seems to have several explanations including: the complexity of the scheme; the element of discretion in certain areas of the scheme; the rapid turnover of staff (as many as 20% leave within 2 years, especially in the London area); and the constantly rising number

1. The figures are extracted from the Annual Report of the S.B.C. for 1975, Cmnd. 6615 (1975) p.96 e.s.; for 1976, Cmnd. 6910 (1977), pp.185-6; for 1977, Cmnd. 7392 (1978) p.106 e.s.

of applicants leading to chronic understaffing. Thus in November 1977, there were 2,991,000 people receiving benefit and about 5.7 million claims were received. Staff increases were not proportionate.

The Inspectorate noted that many of the errors recorded involved less than £1, hardly the stuff of an action in damages, and that in any event many of the errors would have been corrected by an internal review. Of those errors which survived many would be corrected by an appeal to a Supplementary Benefits Appeal Tribunal. Others would be competently dealt with by the Parliamentary Commissioner, whose procedures have the advantage that he may negotiate directly with the department concerned and in many cases secures amelioration of the administrative system. Civil liability, on the other hand, can provide no supervision facilities. A final check to this system of administrative controls is provided by the possibility of appeal to the High Court on a point of law or application for a prerogative order. One can deduce therefore that civil liability is hardly likely to play a major role in this area; on the contrary, its functions are likely to be increasingly assumed by the Ombudsman.

Any attempt to drop a net into these bureaucratic waters and trawl for wrongdoers is likely to result in arbitrariness and injustice. Two modern cases of maladministration illustrate this very clearly. The first was the inquiry into the tragic death of Maria Colwell. In 1973, Maria Colwell, a child of 7, died from brutal injuries inflicted by her stepfather who was subsequently convicted of her manslaughter. Since Maria was in the care of the local authority, it was widely felt that there must have been some failure on the part of the agencies involved in supervising Maria and the Secretary of State set up a public inquiry to investigate the matter. The Committee failed to agree, and, in the course of a detailed and scrupulous dissenting report, Miss Olive

Stephenson, an experienced social worker, pointed to the dangers of erecting "a hierarchy of censure" in cases which seize the public imagination. She said:¹

"As a social worker, my education and experience has taught me that in such matters, there is no one truth; in considering the subtleties of human emotions everyone is subjective. One's feelings, attitudes and experience colour one's perception And when one is dealing with events now some time in the past, drawing to a large extent on records for evidence, and inevitably affected by the eventual tragedy, the probability of distortion in interpretation is all the greater."

The majority of the Commission found it appropriate to censure "a failure of system compounded of several factors of which the greatest and most obvious must be that of the lack of, or ineffectiveness of, communication and liaison"; but they too deliberately refrained from allotting individual blame. They found that it was

"... quite impossible, and indeed unfair, to lay the direct blame for such inadequacies in the care and supervision of Maria upon any individual or indeed upon any small group of individuals. Many of the mistakes made by individuals were either the result of, or were contributed to by, inefficient systems operating in several different fields, notably training; administration, planning, liaison and supervision."²

Following the Colwell inquiry, the Department of Health and Social Security undertook, with the aid of local authorities, a major review of the practices of social service departments in preventing child abuse. Reports from 105 Area Review Committees were co-ordinated

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1. Report of the Committee of Inquiry into the Care and Supervision provided in relation to Maria Colwell, H.M.S.O., 1974, at p.88.
 2. At p.86.

by the Department. Detailed procedural notes were subsequently devised and circulated to all concerned with the aim of securing some uniformity of practice.¹ Thus the Colwell Inquiry was extremely influential in securing administrative change, perhaps the more so because of its self-restraint in the allocation of blame.

There are some lessons to be learned here about the deterrent functions of civil liability. First, the public inquiry and the civil action in a court suffer from procedural defects which may actually impede their deterrent and preventive functions. They look back on the event, which means that they tend to deduce cause from effect. It is tempting to knit threads until a rope of causation has been plaited. The temptation will be the greater in any case which arouses public indignation because catharsis is not achieved unless a suitable scape-goat can be provided.

Secondly, the publicity, inevitable in the case of court proceedings, may hinder the efforts of the inquiry to discover the truth, as with the accident inquiries discussed above. In an inquiry into a case of child abuse in Perth subsequent to the Colwell Inquiry, in which Richard Clark, a child of 4, was assaulted by a foster parent and reduced to a vegetable condition after a cerebral haemorrhage, the decision was taken to hold the resultant inquiry in private. Commenting on the fact that there had been public criticism of this decision, the Committee defended the decision in the following terms:

"We think it proper to record that having heard the evidence and noted the demeanour of the witnesses we have absolutely no doubt that this direction materially contributed to the relaxed and

1. DHSS circulars LASSL (74) 13, CMO (74) 8; LASSL (76) 2, CMO (76) 2, C No. 76 (3).

frank way in which the evidence was presented to us. Had the witnesses, who were not on oath, been subjected to the daily glare of publicity we doubt whether such a very full account of the events would have been furnished to us."¹

A second and very well known case is that of the Vehicle and General Affair.² The Board of Trade possessed powers under the Insurance Companies Acts of 1958 and 1967 to supervise insurance companies in order to insure their solvency and in extreme cases to intervene and suspend operations. In March 1971, following the crash of the Vehicle and General Company, much public criticism of the Board of Trade was heard and a Tribunal of Inquiry was established by the Home Secretary in April 1971 to inquire into the responsibility of the Board of Trade. Not only did the Tribunal conclude that there had been 'misconduct' and 'negligence' on the part of the Board of Trade officials but it went so far as to allocate responsibility to several officials including the Under-Secretary, stating that "his performance as a whole fell so far below the standard which could reasonably be expected from someone in his position and with his experience (or opportunity to acquire experience) that it cannot escape the description of 'negligence'".

The Vehicle and General Inquiry presents a number of interesting parallels with an action for civil liability which suggests how civil liability and administrative conduct may interact. The common features

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1. Report of the Committee of Inquiry into the consideration given and steps taken toward securing the welfare of Richard Clark by Perth Town Council and other bodies or persons concerned, H.M.S.O. 1975, p.37.
 2. Report of the Tribunal appointed to inquire into certain issues in relation to the circumstances leading up to the cessation of trading by the Vehicle and General Company Ltd., H.C.133, H.L. 80 (1972). The citation is at p.341.

were (i) that the Inquiry was conducted by a panel of eminent lawyers (ii) that it held public hearings (iii) that witnesses were legally represented and legal submissions were made (iv) that the civil law concept of 'negligence' and legal notions of 'causality' were used to found responsibility and (v) that responsibility was attributed to individuals. The Tribunal met with hostile criticism on all these points. Writers singled out for particular criticism the decision to allocate responsibility to a single individual. One commentator thought that it would "encourage the level of decision making to creep upwards which is the very thing the Tribunal feared."¹ A second writer, expert in the field of public administration believed the Tribunal's efforts to be amateur, remarking:²

"The approach adopted by the Tribunal of asserting the responsibilities of an official part-way up a line of command without, apparently, fully investigating the actions and attitudes of higher officials, therefore appears to disregard, without any reason being given, both classical principles of formal organization theory and the ethos and traditions of British public administration, which has favoured concentration of responsibility at the top, i.e. at the level of Permanent Secretary ... Furthermore, a charge of negligence in the public service should be seen in relation to environmental factors which condition the way work is actually done, and in this particular case this includes the provision of staff and other resources for doing the work."

These are exactly the type of criticisms which can be levelled at the efforts of courts to sanction what they see as maladministration

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1. Ganz, "Compensation for Negligent Administration Action" [1973] P.L. 84, 94.
 2. Chapman, "The Vehicle and General Affair: Some Reflections for Public Administration in Britain", (1973) 51 Pub. Adm. 273, 286.

by means of the blunt-edged weapon of tortious liability. Tortious liability suffers from all the same defects. It is deduced retrospectively; it is imposed by a judge, who is unfamiliar with administrative techniques; it involves no thorough investigation of the administrative life; the proceedings take place in public, in the hostile atmosphere of the courtroom; finally, civil proceedings are unlike a public inquiry of the type we are considering in that they are not aimed at discovering the truth but at compensation of the victim by means of pinpointing individuals to whose actions the loss can be attributed. The compensation aim and the deterrent aim are thus schizophrenic, pulling the court in different directions.

Even where maladministration can be reliably located and allocated to specific individuals, for procedural reasons an investigation by the PCA or CLA is likely to achieve much better results. In one such affair investigated by the PCA a regular army officer complained to the PCA of serious errors in calculating his war pension. Subsequent investigation revealed 24 similar cases, the discovery of which prompted the PCA to publish a special report stigmatising the malpractices involved as "improper and deceitful". Prompt restitution followed for every victim.¹ But this affair also illustrates that it is public disquiet over the ineffectiveness of disciplinary proceedings which sparks off demands for a greater degree of real individual responsibility and tempts the courts to intervene by way of sanction theories of tortious liability. Even though the PCA had revealed a classic example of deliberate malfeasance and abuse of power, no retaliatory measures resulted. The PCA

1. 4th report of P.C.A., "A War Pensions Injustice Remedied", H.C.312 (1977-78).

has no mandatory powers nor powers of sanction; the Director of Public Prosecutions decided, after investigation by the Police, not to prosecute; the Minister, on the other hand, decided that disciplinary proceedings would be inappropriate because "those concerned have already suffered the anxiety of being subject to prolonged police investigation".¹ This result suggests that, in all probability, the recommendation of the Salmon Commission that, as a measure against corruption,² all the Ombudsmen should be empowered to transmit to the police any evidence of criminal conduct which they discover, would, like the French audit procedures, provide a purely nominal sanction.^{P//} We do know that in England disciplinary measures are occasionally enforced against public servants, because the House of Commons was recently informed that 670 civil servants were dismissed on disciplinary grounds between January 1975 and July 1978. Lesser disciplinary measures were not recorded, and no information was given as to what faults merit disciplinary sanctions other than the statement that there is no "rigid code automatically assigning particular penalties to particular offences."³ This information cannot, therefore, be interpreted.

Rare examples may be culled from the reports of the Parliamentary Commissioner. In one case⁴ a complaint was made about the failure of a Factory Inspector employed by the Health and Safety Executive to investigate an accident although it was reported three times. The P.C.A.

1. The Times, 13 April and 14 Nov 1978.
2. Salmon Commission on Standards of Conduct in Public Life, Cmnd. 6524 (1976) para 264.
3. H.C. Deb 3 Aug Vol 955 col 511 (written answer). [Similarly the Annual Reports of the Chief Inspector of Constabulary contain statistics of disciplinary proceedings which cannot be interpreted].
4. 5th Report of PCA, H.C. 524 (1977-78) Case No. 5/267/77 p.53.

found the Inspector guilty of "personal negligence" of a kind which would normally be the subject of disciplinary action. But no disciplinary action was actually taken as the Inspector had already resigned. Nor was any compensation forthcoming. Both the PCA and the Department took the curiously legalistic attitude that no loss could be proved as "the possible value of an Inspector's report to either side [in civil litigation] can only be a matter of speculation". The victim had to content himself with an apology, a rather unsatisfactory result. Unfortunately, however, there is no evidence to show that a court could achieve a better one.

One area in which the curious interaction between decisions of the courts and administrative behaviour is relatively well documented is the case of the police. All studies of police behaviour emphasise the group ethos which prevails. Both internal and external pressures combine to produce this group morality. The policeman feels cut off, alienated from the public at large, "isolated in a minority of one - in essence the loneliest man on the street".¹ His role has been described as that of a "sub-professional working alone ... in an environment that is apprehensive and perhaps hostile".² His task, normally perceived by him in terms of public order, is difficult and, on occasion, even dangerous. It is natural that the policeman should rely for support and seek approval from his fellows and superior officers.

The structural organisation of the police force reinforces this natural tendency. Generally speaking, the individual policeman is a believer in authority; if he were not, he would not be doing the job. But this characteristic is accentuated by the structure of the police

1. Bowden, *Beyond the Limits of the Law*, 1978, p.23. Also Cain, "On the Beat", in *Images of Deviance*, ed. Cohen, 1971.

2. Wilson, *Variations of Police Behaviour*, 1968, p.38.

force on which he relies for his authority and physical safety. He functions in an "authoritarian, disciplined, hierarchically organized and cohesive unit."¹ One American study goes much further in calling the American police force "a punishment centred bureaucracy [in which] the use of negative sanctions and the threat or fear of their use pervades the day to day operation" of the force.² In such an atmosphere it is hardly surprising if the policeman gives precedence to the views of his colleagues and superiors. Of the three sets of norms - legal norms; behaviour acceptable to the public; and behaviour acceptable to the force - to which the policeman is subject, it is the last which is most influential. There is

"... a strong tradition in the police of self-discipline rather than of discipline imposed from without. A man who offends what is virtually an unwritten code of behaviour suffers heavily at the hands of his equals and immediate superiors, although the matter may never be taken to the stage of giving him an official caution or reprimand ..."³

The 'unwritten code' to which the policeman's conduct must conform may in fact diverge substantially from the legal rules by which his conduct is theoretically regulated. K.C. Davis⁴ once suggested that if the New York narcotics squad were to reduce its unwritten practices to a written code of rules, their blatant illegality would become immediately apparent. On a more serious note, Harding⁵ in a study of the

1. Bowden, loc.cit. above.

2. McNamara, "Uncertainties in Police Work: The Relevance of Police Recruits' Backgrounds and Training" in Bordua ed., *The Police*, 1967, pp.177-9.

3. Martienssen, *Crime and the Police*, Penguin 1953, p.243. See, for the classic exposition, Sir Robert Mark, *In the Office of Constable*, 1977, Chaps. 10, 19 and 20.

4. *Discretionary Justice*, Illeni Books edition 1971, pp.95-96.

5. *Police Killings in Australia*, 1970, p.227.

Australian police identifies three categories of deviant police behaviour: disciplinary offences not amounting to a crime; criminal behaviour alien to police group standards; and finally "conduct which amounts to an ordinary crime, harms the public interest in exactly the same way as an ordinary crime, and is acceptable to and arises out of police group standards". In the latter class may fall serious criminal offences such as assault or even homicide.

The tendency of the police to cut corners in procuring evidence of crime or making arrests is too well-known to require elaboration here. The rules of search and seizure are particularly subject to misuse and the excuse is regularly advanced that the powers allowed by the common law are wholly inadequate and the police are entitled to ignore them, the public interest in the prevention of crime being paramount.

One reason why civil liability is not in England a powerful deterrent in restraining abuse by the police of their legal powers is the attitude of the courts. In marked contrast to their brethren in the United States,¹ English judges have resolutely refused to allow either the law of tort or the rules of evidence and criminal procedure to be welded into an effective deterrent instrument. The rules are imprecise and constantly extended by the cases to the profit of the police. The courts shut their eyes to what they see as technical infringements of the legal rules, and too much is left to the good sense of the police

1. Yet even in the U.S. the deterrent effects of the exclusionary rule are uncertain: see, for the impact of Miranda v. Arizona (1966) 384 U.S. 436, "Interrogations in New Haven: the Impact of Miranda" (1967) 76 Yale L.J. 1519; Griffiths and Ayres "A postscript to the Miranda Project: Interrogation of Draft Protesters" (1967) 77 Yale L.J. 3009; Seeburger and Weitzel "Miranda in Pittsburgh, a Statistical Study" (1967) 29 Univ. of Pittsburgh L.Rev.1; Medahe, Leitz and Alexander "Custodial Police Interrogation in our Nation's Capital: the attempt to Implement Miranda" (1968) 66 Mich. L.Rev. 1347.

and the discretion of the courts. In Ghani v. Jones, for example, Lord Denning M.R. said:¹

"I would start by considering the law where police officers enter a man's house by virtue of a warrant, or arrest a man lawfully, with or without a warrant, for a serious offence. I take it to be settled law, without citing cases, that the officers are entitled to take any goods which they find in his possession or in his house which they reasonably believe to be material evidence in relation to the crime for which he is arrested or for which they enter. If in the course of their search they come upon other goods which show him to be implicated in some other crime, they may take them provided they act reasonably and detain them no longer than is necessary."

In Frank Truman Export Ltd. v. Metropolitan Police Commissioner,² this imprecise principle was extended. Officers of the Fraud Squad entered a solicitor's office under the authority of a valid warrant issued under section 16(1) of the Forgery Act 1913 and took away documents alleged to be forgeries. They also took away further documents which did not clearly fall within the warrant and the solicitor subsequently asked for an interlocutory injunction ordering their return. On the previous law, implied extensions of the powers of search and seizure had probably been limited to the case where the owner of the goods or premises was implicated in the crime charged, or at least in some crime. This case was distinguishable because the solicitors were in no way implicated in any criminal activities. An injunction was nonetheless refused, on the ground that the dictum of Lord Denning was not to be

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1. [1970] 1 Q.B.693, 706. (my italics). See also Chic Fashions (West Wales) Ltd. v. Jones [1968] 2 Q.B. 299; Elias v. Pasmore [1934] 2 K.B.164.
 2. [1977] 3 W.L.R. 257.

interpreted strictly as though it were statute or regulation and that in any event Lord Denning had not been considering a case in which the police had taken away the documents with the consent of the owner of the premises. The customary judicial caution was administered to the police, but as usual in terms so vague as to be incapable of practical enforcement. The police were warned not to interpret the decision as meaning that

"... police entering a solicitor's office under a search warrant should regard themselves as having an unlimited licence to search all his documents meticulously for evidence of any crime that his client may have committed. In the present case I have found that the police acted reasonably because Mr. Wood consented to hand over all his files of papers dealing with these clients for the police to search and sort. What is reasonable when conducting a search in a solicitor's office must depend on the circumstances. What is reasonable in a man's house may well not be reasonable in the offices of his solicitor ..."¹

The protection of the civil law, already limited in character, may be still further reduced according to this decision if the police take the elementary precaution of acquiring the owner's 'consent'. The case cannot fail to suggest to the police that 'consent' may be notional rather than real. The judge expressly found that the respectable Mr. Wood had been "very shocked and felt that he must be suspected of impropriety; that he said words to the effect that he would plead privilege were it not that he thought the search warrant entitled the police to look through the documents and that he could not prevent it";² despite this finding,

1. At p.269.

2. At. p.261.

the judge was prepared to hold that Mr. Wood had 'consented' to the trespass.

This impression of unreality is confirmed by the subsequent case of Jeffrey v. Black¹ in which the defendant was arrested by two members of the Drug Squad for stealing a sandwich from a public house. The police then accompanied the defendant to his room, entered, and, on searching, found cannabis. The justices found that the defendant had not consented to the search and refused to allow the evidence to be admitted in criminal proceedings. The prosecutor appealed to the Divisional Court which accepted the finding that there had been no consent and held the search to be illegal. Lord Widgery C.J. said

"I do not accept that the common law has yet developed to the point, if it ever does, in which police officers who arrest a suspect for one offence at one point can as a result thereby authorise themselves, as it were, to go and inspect his house at another place when the contents of his house, on the fact of them, bear no relation whatever to the offence with which he is charged or the evidence required in support of that offence."

Yet despite this clear statement of the law the Divisional Court returned the case for rehearing before a differently constituted bench on the ground that justices would not be justified in exercising their discretion to exclude evidence favourably to the defence simply because the evidence had been illegally obtained. They should do so "only rarely", and the Divisional Court was not persuaded that the justices had properly considered the extreme nature of their action.

Far from using civil liability as a deterrent, the courts have removed its sting, reducing its practical efficacy to a minimum by their

1. [1977] 3 W.L.R. 895, 899.

refusal to issue injunctions. The police are left with the maximum room for manoeuvre, and, in contrast to internal directives or disciplinary regulations, the imprecise and vague court rulings do nothing to structure the use of police discretion.¹ The police gain further ground for manoeuvre through their right to initiate prosecutions. By preferring minor criminal charges for assault or obstruction of a police officer in the execution of his duty they are able to transfer the action to the noticeably pro-police terrain of a criminal court.² In this way they may even obtain an extension of their legal powers. The absence of any strict exclusionary rule in criminal cases³ also operates to the benefit of the police because it is unlikely that a convicted criminal will obtain worthwhile damages for technical trespass and he may even be left to pay his own costs. By moving in this way to an offensive position the police are able to push the likelihood of a civil action still further into the distance. They are well able to draw the right conclusions. One author was told frankly by a London detective, that, in a case where the owner of property refused permission to search, the police would

"... just go ahead and kick the door down. He can sue you for trespass. But lawyers aren't keen - they're just interested in the criminal legal-aid money, not civil actions. Generally you don't have to worry unless he's acquitted."⁴

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1. See for fuller consideration of the real relationship between courts and police, MacBarnet, "Arrest: the Legal Context of Policing" in Holdaway ed. *The British Police*, 1979.
 2. For a blatant case (which misfired) see Reg. v. Jones (Yvonne) [1978] R.T.B. 137.
 3. Kuruma v. The Queen [1955] A.C.197; King v. The Queen [1969] 1 A.C.304; Callis v. Gunn [1964] 1 Q.B. 495.
 4. Laurie, *Scotland Yard*, Penguin 1972, pp.263-4.

Even where a civil action is brought, the corporate morality will help to shelter individual wrongdoing. Evidence is hard to come by, because,

"When irregularities are committed by one police officer, a defendant has no chance of persuading another officer to testify to them, even if the latter was not personally involved. The spirit of esprit de corps [sic] is too strong. The work of the police involves them in danger and isolates them from the rest of the community. There is, therefore, a powerful sense of solidarity which leads the police to back each other up. When the culprit is a senior officer, he is in a position to influence the promotion prospects of others."¹

A further weakness of tort law as a deterrent is that it assumes abuse of police procedures to be an isolated act of individual wrongdoers rather than systematic in character. Certainly until the 1970s, this myth was assiduously propagated and generally believed in England. Laurie,² for example, felt able to assert that

"The very fact that bribery is hardly discussed is, I think, quite strong evidence that it is almost as rare among the Metropolitan Police as its senior officers claim."

Such a confident assertion can hardly survive the traumatic prosecutions of the CID during the reign of Sir Robert Mark as Metropolitan Police Commissioner. These revealed to an astonished public that bribery, corruption, graft, perjury and other vices were as endemic to the CID as was allegedly the case in the United States. In 1976, Sir Robert Mark announced³ with some pride that 82 officers had during the past four years been dismissed following disciplinary proceedings, while 301

1. Glanville Williams, "Authentication of Statements to the Police" [1979] Crim.L.R. 6, 13.

2. Loc.cit., p.276.

3. Quoted in Cox, Shirley and Short, The Fall of Scotland Yard, 1977, p.213.

had left voluntarily and 12 were suspended pending disciplinary inquiries. 10 more officers were awaiting trial, while 24 further cases were under consideration by the D.P.P. The very same senior officers who had made exaggerated claims for the 'rarity' of bribery must have known it to be common even if they were not actually involved.

The nature of the police force as a disciplined and hierarchical body makes it likely that wrongdoing will be systemic in character and attributable to the force rather than to individual miscreants. In the police force "any general wrongdoing creates a conspiracy: the individuals concerned do it as individuals; they are driven together for moral and practical support."¹

In a clear case, superior officers are able to cover up for the individual and defuse potential political scandal by the tactical device of settlement out of court. Settlement may also prevent exposure of dubious police practices by preventing an opportunity for appellate courts to make a ruling. Laurie was told,² during the 1960s, that although "the power to detain has never been tested in the House of Lords, the Solicitor to the Metropolitan Police settles such claims out of Court, because, of all abuses, none is so easy to detect or prove". A secondary motive might be to prevent just such a test case from ever reaching the House of Lords.

Information on the practice of ex gratia payment is, however, sheltered by the Official Secrets Act and, difficult to come by. Although the suspicion must necessarily arise that the power is being used to stifle

1. Laurie, loc.cit., p.267.

2. Ibid., p.262.

scandals nothing can be proved. The annual total of ex gratia payments excluding settlement of traffic accident cases made by the Metropolitan police alone is very considerable and has increased sharply in recent years.¹ Yet a Member of Parliament who set down a parliamentary question requesting details was told only that "reasons for payments could not be provided without disproportionate cost."²

Although internal disciplinary proceedings are likely to prove more effective in remedying systematic police misconduct than external sanctions - Sir Robert Mark resigned, after all, on this very issue - the police are not wholly impervious to public opinion. Of the United States Wilson sensibly writes:³

"Police chiefs do not as a rule lose their jobs because crime rates go up; indeed, rising crime rates may make it easier for them to get more money and manpower from city councils. But they often get into trouble and sometimes lose their jobs because a particular officer takes a bribe, steals from a store, associates with a ganster, or abuses a citizen who is capable of doing something about it."

If public opinion is to be an effective influence, however, the citizen must be provided with simple machinery for 'doing something

1. Annual totals are as follows:

<u>Year</u>	<u>No. of Payments</u>	<u>£</u>
1968-9	25	6,871
1969-70	12	350
1970-71	128	316
1971-72	12	672
1972-73	29	9,018
1973-74	21	1,050
1974-75	26	4,132
1975-76	16	1,174
1976-77	28	95,079
1977-78	42	56,541

2. H.C. Deb. 23 Mar 1979 Col 65 (written answer). My own private researches met with a similarly negative response.

3. Op.cit., p.69.

about it'. Throughout the protracted debates on police complaints procedure, civil liberties organisations have expressed the view that tortious liability is wholly inadequate in this respect, because it is too costly, too difficult to set in motion.¹ Those most in need are least able to avail themselves of its protection. Criminal sanctions, on the other hand, are also inadequate, because they may be too severe. Many police misfeasances are, after all, trivial irregularities of the type which come before the Parliamentary Commissioner. It is enough for the citizen to complain. To ask him also to bear the expenses of a civil action, provide evidence, and sustain the burden of proving the case is too much. Complaints procedures are essentially fairer and also more effective.² But the first reports of the Police Complaints Board are not particularly comforting reading. In its first year, the Board received 2103 complaints of which 489 concerned minor incivility. There were, however, 330 allegations of assault, 14 of corruption, and 276 complaints of oppressive conduct or harrassment. 307 complaints of assault, 8 of corruption and 27 of oppressive conduct were, during the same period, thought sufficiently serious to be referred to the Director of Public Prosecutions. Disciplinary proceedings were brought in 3 of the assault complaints; but in 2074 of the 2083 complaints which had not already been the subject of disciplinary charges, the Chief Constable concerned decided not to initiate disciplinary charges. In the second year of operation, disciplinary charges were preferred in 59 out of 11,940 complaints and the Board recommended action in a further 15 cases. Yet not all cases are trivial; indeed the Board expressed concern about the high proportion of assault cases.²

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1. See the memorandum of Justice to the Working Party on "Handling of Complaints against the Police", Cmnd. 5582 (1973-4) at p.57.
 2. H.C.359 (1977-78); H.C.4 (1978-79). These ambiguous results entirely confirm the criticisms of Sir Robert Mark that the machinery established by the Police Act 1976 was structurally unsound and likely to prove ineffective, cumbersome and expensive: Mark, op.cit., pp.198-216. Further statistics are contained in the Annual Report of the Chief Inspector of Constabulary, but again no details of disciplinary charges are given.

The Report of the Bennett Inquiry into Police Interrogation Procedures confirms the unsatisfactory nature of complaints procedures.¹ Indeed, the Committee implies that these can hardly be functioning satisfactorily since they had notably failed to bring to light serious abuses of interrogation procedures which the Committee found to be systematic and established. The Report criticises the uncertain relationships between those responsible for investigating complaints (the police); those responsible for prosecution (the Director of Public Prosecutions); and those responsible for disciplinary proceedings (Chief Constables). Because these procedures are not properly meshed in, many culprits escape scotfree and this naturally encourages abuses of the system. Criminal proceedings are rarely successful - no successful prosecution was brought between 1972-78 in Northern Ireland² - and civil proceedings are not much better. "In 5 of the cases where officers were acquitted, damages were paid in civil claims brought by victims in respect of the same incidents."³

Disciplinary proceedings were hardly more satisfactory. The Committee blames the 'double jeopardy' rule which prohibits disciplinary proceedings after an unsuccessful prosecution and which, by administrative action, has been informally extended to cases referred to the Director in which he decides - without giving reasons - not to prosecute.⁴ The

1. Cmnd. 7497 (1978-79) pp.96-122.

2. 19 officers were prosecuted arising out of 8 incidents but only 2 convictions resulted and these were set aside on appeal: See p.52.

3. Ibid.

4. Pp.120-121, and pp.1323. See further 2nd Report of the Police Complaints Board for Northern Ireland, H.C.141 (1978-79) pp.5-8.

Committee also blames the structure of the code of discipline itself.

Yet the Bennett Committee, although it points to defects in existing complaints machinery, does not suggest that abuses would best be eliminated by strengthening criminal and civil law, nor by radically reforming complaints procedures and disciplinary proceedings. The emphasis is laid on supervision and preventive techniques such as closed-circuit television and viewing lenses.¹ It is fair to deduce, therefore, that the shift from deterrence and sanction to prevention and supervision is not confined to the case of the Health and Safety Executive and the Factory Acts but must be seen as a general feature of modern administrative techniques. It is likely to prove more effective than criminal and civil liability. It is also likely to become a permanent feature of the administrative scene.

Ought we to deduce then, that deterrent theories of civil liability, or even tort law is wholly outmoded and superseded?

The unsatisfactory law of civil liability can, on occasion, produce a startling success to balance its depressing record of failure. One such case was mentioned by Mr. Ian Mikardo M.P. in the course of the Commons debate on the Police Bill.² In a case in which a constituent had been 'savagely beaten up' by police officers who were totally exculpated by an internal investigation, the victim sued the individuals responsible and was awarded damages. No disciplinary action was taken against the malefactors. A year later,³ Mr. McNair Wilson called for an adjournment

1. General Conclusions pp.135-140, esp. 136.

2. H.C. Deb. 5 Dec 1975 Vol 901 cols 2097-8.

3. H.C. Deb. 28 July 1976 Vol 916-I col 808 ('Police Disciplinary Offences').

debate on behalf of one of his constituents who alleged assault by the Merseyside police. After the first four days of a civil hearing, £2,500 damages were agreed in a negotiated settlement. The Minister of State for the Home Office confirmed that disciplinary proceedings would not be taken. The case was four years old and the settlement did not entail any admission that there had been an assault. "In essence the sum paid was in respect of inconvenience suffered by the plaintiff in the course of the said inquiry." Since the inconvenience in question amounted to 12 hours in custody, all that can be said is, that if the explanation afforded is true, the settlement was wildly out of line with the standard Home Office practice in cases of wrongful conviction.¹ Both these cases do suggest, therefore, that, at least in this area of police malpractice, the civil action may sometimes provide a remedy superior to disciplinary proceedings with all the attendant advantages of publicity. It is by no means certain that the introduction into administrative complaints procedures of an element of external investigation can supply the deficiency revealed by this type of case.

To generalise about the function of tort law on a basis of such scanty data would be extremely unwise. One might suggest tentatively, however, that personal liability is based on a misconception about human behaviour. Corporate fault is not, as Duguit insisted, merely a metaphor. In some curious way institutions acquire a corporate personality which transcends that of the individuals of whom they are composed. The anonymous concepts of 'maladministration' or 'faute de service' do therefore reflect a truth about the nature of bureaucratic or institutional negligence.

1. Below, pp. 297-306

If this is the case, it is possible that fault liability is wholly misplaced and that we should consider a move in the direction of liability without fault. In the area of administrative liability this conclusion invites us to consider the possibility of risk liability for all invalid or illegal administrative action (Chap.5) or alternatively, the idea of basing liability on the principle of Equality (Chap.6). We might even go further by using administrative compensation schemes as the normal machinery for the provision of reparation (Chap.7).

Each of these solutions suggests that the compensatory and deterrent functions of civil liability need to be separated. We shall have to find new machinery to supply the deterrent element. We can begin to see how this may be done by the use of investigatory techniques such as Ombudsman investigations, or occasionally public inquiries. These could be buttressed by more effective disciplinary procedures or by allowing the Ombudsman greater powers of injunction. As a last resort, criminal rather than civil sanctions could be used to deter grave misdemeanours.

Yet even if tort law cannot be shown to be effective as a deterrent, nor can the possible alternatives such as the PCA or the Police Complaints Board. Judges do not use the law of tort consistently for deterrent ends nor do they always choose appropriate cases. Experience suggests they are prone to single out for reprimand a few miserable 'cornet players' while ignoring major abuses of the system. On the other hand, the judicial process may sometimes provide an excellent weapon because of the relative independence of the judiciary from political pressures and the high status of the common law judge. The tort action possesses an

additional advantage because it is perceived as private rather than public in character. In Professor Linden's words,¹ "the tort route permits ordinary citizens to take the initiative instead of making them wait for some civil servant to make up his mind to move." No other machinery possesses these twin advantages and it may be that they would prove both essential and irreplaceable.

1. Canadian Tort Law, p.23.

CHAPTER 4Unity or Duality?

Institutions once created tend to be self-perpetuating. The existence in France of a separate jurisdiction came to be justified in terms of the need for special rules; this in turn encouraged the belief that the rules were special. To put this slightly differently, the 'autonomy' of the system was justified by its 'uniqueness' at the same time as the 'uniqueness' seemed to justify the 'autonomy'. This was the circular reasoning exposed by Eisenmann.¹ Eisenmann argued that the rules of public and private liability are in all material respects similar and the differences of approach minimal. Furthermore, the choice of law is in France determined on a haphazard basis according to technical rules of jurisdiction, and not by the nature or needs of the individual case. Thus it cannot be maintained that public and private law are 'autonomous' either in the sense that the substantive rules applicable are radically different, or in the sense that all public authorities are at all times subject to the special rules. Eisenmann's first proposition, amply confirmed by the studies of Cornu and Chapus, was discussed in the second chapter. It is his second proposition which concerns us here.

If a genuine need for special rules of liability exists, then it must be possible to isolate the cases in which these are applicable; again, if the solution to the problem of government liability is a separate system of courts, then jurisdictional criteria will have to be

1. Page 103 above, n.2

devised. Eisenmann hints not only at possible deficiencies in existing classifications, but suggests as well that more relevant criteria may be difficult to devise.

At the outset, one is faced with two choices. The justification for separate rules of liability may lie in the existence of characteristic governmental functions for which private law presents no adequate parallels but which, as we saw in the first chapter, are difficult to isolate. Alternatively, we have to accept that it is the unique character of the State which dictates the choice of special theories of government liability in which case logic demands that the special rules must apply to all actions in which the State is concerned.

The jurisdictional test of 'public service' associated with the Blanco decision adopts the second alternative. The choice was approved and justified by Duguit, who believed that no characteristic government function without a parallel in private law could be identified. As he himself said:

"... there is today not a single activity carried on by the agents of the State which one cannot imagine being carried out by individuals. The police function, for example, which is always presented as essentially a governmental function (service d'autorité), could very well be and in fact sometimes is exercised by private individuals. Even justice itself may be handed down by individuals; and at certain periods, the whole of the judicial function has been carried out by private individuals."¹

The use of this test has, however, brought the administrative jurisdiction face to face with the very problem which bothered the English

1. *Traité*, Vol. 2, p.350.

House of Lords as early as 1866.¹ Third parties dealing with bodies which carry out on ^{the} face of things ordinary commercial activities and behave according to normal commercial practices, find themselves for obscure constitutional reasons subjected to different legal rules of administrative tort and contract.

This problem received the attention of the Tribunal des Conflits in 1921 in a leading case.² A ferry, operated by the colonial government of the Ivory Coast as a commercial service, sank. One person was drowned and damage ^{was} caused to a number of motor vehicles. An action was brought in the civil courts of the colony but the Prefect demurred to the jurisdiction and a reference was made to the Tribunal des Conflits. The court ruled that the ferry service was a commercial service and that, in the absence of legislative provision to the contrary, the civil courts were competent.³

This decision, which seemed surprising at the time, was followed in a later case where a rubbish cart belonging to the Corporation of Paris got out of control and ran away causing a traffic accident in which the plaintiff was injured.⁴ The driver was convicted of dangerous driving and the ^{plaintiff} made an application to the criminal court for compensation,

1. The Mersey Docks case, discussed above.
2. Société Commerciale de l'Ouest Africain (Bac d'Eloka) T.C. 22 Jan 1921, S 1924.III.34 concl Matter.
3. To the English reader this situation is indistinguishable on its facts from the Blanco case. It may be distinguished, however, because the manufacture of tobacco has always been a State monopoly in France and is therefore not an ordinary commercial service.
4. Dame Melinette T.C. 11 July 1933, D 1933.3.65 concl Rouchon-Mazerat (contraires) n. Blaevoet.

stating that:

"the said lorry was entrusted to the driver for the purposes of a service carried on in conditions identical to those in which a public industrial service is carried on. The said driver, without taking the necessary precautions, had left his vehicle, to drink in a café."

This reasoning is open to criticism. Rubbish collection is not usually considered an ordinary commercial service but a service to the community or public service. Again, the court seems to be implying that, by sitting in the cafe drinking, the driver was not acting in the exercise of his duty, hence was guilty of a personal fault. This involved the paradox that, for the purpose of jurisdiction, the driver was not acting in the course of his duty; but for the purpose of finding the municipality vicariously liable, he was. (The judgment in this way affords to the foreigner a neat illustration of the dual purpose of the criterion of personal fault). More importantly, the reasoning exposes the underlying purpose of the decision: the creation of "blocks of competence" in the civil and criminal courts which would effectively group like cases together.

This rationale became more obvious in the next year when two cases with very similar facts were decided along the same lines by the Conseil d'Etat.¹ In a note, Waline attacked the new jurisdictional criteria on the ground of their imprecision. He went on to say that the decisions undercut the holistic theories of the "very nature and essence of the State ... one recognises the old, classical, liberal theory. It is an economic and political theory and not a juristic theory of a

1. Verbanck et Mabilie C.E. 9 Feb 1934, D 1934.3.9. n. Waline. For a modern case see Zaoui c. Aéroport de Paris T.C. 13 Dec 1976, AJDA 1977 p.438 n. Dufau (accident on an escalator at Paris airport).

kind which ought to receive the blessing of the courts."

I have treated these rather technical cases at some length because they seem to me to epitomise the practical difficulties which arise from the implementation of Duguit's holistic theory of the state in the area of liability. If all state activity is to be subject to special rules then it is likely that very similar activities will be subjected to two series of rules implemented by two hierarchies of courts. The result will be to cut across other, more realistic, classifications with the result that victims suffering identical injuries receive different awards of compensation, the award being determined not by the nature of the injuries, but by the status of the defendant, and accordingly, the jurisdiction impleaded. As increasingly the law of tort becomes a vehicle for accident compensation, it becomes more victim orientated¹ and this objection becomes more potent. As Cornu argues:

"... if there are any cases in which the legal rules ought to be the same it is those in which the fact situations are absolutely identical. A traffic accident has the same characteristics in private and in public law. What does it matter if the vehicle belongs to a private individual or the State? It is the victim who is the important consideration and his interests are similar in both cases. At this level, the frontiers between public and private law necessarily disappear."²

It was the realisation that this was so which led the French legislature to intervene by a law of 31 December 1957 and transfer to the civil jurisdiction all actions for damages in respect of accidents caused by vehicles belonging to the administration. This legislative

1. See Moreau, L'influence de la situation et du comportement de la victime sur la responsabilité administrative (1956).

2. Op.cit., p.74.

move confirms the "block of competence" solution of the earlier caselaw.

The argument for uniformity is not, of course, unique to road traffic accidents, but is applicable to any case which affords an opportunity of direct comparison with the work of civil courts. Even a cursory look at the work of the French administrative jurisdiction shows that the majority of claims do afford such an opportunity. I propose to illustrate my point by a rough and ready analysis of all claims, whether on appeal or at first instance, which reached the Conseil d'Etat during the period 1970-75 and which the Conseil found worth preserving in their records.

The classification system is a little imprecise and is not designed to provide a typology of the administrative litigation. Furthermore, some cases may be filed under more than one head. Despite these deficiencies, however, a clear picture of the typology does emerge.

Despite the law of 31 December 1957 referred to above, 47 claims involved traffic accidents. This is because accidents arise not only through bad driving but also from failure to maintain the highway. It is always tempting for an injured party or his insurers to recoup their losses by suing the administration, a problem which may be further complicated if the accident arose from roadworks (travaux publics) executed by private contractors on behalf of a public authority. Difficult jurisdictional points may then arise.

This means that, despite the law of 31 December 1957, a traffic accident may still give rise to multiple actions in diverse courts. Although there is, today, less chance of divergent rules being applied. It is worth noting here that many such actions are recursory and subrogatory

actions by insurers.¹

Sixty-four claims concerned accidents in the course of medical care or hospital treatment. Similar claims are heard both by civil and ^{by} criminal courts whenever a personal fault is alleged. Once again, the question of the joint responsibility of hospital authority and doctor, important for insurance purposes, and in England dealt with through private, out of court, settlements,² is complicated in France by the dual jurisdiction where a recursory action by an insurer raises a complex ^{jurisdictional} point recently settled in favour of the administrative jurisdiction.³

Sixteen further cases involved accidents in schools where, by legislative choice, the jurisdiction is shared with the civil courts. There were actions, too, concerning accidents caused by failure to maintain public works (travaux publics). At first sight this category may seem specific to public law. When it is realised, however, that the prototype is an accident in a municipal swimming bath; on a handball court; or in a lift or escalator situated on public property; the picture changes. Public ownership hardly changes the nature of a drowning accident and a defective lift remains a lift whether it is situated in a department store or an airport. Furthermore, similar actions are handled by the civil courts and give rise to complaint if the damages awarded are not roughly similar. In one such case,⁴ for example, the

1. E.g. Cie d'Assurances le Soleil C.E. 22 Nov 1972, Dame Ill C.E. 25 July 1975 also Cie des Assurances La Providence (above p.79). For an explanation of the rules of subrogation see Forde, "Foreign Social Security Institutions and the Collateral Benefits Rules in Britain" (1979) 42 M.L.R. 389.

2. Hepple and Matthews, *Cases and Materials on the Law of Tort*, p.666.

3. Sté Hospitalière d'Assurances Mutuelles c. Heritiers Assemat C.E. 5 Feb 1975, AJDA 1976, p.100 n. Moderne.

4. Hebert June 14, 1963, D 1964 p.326 n. Lalumière.

Conseil d'Etat awarded 25,000F to parents of a child drowned in a municipal swimming baths. In a note, a commentator remarked that, unusually, the administrative jurisdiction had outstripped the tariff of the civil courts, making a comparison with a similar accident in a private swimming pool where the parents had recently received only 15,800F from the Paris Cour d'Appel. I cite this case because it shows how keen the commentators are to unearth discrepancies between awards by the two hierarchies.

A second class of public works liability which comprises 23 cases in the records, is directly comparable to civil law cases of nuisance or negligence: e.g., cases in which a rubbish dump has spontaneously ignited (C.E. 20 Nov 1974);¹ a ship has suffered damage while docking resulting from failure to maintain the port (C.E. 20 Feb 1970); or where drainage ditches beside a road have overflowed (C.E. 25 June 1971).² These nuisance cases afford an interesting comparison with one recent English case³ in which a Saxon burial mound situated on land owned by the National Trust slipped gradually down into the property of a neighbouring landowner, threatening her house. If England were to adopt the solution of a separate jurisdiction, such a case might give rise to a jurisdictional dispute since the National Trust, although a private charity, exists to carry out the public service function of preserving the national heritage. A functional application of the 'public service' criterion would constitute the National Trust as a creature of public law, strictly liable for failure to maintain 'public works'; on the other hand, a stricter organic interpretation would view the

1. Compare Job Edwards Ltd. v. Birmingham Navigation [1924] 1 K.B. 341.

2. Compare Langbrook Properties Ltd. v. Surrey C.C. [1970] 1 W.L.R. 161.

3. Leakey v. National Trust [1978] 2 W.L.R. 774. The point is briefly discussed by Wedderburn (1978) 41 M.L.R. 589.

National Trust as a private law body, liable under the principle of nuisance.

Seventeen cases involved maladministration or "bureaucratic negligence", ranging from cases of inadequate advice to applicants from the planning services (C.E. 10 June 1970 and 28 April 1971) or technical advice to local authorities over school buildings (C.E. 20 June 1973); to cases of incompetent use of the government's supervisory powers over private companies (C.E. 9 April 1975); and miscellaneous errors such as the loss of the applicant's marriage certificate by a government department (C.E. 30 Nov 1973) or a clerical error by deleting the applicant from a list of people seeking work (C.E. 19 Jan 1973). These cases certainly do not justify a special system of rules. There is little distinction, for example, between the negligent operation of a private bank account and / ^{that of} the Post Office in relation to a savings bank account (C.E. 17 March 1971); indeed, the banking facilities offered by the Post Office really amount to a commercial service. Moreover, I have already referred to Rubinstein's view that in England, private law is perfectly able to cope with this situation - even if in practice we prefer to direct such matters towards the Parliamentary Commissioner and the Commission for Local Administration.

Not even those actions which relate more obviously to the "public services" are quite without private law parallels. The two prison actions, for example, (C.E. 12 Feb 1971 and 19 Nov 1973) are for personal injuries, one of which concerned injuries suffered by a prisoner during a riot and one a suicide. These cases are directly comparable with an

English case¹ in which a sexual offender brought an action against the Home Office alleging negligence by prison officers in failing to supervise him. The result was that a fellow prisoner assaulted him. The court found no difficulty at the theoretical level in coming to grips with this fact situation even if the action did not, in the event, succeed.

Two classes of case do seem to possess 'special' public law characteristics. There were only 27 actions for loss caused through the planning process. This is not very surprising, since, as in England, planning compensation is regulated by a statutory scheme. The administrative courts therefore hear only peripheral cases or cases in which the applicant sees a chance of obtaining greater compensation than the statutory scheme allows. The majority of cases were complaints of incorrect advice² or procedural errors. There were only three applications for compensation for breach of the principle of Equality before public charges (C.E. 29 May 1974, 27 Nov 1974, 14 March 1975). To these we may add one further successful case which did not concern the planning process but involved loss caused to individuals because of diplomatic immunity granted by the French State in accordance with an international Treaty.³ Even if these figures are not wholly reliable, they do tend to

1. Egerton v. Home Office [1978] Crim.L.R. 494. See also Bryson v. Northumbria Police Authority [1977] 2 C.L.176 (whether duty of care owed by police to person arrested for drunkenness when released on bail).

2. This class overlaps with the 17 maladministration cases.

3. Min. des Affaires étrangères c. Burgat C.E. 29 Oct 1976

confirm the statistical surveys, including the Annual Report of the Section du Contentieux du Conseil d'Etat, which report cases founded on the Equality principle as rare in the extreme.¹

I have left to the last the actions against the police because of the inconvenient demarcation line which divides jurisdiction over the police. Actions against the administrative police are heard by the administrative courts; those against the judicial police are heard by the civil courts. 'Judicial police' are normally those officers of police detailed for service under the supervision of the judiciary in the investigation of crime. The jurisdictional test is functional / rather than organic. If officers are engaged in collecting evidence of a crime or searching for its authors (in terms of Art. 14 of the Criminal Procedure Code) then the civil courts are competent; if they are engaged in maintaining public order then the administrative courts are competent. Thus, the jurisdictional line is extremely fine and, in the course of a single operation, officers might / theoretically cross the jurisdictional boundary several times.

This might be important because of the complexity of the substantive law. The normal administrative law rule is that liability is for gross fault, but this requirement is limited to situations defined as 'urgent' i.e. where the police are carrying out their functions of maintaining order or combatting crime. In the case of minor everyday functions such as traffic control a simple fault will suffice for liability. Where a 'dangerous weapon' is in use, however, the Conseil d'Etat has

1. The Report is published annually in Etudes et Documents du Conseil d'Etat (E.D.C.E.). No consistent breakdown of the liability cases is made, but references to liability for breach of the Equality principle are extremely rare. Prieur (op.cit. above) mentions no example. Drago, "Etude relative aux décisions rendues par le Tribunal administratif de Versailles (1967-8)," E.D.C.E. 1968 p.165 mentions 11 Egalité claims and 1 case of liability without fault out of 148 cases. In a second survey of the Conseil d'Etat in 1965-66 (E.D.C.E. 1967 p.147) he mentions only one case.

substituted risk liability. Theoretically, therefore, a plaintiff injured by a shot from a revolver would be at an advantage in the administrative courts, while a plaintiff beaten up during interrogation would be at an advantage in the civil courts, where simple fault is the normal standard. But this result would not be tolerable. The civil courts have therefore adjusted their caselaw to bring themselves into line with the administrative jurisdiction by admitting public law as the standard of liability, a deviation from the normal civilian rules.¹

Not only do these jurisdictional complexities in themselves provide ample evidence of the truth of Eisenmann's assertion that, in France, not all administrative bodies are subject to the administrative courts and to their substantive rules, but they show also just how arbitrary the allocation may be. Moreover, they distort the picture where actions against the police are concerned. My survey revealed only 6 police cases in the Conseil's files, 4 of which concerned accidents resulting in death with police firearms (21 July 1970, 26 Oct 1973, 12 March 1975, 23 April 1975). The last two were rather different. The first was a successful action against the police for failure to enforce parking regulations;² the second was a claim against the police for failure to intervene during a strike by factory workers (C.E. 18 June 1975) which would normally be dealt with as a breach of the Equality principle.

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1. Plantey, "La responsabilité du fait de la force publique" (1973) 26 E.D.C.E. p.71 at pp.81-2.
 2. Marabout C.E. 20 Oct 1972 Rec. 664, R.D.P. 1972 p.832 n. Waline. Compare R. v. Commissioner of Police of the Metropolis ex p.Blackburn (No.3) [1973] Q.B. 241 which suggests the correct remedy (if one exists) in England is by prerogative order.

This informal survey does not support the thesis that governmental liability is 'special' in character. On the contrary it shows that, in the area of tortious liability, as many as 60% of appeals to the supreme administrative court involve personal injuries. Cases with "special" characteristics are exceptional, and the majority of cases offer the litigant an opportunity of direct comparison with the work of civil tribunals. This is significant, because a modern sociological survey shows that 50% of all appeals from the Marseille administrative tribunal to the Conseil d'Etat concern tortious liability. The authors suggest that this is only partially because large sums of money are involved: an equally important factor is the possibility of comparison with civil courts. They say:

"... this is also an area in which the litigants possess grounds for comparison thanks to the decisions of the civil courts. Litigants are very unwilling to accept differences in the assessment of damages by the two jurisdictions."¹

In this area of liability, where the two jurisdictions largely duplicate each other's work, it seems that they are under constant pressure to harmonise their practice in assessing damages. Equally the substantive rules of liability must be harmonised if justice is to be done to individual victims in identical or closely similar fact situations.

This is an important proposition and one worth illustrating from another angle. In a leading case² four people were found asphyxiated

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1. Frayssinet, Guin et Blum, op.cit., 1972 at p.69.
 2. This litigation is reported in Trésor public c. Giry Cass. civ. 23 Nov 1956, Bull.II.407, D 1957 p.34, concl. Lemoine, G.A. No. 98; Commune de Grigny C.E. 11 Oct 1957 Rec. 524, R.D.P. 1958 p.306 concl. Kahn; Commune de Grigny C.E. 6 June 1958 Rec. 323, S 1958 p.319 concl. Chardeau.

in a small hotel (one morning in 1949) by some visitors who alerted the police and also called a private doctor, Perrier who, arriving first, made an examination, and as he left the hotel met his colleague Giry, the police doctor. The two turned back to make a further examination, only to be gravely injured by a violent gas explosion, the cause of which was never explained.

Three actions followed. P sued the municipality in the administrative courts on the ground that he was an "occasional collaborator assisting in the operation of public service".¹ By virtue of the Ganes caselaw this claim would succeed on the basis of risk and without proof of fault. G sued in the civil courts, claiming that he had been summoned to the scene by the judicial police for whose acts the Ministry of Justice was vicariously liable. The rules of civil law normally in such cases require proof of fault and G's action therefore failed in the Court of Appeal.

Faced with this situation in which two litigants injured in the same explosion seemed likely to obtain dramatically contrasted prizes from the forensic lottery, the Cour de Cassation changed course to enable G to succeed. It was held that the appeal court had been wrong to apply the provisions of the Civil Code in respect of delict and quasi delict; and that might not these / be invoked to found the liability of the State. On the contrary, the Court had, in the instant case, the power and duty to apply the rules of public law. G was therefore found to be an "occasional

1. An "occasional collaborator" is someone who is temporarily acting on behalf of the public service normally without receiving remuneration. Members of the public have a duty to assist e.g. in firefighting or carrying out an arrest and, in this capacity, would be "collaborators". For further explanation, see Chapter 2 above.

collaborator" to whom the State was liable to make compensation.

In the administrative courts, P had succeeded in his action against the municipality on identical grounds. He was awarded substantial damages by the administrative tribunal, including a large sum in respect of exceptional pain and suffering (technically the pretium doloris). On appeal, the municipality challenged this head of damages, arguing that, in administrative law neither the pretium doloris nor the pretium affectionis (damages for mental suffering and grief) were available. This time it was for the Conseil d'Etat to come into line with the practice of the civil courts, which it did by upholding an award of 400.000F for pain and suffering as a pretium doloris.

Of the Giry case, one of the most brilliant public lawyers in France writing 20 years after the decision, M. Jean Kahn, Conseiller d'Etat and himself Government Commissioner in one of the appeals, said:

"It was the fashion, immediately after the Giry decision, to speculate on the application of public law by the civil courts, as if public law was the complement of private law and civil justice a possible substitute for administrative justice.

This is to misunderstand the nature of law and of the judicial function. Civil courts arbitrate, in the light of unchanging Rules, in conflicts submitted by generations of litigants who come and go. The administrative judge hears only one single suit: that of the administration. Each hearing provides an opportunity to rediscover the same contendant and to continue the same debate adjourned yesterday."

I cite these remarks because they seem to me to illustrate a point I made in the first chapter that, to French public lawyers, the principal rationale of le recours de pleine juridiction is its value as a sanction for maladministration; that is to say, as the second limb of the recours pour excès de pouvoir. This is indeed a position of principle; (to use Eisenmann's phrase) /and one, moreover, which seems far removed from the Giry affair. It is as though the wretched victim of a gas explosion has somehow found himself a pawn on a board on which is being played a match between grand masters.

I pass/^{over} the procedural deficiencies implicit in this litigation and concentrate on the two substantive points, the first of which is the basis of liability. The classic justification of the administrative jurisdiction is that it is free to develop new rules; the Giry decision dispels this illusion and demonstrates how limited are the options open to the courts. For one of two blameless victims in the same accident to succeed while the second fails is not acceptable. The courts will have to prevent such a result even if it means bending the rules. A multiplicity of actions and divergent legal rules make it harder for the courts to ensure fair play to victims.

My second point concerns the assessment of damages. If the theoretical basis of administrative liability is really the mutual assurance principle, then, as Duguit argued,¹ claims against the State resemble a claim for compensation rather than an action for damages. The award of compensation need not necessarily follow the civil law pattern of damages, where the "commitment to fault and to full compensation seem to go hand in hand."² The refusal of the administrative

1. Below, p.251

2. Blum and Kalven, Public Law Perspectives on a Private Law problem, 1965, p.38.

courts to follow the principles of civil law and their desire to husband public resources may be theoretically justifiable, since there is no particular reason why the State should undertake to guarantee to individuals total security, by undertaking to compensate for intangible losses such as loss of amenity, grief, or psychological suffering. Arguably, to accept such a duty is itself inequitable, since it discriminates against those who suffer under equal disadvantages but whose loss is not legally attributable to the State. Yet nothing has done more in practice to lower the French administrative courts in the public esteem than their frugal attitude towards damages. Today Gjidara calls this divergence "one of the greatest obstacles to unification of the jurisdictions",¹ (a unification which he incidentally believes to be desirable).

An identical point could be made about the Criminal Injuries Compensation Scheme established in 1964 by the U.K. government to provide compensation on an exgratia basis for the victims of violent crime. The rationale for this scheme was never considered to be legal liability on the part of the State. The White Paper which preceded the scheme emphasised the aspect of social solidarity, "public sympathy" for the innocent victims of violent crime. It followed logically that the measure of compensation was not necessarily common law damages since

"... the level of compensation which may reasonably be awarded and the conditions which are imposed to ensure that money does not go to the undeserving are very much a matter for decision from time to time in the light of the country's resources and the need to distribute them equitably."²

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1. La fonction administrative contentieuse, 1972, p.381. See for further examples, Harlow, op.cit., [1976] P.L. at p.240.
 2. "Compensation for Victims of Crimes of Violence", Cmnd. 2323 (1964) and "Review of the Criminal Injuries Compensation Scheme: Report of an Interdepartmental Working Party", H.M.S.O. 1978, p.3. The terms of the Scheme are reprinted as Appendix 4.

Despite this reasoning, the Scheme specifically provided (para 10) that compensation should be assessed on the basis of common law damages and should take the form of a lump sum payment. The Board (C.I.C.B.), whose Chairman is a distinguished lawyer, takes this requirement seriously and conducts joint assessment exercises with the Bench and Bar to ensure that awards keep broadly level.¹ Despite their efforts, complaints are constantly heard that the C.I.C.B.'s awards are below that of the courts. One of the main reasons for this is, however, that the terms of the Scheme itself impose an upper earnings limit and preclude the award of punitive damages,² for the very reason given above that the basis of the State's obligation to compensate differs from the legal liability of the offender himself.

Since 1972, this position has been made more complicated by a power allowed to the criminal courts to order offenders to compensate their victims for personal injury, loss or damage resulting from a criminal offence. There are today three avenues open to the victim of a violent crime for securing compensation: via the civil courts (usually a profitless exercise); via the criminal courts; and via the C.I.C.B.

Unfortunately, however, neither the legislation nor the Report on which the legislation was based,³ gives any clear guidance as to the use of their powers by criminal courts as part of the sentencing process.

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1. 14th Report of the C.I.C.B., Cmd. 7396 (1978) pp.12-13, where the Board points out that in rape cases its awards exceeded those of the common lawyers.
 2. Review, pp.43-49.
 3. "Reparation by the Offender" Report of the Advisory Council on the Penal System, H.M.S.O., 1970 para 137; Walik "The Place of Compensation in the Penal System" [1978] Cr.L.R. 599. The governing legislation is now the Powers of Criminal Courts Act 1973, ss. 35-38.

The Report does hint that the powers are not entirely compensatory in character, since it suggests that, in making the orders, courts should have regard to the offender's means and the chances of enforcement.

The subsequent caselaw stresses that compensation orders are primarily punitive in character and, although they may occasionally provide an effective alternative to a civil action, they should be used only where liability is clear and not in cases of disputed fact. To make an excessive order is, from the penal point of view, likely to be counterproductive.¹

There is a further ambiguity. The legislation gives no guidance on the relationship between civil liability and compensation by a criminal court. It is, therefore, possible for a court to order compensation in a case where the defendant would be under no civil liability to the victim/plaintiff. On this point the caselaw as yet affords no guidance.²

In view of the ambiguities left by the legislation and the consequent difficulty experienced by superior courts, it is hardly surprising that magistrates have shown some hesitation in making use of their new powers. The first studies showed both magistrates and Crown courts to be uncertain when compensation orders could properly be made. The uncertainty was most acute in the area of personal injuries where courts were inexperienced and where relevant medical evidence might not be available. There was, however, considerable variation both in the number of orders made and in the amounts awarded.³ Softley found, for

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1. Miller [1976] Cr.L.R. 694; Stapleton and Lawrie [1977] Cr.L.R. 366; O'Donoghue and Dallas Cope (1974) 66 Cr.App.Rep.116.
 2. Atiyah, "Compensation Orders and Civil Liability" [1979] Cr.L.R.504.
 3. See Softley, Compensation Orders in Magistrates' Courts, Home Office Research Study No. 43, H.M.S.O.1978, p.29; Tarling and Softley, "Compensation Orders in the Crown Court" [1976] Cr.L.R. 422; Vennard, "Magistrates' Assessments of Compensation for Injury" [1979] Cr.L.R.510.

example¹ that, in magistrates' courts only 9% of people convicted of wounding and assault were ordered to make reparation as compared to 90% of defendants convicted of criminal damage and approximately 60% of defendants convicted of offences of dishonesty. Finally, the Magistrates' Association stepped in, publishing a table of guidelines.² There was an immediate outcry from practising solicitors, who claimed the Guidelines were a "dangerously misleading simplification" which might mislead the victims of criminal assaults into accepting lesser sums than they could easily have obtained via the civil courts.³

Although this fear is probably unwarranted, since magistrates rarely make compensation orders of over £50 in cases of personal injury, and the typical order is for £10-30 as reparation for slight cuts and bruises,⁴ Softley could not help feeling "the incongruity of harnessing to criminal proceedings a procedure for compensating the victim or loser."⁵ It is probable that not all the difficulties with the interlocking procedures have as yet manifested themselves.

A further complication in the same area is provided by Sec.55(1) of the Children and Young Persons Act 1933 as amended in 1969. This provision permits a court to make an order against the parent or guardian of a child or young person found guilty of an offence to pay a fine, damages or costs. After the 1969 legislation came into operation,

1. Op.cit., (1978) p.10. Table 2 and text.

2. The Times, 6th September 1978.

3. The Times, 7th September 1978.

4. Vennard, op.cit., p.518.

5. Softley, op.cit., 1978 p.30.

magistrates, probably influenced by a feeling that the law was insufficiently 'hard' on juvenile offenders, began to make compensation orders against local authorities in respect of children in the care of local authorities who absconded from community homes and caused damages on the ground that the staff had paid too much attention to their function of rehabilitating their charges and insufficient to the interests of the public. The Divisional Court promptly intervened,¹ reminding the magistrates that such an order could only be made in the case where the guardian had "conducted to the commission of the offence by neglecting to exercise due care and control" of their charges. Such a finding should not be lightly made. Faced with a statement by magistrates that they were only applying the principle of the Dorset Yacht case, the Chief Justice stated his view that this civil law principle was wholly irrelevant. The line of cases seemed to end.

In a recent civil action for negligence, however, the Dorset Yacht principle was applied. An action was brought against the Essex County Council² for breach of its duty of care in that the staff of a community home had allowed a child committed to its custody to escape. The child set fire to a church, causing £99,000 of fire damage and the Council was held liable. The court found that, in the given circumstances, the staff should have kept "a strict watch" on the child comparing this duty with that of "a reasonable parent".

1. Reg. v. Croydon Juvenile Court ex p. Croydon B.C. [1973] 2 W.L.R. 61 (fine); Somerset C.C. v. Brice [1973] 1 W.L.R. 1169 (fine); Somerset C.C. v. Kingscott [1975] 1 W.L.R. 283 (compensation order). See especially pp. 288, 290 (Lord Widgery C.J.).

2. Reported in The Guardian, 3 April 1979. See also p. 93 above.

The criminal law right of compensation depends on "neglect" by the parents or guardians, the civil law liability depends on "negligence". Curiously, these two standards appear to differ. The civil law duty requires "a strict watch" to be kept while a finding of "neglect" should never be lightly made by a criminal court. Unless these two standards can be harmonised, confusion is certain to result. Moreover, there is likely to be dissatisfaction with a rule which sends litigants in relatively trivial cases to knock at the door of civil courts.

This is not a detour. What we are observing here is the same phenomenon as the French experience with their parallel hierarchies. Where concurrent remedies are provided for the same 'wrong' in separate courts there is an inevitable pressure towards harmonisation. Litigants are not impressed by an argument that the remedies are designed for different purposes nor can the public easily accept that the victim of a criminal assault might receive in compensation one sum if he used civil procedure and another sum from a criminal court. To the victim this can only seem as though his injury has been differently valued by different valuers.

Since the victim's interest is naturally in obtaining the maximum compensation, divergent legal rules as to liability or assessment of compensation, lead to the practice of 'forum shopping'. By this I mean that litigants use the variants and play off the procedures to secure the best results. This may be done to obtain the benefit of more generous rules of liability or more generous assessment of compensation.

'Forum shopping' may equally be used to secure technical, procedural advantages. In France partie civile procedure may be used to discharge the burden of proof. This is often helpful in medical cases where it is

notoriously difficult to overcome the twin problems of professional solidarity and professional secrecy. If he can persuade the authorities to institute criminal proceedings and himself appear as 'partie civile', the victim finds proof much easier in cases of medical negligence. An expert has said of this phenomenon:

"The plaintiff relies on the prosecutor and examining magistrate to assemble his evidence for him. The weapons at the disposal of the private individuals cannot begin to compare with the powers of search and seizure possessed by magistrates. Even if the prosecution finally breaks down, the plaintiff has a good chance of leaping the hurdle of professional secrecy. He can present the civil court with a relatively complete casefile, in which experts will find the information which would never have been forthcoming in civil proceedings."¹

I would like to suggest a further parallel with English law. The Parliamentary Commissioner and Health Service Commissioner (P.C.A.) possesses wide powers to examine departmental documents and ^{to} talk to witnesses during the course of his investigations (Section 8 of the Parliamentary Commissioner Act, 1967). This is particularly useful in the case of hospitals, where it may be difficult for reasons of professional privilege to obtain discovery of documents and medical records unless there is at least a strong suggestion of negligence.² A temptation exists, therefore, to institute a PCA investigation in order to assemble evidence for a civil action. Amongst the first complaints to the Health Service Commissioner was the case³ of a girl paralysed during a

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1. P. Monzein, *Les problèmes de la responsabilité médicale sur le plan pénal*, 1971, p.6.
 2. Dunning v. United Liverpool Hospitals Board of Governors [1973] 1 W.L.R. 586, 590 contains generous dicta per Lord Denning M.R. And see Melvor v. Southern Health Board [1978] 1 W.L.R. 757 (H.L.).
 3. 1st Report of the P.C.A. for 1972-73, H.C.18 (1973) Case No. C246/G, p.114.

routine tonsillectomy. There was no evidence of negligence and no proceedings were at the time pending, the limitation period having expired. Although he has no jurisdiction in cases of clinical negligence the PCA investigated the case. He concluded that the hospital would not have been legally liable, but went on to discuss with the D.H.S.S. the possibility of an ex gratia payment.

Slightly earlier the Select Committee had shown awareness of the possible interaction between the courts and the PCA. The Chairman expressed anxiety that the PCA's powers to investigate might be abused by "a really adroit citizen who is intending in the long run to sue a government department in the courts to get evidence which he could not otherwise have got via the Parliamentary Commissioner." The PCA promised to bear this point in mind in using his discretion under sec 5(2)(b) of the Parliamentary Commissioner Act, 1967, to investigate cases in which the complainant might possess a legal remedy, and the practice seems to have developed of asking for an assurance that complainants were not contemplating legal action before certain investigations were undertaken. This did not bring 'fishing' investigations to an end. In a later case the PCA was asked to investigate a complaint that a young woman had been sterilised without her consent being obtained. The complainant assured the PCA that she would not take legal action. Following the investigation, however, a writ was issued.² The different limitation periods (one year for the PCA, three years for personal injuries litigation) mean that a shrewd legal adviser should at least consider the advantages of seising the PCA before issuing a writ.

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1. 1st Report of the Select Committee 1970-71, H.C.240 (1971) pp.39-48. The citation is from p.48.
 2. Second Report of the Select Committee (1977-78) H.C. 372 (1978), pp.xi, 60.

It is not always the plaintiff who benefits from 'forum shopping'. Technical jurisdictional points are often used in France to cover administrative scandals, shelter guilty officials, deter litigants and stifle public criticism. This technique is particularly valuable in the case of actions against the police, where the divided jurisdiction and the uncertain caselaw may allow a long period of respite to elapse while the courts debate the jurisdictional refinements. There are many notorious cases; indeed, one author maintains that the Prefect's power to demur to the jurisdiction may be used "systematically ... as a delaying tactic".¹ In one case, for example, where a man died in the course of a police interrogation, the Prefect, having successfully blocked criminal proceedings, entered a demurrer in the course of the civil action brought by the widow. The guilty officer apparently obtained a respite of 7 years.² An equally celebrated, but more modern example, is the Audin affair,³ in which the plaintiff was the widow of a young man seized for interrogation by the military during the crisis in Algeria in June 1957. He "disappeared" leaving no trace and in 1963 a declaration of presumed death was obtained from an Algerian court. Unfortunately, the widow failed to submit her claim for damages against the State before the limitation period had elapsed.⁴ In 1968 she did,

1. Maestre, op.cit., pp.210-211, 309-311.

2. Dame Veuve Rezsztin T.C. 19 May 1954, J.C.P.1954-2-8244 n. Vedel.

3. C.E. 11 Jan 1978, A.J.D.A. 1978 p.330 n. Plouvin.

4. The limitation period in actions for contractual or extra-contractual liability is governed by the rule of la déchéance quadriennale which extinguishes debts of the administration 4 years after the 1st January in the year in which the act creating the debt occurred. If a request for compensation is interposed and refused by the administration, however, the refusal must be challenged within two months of its being made. If four months elapse with no reply, the request is deemed to be refused (See further Auby et Drago op.cit., Vol.2 p.200. Commune d'Antibes, C.E. 21 Feb 1975 mentioned Rec. 939) but the limitation period is not activated and the four year period applies.

however, submit a claim on behalf of herself and her minor children. Instead of making a generous ex gratia settlement the Minister appealed to the Conseil d'Etat on the technical grounds (i) that the limitation period had expired and (ii) that the civil courts were alone competent. Although the court found for the plaintiff on the first ground, they felt unable to follow the advice of their Government Commissioner, M. Genevois, and accept jurisdiction to decide the substantive issue of compensation. Thus, 20 years after the initial wrong, the case was returned for trial to the civil courts where, no doubt, it will ultimately reach some conclusion which will profit minor grandchildren.¹

I do not wish to overstate my case by suggesting that these procedural defects all flow necessarily and inevitably from the decision to allocate cases involving the liability of the administration to separate courts. Many of them spring from idiosyncracies of the French legal system which could be obviated by slightly different structures. Power could be given, for example, to a court wrongly seised to transfer the file to the correct court. The Tribunal des Conflits could be given a power to decide substantive issues once a reference had been made. The decision of a court to accept jurisdiction, even though incorrect, could be held binding and unappealable.

1. I am informed that it is not the practice of the Law Officers to take technical points of this type but they are by no means always blameless as the history of the Crown proceedings shows: See Conway v. Rimmer [1968] A.C.910 where the doctrine of Crown Privilege was allegedly used to stifle an action in tort. See also Town Investments v. Min. of Environment [1977] 2 W.L.R.450 for a similar, technical point.

But such improvements would not affect the basic issue. Under the present French system, civil and administrative courts are operating in the same area, hearing identical cases to which they are applying broadly similar rules. Not only is Eisenmann's thesis intrinsically correct, it is also self-explanatory. Administrative liability is not, and never can be, independent of civil liability so long as the two jurisdictions are covering the same field. So long as cases are allocated not according to valid, functional criteria but arbitrary^{it}, haphazardly and in random fashion, so long will the courts be pushed relentlessly towards uniformity in the legal rules.

A clean division between civil and administrative courts and between public and private law might be tolerable if it were the only division, but of course it is not. The civil jurisdiction is itself divided in both England and France into civil and criminal courts, both of which have powers of compensation. Both France and England, too, rely heavily on statutory and administrative compensation schemes.

There is therefore a second sense in which administrative liability is neither unique nor autonomous. It has to fight for place with a multiplicity of compensation schemes with which the principles of administrative liability must be co-ordinated and aligned. The difficulty is the greater because the schemes prove on examination to be themselves disparate, based on no easily discernible principle, incoherent and each atypical. We are accustomed to seeing this picture in England. One of the standard criticisms of English courts is, indeed, that they treat administrative law generally as an occasion for the exercise of

perverse ingenuity in statutory interpretation, no general principles being discernible. One of the major arguments for adopting a specialised system of courts is, on the other hand, that this will enable the system to be unified and co-ordinated. The need for diverse and disparate statutory schemes will thus disappear. It is surprising, therefore, to find that this is not the case in France.

In the leading survey of the subject in France,¹ the author identified dozens of different statutory provisions dealing with administrative compensation some of which derived from pre-Revolutionary provisions,² and others of which, enacted during the transitional period of 1789-1800, are today still partially in force. These provisions have been amended, re-amended, extended and amplified continuously by a succession of legislatures into the immediate present.³ The schemes are, not surprisingly, lacking in all coherence and, after a survey of some 500 pages, the author felt unable to construct any coherent pattern. As Professor Vedel put it in his introduction to the work,

"... the effort at structural rationalisation proved disappointing. Despite the unwearied search for rationality conducted with vigour, not to say stubbornness by the author, the hoped for synthesis did not emerge ..."⁴

words, Mme. Brechon-Moulènes

In other/ found that the legislative interventions followed no consistent pattern and many, rather like our own Crown Proceedings Act,

1. Brechon-Moulènes, Les régimes législatifs de responsabilité publique, 1974.

2. E.g. the case of the postal service, given limited exemption by an Edict of 1627 confirmed in 1759, op.cit., p.28.

3. See Analytical Index, op.cit., pp.525-542.

4. At p.ix.

were designed merely to remedy particular deficiencies which from time to time revealed themselves.¹ The legislator was not consistent in allocating jurisdiction to civil and administrative courts respectively.² Nor did the legislator consistently opt for either civil law principles or administrative law principles of liability.³ Even the theoretical public law bases of administrative liability could not be traced consistently through the provisions.⁴ The author could deduce from this tangle only that "the drafting of the legislation making provision for public liability is largely ad hoc in character".⁵ The legislator left much for the judge to do, sometimes designedly, on other occasions inadvertently.

The task of the judge is a hard one. Not only must these disparate provisions be co-ordinated, but they must also be woven into the general principles of liability created by the judges so as to provide a more or less coherent pattern.

This process of harmonisation which falls to the judge to perform is difficult and delicate. Inevitably it results in blurring of the general principles of liability and usually also creates a tangle of cases in which no general principle is easily recognised. The judge is then criticised for having discarded principle in favour of a miscellany of statutory glosses. The difficulties are well explained by M. Odent, himself President of the Section du Contentieux of the Conseil d'Etat and

1. Pp. 213-240.

2. Pp. 87-110.

3. Pp. 126-128.

4. Pp. 128-137.

5. At p. 241.

an experienced judge, in his standard text:

"Various texts set out the conditions in which persons are entitled to compensation by virtue of the fact that special laws have caused loss to them. The Conseil d'Etat has held that the legislator, having taken a decision as to the nature and the extent of the right to compensation open to the victims of special statutory provisions, intended to exclude rights created by the general principles of administrative liability, even where these rules would have been more favourable to the victim. The result is sometimes paradoxical. The legislator in any given area may wish to express sympathy for certain categories of victim, yet he risks actually reducing their rights or placing a limited class in a situation less favourable than that created by the general principles of liability."

The author gives several examples in the area of war damage, finding particularly shocking the case of certain people detained during the occupation whose rights to compensation depended entirely upon laws first annulled then subsequently validated retrospectively for certain classes of detainees. The result was that those subject to house arrest rather than detention obtained no compensation.¹

Where the court decides to take the opposite course and compensate the victim, the result may be to allow a measure of sympathetic over-compensation.

¹In Gonfond,² for example, the military was called upon to assist the mayor of a local municipality when a serious forest fire broke out. A soldier, (perhaps driving carelessly) through exhaustion, was seriously injured when his vehicle was involved in an accident. He subsequently

1. Odent, op.cit., p.1052-3; Giraud C.E. 4 Jan 1952 Rec 14.

2. C.E. 9 July 1976, concl Gentot (contraires) R.D.P. 1977 p.529 n. de Soto, A.J.D.A. 1976 Chr. Nauwelaers et Fabius p.560.

retired with an 80% military invalidity pension, the amount of which seemed to a commentator to have been "calculated with military miserliness" and which "bore no relation whatsoever to the injury suffered". The soldier sued the municipality in the administrative courts, claiming to be an "occasional collaborator" in the work of the public service. His claim failed on the ground that he remained a permanent servant of the military authorities whose services were placed by the authorities at the disposal of the municipality. He was not, therefore, an "occasional collaborator".

This decision, heavily criticised by the commentators and delivered against the advice of the Government Commissioner, seems inequitable if weighed against Giry. It is, however, correct. Any other solution would mean that a soldier injured on active service might receive less than one detached on civilian duties, a still less equitable result. If military pensions are "parsimonious" the solution lies with a general upgrading rather than alleviation of a single distressing case.¹ It is the Giry decision which is wrong because it allows the plaintiffs to receive a double benefit from mutually incompatible principles of administrative and private law. The risk assurance principle, which relieves the plaintiffs of the burden of proving fault, when coupled with the more generous civil law principles of damages which are inextricably linked with the fault principle, here permit a measure of sympathetic, but illogical, overcompensation.

1. It may be that an identical criticism should be made of the way in which police officers on duty are allowed to avail themselves of the Criminal Injuries Compensation Scheme. 15% or more of all awards are made to serving police officers: Annual Report for 1976.

A second case¹ concerned the provisions of a law which provided pensions for the widows of the personnel of the fire service. The statute did not extend to unmarried dependants. A fireman killed in an accident while on duty left a mistress who was dependant on him and who had lived with him for several years. She brought an action in the administrative courts claiming damages from the municipality as employers of the deceased. The Conseil d'Etat held that she had sufficient interest to support her claim.

The question now arose as to what was the basis of liability. The answer logically should have been that liability was without fault under the Cames principle on the ground that, in French law, the dependant's claim is purely parasitic and the mistress should therefore be treated as standing in the shoes of the deceased. The difficulty with this solution was that mistresses would be placed in a position superior to that of widows, whose rights were limited to the statutory pension. Mistresses, on the other hand, would obtain full damages modelled on the Giry principle. The Conseil d'Etat withdrew from the logical solution and substituted liability for gross fault, treating the plaintiff as a third party injured by an operation of the public service. They went on to deny the plaintiff her damages on the ground that she could produce no evidence of gross fault. In this way the court (i) harmonised the civil and administrative caselaw by extending protection to permanent liaisons which fall short of marriage (ii) retained their own moral position on the rectitude of such liaisons (iii) upheld the superior status of widows protected by the statutory scheme. The

1. Dame Muësser, veuve Lecompte C.E. 3 March 1978, A.J.D.A. 1978, pp.232 and 210 chr. Nauwelaers et Dutheillet de Lamothe. Compare Adams v. War Office [1955] 3 All E.R. 245.

annotators were left to cavil at their manipulation of legal logic.

Thus the French system, far from representing a logical and coherent systematisation as we have been led to expect, presents the same picture of a plethora of systems, some mutually exclusive, some cumulative, of which Professor Atiyah complains:

"If there was any rational pattern to the various compensation systems as a whole it might have been possible to construct a hierarchy of systems under which a man should be compensated by system A, if that were possible, and if not, he should then be relegated to systems B, C and D in turn. But this is not how things have developed. In fact each system by and large decides whether it is willing to shoulder a burden, irrespective of other compensation available, or whether it wishes to push the burden onto another system or whether it is willing to share the burden. But the whole process is one of almost unbelievable complexity."¹

The sole distinction is that, in France, the picture is rendered even more complex by the dual jurisdiction. All this achieves in the field of tortious liability is the drawing of a line, not even a straight line, through the middle of the terrain of civil liability. A further complexity is added by the creation of a machinery to resolve jurisdictional disputes which is competent only to deal with jurisdictional points and not to decide issues of substance. Nor is the situation ameliorated in any way by antagonism between the two hierarchies and by illegitimate 'poaching' on the territory of the other jurisdiction.

1. Accidents, Compensation and the Law, 2nd edn. 1975, p.392. See also D. Williams "State-financed Benefits in Personal Injury Cases" (1974) 37 M.L.R. 281

The inability to join as parties in the litigation persons or bodies subject to the jurisdiction of the alternative hierarchy means a multiplication of litigation. Recursory actions are brought by the administration against its agents and by agents against the State. Subrogatory actions by insurers are not infrequent. Sometimes, the State, in the person of a locally organised Caisse de Sécurité Sociale has already satisfied the victim and the ludicrous spectacle is seen of the two agencies pursuing each other through the courts for accounting purposes. In Abamonte,¹ for example, a small boy fell into a disused quarry in the depths of a forest owned by the State. The victim sued in the administrative courts and an obscure jurisdictional point arose whether the forest formed part of the 'private property' (domaine privé) of the State, in which case the civil courts were competent, or whether, in the interests of the litigant, the administrative courts, which had been seised, could hear the case. $3\frac{1}{2}$ years were spent in establishing that they could not. In the meantime (fortunately for the victim) the social security system was maintaining him and was subrogated to his rights.

Perhaps such difficulties might be avoided if a 'functional' test were employed instead of the 'organic' test chosen by French administrative law?

To use a 'functional' test, attempting to limit the special rules to a limited category of cases in which the government is exercising its 'sovereign' or 'governmental' powers, is not much more logical. In my first chapter I have attempted to show how little agreement there

1. C.E. 28 Nov 1975, A.J.D.A. 1976 p.148 n. Julien Laferrière.

really is over which administrative functions are truly governmental. There might be limited agreement in theory over President Pompidou's residual category of defence, law and order. In practice, even this category could be dismantled. The judicial function may be exercised on occasion by arbitrators, as Duguit himself pointed out. A clearer example is, however, that of the police power.

France envisages the police power as inherently 'governmental', vesting it in the State. On the other hand, this characterisation does not automatically entail the jurisdiction of the administrative courts because of the division between the 'administrative' and 'judicial' police. Thus, France has tacitly to admit that rules of civil liability administered by civil courts may adequately cater for the police function.

England, on the other hand, characterises the police function as inherently personal, subscribing to the fiction of the individual police officer as a 'citizen in uniform'. No governmental police power is admitted. Moreover, the State does not always claim a monopoly. Police powers are frequently exercised by individuals or by private companies such as Securicor, whose services may be contracted for by the State or by private corporations such as banks, indifferently.¹ A private security organisation has, for example, been employed to carry out the work of detaining immigrants by the Home Office.² Some public enterprises, such as British Railways or the dock and airport authorities, also employ their

1. On the security industry see Draper, *Private Police*, 1978.

2. For use of a private security organisation by the Home Office to detain immigrants, see 15th Report of the Expenditure Committee, H.C. 662-1 (1977-78).

own, private police forces. By way of contrast, the police force proper is permitted to contract with private individuals to carry out private functions, such as the maintenance of order at political meetings or sporting occasions.¹

In mixed societies, government functions are not precisely defined and governmental powers are not rationally allocated. Besides central and local government, functions may be hired off to autonomous bodies; similarly they may be exercised on behalf of the government by private bodies. In a recent English case, for example, the Crown's power as 'parens patriae' to watch over the upbringing of young children and ensure their safety was found to be exercised alike by police, by local authorities and by private charitable organisations.² In a second similar case, the nature of the Bank of England was questioned and one judge at least wished to classify its functions as primarily commercial.³

Today the tentacles of the State are everywhere. The public and private sectors can no longer be disentangled. As Kamenka and Tay have put it:

"The major sphere of social life passes from the private to the public, not merely in the sense that more and more activity is state activity but in the sense that more and more 'private' activity becomes public in its scale and its effect, in the sense that the oil company is felt to be as 'public' as the State electricity authority utility, the private hospital and the private school, with their growing need for massive state

1. Glasbrook Bros. v. Glamorgan Corp. [1925] A.C. 270.

2. D. v. N.S.P.C.C. [1977] 2 W.L.R. 201.

3. Burmah Oil v. Bank of England [1979] 1 W.L.R. 473, 486-7 (Lord Denning M.R., dissenting)

subsidies, as public as the municipal hospital and the state school."¹

In such societies it is as difficult to distinguish the 'public' from the 'private' organism as to distinguish the 'governmental' from the 'civilian' function. It is infinitely simpler therefore that all parties should be amenable to the same courts and subject to the same principles of liability. Special cases may sometimes need special treatment. It is the prerogative of the Legislature to provide for these needs.

1. Kamenka and Erh-Soon Tay, "Beyond Bourgeois Individualism: the contemporary Crisis in Law and Legal Ideology" in Kamenka and Neale, Feudalism, Capitalism and Beyond, 1975.

CHAPTER FIVEIllegality and Liability

All that we have so far succeeded in establishing is the self-evident proposition that not all government torts differ radically in character from the torts of private individuals and that, where they do differ, the concepts of civil liability are perfectly adequate to determine the liability of the administration or ^{the} State. This is easily admitted when the wrongful act is clearly attributable to an individual - for example, when a negligent driver causes a traffic accident - in which case the State is cast in the role of employer and its liability can be assessed according to the normal principles of vicarious liability. But it is equally true in many cases where the tortfeasor is the State itself. We have seen that an accident on publicly owned property does not differ in kind from an accident on privately owned property. It is better to leave such situations to the rules of civil liability which is perfectly able to cope with them. To do otherwise results in discrimination between victims through the operation of disparate rules of legal liability.

Implicit in these propositions is the deduction that "actions in tort against persons exercising authority do not always involve an examination of the validity of their acts."¹ In many cases of government torts, however, the reverse is true and the validity of the administrative actions is central to the success or failure of the action. In other words, central to the theme of administrative liability is the idea of abuse of power.

1. Rubinstein, Jurisdiction and Illegality, 1965, p.122.

It is here that administrative liability has the greatest claim to be unique in character and it is here, too, that the concepts of private law are likely to be least able to provide a solution. To cite Hauriou, never an ardent supporter of the autonomy of State liability,¹

"... the true autonomy of administrative liability is manifested when the Administration avails itself of purely governmental powers for which civil law provides no parallel."

It is in this limited area that Hauriou believed that the concept of fault would have to be abandoned if it were not to be unduly strained, and replaced by theories of liability without fault, which, he admitted, would be difficult to devise.

Invalidity and abuse of power cause similar problems for our common law system. Damage attributable to administrative action does not always fall squarely within the old, common law categories. In the words of Denning L.J.:²

"... where the damage complained of does not result in trespass to person or property some difficulties arise. In the first place, there is no recognized category of the law of tort under which the action can be classified. Where a licence is illegally revoked or refused, the very gist of the action consists in showing an unauthorised exercise of authority which causes damage. Unlike actions of trespass, the cause of action in this case is peculiar to actions against public officials and bodies ..."

1. Précis de droit administratif, 10th edn. 1921, p.381.

2. Abbott v. Sullivan [1952] 1 K.B. 189, pp.200-202. (Denning L.J. dissenting).

Justice
 Lord Denning went on to ask the question whether such an action could be maintained independently of any recognized head of tort, to which question he gave an affirmative answer. "I should be sorry to think", he said "that if a wrong has been done, the plaintiff is to go without a remedy simply because no one can find a peg to hang it on."

To Rubinstein, the absence of such a peg

"... leaves unactionable a whole host of administrative functions which do not result in direct interference with person and property. In the age of welfare states and controlled economies, such spheres as the distribution of social benefits and all licensing functions are excluded from the orthodox rules of liability."¹

Among public lawyers there would be general agreement that a system of administrative liability which makes no provision for compensation in cases such as these is inadequate. If one were to press the point and ask what should be done, it is probable that the problem would be analysed as a need to provide for legal liability for excess or abuse or misuse of power. A slightly more abstract formulation might be that there should be liability for illegal or invalid administrative acts. At this point the difficulties begin, because, deceptively simple and precise as these statements seem, in reality every term used is ambiguous, imprecise and complex. The term 'abuse' for example, is normally defined as meaning 'to make a bad use of' and seems to possess some pejorative sense. In common parlance an 'abuse' would probably be thought of as graver than a 'misuse'. Yet the dictionary defines a 'misuse' as an 'improper use or application to a bad purpose' which suggests that the two terms are interchangeable and that they may be emptied of their

1. Op.cit., pp.145-6.

pejorative content and stretched to cover the apparently more neutral term of 'excess of power'. In the modern law of ultra vires the latter is the sense in which the terms are normally used. Lord Denning has recently explained that¹

"... When discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers to see that they are used properly, and not improperly or mistakenly. By "mistakenly" I mean under the influence of a misdirection in fact or in law."

Slightly later, he remarked

"To my mind such a procedure was never contemplated by the statute. The Secretary of State was mistaken in thinking that he could do it. No doubt he did it with the best of motives ... Nevertheless, he went about it, I think, in the wrong way. He misdirected himself as to his powers. And it is well established law that, if a discretionary power is exercised under the influence of a misdirection, it is not properly exercised, and the court can say so."

A very similar ambiguity is associated with the expressive French phrase 'détournement de pouvoir' which literally possesses the meaning of a misdirection or diversion of power from its proper ends. Yet the term has developed a strong pejorative sense. Odent refuses to define it on the grounds that it is "supple, fluid and essentially evolutionary." He also remarks:

"By reason of the nature of the assessments involved, détournements de pouvoir are always delicate to investigate. A subjective and sometimes a disparaging assessment of the administration and its representatives is involved, and their loyalty and good faith are suspect."²

1. Laker Airways Ltd. v. Dept. of Trade [1977] 2 W.L.R. 234, 250-251.

2. Odent, op.cit., pp.1581-3.

Similarly, in connection with liability, a leading author correctly asserts that détournement de pouvoir is always actionable because it is "one of the gravest of illegalities".¹ We can deduce that the reason for this is that détournement de pouvoir contains a subjective or mental element and that in imposing liability the court is sanctioning wrongdoing or 'abuse' of power.

Increasingly, however, judicial review in both England and France has been moving from the 'subjective' to the 'objective'; that is to say, in assessing the legality of administrative action, the interest has moved from the administrator's intentions, aims, motives, goals and purposes, to the objective assessment of his acts in the framework of the enabling legislation. In the leading case of Padfield v. Minister of Agriculture it was said that:²

"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court."

Modern cases show a clear intention to narrow the ambit of discretionary power. In bringing discretionary power under control, however, the judge hopes to avoid "the role of censor of those persons whose good or bad intentions he weighs and whose motives he finally assesses."³ This is done by substituting (so-called) objective criteria for assessment. It is assumed that public authorities will expect to act inside

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1. Moreau, "Dommages causés par des décisions administratives entachées d'excès de pouvoir", Jur.adm., fasc.720 p.10.
 2. [1968] A.C.997, 1030 (Lord Reid). See further, Austin, "Judicial Review of Subjective Discretion - At the Rubicon; Whither Now?" (1975) 28 C.L.F.150.
 3. Bréart de Boisanger C.E. 13 July 1962, D 1962 p.664, concl. Henry. See also Smith v. East Elloe R.D.C. [1956] A.C. 736 at pp.769-770 (Lord Radcliffe)

the legal framework of legislative and regulatory provisions and that they will

"make their discretionary decisions responsibly and for reasons which accord with the statutory purpose ... If they do not exercise their discretion in this way they can be challenged in the courts."¹

By moving towards the objective, judicial review in England has taken a first, cautious step towards creating a concept of 'illegality', a development which has so far been impeded by the orientation of English law towards rights and remedies. But English law is still very uncertain about the nature of 'illegality' and whether it should be defined objectively from the viewpoint of the nature and quality of the act impugned, or subjectively from the standpoint of the victim and the availability of a remedy. To put this somewhat differently, if we start from the point that an 'illegal' or 'invalid' act is one which is 'ultra vires', then we are still left with an ambiguity. We may interpret the act objectively by giving it a substantive content and saying that an illegal act is one which is vitiated by some excess of power, irrespective of whether it is reviewable. An act which is merely 'voidable' then becomes an ultra vires act. If, on the other hand, a subjective procedural test is used, an illegal act is one which is capable of being reviewed for ultra vires. This approach is really summarised in the celebrated dictum of Lord Radcliffe that "an order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead."²

Since it has the demerit of bestowing 'legality' on a number of grave abuses

1. Anne v. Merton L.B.C. [1977] 2 W.L.R. 1024, 1035 (Lord Wilberforce); see also Kahn, *Le Pouvoir discrétionnaire et le juge administratif*, op.cit. above.
2. Smith v. East Elloe R.D.C. [1956] A.C. 736, 769.

of power for purely fortuitous procedural reasons, many would disagree with this dictum. Moreover, it is clear that by manipulating the unstable concepts of 'voidness' or 'nullity' and 'voidability', the courts can vary the nature of the twinned concepts of 'illegality' or 'invalidity'. A leading judge has assured us that their motive in so doing may be more closely linked to the question of liability than of legality.¹

If we turn to the concept of 'liability' a similar ambiguity is noticeable. 'Fault', a noticeably flexible concept, is traditionally defined as an objective standard of care. Running through the law of torts, however, is a strongly subjective cross-current which springs from the notion of torts as 'wrongs'. Nowhere is this more obvious than in the imprecision of meaning of the term 'malice', something which, like the idea of reasonableness in ultra vires, may range from deliberate and wicked wrongdoing to the nearly objective standard of conscious negligence. As a leading writer has said

"'Malice' in this context discloses an uneasy, reckless indifference, and bad faith are not interchangeable ideas; it would seem that none of them is paramount ... Recklessness is properly described as a variety of negligence in which the actor is aware of the risk but resolves to "chance it". It is conscious negligence."²

/conjunction of ideas. Intention to injure

Thus, when a distinguished French writer tells us in sibylline fashion that "it is undeniable that illegality and liability are fundamentally different in character and difficult to compare"³ he may really be circumnavigating the unpalatable truth that neither concept has any

1. Below, p.231

2. Millner, Negligence in Modern Law, 1967, p.69.

3. Delbez, De l'excès de pouvoir comme source de responsabilité, 1932 R.D.P. p.441, 488.

fixed content. The word 'liability' conceals behind it a number of subsidiary concepts, such as 'fault', 'intention' and 'malice', which can be varied at will from the subjective to the objective. The same is true of the concept of illegality. Indeed, the latter is not so much a concept as a number of points on a scale of values.

Worse still, both illegality and liability are 'schizophrenic' in the sense that each serves a number of ill-defined purposes which pull in opposite directions. The main aim of tortious liability is considered to be compensation; not only does it possess a number of subsidiary ends but the victim's needs have to be balanced against those of the defendant. Judicial review of administrative action also has two goals: to punish (or sanction) illegal administrative activity and to provide a remedy to injured parties. In any system of administrative law or, for that matter, in any given case, priority may be given to one or the other of these goals. It is painfully clear, then, that the concepts of illegality and liability may vary according to the use which, at the time, is being made of them. To attempt to marry the schizophrenic characteristics of one concept is hard enough for a court; to link the two is to create the potential for nuclear fission.

However illusory, the synthesis between illegality and liability is an attractive one which has been influential in the English caselaw from an early date. It derives from the idea, traceable to the Case of the Marshalsea¹ that a judicial officer is protected when acting within his jurisdiction but may be liable in trespass when he exceeds his

1. (1613) 10 Co.Rep. 68b. And see further, de Smith, *Judicial Review of Administrative Action*, 3rd edn. 1973, p.95; Rubinstein, "Liability in Tort of Judicial Officers" (1964) 15 Univ. of Toronto L.J. 317.

jurisdiction. At this stage 'legality' is merely a defence to the strict liability of the action for trespass. In more abstract terms we could say that the notion of legality is a barrier which the defendant sets up against the plaintiff's allegation of an invasion of his protected rights, legality being defined in terms of jurisdiction.

With the growth of judicial review by means of the ultra vires principle, the idea of jurisdiction spread from the limited field of liability of judicial officers into the wider field of general discretionary power. The connection between ultra vires and liability could on occasion be used to secure the most perverse results. In Duncan v. Findlater¹ for example, the Lord Chancellor felt able to argue that an administrative body could never be liable for intra vires acts unless the statute itself provided for compensation. But neither could it be liable for ultra vires acts, since any officer acting in excess of his powers would naturally also be acting in excess of his functions.¹

At a later date the supremacy of the civil law of liability was reasserted by the creation of a judicial presumption that Parliament, in granting statutory powers, could never have intended to authorise negligence in their exercise.² But the heresy has never been entirely scotched. The leading case of Everett v. Griffiths³ concerned the power of a magistrate under the Lunacy Act 1891 to sign a reception order if he was

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1. 6 Cl and F 894, 7 E.R. 934. The passage is cited above p.39 where I have argued that the case is wrongly decided. Moreover, since the case concerned 'operational' negligence i.e. a pile of rubble left in a road, it can hardly be an authority on the exercise of discretionary power.
 2. Geddis v. Proprietors of The Bann Reservoir (1878) 3 App.Cas. 430 at p.456 (Lord Blackburn).
 3. [1921] 1 A.C. 631, 657.

"reasonably satisfied" that this was necessary. In the House of Lords it was held that no duty other than the duty to act honestly and in good faith - the ultra vires test of reasonableness - could be implied. Lord Haldane said:

"If [the magistrate] does his best to act fairly within the limits laid down for him, he has acted up to the standard prescribed and I do not think he can be made liable to an action at common law for want of care beyond this. For assuming that he has actually satisfied himself, acting honestly and bona fide in arriving at his conclusion and proceeding on it, he has done the very thing which the statute told him to do, and no further question arises".

Similar reasoning was easily refuted by Atkin L.J. dissenting in the Court of Appeal.¹ Arguing for the superimposition on the statutory power of a common law duty of care he reasserted the supremacy of the negligence test of reasonableness, saying:

"The statute obviously assumes that persons believing that they are acting within their jurisdiction will consider themselves bound to exercise reasonable care."

In East Suffolk Rivers Catchment Board v. Kent² Lord Romer again denied that public authorities could owe a duty of care in respect of an exercise of discretionary power. He said:

"If in the exercise of their discretion they embark upon an execution of the power the only duty they owe to any member of the public is not thereby to add to the damages which he would have suffered had they done nothing. So long as they exercise their discretion honestly, it is for them to determine the method by which and the time within which and the time during which the power shall be exercised and they cannot be made liable

1. [1920] 3 K.B. 163, 212.

2. [1940] 4 All E.R. 527, 543.

except to the extent to which I have just mentioned for any damage which would have been avoided had they exercised their discretion in a more reasonable way."

A very well known passage of Lord Atkin, once more driven to dissent, demonstrates the failure of logical analysis inherent in this reasoning:¹

"I cannot help thinking that the argument did not sufficiently distinguish between two kinds of duties: (i) a statutory duty to do or abstain from doing something, and, (ii) a common law duty to conduct yourself with reasonable care so as not to injure persons liable to be affected by your conduct."

None of these dicta ^{goes} / so far as to leave the individual affected by a misuse of power entirely without remedy. Liability is, however, restricted to the case where there has been an ultra vires use of power, the question being how this requirement should be interpreted. Initially, and perfectly correctly, the emphasis had been on the character of the right which the plaintiff set up against the defendant's powers. In Ashby v. White² the celebrated judgment of Holt C.J. suggested that any deliberate interference with the plaintiff's right to vote would be sufficient to found an action.

"Supposing then that the plaintiff had a right of voting and so appears on the record, and the defendant has excluded him from it, nobody can say that the defendant has done well; then he must have done ill, for he has deprived the plaintiff of his right; so that the plaintiff having a right to vote, and the defendant having hindered him of it, it is an injury to the plaintiff."

1. At p.533.

2. (1703) 2 Ld. Raym.938; 92 E.R. 126, 136.

Once again, however, the later cases diluted the principle by substituting for a 'deliberate' act - a minimal requirement as to intention paralleled in the law of trespass - two narrower tests. The first was the idea of 'malice', a slippery term whose place in the law of torts has never been clear;¹ the second, borrowed from the law of judicial review or ultra vires, was the idea of 'honesty and good faith' referred to in Everett v. Griffiths and the Kent case. These different requirements gradually became confused until in David v. Abdul Cader,² in a passage hardly conspicuous for clarity, Lord Radcliffe said of an action for refusal to grant a licence

"The presence of spite or ill-will may be insufficient in itself to render actionable a decision which has been based on unexceptionable grounds of consideration and has not been vitiated by the badness of the motive."

Disentangled, this seems to mean that a malicious or spiteful motive is not enough to found an action provided that it is only a subsidiary motive. Malice has acquired a technical meaning and has been equated with the concept of ultra vires.

If the courts were using the ultra vires doctrine in the area of civil liability to restrict liability for loss flowing from the lawful exercise of power, they ought then to have admitted as a logical corollary that a breach of a statutory duty by a public authority would found an action for damages by an individual who had suffered loss. In this way the equation would have been completed to read:

Illegality in the shape of an ultra vires exercise of statutory power or a breach of statutory duty entails

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1. Friedman, "Malice in the Law of Torts", (1958) 21 M.L.R. 495.
 2. [1963] 1 W.L.R. 834, 840. See further Harlow, op.cit., 39 M.L.R. at pp. 526-539.

civil liability for damage caused:
but intra vires or legal exercise of
power does not.

At first this logic was accepted as a matter of course. In
Ferguson v. Kinnoul¹ Lord Lyndhurst declared

"When a person has an important
public duty to perform, he is bound
to perform that duty; and if he neglects
or refuses so to do, and an individual in
consequence sustains injury, that lays
the foundation for an action to recover
damages by way of compensation for the
injury that he has so sustained."

This position was maintained in the later case of Couch v. Steel,²
an action by a seaman against the master of a ship who had, contrary
to statutory provisions, failed to provide him with medicine. The
position was complicated by the fact that this statute provided for a
penalty, but Lord Campbell C.J. confidently disposed of this objection,
saying:

"As far as the public wrong is concerned,
there is no remedy but that prescribed
by the Act of Parliament. There is,
however, beyond the public wrong, a
special and particular damage sustained
by the Plaintiff by reason of the breach
of duty by the Defendant, for which he has
no remedy unless an action on the case at
his suit be maintainable."

By the time Atkinson v. Newcastle Waterworks Co.³ fell to be
decided, however, the courts seem to have repented of their original
generosity in the matter of breach of statutory duty. Doctrines such as
the principle that an alternative remedy provided by the statute bars
recovery; and the concept of 'public' rights, or rights owed to the

1. (1842) 9 Cl and F 251, 8 E.R. 412, 423.

2. (1854) 3 El and Bl 402; 118 E.R. 1193, 1197.

3. (1877) 2 Ex. D 441.

public at large but not enforceable by any single individual, were developed to restrict liability.¹ The link between illegal administrative action and civil liability, once clearly acknowledged, was diluted by a confused application of other, more general rules of tortious liability. Finally, it became possible to argue that no civil action for breach of statutory duty existed independently of negligence.²

The traditional emphasis of the law of torts on protected interests is visible both in the early actions for misuse of statutory powers and in the early actions for breach of a statutory duty. It could, of course, like any other principle, be used restrictively. In an early licensing case, which epitomises rather well the necessary relationship between a protected interest and the legality of administrative action, the plaintiff unsuccessfully sued licensing justices for refusal to grant him a licence. The action failed on the ground that the plaintiff had no property right which the law could protect. The court said:

"The plaintiff here has no right to have a licence unless the justices think it proper to grant it, therefore he can have no right of action against the judges for refusing it."³

Street has admirably summarised the correct position in regard to statutory duty when he says:

"... it is abundantly clear that a plaintiff who merely proves that the defendant broke a statutory duty is far from having established the tort. The emphasis should be, as a few eminent judges have pointed out, on the nature of the interest of the plaintiff ... The problem of tortious liability is not solved by asking whether there was a breach of a statutory duty: one must discover whether the statute created in the plaintiff an interest which was to be protected against interference

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1. Street on Torts, pp.269-275. See also Watt v. Kesteven C.C. [1955] 1 Q.B.408.
 2. See further Fricke "The juridical nature of the action upon the Statute" (1960) 76 L.Q.R.240; Glanville Williams, "The effect of penal legislation in the law of tort" (1960) 23 M.L.R. 233; Street on Torts, p.268.
 3. Bassett v. Godschall (1770) 3 Wils.K.B.121; 95 E.R.967,968. See now Malone v. Commissioner of Police for the Metropolis [1979] 2 W.L.R.700 for a modern example of similar reasoning.

of the defendant by an action in tort."¹ [sic]

This is also the light in which the English law of tort struck a distinguished French public lawyer. Concluding his survey of State liability in England, M. Lévy said²

"The law of liability in England ... does not present the same logically simple picture as the French law of civil liability. Its primary object is not solely the re-establishment of the status quo ante by means of indemnity or even the determination of the body on which the cost of the loss will ultimately lie.

The law of liability in England must actually be read as a system for the protection of rights. In the last resort, it is always a question of finding out whether the victim possesses rights which can be set off against the author of the damage. The concepts of fault or guarantee thus play only a secondary part, because the centre of gravity in the system is to be found in the rights of the victim."

It is convenient at this stage to summarise the argument, which runs as follows. Initially, the concept of legality was introduced into the law of torts to circumscribe the strict liability of the law of trespass by providing a defence. A parallel development was the creation of a civil action for illegality in the shape of breach of a statutory obligation. These actions, which focussed on the plaintiff's rights, were capable with a modicum of judicial creativity of developing into an excellent system of remedies for the abuse, misuse or excess of administrative power. In fact, however, the courts proceeded to restrict liability. This could be done in the first instance by limiting the interests recognised by the common law as worthy of protection - that is

1. Street on Torts, p.268. The author cites in support of his views Holt C.J. in Ashby v. White; Bramwell B in several cases; and Lord Atkin in various cases.

2. Op.cit., p.349.

to say, by limiting the number of pegs on which actions could be hung - and disallowing actions for which no apposite label seemed to exist.

The second approach was to shift attention from the plaintiff to the defendant. The negligence principle restricted liability to cases in which a duty of care was owed and, by allowing this concept to invade the area of statutory duty, the stricter obligation imposed by the statute could be diluted. In similar fashion, the ultra vires principle could be used to restrict liability to cases in which administrators had exceeded their powers or acted unlawfully. Since the ultra vires test was thought to be more generous to public authorities than the common law duty of care, this test of illegality could be superimposed on the common law duty of care to restrict liability for negligence. Ironically, the test of illegality in England law produced a restriction in the ambit of the civil law of liability. Confirmation that this was a deliberate act of judicial policy comes from the leading modern apologist of the equation of liability with illegality, Lord Diplock, when, in the Dorset Yacht case he listed a variety of reasons why in his view,¹

"... the public law concept of ultra vires has replaced the civil law concept of negligence as the test of the legality, and consequently of the actionability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament as to the means by which they are to achieve a particular public purpose. According to this concept Parliament has entrusted to the department or authority charged with the administration of the statute the exclusive right to determine the particular means within the limits laid down by the statute by which its purpose can best be fulfilled. It is not the function of the court, for which it would be ill-suited,

1. At pp.1183-4. The reasons are discussed at a later stage in the argument.

to substitute its own view of the appropriate means for that of the department or authority by granting a remedy by way of a civil action at law to a private citizen adversely affected by the way in which the discretion has been exercised. Its function is confined in the first instance to deciding whether the act or omission complained of fell within the statutory limits imposed upon the department's or authority's discretion. Only if it did not would the court have jurisdiction to determine whether or not the act or omission, not being justified by the statute, constituted an actionable infringement of the plaintiff's rights in civil law."

The leading modern case¹ takes up this reasoning. It was alleged that the defendant council was negligent in that it had allowed builders to construct a block of flats on inadequate foundations either because the council had been negligent in the exercise of its statutory powers of inspection or because it had failed to make any inspection at all. The Council appealed to the House of Lords, arguing that it was under no duty of care to the plaintiffs as lessees of the defective property, because it had no statutory duty to inspect. The House dismissed this contention holding that the Council did owe a duty of care. This duty was not to be delimited, however, solely by reference to the "neighbourhood" principle of Donoghue v. Stevenson because so to do "would be to neglect an essential factor which is that the local authority is a public body, discharging functions under statute: its powers and duties are definable in terms of public not private law."² To get round this problem and to avoid curtailing the greater freedom bestowed by the ultra vires or illegality principle, the court proposed to slice discretionary power horizontally into "an area of policy or discretion" and an "operational area".

1. Amns v. Merton L.B.C. [1977] 2 W.L.R. 1024. The case was decided on a preliminary point of law and finally settled at the door of the Court some eighteen months after the House of Lords decision.

2. At p.1034 (Lord Wilberforce).

Thus while the court was prepared to admit that "there might be room, once one is outside the area of legitimate discretion or policy, for a duty of care at common law ... in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of the power."¹

To define the two areas is not easy, even at the level of principle. Lord Wilberforce says:

"Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many "operational" powers or duties have in them some element of "discretion". It can safely be said that the more "operational" a power or duty may be, the easier it is to superimpose upon it a common law duty of care."²

The trouble comes when this rule is applied to specific fact situations. Of the inspector's function, Lord Wilberforce says somewhat hesitantly:

"But this duty, heavily operational though it may be, is still a duty arising under the statute. There may be a discretionary element in its exercise - discretionary as to the time and manner of inspection, and the techniques to be used. A plaintiff complaining of negligence must prove, the burden being on him, that the action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely upon a common law duty of care ..."³

Not only is this confusing passage so wide as to save all the existing caselaw, including the ill-fated failure of the catchment board

1. At p.1037 (Lord Wilberforce).
2. At p.1034.
3. At p.1035. For criticism of this test as used by the American courts see Ganz "Compensation for Negligent Administrative Action" [1973] P.L.84. For a general critique of the caselaw see Craig "Negligence in the Exercise of a Statutory Power" (1978) 94 L.Q.R.428.

in Kent's case¹ to drain the plaintiff's land competently, but it totally eliminates any purpose for the distinction, originally introduced to delimit the respective spheres of the civil law of negligence and the public law of ultra vires.

Faced with such reasoning, it is easy to suggest a wholesale defection to the French concept of faute de service, easily able to deal with such situations.² In fact, the answer lies in reasserting the common sense of the common law by breaking the delusive and illusory link between illegality and liability, and allowing the free rein to much less complex and ^{more} flexible negligence concept. This is immediately clear from the judgment of Lord Salmon in the Arns case itself.

Dismissing the reasoning of the Kent case as unsatisfactory and adopting a passage from the dissenting judgment of Lord Atkin, Lord Salmon deduced that the council, through its inspectors, was under a duty to exercise reasonable care and skill. That is simply to confirm that:

"Every person whether discharging a public duty or not is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care. This duty exists whether a person is performing a public duty, or merely exercising a power which he possesses either under statutory authority or in pursuance of his ordinary rights as a citizen."³

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1. East Suffolk Rivers Catchment Board v. Kent [1941] A.C.74 expressly approved by Lord Wilberforce at p.1036.
 2. Schwarz, loc.cit., Ch.2 above.
 3. East Suffolk River Catchments Board v. Kent at p.89 (Lord Atkin) approved by Lord Salmon at p.1046.

Lord Salmon dismissed with scorn the idea that the imposition of notional liability for negligence might tempt the council to inertia and inaction. In any event, remedies existed in such a case. He said:

"I find it impossible to conceive that any council could be so irresponsible as to pass any such resolution. If it did, this would, in my view, amount to an improper exercise of discretion which, I am inclined to think, might be corrected by certiorari or mandamus. I doubt however whether this would confer a right on any individual to sue the council for damages in respect of its failure to have carried out an inspection."¹

In short,

/it is important to bear in mind that this link between liability and illegality in the exercise of discretionary power by no means represents the common law orthodoxy. There is a strong current of opinion, to which a number of our greatest judges have subscribed and do today subscribe, to the effect that illegality and liability are wholly separate concepts designed for different purposes.

It may be that French administrative law has always been in a better position than English to create a universal remedy for all illegal or invalid administrative activity. The general civil law principle of fault, as Lévy reminds us, was itself objective in character. A natural link was possible with review of administrative action which, in France though not in England, concentrates attention on the legality of the administrative action rather than the plaintiff's right or

1. At p.1042. For an identical argument by the Conseil d'Etat in the case of failure by a municipality to provide adequate warning to skiers of an approaching avalanche see, Lafont C.E. 28 April 1967, D 1967.434 concl. Galabert.

interest.¹ This made synthesis of the two parallel actions easier. Secondly, the existence of a separate administrative jurisdiction competent in contract and tort fostered the growth of the idea of a link between the liability concept and the legality concept. Joinder of actions was a concrete reminder of this link. Finally, French publicists were alive to and attracted by the theory of risk. Conditions were therefore favourable for a move towards liability in all cases of illegal administrative action. The interesting thing is that this has never occurred.

Like the common law, the French rules have crystallised around pre-existing causes of action recognised by the civil law. The paramount concept is that of fault: to quote Moreau² "It is the system of faute de service which is applicable in this area". But a right of action is also admitted in all cases of grave abuse of power (détournement de pouvoir). This action is undoubtedly based on the civilian law principle of abuse of right. ^{In the} Olivier et Zimmermann decision, (in which, it will be remembered, an action was brought against the Prefect by the owners of land on which illegal gravel digging operations had been carried out for grave abuse of his powers and manipulation of legal and administrative procedures), it was held that the right to implement an administrative procedure without recourse to the court was of such significance that it could be taken only at "the risks and perils of the administration". But in a very careful commentary on the case,³ Hauriou pointed to the Conseil's use of the phrase "A number of abusive measures"

1. For the evolution, see Auby et Drago, op.cit., Vol.2 pp.235-238; Gazier, "Essai de présentation nouvelle des ouvertures du recours pour excès de pouvoir en 1950" (1951) 5 EDCE p.77.

2. "Dommages causes par des décisions administratives entachées d'excès de pouvoir", Juris.classeur administratif, fasc.720, p.8.

3. Olivier et Zimmermann C.E. 27 Feb 1903, S 1905.III.17 n. Hauriou.

(un ensemble de mesures abusives) from which he deduced a reference to the principle of abuse of right. According to this civilian principle of liability, rights can be exercised only for the purpose for which they are intended. To borrow Josserand's classic definition

"An abuse of power is an act contrary to the aim of an institution, to its spirit and to its ends."¹

Although Hauriou discerned slight differences between the civilian theory of abuse of right and the administrative law doctrine of abuse of power (détournement de pouvoir), the concepts largely overlapped and it was safe to say that "in every case of abuse of power there is an abuse of right and the possibility of compensation".

In this affair, there could be no doubt over the Prefect's intention. A later case carried the doctrine further into the area of illegal administrative activity or excess of power. In Compagnie des Mines de Siguri² a colonial mining company claimed compensation from the French government on the ground that its concession had been wrongfully withdrawn by the Colonial Governor. Mining was permitted only on ministerial authorisation and at deep levels. The company during its activities excavated a crater which prevented native mining at shallow levels, and its concession was thereupon withdrawn. In view of the encouragement given to the company by the Governor and the fact that no complaints had been received from the native miners whose interests were allegedly affected, the Conseil d'Etat felt that this sanction was disproportionate. The Government was thus ordered to make reparation.

1. De l'Esprit des droits, p.292 ("L'acte abusif est l'acte contraire au but de l'institution, à son esprit, à sa finalité").
2. C.E. 22 Nov 1929, S 1930.3.17 n. Bonnard.

In his note on the case, Bonnard, a proponent of the autonomy theory of public law, argued that this decision extended beyond the doctrine of abuse of right which always requires intention to injure.¹ A new head of liability for abuse of power had been created and this could be stretched to all cases of excess of power, i.e. every case in which the applicant would be theoretically able to apply for annulment. It is worth noting the exact parallel to the expansion of the common law definition of malice.

In these two cases, the Conseil de'Etat had the basis of a theory of liability which would correlate administrative liability with illegality and even go so far as to transfer the risk of all illegality to the administration. Since the court had allowed joinder of the two applications for review and compensation since 1911, the way was open for collateral review of administrative action by way of an application for compensation, something which would have permitted the short limitation period of two months to be evaded. Hauriou immediately prophesied that joinder would become common practice to a point where the recours pour excès de pouvoir would be swallowed up by the recours de pleine juridiction.²

Delbez suggests³ that this was not really the natural solution. There were really three remedies for illegality: annulment; damages; and annulment plus damages under the Blanc procedure, the main significance of which was the circumvention of the limitation period. Illegality and liability

1. This is a debatable point. For the authorities see Lawson, op.cit. above, pp. 15-20. See for a fuller study Chapus, op.cit., pp. 381-392; Cornu, op.cit., pp. 151-177.

2. Blanc C.E. 31 March 1911, S.1912-1913.3.129 n. Hauriou (above p.32)

3. Op.cit., above p. 488.

were not really Siamese twins and to correlate them ^{might} result in limiting both. To expand this somewhat cryptic explanation, one might say that 'fault' is essentially wider than 'illegality' in that it is capable of concerning those cases of 'operational' negligence by agents of the administration in which the validity of administrative action is not at stake. On the other hand, illegality is frequently wider than 'liability' because 'liability' implies damage while 'illegality' does not always result in damage to an individual.

What in fact caused ^{all} these ingenious theories to fall down was the stubborn adherence of the caselaw to the fault principle. Opinion varies as to the precise relationship between fault and illegality although the caselaw makes it clear that the correlation is not absolute. The classic position, supported by Delbez, Duez, de Lambadère and Odent, is that illegality creates a rebuttable presumption of fault. As Odent himself puts it:

"The illegality of an administrative decision is a condition precedent without which the decision cannot amount to a fault capable of entailing the liability of the State, but this condition is not in itself sufficient for liability."

Some writers, in the light of the latest cases, would prefer to reverse the presumption. Moderne,² for example, prefers the following formulation:

"One starts from the proposition that a decision tainted with illegality may amount to a fault which will entail liability and that, on the contrary, where there is no illegality, there can be no liability."

1. Op.cit., p.1085. My translation is rather a free one.

2. Moderne, "Illegalité et responsabilité pour faute de service; vers de nouvelles relations", Rev.adm. 1974 p.29; see also Moreau, loc.cit.

The failure to correlate illegality with fault is explicable in terms of a desire to preserve a maximum area of judicial discretion. Consistently, trivial irregularities are held not capable of creating a right to compensation. The game of exclusion may be played in several ways: the decision may be held to be justified on another ground; it may be said to be a mere error in assessment of the facts, incapable of giving rise to liability; the error may be too trivial to be worthy of annulment; the fault may be held not to be the cause of the damage; a requirement of gross fault may be imposed; or finally, the applicant may be held to have suffered no injury to a legal right.¹

To give some simple illustrations. In Neher² a student complained of the illegality of the decision of a 'conseil de classe' which, on considering his academic record, advised him to change courses. The Conseil d'Etat held that there was no liability on the ground that the decision was an assessment based on a fact situation and could not be reviewed in the absence of a grave error or a détournement de pouvoir. In other words, the complaint was too trivial to found liability. In Clément³ it was held that liability could not be based on a peripheral procedural error because if the administrative procedure had been regular, the annulled permits could have been legally granted and in fact would have been so granted." In Sucrierie Coopérative Agricole de Vie-Sur-Aisne⁴

1. Moreau, op.cit., pp.12-13. The question whether there must be an injury to a legal right is obscure (ibid. p.14). A common lawyer reading Société Beccaria C.E. 13 Nov 1974 Rec 557 in which damages were awarded in a licensing case for loss of "a serious chance" to get a licence would probably say not. The issue was sidestepped in the earlier case of Société Laitière Métropolitaine C.E. 6 July 1966, AJDA 1966, p.678 concl. Rigaud.

2. C.E. 1 Dec 1965 Rec 648.

3. C.E. 11 Oct 1961 Rec 559.

4. C.E. 20 Feb 1974 Rec 121.

the customs authorities gave erroneous advice to the company which led them to acquire a large quantity of sugar which they were unable to sell, with disastrous financial consequences. The Conseil d'Etat found that the letter of advice was illegal in the sense that it was capable of annulment. It followed that it also constituted a faute de service. Damages were not awarded, however, on the ground that the applicants had failed to submit a certain application form and their damage was attributed to this failure rather than to the departmental error.

All these tricks of legal reasoning are instantly recognisable to the common lawyer who could probably provide parallels for every example of hedging. To confine myself to one example, in McClintock v. Commonwealth,¹ M delivered his pineapples for processing to a statutory committee under the terms of a scheme which he later claimed was invalid. He thereupon sued for damages in conversion. The High Court of Australia disallowed his claim, their reasoning being rather unattractive. Either the scheme was valid, in which case M had received compensation and had suffered no loss; or the scheme was invalid, in which case M, having delivered his pineapples voluntarily, was bound by his mistake and there was no conversion. In this way, the central issue of legality or illegality could be sidestepped.

It is not quite fair to pass on from this rather negative discursus without clearly making the point that the recovery through the courts of compensation for loss caused by invalid administrative action is much less painful in France than England. The spread of liability is wider; and there is less hesitation over the imposition of liability for the use of licensing powers and of supervisory powers such as ministerial powers

1. (1947) 75 C.L.R. 1.

to supervise private companies, prefectoral powers of tutelle, or social worker's supervisory powers. The latest cases¹ go a long way towards providing a remedy in damages for all illegal decisions other than the most trivial.

But even in this public law system where the two parallel actions provide every excuse for synthesis, a total correlation has never been made. The preference for fault is fairly easy to explain. A first explanation lies in the ethos of sanction which pervades French administrative law and which is epitomised in the picture presented by M. Kahn of an endless dialogue between the judge and administrator in which the latter becomes ever more cunning and the former more creative.² By clinging to the fault principle the judge preserves his discretion to sanction administrative excesses and overlook minor procedural deficiencies. In this way, the necessary balance between administrative morality on the one hand and freedom of action on the other is preserved. This is particularly important in the area of discretionary power, where minor procedural irregularities cannot be allowed to inhibit all administrative action.

The second reason lies in what I have termed the schizophrenic nature of tortious liability. The judge in the area of administrative liability has to balance the two irreconcilable objectives of compensation of victims and prevention of too great a drain on public funds. The first objective is most easily served by a transfer to risk liability the second by preservation of the selective fault principle. As Soulier,

1. Min. de l'Équipement c. Bourasseau C.E. 31 Jan 1969, AJDA 1969, p.194 concl. Guillaume; Min. de l'Intérieur c. Lambert C.E. 16 July 1976 (unreported).

2. Le pouvoir discrétionnaire et le juge administratif, 1978, p.9; Cited above, p.173

who criticises the Conseil d'Etat for its parsimony, has said:

"The judge remains attached to the idea of fault because he is afraid to arrive at any excessive generalisation of State liability. The fault principle, because it is so malleable, allows him great freedom to accelerate or to brake the flow of compensation." 1

A third reason, which cannot be too greatly stressed, lies in the absence of mandatory remedies in French administrative law. Where Courts possess no injunctive powers, the only real remedy for individual victims, and the only real deterrent against wilful disobedience by recalcitrant public authorities, lies in an award of damages. Courts which do possess injunctive powers may refuse to encourage actions for damages on the ground that they do not provide a final solution. A prerogative writ could speedily dispose of an administrative illegality in a single application; actions for compensation might result in a vast number of trivial suits which would drain away public funds without terminating the trouble. Some early cases show the English courts very much alive to the advantages of mandatory remedies. In one typical action² brought against a local authority which had neglected to maintain the river Crane with the

2. Glossop v. Heston and Isleworth Local Board (1879) 12 Ch.D. 102, 115.

1. Loc. cit. p. 1088

result that untreated sewage flowed through the plaintiff's grounds, James L.J. said:

"If the neglect to perform a public duty for the whole of the district is to enable anybody and everybody to bring a distinct claim because he has not had the advantages he otherwise would be entitled to have if the Act had been properly put into execution, it appears to me the country would be buying its immunity from nuisance at a very dear rate indeed by the substitution of a far more formidable nuisance in the litigation and expense that would be occasioned by opening such a door to litigious persons, or to persons who might be anxious to make profit and costs out of this Act of Parliament. It appears to me the only remedy would be by an application for mandamus."

In a slightly later case,¹ Lopes L.J. returned to this theme saying:

"There are insufficient sewers and no doubt this may affect private individuals; but it also affects the whole district. If there is a right of action in individuals affected, there might be a number of actions in which they might obtain damages, and put the money in their pockets, but the mischief might still remain."

The court held, therefore, that the duty to make the sewers was only enforceable by means of the statutory complaints system, a line of reasoning adopted in a later case² against a catchment board for leaving rubble on the river bank which caused flooding which in turn damaged the plaintiff's bridge. The statute contained provision for compensation and this fact proved decisive. Singleton L.J. said:

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1. Robinson v. Workington Corpn. [1897] 1 Q.B. 619, 622. A contemporaneous case, Peebles v. Oswaldthistle U.D.C. [1897] 1 Q.B. 625 decided that mandamus will not lie.
 2. Marriage v. E. Norfolk Rivers Catchment Board [1950] 1 K.B. 284, 298. The case was framed in nuisance and the court held that negligence in carrying out the work might have founded a good cause of action.

"My impression is that the intention of Parliament was to avoid lengthy and costly litigation on questions of this kind and to ensure that anyone who suffered damage in consequence of work done under the powers given by the section should have a right to compensation."

It is time to ask whether there is any prospect of rationalisation in England. That there exists a long tradition in the English caselaw of liability for the malicious exercise of discretionary power, has already been suggested. To some, who prefer to classify tortious liability under nominate torts, this caselaw suggests an embryonic tort, to be designated "misfeasance in public office". The leading authority suggests, however, that "this tort is not firmly anchored in the English caselaw" and that its outlines are amorphous.¹

Whether by way of a nominate tort or by way of a general principle, rapid development would be perfectly feasible. A key decision here could be the Canadian case, Roncarelli v. Duplessis,² in which the law of England and France met, for once, on fertile ground. An independent commission had been established in Quebec, empowered to issue or revoke liquor licences. The plaintiff, who had held such a licence for more than 30 years, was a Jehovah's Witness, and had regularly stood surety for members of the sect on minor public order charges. The Premier of Quebec, who was also Attorney-General, directed the Commission to revoke the plaintiff's liquor licence. The

1. De Smith op.cit., p.297. See also Hogg op.cit., pp. 81-85; Gould "Damages as a Remedy in Administrative Law" [1972] N.Z. Univ. L.R. 105; and Farrington v. Thomson and Bridgland [1959] V.R. 286.

2. (1959) 16 D.L.R. (2d) 689.

plaintiff brought an action for damages under Art. 1053 of the Quebec Civil Code. This article provides, in terms comparable to the French Civil Code, that:

"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another ..."

The defendant was found liable for the substantial losses suffered by the plaintiff on the grounds that he was guilty of "a gross abuse of legal power" which amounted to "a fault engaging liability within the principles of the underlying public law of Quebec". At this stage, the reasoning seemed closer to French law than English and could be said to parallel decisions such as Compagnie de Siguri or Olivier et Zimmermann. One commentator felt that the result had been achieved only by equating "the finding of illegality with delictual responsibility",¹ something which he thought could not have been done in the framework of the common law. But the judgment of Rand J. proves conclusively that this assertion is incorrect and that the common law is capable of reaching an identical result. Basing himself on a classic line of English cases, the learned judge held that the defendant had acted outside the scope of his powers and 'maliciously'. His definition of malice was an extended one, readily identifiable to an administrative lawyer: "Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry".² Although better expressed, this definition is very similar to the passage of Lord Radcliffe in the nearly contemporaneous case of David v. Abdul Caser which has already been discussed.

1. Wade, (1951) 29 Can.Bar Rev. 665, 669-670.

2. At p.706.

The learned judge went on to define good faith in similarly wide terms:

"[Good faith] means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status."

This wide and flexible definition of malice is all very well and few would object to its use in cases such as Olivier et Zimmerman or Roncarelli v. Duplessis. It does, however, entice the courts down the road of collateral challenge of administrative action and oblique review which is fraught with danger.¹ One modern commentator who deplores the new development feels that it may result in unnecessarily tramelling administrative action. She argues:

"The court can considerably narrow the area of discretion by reading in limitations from the context of a statute and knowledge of this limitation by the administrator can be assumed. Malice comes to mean any purpose which the court considers improper."²

It could on the other hand be argued that the cases do not go far enough in divorcing tortious liability from a subjective mental element. The trend of judicial review in both England and France is objective not subjective and in both countries review which depends on value judgments as to subjective states of mind

1. See Central Canada Potash Co. v. Government of Saskatchewan (1978) 88 D.L.R. (3d) 609 where the Supreme Court of Canada refused unanimously to equate ultra vires acts with intimidation.

2. Ganz, "The Limits of Judicial Control over the Exercise of Discretion" [1964] P.L. 367, 375.

is unfashionable. It follows that to enter the field of discretion obliquely is dangerous because of the uncertain ambit of the existing law of torts and its basis in intention. Unlike continental countries, England does not possess a doctrine of abuse of right,¹ which could serve as a foundation for tortious liability and which, because it permits rights to be used only "in satisfaction of a serious and legitimate interest", could help liability to move in the objective direction of review of purposes introduced by Padfield's case.

We are thus thrown back on the doctrine of malice and the contentious torts of conspiracy, intimidation and inducement of breach of contract. These necessarily involve the court in precisely the sort of value judgment which the modern so-called objective principles of judicial review are designed to avoid. One recent case actually links these two controversial political areas. In Meade v. Haringey L.B.C.,² an industrial dispute arose in the course of which school caretakers employed by the defendant went on strike. The response of the local authority was to close all schools. The plaintiff, a parent, sought to challenge the decision, asking for a declaration that the decision was ultra vires and unlawful, together with a mandatory injunction and an interim injunction. The action was dismissed, since by the time of the appeal the schools were already open. Lord Denning,^{M.R.} however, took the opportunity to suggest to parents that an action for conspiracy might be open to them. His reasoning, if unsubstantial, is relevant to the argument

1. This is the unfortunate result of Bradford Corporation v. Pickles [1895] A.C. 587 and Mogul S.S. Co. v. McGregor Gow [1892] A.C. 25.

2. [1979] 1 W.L.R. 637, 648.

because he seems to think that this tort could be founded on agreement to break a statutory duty, which is, once more, an equation of illegality with liability. Lord Denning said (obiter):

"There is another way of putting the case. On the evidence so far, it would appear that, at the behest of the trade unions, the council agreed with them that the schools should be closed. Now seeing that it was a breach of statutory duty (for the schools to be closed) this agreement was nothing more nor less than an agreement to do an unlawful act, or at any rate to use unlawful means. Such an agreement, if it results in damage to anyone, is an actionable conspiracy ..."

If this ill-considered dictum of Lord Denning's were to be acted upon, it would lead the courts straight back to the most contentious area of modern English law.

Recently, in commonwealth jurisdictions, courts have been asked to take vital and substantial decisions concerning the use of discretionary power at ministerial level in a collateral fashion by means of an action in damages rather than application for judicial review. Not surprisingly the courts are not very willing to entertain such applications, preferring to remain within the ambit of the traditional law of negligence. In Takaro Properties v. Rowling,¹ the New Zealand courts were asked to take jurisdiction in an action for damages against the Finance Minister, later Prime Minister, for excess of discretionary power in refusing permission to the plaintiff company to sell shares to a Japanese company. An improper collateral purpose of retaining for New Zealand owners an area of outstanding natural beauty was alleged. The court struck out all causes of action not based on malice or negligence and the judgment of

1. [1976] 2 N.Z.L.R. 658 confirmed [1979] 2 N.Z.L.R. 314.

Beattie J. was confirmed by the New Zealand Court of Appeal.

In a rather similar Canadian case,¹ a court was asked to award damages for conspiracy and intimidation for loss caused by directives issued by the Minister of Mineral Resources in Saskatchewan for the control of the potash mining industry in the province. The directives were subsequently found to be invalid, but the court refused to hold that this invalidity was enough for tortious liability.

Some cases suggest that the effect of the link between illegality and liability is not, as Ganz feared, to narrow the range of discretionary power available to the administration, but to reduce the efficacy of review.

Delvolvé alleges² that the ability to award compensation for breach of the Equality principle (discussed in the next Chapter) has led the courts to refuse annulment in certain sensitive cases. Professor Weil takes this criticism further saying:³

"Up until this point we have been considering discretionary power from the angle of review of legality. It seems to me that we should also think about the question of liability. Take the Navarra case.⁴ Here one finds a Government Commissioner saying, that, in refraining from demolishing a building built without planning permission, the administration had shirked its duties disgracefully. However, he suggests to the Conseil d'Etat - who accept the opinion - that they should not categorise

1. Central Canada Potash Co. v. A-G for Saskatchewan (1978) 57 D.L.R. 3d 123; and (1978) 88 D.L.R. (3d) 609.

2. Le Principe d'Egalité devant les Charges Publiques, 1969, pp.388-9.

3. "Le pouvoir discrétionnaire et la justice administrative" in Le pouvoir discrétionnaire et le juge administratif, op.cit., 1978 at p.47.

4. Ministre de l'Équipement c. Navarra C.E. 20 March 1974 Rec.200 concl. Rougevin-Baville; 1974 R.D.P. p.926 n. de Soto.

this act as a fault but should limit themselves to awarding damages for the injury caused to the plaintiff by the illegal building. This can only mean: that the administration can do what it pleases, but it is to compensate for the injurious consequences of its decisions. If the law is going to evolve in this way, the hoped for expansion of administrative non-fault liability will bring in its wake an embryonic but nonetheless favourable extension of the discretionary power of the administration. This, I think, is an aspect which one should not altogether disregard as of no account."

Rather similar game-playing can be observed in the English case of Hoffmann-LaRoche v. Environment Secretary,¹ where, in the course of an interlocutory application, the legal status of a ministerial statutory order made under statutory authority was raised. In a strong dissenting judgment, Lord Wilberforce accused the courts of manipulating the concepts of nullity or voidness and voidability to avoid payment of compensation. He said:

"In truth when the court says that an act of administration is voidable or void but not ab initio this is simply a reflection of a conclusion, already reached, on unexpressed grounds, that the court is not willing in casu to give compensation or other redress to the person who establishes the nullity. Underlying the use of the phrase in the present case, and I suspect underlying most of the reasoning in the Court of Appeal, is an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action. It is this which requires examination rather than some supposed visible quality of the order itself."

1. [1974] 3 W.L.R. 104, 125. Compare Lord Diplock in the Dorset Yacht case, cited above p.211 And see the Central Canada Potash case, (above) where the court expressly approved the reasoning of the majority judgments in Hoffmann-LaRoche.

In short, the extension of administrative liability may actually weaken judicial review. This is a very real possibility and a result which we may not desire.

Procedural difficulties over ouster and limitation also complicate the issue. In Smith v. East Elloe R.D.C.,¹ the plaintiff complained of bad faith in the making of a compulsory purchase order. A preclusive clause provided that, after the expiry of a six weeks period, the order should not be questioned in any legal proceedings whatsoever. An action for damages for trespass and a declaration was held to be barred. The decision has been much criticised, yet any other solution would seem to invite the result which Hauriou feared would flow from the Blanc decision: i.e. the swallowing up of the application for judicial review in the action for damages. Early cases on statutory duty make it clear why the courts fear such a result.

I have left to the last one interesting case which goes much further than the English caselaw in developing an action for 'misfeasance in public office'. Indeed, it goes about as far as it is possible to go in diluting the notion of malice or deliberate wrongdoing and substituting the old, nominal, trespass test of intention.

This case is Beautesert Shire Council v. Smith.² In this case the

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1. [1956] A.C.736; Wade 85 L.Q.R.198; de Smith [1969] C.L.R.161; Alder "Time Limit Clauses and Judicial Review - Smith v. East Elloe Revisited" (1975) 38 M.L.R.274, 287-291; Gould, op.cit., 112; Fridmann op.cit., above. See also Smith v. Pywell 1959 C.L.Y.3215; Reg.v. Environment Secy. exp. p. Ostler [1976] 3 W.L.R. 288.
 2. (1966) 120 C.L.R. 145 (High Court of Australia); Dworkin & Harari, "The Beautesert Decision - Raising the Ghost of the Action upon the Case" (1967) 40 A.L.J. 296, 347 argue that the decision introduces a "prima facie" tort doctrine into this area of law.

municipal council, acting under a mistaken belief that it was authorised so to do, extracted gravel from a river bed, indirectly damaging the respondent's well. Although a licence could have been obtained, this had not been done, and the operations were technically illegal. The council was held liable on the ground that "a person who suffers harm or loss as the inevitable consequence of the unlawful intentional and positive acts of another is entitled to recover damages from that other." The court hinted that a still wider proposition could be justified. Thus technical procedural irregularity was equated with liability. The case affords the courts of the common law jurisdictions the same chance of substituting risk liability for fault as the Olivier et Zimmerman ruling offered to the Conseil d'Etat, a chance which we have seen, the Conseil d'Etat never used.

It is now clear that a link between illegality and liability is capable of producing two diametrically opposed results. First, it may be used, as in England, to restrict liability. This is an undesirable effect, which some of the greatest of our common law judges have rightly rejected. Secondly, the link may be used to transfer to the government the risk of all loss flowing from invalid administrative action.

In practice, however, we have no idea what the cost of such a change would be because the present preference of the judiciary for the fault principle is concealing the cost and disguising the number of potential claims. The cost could be great—as the Hoffmann-La Roche affair, discussed in the next chapter, reminds us.¹ It is, of course, possible that a model, based on compensation in planning cases, could be

1. The decision of the French President to revoke 5 legal grants of planning permission cost the French State F100 million in 1976-8 and further claims of F4 million were expected: *Le Monde*, 21 Nov. 1978.

designed to help calculate the costs. In the absence of hard data, however, we must be careful not to discount the cost of a change to risk liability.

Secondly, we ought not to underrate the effect on our legal system. The inevitable result of a new right to compensation for invalid administrative action would be an increase in judicial discretion. Manipulation of legal concepts such as causation, voidness or voidability and illegality would certainly ensue. This is also discussed in the next chapter. Such a radical change would entail a major change of heart on the part of the administration and the judiciary, each traditionally cautious in the use of public funds. The danger is that the judiciary may be tempted, because of government inertia, to walk down the alluring path unawares.

We ought not to accept too quickly that such a move is desirable. The argument is usually founded ^{either} on profit and loss theories of liability or on the principle of Equality before Public Charges. To use Laubadère's formulation:

"The basis of administrative liability can actually be traced to the following idea: the public services operate in the interest of the community at large ...

It is only fair that the community, which derives benefit from these services, should support the cost of compensation where the operation of a given public service causes special damage to an individual."¹

1. de Laubadère, *Traité de droit administratif* 6th edn., 1973 Vol.1, p.679; Eisenmann, *op.cit.*, above; Berlia, "Les fondements de la responsabilité civile en droit public français", *R.D.P.* 1951 p. 685; Soulier, *op.cit.*, above.

On the other hand, the warning of Professor Weil must not go unheeded. There would almost certainly be a change in the nature of judicial review. Review might easily be weakened if the administration were allowed regularly "to purchase illegality". This undesirable practice ought emphatically to be discouraged because of its detrimental effects in the area of civil liberties.¹

Finally, the political consequences of a move to risk liability must be considered. The effect of paying compensation in every case of invalid administrative action would be to create a large but necessarily incalculable class of potential claimants whose rights to compensation would depend not on the government but on the judiciary. The result could only be a diminution of the government's power to control public expenditure and a considerable increase in the discretionary powers of the judiciary. Whether one wishes the judiciary to undertake this type of decision depends not only on one's political views but on one's assessment of the legal process as an efficient machine for deciding questions of general policy. In the next chapter I shall argue against its efficiency.

1. See further Harlow, *op.cit.* [1977] P.L. 227, 234.

In the course of the last chapter it was argued that it was desirable and legitimate to sever the restrictive link between illegality and liability. For the purposes of this argument, an illegal act was assumed to be one which is ultra vires and unreviewable, or, in the terminology of the Anns case and the Dorset Yacht case, an act which is contrary to the rules of 'public law'. This narrow definition was seen to be capable of ambiguity. It may be given a substantive content: if an illegal act is one vitiated by some excess of power irrespective of whether or not it is reviewable, then Smith v East Elloe R.D.C. is correctly classified as a case of compensation for the illegal use of power. If, on the other hand, a procedural test is used and an illegal act is one which is capable of being reviewed, Smith v East Elloe R.D.C. is instantly converted to a case of compensation for the legal use of power. It is the prospect of such a reclassification which worries those who find 'liability' in respect of 'legal' administrative actions an unthinkable contradiction in terms.

At a semantic level this difficulty can quickly be untangled since 'illegality' is not customarily defined solely in terms of 'public law' or ultra vires. It is an inherent part of the common law tradition to define a legal act as one which is in conformity with statute and the common law. An act which involves the breach of an obligation imposed by the common law is in this sense 'illegal'; indeed, tortious liability has been defined as "the breach of duty primarily fixed by the law".¹ Thus, in imposing a duty of care the court effectively circumscribes the area of legality and declares the administrative act 'illegal'.

¹ Winfield, *Province of the Law of Tort*, p. 40.

To take another simple example, a conspiracy at common law is defined as an agreement to commit an unlawful act or to do a lawful act by unlawful means and it has long been admitted that an 'unlawful' act can be construed to include acts which amount to torts or even breaches of contract as well as criminal acts.¹ Were it otherwise, the courts would lose most of their lawmaking powers in the area. Again, the prerogative powers are traditionally defined as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown."² It is well-known that this allows to the courts the power of delimiting the ambit of the prerogative powers in the same way as they delimit the ambit of statutory powers by the practice of statutory interpretation.³

At this purely semantic level, it is probably more logical to correlate 'illegality' with 'liability' than to impose liability for an act which the court states at the same time to be 'legal'. Certainly the English courts have always favoured this approach. Yet it has its problems for the judicial conscience since, to impose liability, the judge has to make a finding of 'illegality'. This seems to result in cutting down the area of discretion possessed by the government or by administrators. This in turn is seen as an unwarranted departure from the rules of 'public law' or 'ultra vires': first, because the imposition of liability seems to have narrowed the concept of 'ultra vires', secondly, because the court seems to have broken an old and accepted convention that courts will not slip inside the charmed circle of politics or policy by questioning the manner in which governmental (including prerogative) power is exercised or by substituting their own discretionary decisions for the discretionary decisions of an administrative body. It is difficulties of this kind which led

1 Street on Torts p. 348; Marrinan v Vibart [1963] 1 Q.B. 528; Reg v Kamara [1973] 3 W.L.R. 198. And consider Shaw v DPP [1962] A.C. 220; Reg v Kneller [1973] A.C. 435.

2 Dicey, the Law of the Constitution, p. 424. See also Markesinis "The Royal Prerogative Re-visited", (1973) Cam. L.J. 287.

3 Laker Airways v Department of Trade [1977] Q.B. 643.

to the doubts expressed by Lord Diplock in the Dorset Yacht case.

Why should this be so difficult? By phrasing the debate in formalistic legal terms I believe we have obscured its real nature. Behind these twin concepts of 'legality' and 'illegality' lies concealed the reality of Sovereign power and we cannot divest the debate of its political dimension simply by asserting that "maladministration is not in the true modern sense of the word political."¹

Largely for historical reasons, the frontier between the 'political' and the 'justiciable' - if it exists at all, which some would deny - has been left deliberately obscure. The historical experience of the Conseil d'Etat, or of the United States Supreme Court, both countries with a tradition of written constitutions, suggests that this may have something to do with the difficulty of devising appropriate legislative formulae. At a more theoretical level, the power of the judiciary to define its own jurisdiction is clearly seen as an essential corollary of the doctrine of Separation of Powers. To allow the legislature to have the last word on jurisdiction allows it to encroach upon, or even swallow up, the judicial function. Thus many Commonwealth constitutions provide that judicial functions may only be entrusted to "courts" and even in England where theories of mixed or balanced government are preferred,² the legend is not without potency. On those occasions when the legislature attempts to curtail the jurisdiction of the superior courts, the political opposition frequently argues that these attempts threaten the cherished tradition/ of judicial independence. The legislature prefers on

1 Mitchell "Administrative Law and Parliamentary Control" (1967) 38 Pol. Quarterly, 360.

2 Vile, Constitutionalism and Separation of Powers, 1967.

balance to let well alone or, at the most, to resort to the oblique techniques of directing cases to administrative tribunals and of ouster of judicial review. Such devices, however, can never be final. The courts are well aware of this and have occasionally played some very dangerous games in order to repossess themselves of their ultimate right to "declare the law".¹

The judges are perfectly alive to the dangers of the games which they play and prefer to avoid head-on conflict by the exercise of judicial self-restraint. Occasionally, warning shots may be fired, as in a recent case² where counsel for the Home Office allegedly told the Court of Appeal that, in the event of the court deciding against him, "it would not be long before the powers of the court would be called in question." The Master of the Rolls, an astute politician, took care to draw attention to this piece of rhetoric, piously hoping that it was "not said seriously, but only as a piece of advocate's licence." Such exchanges are, however, exceptional. Normally a tacit understanding or constitutional concordat prevails. On the one hand, it is accepted that the government will obey the law by conforming to the judgments of the courts. On the very rare occasions when it fails to do, so the Rule of Law myth is prayed in aid to rally public opinion to the support of the courts.³ On the other

1 Anisminic v Foreign Compensation Commission [1969] 2 A.C. 147.

2 Congreve v Home Office [1976] 2 W.L.R. 291, 308. The exchange invoked some public response see The Times, 9 December, 1975.

3 See particularly, the Clay Cross case, Bernard Levin, The Times March 26 and April 8 1975; the Burmah Oil case discussed below. And see Harlow, "Administrative Reaction to Judicial Review" [1976] P.L. 116; Griffith, "The Political Constitution" [1979] 42 M.L.R. 1, 15.

hand, the courts agree to respect the privileges of Parliament and not to impinge too greatly upon the freedom of the government to govern. If they do not restrain themselves, then the courts (and the Rule of Law) will be endangered because the government may use its legislative superiority to strip the courts of their powers.¹ The superior role of Parliament is supported and furthered by the legend that judges are never lawmakers and that their function is to expound the law which they do simply by 'interpreting' the wishes of Parliament².

All we are saying is that judges in fact possess an undefined and indeterminate political role which they may be anxious to disguise. The political role of the Supreme Court in the United States has, of course, been recognised for many years. In France, too, academics have for many years stressed the political role of the Conseil d'Etat and pointed to the special ethic which the Conseil seeks, through the medium of the caselaw, to impose on governments and administrators. Not only is this function admitted quite openly, but it appears to be a matter of pride.³ The position was summarised by Waline in a well-known article in which he said:⁴

- 1 See Lord Parker, the Lord Chief Justice, in a speech reported in The Times, 8 April 1971.
- 2 Lord Hailsham, *The Dilemma of Democracy, diagnosis and prescription*, 1977 Chap. XVI, p. 104.
- 3 Loschak, *Le rôle politique du juge administratif français*, 1972 contains a very full bibliography; Hamson, *Judicial Control of Administrative Discretion*, 1956; Kessler, *Le Conseil d'Etat*, 1968 is a sociological study of the attitudes of members of the Conseil d'Etat and of its effects on public life.
- 4 Waline "L'action de Conseil d'Etat dans la Vie française", *Livre Jubilaire du Conseil d'Etat 1950*, p. 131.

"Thus, throughout its history, the Conseil d'Etat has been involved in the great events of French political life, and, more particularly, it has in many respects contributed to the moulding of general social conditions and of economic affairs. Viewed as a whole, its role has been to soothe political passions and to create the legal conditions for social and economic progress."

Professor Rivero, in a later article,¹ referred to the French administrative judge as a "judge who governs" and went so far as to use the phrase "government by judges". In the area of administrative law, Rivero submitted that politics and law were inextricably linked. This was partly attributable to the absence of codification which - and the parallel with the unwritten common law is self-evident - permitted to the judge an unusually creative role. Rivero also pointed to the unwillingness of the administrative judge - and again the parallel with England is obvious - explicitly to set out the ethos or credo on which its interventions were based or, in other words, to admit to his normative function. He said:

".... it is to the Civil Code that the civil judge must, above all, turn for principles; the administrative judge, on the other hand, has nowhere to look except to a particular understanding of the relationship between the individual and power. This is derived from the judge's consciousness and his conscience, and, in his eyes and for those purposes, it comes to embody the Just Man. The administrative judge has never made any claim to having created this embodiment of justice. Indeed, until very recently, he never took the trouble to elucidate his ideal, simply because it seemed to go without saying and to embody a general public sentiment."²

1 "Le juge administratif français: un juge qui gouverne?" D. 1951 Chr. 21.

2 Loc. cit. above. Compare Lord Devlin "Judges, Government and Politics" (1978) 41 M.L.R. 5011.

But it is not only that the administrative judge "governs". He may admittedly on occasion use his powers to deaden the impact of what he sees as "the sudden changes introduced into our public life by the caprice of our lawmakers and the innovatory tastes of our constitution makers and, in so doing, to blunt the cutting edges of French political life." It is more that the political function of the judge is inescapable because it flows inevitably from the nature of his task. In other words:

"It is quite certain that the very material of his task leads the administrative judge towards options of a political nature. As judge of the relationships between the State (Pouvoir) and citizens, between the governors and the governed, he is led by the force of circumstances to pass judgements, the repercussions of which will be felt at the political level."¹

Rivero, in a cynical and witty pastiche of Voltaire, has pointed to the essentially ambiguous nature of the declaratory theory of law.² It may be used, on the one hand, to deny the role of the judge as lawmaker and to refute allegations of "government by judges". Equally, it can be used as an excuse for the relative impotence of the judge in securing obedience to his orders or, to use the English terminology, in ensuring the Rule of Law. Once again, however, this deficiency may be read as a deliberate move in a political game. By robbing decisions of their practical efficacy, it is possible to reassert the justiciability of political issues and preserve the

1 Weil, "Le Conseil d'Etat statuant au contentieux: politique jurisprudentielle ou jurisprudence politique" Annales de la Faculté de droit d'Aix, 1959, p. 281, 282.

2 "Le Huron au Palais-Royal: ou réflexions naïves sur le contentieux administratif" D 1962 chr. 37. Clearly this has been important in political theory since the Revolution: see the ideas of Troper, discussed above pp. 19-21

moral supremacy of the court without risking its continued existence.¹ Such a solution is likely to be a particularly attractive option in any system where the paradigm of 'L'Etat légal' rules just because, in such a system, it is of primary importance that the widest possible range of issues shall be justiciable.

The unwillingness of the English judiciary to admit the extent of their political role may be largely due to their exposed position in the absence of any constitutional protections for the judicial function. A further constitutional factor is the importance which attaches in a system of mixed government to the ideal of judicial independence. It seems shocking to advocates of the 'balanced' constitution that the State may in fact be monolithic rather than dualist. The idea of "the political constitution", in which Professor Griffith has presented his vision of the game of politics as a 'jeu sans frontières', thus becomes a dangerous heresy. The idea of "the politics of the judiciary"² is, however, no less shocking, because the myth of the independence of the judiciary may be linked to the declaratory theory of the judicial function to drain decisions taken in a court of law of their political content. The consequences of this are enormous in terms of public support. Accepting the myth a little too easily, Lévy writes:³

"...the English judge is placed in an infinitely more favourable position in respect of the administration than are French civil courts. He enjoys all the prestige which history has imparted to the English judicial function as well as a well-deserved reputation for impartiality which gains for him the support of public opinion [in a society] which has an appreciation of its rights and duties. It would be absolutely unthinkable for a public servant even to consider refusing to execute a court order. If he did so, he would certainly go to prison however senior he was, and nobody would find anything to criticise in this result."

¹ Mestre, Le Conseil d'Etat, protecteur des prérogative de l'administration, 1974, pp. 59-83; Rivero, loc. cit.

² Griffith, The Politics of the Judiciary 1977.

³ op.cit. pp.

But a member of the Conseil d'Etat has pointed to the similarity between the High Court and the Conseil d'Etat. Again accepting too easily the myth of impotence before the administration which so often masks connivance, Pěpy¹ points to a number of structural similarities between the two great institutions in matters such as: the esprit de corps of Bar and Bench; irremovability and independence; and the high status of the judge. Pěpy concludes that the role of the Conseil is nearer to that of the Supreme Court, but that its "atmosphere is nearer to that of the Law Courts than to that of the Palais de Justice." The English courts, in other words "could an' if they would". Something seems on occasion to hold them back.

To summarise the argument at this stage, I believe the modern Conseil d'Etat and High Court to be rather similar institutions which embark upon their task with rather similar advantages. I believe too, that it is immaterial whether courts assert their jurisdiction by granting 'compensation' for 'legal administrative action' or by imposing 'liability' for 'illegal' administrative action. Their goal is the same even if they follow a different path, and the game is the same even if there is minimal variation in the rules. It is the assumption of jurisdiction which offends. The debate cannot - and ought not to be - obscured by legal subterfuge. The main dangers can, of course, be avoided by a refusal to assume jurisdiction. But although I have suggested that judges as well as lesser mortals know which side their bread is buttered on, I would not wish to deduce that such decisions are always the coward's way out. The court's motive in declining jurisdiction may be to force back into

1 "Justice anglaise et Justice administrative française" (1956) 10 EDCE p. 159, 166. The piece is a review of Hamson's Judicial Control of Administrative Discretion, which may have misled its author in certain respects.

the conventional political system decisions which it believes can more conveniently be taken there.

I descend rather gratefully from this esoteric atmosphere to an examination of the actual caselaw, in which many of these arguments are openly discussed. In Burmah Oil v Lord Advocate¹ the valuable oil installations of the appellant company had been destroyed on the orders of the Crown during the 2nd World War to prevent their falling into the hands of the advancing Japanese. After the war, the company, in common with many others who had suffered loss by war damage, was awarded ex gratia compensation of £4 $\frac{1}{4}$ million. It would have been normal practice for the Crown to demand an indemnity from the company, but this was not done to avoid prejudicing forthcoming legal proceedings in the Burmese courts. It was at all times made clear by successive Governments, however, that the award was final.

Many years later, the company brought an action for damages in the Scottish courts, and it was argued on behalf of the Crown that there had been a lawful exercise of the prerogative right to sequester private property in defence of the country in time of war. The Scottish courts, relying on the civilian concept of 'eminent domain', held that, with the single and severely limited exception of 'battle damage', private property cannot be expropriated or used for public purposes without compensation by use of the prerogative powers and without express statutory authority.

This decision was upheld by a majority of the House of Lords. The reasoning is unassailable. In declaring that the prerogative power of sequestration automatically entails a right to compensation, the court is delimiting the extent of the royal prerogative and narrowing the area of executive immunity. By stating that sequestration is legal only if compen-

1 [1964] 2 All E.R. 348.

sation is made, the court in effect asserts that, at common law, the administration may act only if it is prepared to pay. If it is not prepared to pay, it must seek the help of the legislature. If it fails to do so. and subsequently refuses to pay, or if a dispute over compensation arises, then a justiciable issue exists.

In the Burmah Oil case, the principle of compensation was not in issue; indeed, the company had already received an ex gratia payment. The quantum of compensation was admittedly in dispute, but, more important, the nature of the appellant's claim, legal or equitable, ex gratia or as of right, was at stake. The real issue was nothing less than the justiciability of the claim.

That the court understood the dimensions of the affair is made very clear in the dissenting judgement of Lord Radcliffe who said,¹

"It is just in that distinction between what is expected by public sentiment and what is actually obtainable by legal right that our present difficulty lies. We know that by long tradition private property appropriated for public use is treated as the subject of compensation and we look to the government to secure this, either by moving Parliament to provide it or by some ex gratia payment which will afterwards receive Parliamentary sanction"

Lord Radcliffe went on to justify his preference for extra-judicial redress on the grounds of convenience and public policy:

"Such damage [i.e. war damage] is a matter, being unpredictable in extent and range, that must be controlled by that department of the sovereign power that is responsible for the raising and expenditure of public money, None of this is an argument against the propriety or indeed urgent desirability of the state providing compensation schemes to take care, so far as possible, of all war damage, of person or property. It is for those who fill and empty the public purse to decide when, by whom, on what conditions and within what limitations, such compensation is to be made available."

¹ At pp. 371, 375-6.

An equally powerful intuition that the government of a democratic society ought not to rely on archaic residual privileges in addition to the plenitude of legislative powers which it possesses today, prompted the rejection of this argument. This intuition was probably correct, although the heat generated by the ensuing collision with the legislature, deflected attention from the merits of Lord Radcliffe's argument.

This was doubly unfortunate, because the court, although admitting the principle of compensation, had expressed doubt about proof of damage and causality.¹ Thus, the matter might have been resolved by the courts themselves without recourse to the unpopular method of retrospective legislation. Secondly, as the parliamentary debate makes plain, there was much merit in Lord Radcliffe's argument.

Speaking in the House of Commons on behalf of the government, Niall MacDermot pointed to the hidden dimensions of Burmah Oil's claim, the inappropriateness of damages as a means of redress, and the possibility of injustice. He said:²

"...the scale of losses in total wars in this century has been so formidable as to make the idea of their reparation in full impossible There has, therefore, emerged.....the concept of sharing the burden of losses in the country as a whole, on whatever scale the country as a whole can reasonably be held to afford.

This carries two implications: first, there must be some equitable scheme for distributing such compensation as may be afforded in relation to the losses suffered by individuals; and secondly, opportunity must not be left open to any special groups amongst those who have suffered loss to claim redress on a preferential scale. Any entitlement to compensation on an indemnity basis of common law would, in effect, give preferential treatment to those enjoying it."

1 p. 362 (Lord Reid); p. 394 (Lord Hodson).

2 H.C. Deb vol. 705 cols. 1092-3

I have cited this passage at length, because it seems to me to epitomise the issues which arise in cases in which one departs from the classic fault based actions for civil (tortious) liability. First, the argument is not really one about ends but means. The principle of compensation is not denied but the choice of the courts as a means of distribution is disputed. Secondly, the measure of compensation is in issue. The obligation to compensate is there, but full reparation on the basis of legal damages is not necessarily appropriate. It has to be shown, if the courts are to be given jurisdiction, that they are capable of devising a model different to the damages model. Finally, the basis of compensation, as in the case of the Criminal Injuries Compensation Scheme, lies not in the idea of tort or wrongdoing, but in notions of equity and solidarity.

Mitchell, criticising the Burmah Oil decision for its lack of legal logic,¹ suggested that a better basis for liability would have been the French principle of 'Equality before Public Charges' which many publicists suggest to be the basis of all government liability. This criticism may be dismissed at the outset. Admittedly, in the Burmah Oil decision, there was much reference to the Scots law principle of 'eminent domain', which clearly parallels (and may easily spring from the same root as) the Equality principle. English law is, however, quite capable of throwing up similar principles. The House of Lords specifically approved in the Burmah Oil case the dictum of Lord Moulton in an earlier English decision that it is "equitable that burdens borne for the good of the nation should be distributed over the whole nation".² This is a clear formulation of the Equality

1 [1968] P.L. 201.

2 A-G v De Keyser's Royal Hotel [1920] A.C. 553, 554, cited [1964] 2 All E.R. at p. 355 (Lord Reid).

principle, accepted as the rationale of liability not only by the courts but, as I have pointed out, by Parliament.

In France, the principle of 'Equality before public charges' derives essentially from Article 13 of the Declaration of the Rights of Man 1789, which states:

"For the maintenance of the forces of law and order and for the expenses of administration a general contribution is indispensable; it must be equally shared between citizens according to their means."

This Article is obviously no more than a principle of taxation which contains a tacit reference to the greatly resented practices of the Ancien Régime of distributing the tax burden inequitably by exempting certain classes of the population - particularly the nobility - from liability. Coupled with this dislike of the inequitable burdens of the tax system, went resentment at the failure of the Royal government to make reparation for damage caused by state operations such as public works, and for war damages.

This resulted, very quickly after the Revolution, in legislation to provide compensation for expropriation and damage caused by public works.¹ The underlying rationale of the Equality principle therefore lies in the protection of private property and in this sense has much in common with the more limited common law maxim that "a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms."²

1 Kocehlin, op.cit. above, paras. 306-319.

2 Colonial Sugar Refining Co. Ltd. v Melbourne Harbour Trust Commissioners [1927] A.C. 343, 359 (Lord Warrington); De Smith op.cit. p. 87.

The emphasis of the 1789 Declaration was on civil liberties, but it has been said that the social order which resulted was "profoundly individualistic and weighted in favour of a minority of property owners".¹ This society was capable, gradually and at a later date, of transforming the statutory schemes into a general principle of liability which, in the words of Duguit, tended "to recognise the liability of the State in every case where its intervention, although legal and without fault, imposes on an individual or a group a charge heavier than that imposed on others."²

Not only is this a relatively late development, but it is supported on a fragile base, since the texts of the laws are themselves wholly inexplicit as to the basis of compensation, while the caselaw is silent as to the derivation of the principle. It may be, therefore, that the 'transformation' of the Equality principle into a basis for liability is largely due to Duguit himself, and that his edifice existed largely in his own mind. Duguit's espousal of the cause seems to have sprung from his doubts over the compatibility of liability with Sovereignty and his belief that the State, as a corporate entity, was incapable of fault. Seeking a new basis for liability in public law, he found it in the theory of 'mutual assurance' saying:³

"Finally, since the public service is established and ought to function in the interest of everyone, if special damage is caused to an individual through its irregular operation, it is legitimate that the cost of reparation of the damage should be supported by the goods which are assigned to the use of the public service in question."

- 1 Kamenka and Ehr - Soon - Tay, "Beyond the French Revolution: Communist Socialism and the Concept of Law" (1971) 21 Univ. of Tor. L.J. 109, 114.
- 2 Transformations, p. 228. See further Delvolvé, *Le principe d'égalité devant les charges publiques*, 1969, pp. 8-15.
- 3 *Traité*, vol. 2, p. 69; and see vol. 4, p. 468.

Elsewhere Duguit formulates his theory in terms of risk:¹

".....it is in no way this pretended fault of the State which founds its liability. It is not a question of liability arising from the legal doctrine of causation (imputabilité) but merely a question of finding out which funds (patrimoine) will finally support the risk of damage flowing from the operation of a public service."

Radical as these propositions sound, and concerned as Duguit was to deny the link with fault, it is quite possible in practice to square both propositions with the fault-based liability which formed the staple fare of the caselaw. The use of the term "irregular operation" suggests either fault or illegality, and in another passage Duguit implied that the "risk" supported by the public funds would normally be the risk of fault. Speaking of liability to the victims of miscarriage of justice, acquitted on appeal - surely the paradigm case for application of the Equality principle -² Duguit argued that³

"The State is not liable because, at the end of the day, the judicial system has functioned perfectly. The innocent person has been acquitted by the operation of the legal appeals machinery and he who owed nothing has received a full and complete satisfaction. Thus no one has anything to complain about. If the first instance judge is guilty of a personal fault, this could entail his personal liability; but this is quite a different matter."

This passage seems wholly to undercut Duguit's 'mutual assurance' principle and to reveal the theory in its true colours as an alternative explanation for, or perhaps an underlying rationale for, the legal liability of the State assessed along traditional lines.

The same observation could be made of the Equality theory propounded by Cornu. At the end of an exhaustive comparison of civil and administrative liability, which led him to deduce their inherent similarity in virtually every

1 Transformations, p. 231. The translation is rather a free one.

2 Street, Government Liability, p. 41; Delvolve, op.cit. p. 362.

3 Transformations, p. 251.

respect, Cornu advanced the view that both public and private liability derived from a right to personal security.

"This requirement penetrates to the heart of modern consciousness in one of its fundamental aspirations. In this craving for security, one can see mankind's most fundamental effort to find the surroundings or climate in which his activities will be able to expand freely. Thus security is not an end in itself but a means which will permit individuals to realise their goals. Individual human beings have an indefeasible right and a natural duty to act, and to act they need security." ¹

Cornu goes on to explain that the victim is entitled to restoration of his 'security' when this is invaded by another individual. In civil law, the basic equality between the parties means that reparation will normally follow only in the case of fault. In public law, on the other hand, the parties are always, by definition, unequal while the individual's right to security, measured against the right of other individuals as represented by the collectivity, is relative. The measures of the relativity are the concepts of 'normality', 'equality' and 'profit'.

Cornu argues:²

"If the collectivity owes equal security to everyone, this equivalence involves a measure of proportion. There is no question of absolute equality but only of equality calculated with reference to the victim's own situation as against the service or activity which causes the damage. This procedure alone allows one to establish the "personal equation" of victim and service and to balance the profit which the victim obtained against the loss which he has suffered."

These passages seem to have more to do with moral philosophy than with legal liability. They do, however, illustrate two of the themes which run through the public law theories of administrative liability. First, every theory has to grapple with a number of disparate heads of liability which,

¹ op.cit. pp. 271-272.

² At p. 279. The principle is used to justify the distinction between third parties and users of the service so important in the caselaw of the Conseil d'Etat.

ultimately springing from statutory authority, have been freely developed by a very creative caselaw, and provide a coherent explanation of this phenomenon. Secondly, the three apparent explanations of administrative liability - fault, risk, and Equality - in fact may be reduced to two, since the authors are able at will to explain Equality in terms of 'risk' or 'profit and loss' or, vice versa, to explain risk in terms of 'Equality' or 'mutual assurance'. Worse still, it is possible, as Duguit does, to explain fault in terms of risk, or, as Blaevoet¹ does, to explain both risk and equality in terms of fault, i.e. a failure by the administration to preserve the equality of individuals. Ultimately these syntheses appear to depart so greatly from reality as to be almost valueless.

In the final conclusions to his study, adopted as the classic work by French public lawyers, M. Chapus confirms this suspicion:²

"We conclude that the principle of the equality of citizens before public charges is, in the state of the actual law today, totally devoid of any relevance to the problem to which it purports to be relevant. It seems that, in placing this principle as the foundation stone of the liability of public authorities, the theorists have succumbed to the double gratification of justifying every case of liability in terms of a single idea and of labelling the practical results of the caselaw of the Conseil d'Etat with one of the fundamental principles of our public law. They have no doubt been led further down this road by the fact that the liability of public authorities (or at least the public law of the liability of public authorities) could in this way be clearly distinguished from liability in private law, and this provided an admirable illustration of the dogmatic principle so dear to the heart of public lawyers, i.e. the principle of the autonomy of public liability."

This conclusion of M. Chapus points to the likelihood that a single, unitary explanation is not possible for all cases of government liability which

1 "De l'anormal devant les hautes juridictions civile et administrative" 1946 JCP 560.

2 Op.cit. p. 346.

do not in reality share common features. One ought therefore to accept theoretically "a multiplicity of solutions as natural to civil liability."¹ This deduction would have the merit of harmonising with the practice of the courts, where pragmatic solutions are usually acceptable.

Two celebrated decisions establish the Equality principle in the judicial vocabulary of administrative liability. Although they differ as to detail, they are so closely connected that one author calls them "two branches springing from the same trunk".² Significantly, each case involves judicial trespass on a hitherto sacrosanct area of governmental activity, and in each case the Equality principle is invoked to minimise this trespass. In the first case, Couitéas,³ the applicant was the owner of a large estate in Tunisia, which was actually occupied by 8,000 nomadic tribesmen. He obtained an order from a civil court for possession of his estate, but when he called upon the authorities for help in enforcing the decision they were understandably reluctant to act. He demanded compensation. Some years later the Conseil d'Etat found in his favour. The judgment declares the refusal of the Government to act perfectly lawful, but adds:

"...the loss which results from this refusal, if it exceeds a certain length, cannot be said to be a charge falling normally on the party, and it is for the court to determine at what point the community must take over responsibility for the loss."

There are two remarkable points here. First, the court prefers to create a right to compensation rather than to annul for illegality. This may be because of the nature of the case, an act of government policy

1 Berlia, "Fondements de la responsabilité civile en droit public français" RDP 1951, p. 685, 701. The author rejects this conclusion, favouring a single explanation for government liability of "Socialisation of risk", however.

2 Kahn, "L'évolution de la jurisprudence relative à la responsabilité du fait des lois", (1962) 16 EDCE p.63.

3 Couitéas, C.E. 30 Nov. 1923, S 1923.3.57 n. Hauriou G.A. No. 45.

equivalent to an Act of State. Secondly, the court allows itself a considerable latitude to determine the point at which liability accrues, and even if it accrues at all. In this respect, the decision presents a marked contrast to the Burmah Oil case which gives clear directions as to the use by the executive of the prerogative powers. The court here seems to acknowledge an equitable 'claim', a chance to apply to a court for compensation, rather than a legal 'right'. In Dworkin's terminology the case establishes a 'principle' rather than a 'rule': it "does not even purport to set out conditions which make its application necessary."¹

The decision of La Fleurette² in 1938 extended the Couiteas rule. The applicant company made an artificial cream, the manufacture of which was subsequently prohibited by a statute intended for the protection of the dairy industry. The legislation in question made no provision for compensation, but the Conseil d'Etat held that an indemnity was nonetheless due.

Conscious of the dangers of its chosen course, the court was careful to make reference to the supposed intention of the legislature, stating that:

"nothing, whether in the text of the law itself, or in the travaux préparatoires, or in the surrounding circumstances of the affair, could lead one to suppose that the legislature intended that this charge, which would not normally be borne by the applicant, should in this instance fall upon him".

The logical deduction to be made from the absence of provision in a given statute for compensation - or for compensation for loss a given kind - is that the legislature did not intend that loss to be compensated.³

1 Taking Rights Seriously, 1977, p. 26.

2 Ste anonyme des produits laitiers "La Fleurette" C.E. 14 Jan 1938, R.D.P. 1938 p. 87 concl. Roujou n. Jèze.

3 Hammersmith Railway v Brand (1869) L.R. 4 H.L. 171. See also the remarks of the House of Lords in Buchanan v Babco Forwarding & Shipping (U.K.) Ltd. [1977] 3 W.L.R. 907.

To cite Teissier:¹

"Legislation is the prime example of an act of Sovereignty and the damage which it causes to individuals, in the absence of provision to the contrary, cannot give rise to an action for damages against the State".

A court which intervenes to fill such gaps is trespassing on legislative territory, and the substitution of the term 'compensation' for 'liability' or 'legal' for 'illegal' administrative activity cannot disguise this fact, any more than it can be disguised by deferential references to the legislative intention. If it attempts to apply the compensation principle generally, the court inevitably provokes a conflict with, and invites retaliation from, the elected legislature. It is not surprising to find for example, that the celebrated La Fleurette rule has been applied only once thereafter; that the second decision was never implemented by the government; and that it involved the Conseil d'Etat in a struggle exactly comparable to that provoked by the Burmah Oil decision.² Conscious of this ever present danger, the court seeks to escape by creating a series of casuistic exceptions to the supposed rule. In this respect, the French cases which attempt to formulate the conditions in which the Equality principle becomes operative,³ are directly comparable to the illogical and contradictory English rules concerning liability for breach of statutory duty.⁴ The Equality principle is seldom held to apply⁵ and

1 La Responsabilité de la Puissance publique 1906 no. 17; to the same effect Laferrière, Traité, cited G.A. p. 236.

2 Caucheteux et Desmonts C.E. 21 Jan 1944 Rec 22, and C.E. 2 May 1962, RDP 1963 p. 279 n. Waline.

3 For an excellent précis see G.A. pp. 236-242. See further, Delvolve op.cit., pp. 246-276; Odent op.cit. p. 1122 et seq.

4 Street on Torts, pp. 269-276, discussed above pp 209-210.

5 The rule has been applied in a handful of cases: Sté la cartonnierie et l'imprimerie St. Charles C.E. 3 June 1938 Rec 251 concl. Dayras; Braut C.E. 22 Jan 1943 Rec 19; Min de l'Équipement C. Bovero C.E. 25 Jan 1963 Rec 53; Perruche C.E. 19 Oct Rec 555; E.D.F.c. Farsat (below); Min de l'Équipement c. Navarra (above); Ville de Bordeaux c. Sastre (below); Ste Omer-Decugis (below). See G.A. loc. cit.

even where lip service is paid to its applicability, the applicant's claim is often dismissed on the merits.¹

It is not possible to be certain why the Conseil d'Etat prefers the circuitous route of compensation for valid administrative action. Not everyone favours its approach. In his note on Couitéas,² for example, Hauriou censures the court claiming that it has abandoned its proper task of control of administrative action by delimiting the boundaries of legal administrative activity. He goes further than this, pointing out that such a theory of governmental liability obliges the State in principle to "guarantee to each individual the balance of the credits and debits of communal life", and threatens to submerge the court in a series of economic and political judgments which are sufficient to sink it. Furthermore, the theory opens the way for a continual see-saw process of challenge to government action in the courts. As Morange has said of liability in respect of legislation:

"to admit the principle of compensation for those who have been sacrificed would often be to reopen the apportionment itself and introduce anarchy into the State by paralysing it."³

This reasoning is basically sound, and it seems that the Conseil d'Etat may agree, since it reserves the Equality principle for a tiny minority of 'hard cases' which seem insoluble by recourse to other principles.

Delvolvé confirms that the courts seem to prefer compensation to annulment, seeking "to make good on the plane of liability what it abandons on the plane of legality". This could be construed as a relaxation of

1 For example the celebrated case of Gie. gén. d'énergie radioélectrique C.E. 30 Mar 1966 Rec 257 G.A. No. 107, in which no compensation was awarded and which was never applied for 10 years: Min de l'Etranger c. Burgat (below).

2 S. 1923. 3. 57, loc. cit. above.

3 Morange, "L'irresponsabilité de l'Etat législateur", D 1962.I.163.

'control'. On the other hand, we must never forget that, in the absence of injunctive powers, the imposition of liability is the only way in which the academic 'ought' may be translated to the pragmatic 'shall'.

Delvolve¹ defends the practice on another ground arguing that

"The general interest sometimes demands that a charge shall be imposed, but it is not necessary for it to bear only on certain citizens: there is then no link between the general interest and inequality. Thus the burden, however justified it may be on the plane of legality, must be lightened by an indemnity designed to re-establish equality".

This proposition does not really advance the debate, however, since the author assumes the court's inherent right to make the assessment and does not attempt to distinguish 'political' from 'justiciable' issues.

If we could establish some rational foundation for our innate belief that 'political' and 'justiciable' issues are distinguishable and that "some issues are inherently or properly of one kind or the other whoever decides them or by whatever means"², the argument would be advanced. It would then become possible to establish criteria for distinguishing the two categories, and matters could be more rationally assigned to one or the other. The difficulty is to find any point of departure; and this in turn is directly attributable to the problem in defining the judicial role. To indulge in punning once more, to attempt a division between the 'political' and 'judicial' is to devise frontiers for the 'le jeu sans frontières'.

1 Op.cit. pp. 258-259. This is, of course, the Burmah Oil principle.

2 Marshall, "Justiciability" in Oxford Essays in Jurisprudence, 1st series ed. Guest, 1961, p. 265, 267.

Like Lord Radcliffe in the Burmah Oil case, judges are sensitive to a need to distinguish the 'legal' from the 'equitable or moral' claim - i.e. to distinguish the 'justiciable' from the 'non-justiciable' - but they seldom pause to explain the reasons for their superficial classification as explicitly as Lord Radcliffe did. In the Ocean Island case¹ for example, an action was brought in the High Court by native inhabitants of Ocean Island against the Crown for breach of fiduciary duty and breach of trust. The colonial government had permitted, nay urged, the islanders to assign their rights in phosphate mining to a mining commission in exchange for derisory royalties. Ultimately the island was rendered uninhabitable and the islanders, grown more sophisticated, claimed compensation. An action was filed in the High Court, but the claim failed. Despite the moral validity of the islanders' claim, the judge felt obliged to hold that the Crown owed only a moral obligation which was not justiciable in the courts. Nonetheless, so strongly did he feel that justice had not been achieved, that he asked the Attorney-General to mention his impression to the Government, observing that "the Crown is traditionally the Fountain of Justice, and justice is not confined to what is enforceable in the courts".²

We can immediately dismiss the idea that this claim foundered because of the inability of a private law system to provide an apposite conceptual peg on which to hang it. The equitable principles of fiduciary duty and breach of trust, well developed, and undoubtedly more precise than the Equality principle, were perfectly appropriate. The hesitation of the judge was due to his doubts concerning jurisdiction: in other words, his lack of

1 Tito v Waddell (No. 2) [1977] 2 WLR 496.

2 At p. 616.

confidence in his mandate. He chose not to confide the reasons for his doubts, a modesty which characterises the English judiciary when faced with such questions.

It is convenient to take a second point shortly, although it is a digression from the main theme. Both the Burmah Oil case and the Ocean Island case suggest that, unless the courts can develop new principles of assessment of compensation, they are unlikely to make a success of their jurisdiction in such cases. In the Burmah Oil case, considerable uncertainty arose as to how the damage was to be quantified.¹

To quantify the damage caused by the total destruction of an island in the Pacific is, obviously, virtually impossible. And even if the principles of civil liability were thought to be applicable and were applied, the sum would, like the damage of two World Wars mentioned by Nial MacDermott in the Burmah Oil debate, exceed all reasonable bounds. I reiterate the point that the rationale of special systems of administrative liability is to provide fair and equitable 'compensation' rather than 'damages' assessed on the civil law principle of restitutio in integrum.

The courts are not unaware of the importance of this distinction, but normally use it to draw a boundary between legal rights enforceable in courts, and equitable or moral claims which are not justiciable. To bring the distinction inside the legal framework is difficult, because it is likely to lead to invidious discrimination between victims which, as I showed earlier, occasions great resentment. In one recent case,² however, the Privy Council

1 This emerges clearly from the parliamentary discussions of appropriate figures. See especially H.C. Deb vol. 712 col. 594 (Mr. Gardner) and H.C. Deb vol. 705 cols. 1094 (Mr. MacDermott) and col. 1185 (Mr. Wall). For Ocean Island see Tito v Waddell (No. 2) (Note) [1977] 3 WLR 972 and H.C. Deb 24 May 1979 cols. 1267 et seq (Sir Bernard Braine) and col. 1317 (Mr. Skeet).

2 Maharaj v Attorney-General of Trinidad and Tobago (No. 2) [1978] 2 WLR 902 (P.C)

did attempt a distinction between 'damages' and 'compensation'. A barrister committed for contempt of the High Court of Trinidad and Tobago, by a committal order subsequently declared invalid, claimed damages for wrongful detention and false imprisonment under the Trinidadian Constitution, which provided for 'redress' in cases of deprivation of liberty.

Lord Hailsham(dissenting) found himself incapable of grasping the nature of the plaintiff's claim, or of accommodating it within existing legal categories. Expressing all the doubts of an administrator as to the wisdom of drawing a line between victims of miscarriage of justice generally, and those victims of judicial error deprived of due process, Lord Hailsham said: ¹

"I must add that I find it difficult to accommodate withⁱⁿ the concepts of the law a type of liability for damages for the wrong of another when the wrongdoer himself is under no liability at all and the wrong itself is not a tort or delict. It was strenuously argued for the appellant that the liability of the state in the instant case was not vicarious, but some sort of primary liability. But I find this equally difficult to understand. It was argued that the state consisted of three branches, judicial, executive and legislative, and that as one of these branches, the judicial, had in the instant case contravened the appellant's constitutional rights, the state became, by virtue of section 6, responsible in damages for the action of its judicial branchI could understand a view which said that because he had done so the state was vicariously liable for this wrongdoingWhat I do not understand is that the state is liable as a principal even though the judge attracts no liability to himself and his act is not a tort....."

This judgment - which to those who, like Lord Hailsham, favour a judicially monitored Bill of Rights must make depressing reading - illustrates the failure of the common lawyer to come to terms with any State liability which is not based (i) on personal responsibility, and (ii) on fault or tort. It is, however, a dissent, and the majority, for whom Lord Diplock spoke, did admit to a liability of the state which "is not vicarious liability; it is liability of the state itself". Lord Diplock thought it right, however, to classify this liability as a 'claim' rather than a 'right'. It followed that 'compensation' not 'damages' was the measure of 'redress' available.

¹ At p. 921.

"The claim is not a claim in private law for damages for the tort of false imprisonment, under which the damages recoverable are at large and would include damages for loss of reputation. It is a claim in public law for compensation for deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration. Counsel for the appellant has stated that he does not intend to claim what in a case of tort would be called exemplary or punitive damages. This makes it unnecessary to express any view as to whether money compensation by way of redress under section 6(i) can ever include an exemplary or punitive award." ¹

This was an unusual case decided by a commonwealth court. If English courts were to persevere in this course, they would certainly attract criticism. Only the legislature has authority to single out classes of complaint and state that the plaintiff 'not be entitled' to damages based on the well established principles of common law but to some lesser sum to be denominated 'compensation'. The attempts of French administrative courts to prune damages have always ended in failure. It is most unlikely that our own courts would succeed.

Let us return to the main theme by attempting to provide a more precise classification which the judges could use to identify justiciable issues. Marshall ² tentatively identifies the characteristics of judicial process as: objectivity of decision making, independence of the decision maker from administrative or popular pressure and finality of conclusion. Perhaps then, we should reserve for the judicial process cases which seem primarily to demand these characteristics, adding, as an afterthought, those cases which are unlikely to be resolved by the political process because they "cannot easily and immediately be made the subject of political agitation

¹ At p. 913. For the general rule as to exemplary damages see Rookes v Barnard [1964] A.C. 1129, 1223-4.

² Op.cit. pp. 271-287.

and redress".¹ Such a division would leave to the political process those issues which entail the exercise of discretion or involve 'policy'.

'Policy' is another slippery word which the judiciary has been notably reluctant to explore. One judicial attempt to identify 'policy' issues and distinguish the changes which may properly be introduced by a court is to be found, however, in the recent case of Launchbury v Morgans.² Here the House of Lords had to consider a major extension of the doctrine of vicarious liability to cover the case of the "family car". Lord Pearson summarised the difficulties succinctly, saying:

"It seems to me that these innovations, whether or not they may be desirable, are not suitable to be introduced by judicial decision. They raise difficult questions of policy, as well as involving the introduction of new legal principles rather than extension of some principle already recognised and operating. The questions of policy need consideration by the government and Parliament, using the resources at their command for making wide inquiries and gathering evidence and opinions as to the practical effects of the proposed innovations ... Any extension of car owners' liability ought to be accompanied by an extension of effective insurance cover. How would that be brought about? And how would it be paid for?... It seems to me that, if the proposed innovations are desirable, they should be introduced not by judicial decision but by legislation after suitable investigation and full consideration of the questions of policy involved."

This passage suggests that prospective changes in the law ought not to be made through judicial process;² a principle which correlates with the principle that legislative action is properly prospective rather than retrospective. This deduction in turn helps to explain the insistence on the finality of judicial decision, and implies that the Burmah Oil case, being

1 Ibid, p. 287.

2 [1972] 2 WLR 1217, 1228, also 1222 (Lord Wilberforce)

3 See however Nicol "Prospective overruling: a new device for English courts?" (1976) 39 M.L.R. 542; Chayes "The role of the judge in Public Law litigation" (1976) 89 Harv. L.R. 1281, 1302 et. seq.

purely retrospective in character, did contain a justiciable issue. If this reasoning is correct, then the reversal of the decision by the War Damages Act 1965 was illegitimate, the proper course of action for the legislature being to amend the law prospectively, leaving to Burmah Oil the fruits (if any) of their victory in the courts. It is only fair to add that this is the course usually taken by the legislature,¹ the Burmah Oil decision being unusual in this respect.

Could one reverse this argument so as to reserve for the political process all decisions involving radical changes in the law which are prospective in character? Such a classification seems at first to preclude the imposition of liability in the Dorset Yacht case or the Ann's case. One might argue that these cases are distinguishable. They involve the application of established principle to new fact situations; it is the introduction of new legal principles to which Lord Pearson objects. But if there is a line to be drawn here, it is one which is likely to prove difficult to operate in practice.

Courts render themselves particularly vulnerable if they intervene to award compensation for loss caused either by government policies which are designed to regulate the economy, or by planning laws. The danger is that by imposing liability the court will "neutralise the effect of deliberately discriminatory measures."² Many years ago, Bohlen suggested³ that "it is a fundamental principle that taxation shall be laid equally upon all who benefit by the expenditure of the fund realised thereby." This phraseology is misleading, and gives to the Equality principle an extended, substantive meaning which it was never intended to bear. The Equality principle demands equality of treatment; it creates a presumption against singling out individuals and

1 Harlow, op.cit. [1976] P.L. 116; Prosser "Politics and Judicial Review: the Attkinson Case and its aftermath" [1979] P.L. 59.

2 Loschak op.cit. p. 234.

3 Studies in the Law of Torts, 1926 p. 430 (discussed above p. 89).

subjecting them to taxes which others in the same class are not expected to bear. It does not create any presumption against subjecting particular classes to differential rates of taxation, nor does it prohibit subsidisation of the poor at the expense of the rich. This is often called 'formal' or 'procedural' equality and, according to one modern writer, can be

"...expressed in the following double-barrelled principle:

- (a) good reason has to be shown for treating one person or group of persons differently from any other person or group of persons. In the absence of such a reason all persons or groups of persons should be treated similarly.
- (b) Like cases are to be treated as like and unlike cases as unlike."

Even if a good case can be constructed for application of this principle in the field of welfare - and it is by no means clear that it can - the principle is clearly wholly antipathetic to the very notion of planning, subvention and grants, and economic regulation generally. Loschak² explains this by defining Equality in terms of 'neutrality', a virtue - or vice according to one's political standpoint - traditionally associated with "the liberal conception of the limited role of the State." Equality and interventionism are natural enemies because "neutrality implies the absence of discrimination, while the intervention of the State is necessarily characterised by selective action to adapt the economy to the needs of the public interest."

1 Weale, *Equality and Social Policy*, 1978 p. 11; Dworkin, *op.cit.*, and "Liberalism" in *Public and Private Morality* ed. Hampshire 1978 p. 113. Delvolve, *op.cit.* pp. 416-418.

2 *Op.cit.* p. 229.

The results of applying the Equality principle to economic subvention have, according to Hayward,¹ already been experienced in France. He says:

"Thus the multiplicity of government grants are not merely the instruments of central control but the result of local pressures.....This has led to the phenomenon of Sanpoudrage - the dispersion of public investment grants in egalitarian, unselective profusion, giving a little of everything to everyone - which is politically rational in the present system buteconomically irrational."

It could be said that the intervention of courts in such an area tends to repeat the phenomenon of 'Sanpoudrage' by creating a series of vested interests which, once created, are not easily disestablished. The available funds are then dispersed and do not reach their intended destination.

For this reason, the courts of both countries prefer to confine their interventions in the field of economic intervention to the minimum control of ensuring procedural fairness, in the narrowest sense of preventing arbitrary or block decisions and imposing some procedural formalities in the shape of a hearing or a right to reasons.²

Some would go further, and conclude that judicial procedures are not appropriate to this area, as there is no real mechanism for ensuring that the interests of third parties or the public interest are protected.³ However that may be, and I do not propose to take sides in the dispute, judicial review by means of the ultra vires principle (or recours pour excès de pouvoir) is far more appropriate than the imposition of liability for breach of the Equality principle. The Conseil d'Etat is well aware of this. A Government

1 The One and Indivisible French Republic, 1973 p.20.

2 De Soto "Recours pour excès de pouvoir et interventionnisme économique", (1952) 6 EDCE p. 64. Sté "Maison Genestal" C.E. 26 Jan 1968 Rec 62 concl. Bertrand; British Oxygen v Board of Trade [1970] 3 All E.R. 165; Loschak, op.cit. pp. 228-235.

3 See further Ganz, Government and Industry, 1977 pp. 31-34; Booth and Co. (International) v National Enterprise Board [1978] 3 All E.R. 624.

Commissioner, in a case where the applicant firm claimed compensation in respect of vines destroyed in compliance with some new government regulations which prohibited retention of such stock, explained:

".....it should be noted that we are in one of those areas of economic activity in which during the last few years your caselaw has tended to exclude all indemnity by the State. In view of their object, there cannot be any State liability in respect of laws or regulations which deal with such matters, always provided that the correct legal formalities have been observed".¹

Compensation was refused.

In the planning field, similar arguments apply. The Conseil d'Etat is not happy to allow compensation without proof of fault in this area, and prefers to restrict liability to cases of fault or clear illegality.² The English courts have adopted a similar restrictive attitude. A court may be very tempted to rectify an apparent injustice, for example, by imposing "some limit to the time land can be 'blighted' by the refusal of planning permission",³ or by filling other supposed lacunae in Acts of Parliament. To do so is self-indulgent; a court which embarks upon evaluation of the factors "personal sacrifice versus public benefit"⁴ usurps the functions of legislature and government. The fact that no compensation has been provided must be assumed to represent a conscious decision as to economic priorities which it is well within the competence of Government and Parliament to make and which should be respected accordingly. This is not an area for the Equality principle. It is a political rather than justiciable area.

- 1 Olivier CE. 26 Oct 1962 R.D.P. 1963 p. 79 concl. Heumann. It seems that the regulations did not necessitate the destruction and the court found that the applicant caused its own loss; compare McClintock v Commonwealth (discussed above p. 221).
- 2 Min de l'Equipement c Navarra C.E. 20 Mar 1974 Rec. 200 concl. Rougevin-Baville; Sté immobilière de la vallée de chevreuse C.E. 14 Mar 1975 Rec. concl. Dondoux; Leduc C.E. 12 May 1976, R.D.P. 1977 p. 207n. de Soto.
- 3 Westminster Bank v Beverley C.C. [1970] 1 All E.R. 734, 744 (Lord Dilhorne); contrast Hall v Shoreham-by-Sea U.D.C. [1964] 15 P & CR 119; compare E.D.F. c Farsat C.E. 23 Dec 1970, AJDA 1971 p. 96 concl. Kahn. This was an exceptional case.
- 4 Wade, op.cit pp. 657-8 in a criticism of Hammersmith Railway v Brand (above), which I respectfully suggest is entirely misconceived.

I have already mentioned the link between the Equality principle, liberal economic theory and vested interests. The demand for increased government liability may clearly be part of the political game. Proponents of increased liability are seeking, quite deliberately, to use the judicial function "to drain decisions taken in a court of law of their political content" in the knowledge that courts are likely to use their powers "to neutralise the effect of deliberately discriminatory measures". In this way the status quo is maintained through the liberal "Rule of Law" myth of respect for the integrity of the judicial decisions (inviolabilité de la chose jugée).

As Professor Griffith might put it,¹ political 'claims' are transmuted into legal 'rights'.

As one would expect from a game without frontiers, this machinery may easily be set into reverse. The classic liberal assumption concerning the protection of human rights is that the courts are the sole bulwark between the individual and the "perfidy of Governments who destroy property to obtain their own very proper ends for the good of the nation and then, when the day of reckoning comes try to find loopholes for escape".² It is not so generally realised that recourse to the courts may itself on occasion represent such a loophole. The assumption of jurisdiction by a court may mitigate against a complete solution, by insulating the government from political criticism and concealing the necessity for political control of what is essentially a political mechanism. Two examples, one from each country, illustrate this particularly well.

1 Op.cit. 42 M.L.R. pp. 17-18.

2 H.C. Deb. vol 705 col. 1158 (Mr. Thorpe)

In 1953, the French government embarked upon a major reorganisation of national wholesale markets. This was brought into operation in the Bordeaux area by a decree of 7 November 1962, which instituted a new wholesale market at Bordeaux-Brienne to which all existing wholesalers were instructed to remove. Unfortunately, they failed to obey. The Mayor of Bordeaux, with the support of the Prefect, instituted criminal prosecutions; at the same time, the legality of the decree was referred by objectors to the Conseil d'Etat. On 4th June 1964, the criminal chamber of the Cour de Cassation held on appeal that no offence had been committed by wholesalers who refused to cooperate since the relevant regulations were invalid. On 4th December 1964, the Conseil d'Etat upheld the validity of the decree. No machinery exists for the resolution of such deadlocks. The mayor was left either to enforce the decree indirectly by the withdrawal of vehicle permits, or to intervene forcibly. In the event, it was thought preferable to change the boundaries of the market.

Certain retailers, arguing that they had suffered loss of profits during the interim period, now claimed compensation from the municipality and the State. In December 1967, both defendants were held liable for a faute de service by the Bordeaux administrative tribunal on the ground that they had failed to implement the legislation by force.

On appeal, however, the Conseil d'Etat reversed the decision of the administrative tribunal and denied fault on the part of the mayor. The right to execute a decision by force was exceptional and not available in this case. Furthermore, the administration possessed a discretion as to how laws or decisions should be implemented, and this could not normally be reviewed by the courts. The mayor's decision to proceed solely through the criminal courts could not be accounted a fault.

The alternative was to impose liability without fault, and the Government Commissioner indeed recommended liability for breach of the principle of Equality before Public Charges. The Conseil d'Etat rejected his opinion,

contenting themselves with declaring that there could be in theory "liability without fault". They took the unusual course of remitting the affair to a commission of experts for assessment of damages, and to determine whether the State or City of Bordeaux was to be liable.

The experts predictably failed to resolve the issues (partly, it must be admitted, due to the uncooperative attitude of the traders, who, afraid of prejudicing their tax liability, refused to reveal their trading figures to the commission). The administrative tribunal was driven to hold, on 13th April 1973, that there was insufficient evidence of loss for the imposition of liability. But, in 1976, the Conseil d'Etat replaced this judgement, holding the City of Bordeaux liable on the tenuous grounds (i) that the Mayor had responsibility for maintaining order in market, a ground which in any event implies fault, and (ii) that the loss was attributable, not to the failure of certain retailers to obey the law, but to "the creation of a national wholesale market at Bordeaux-Brienne".¹

Twelve years of litigation did little to resolve this problem. The mayor of Bordeaux received the blame for a series of events which he could hardly have avoided. The rate payers of Bordeaux were subjected to a charge which was never rightly theirs. Prompt political intervention through the creation of a special compensation scheme to deal with all claims submitted by tradesmen in a similar case could have resolved the issues expeditiously and expediently.

¹ This litigation is reported at: Syndicat general du marché des Capucins de Bordeaux C.C. 4 Jun 1964 D 1964. 555 rap. Costa; C.E. 4 Dec 1964 RDP 1965, 272 n. Waline; Ministre des Finances et Ville de Bordeaux c. Sastre C.E. 23 June 1971 Rec. 335, noted Waline R.D.P. 1971 p. 443, Loschak J.C.P. 1972.I.2246; Sté Etab. Omer-Decugis C.E. 4 Feb 1976, RDP 1976 p. 1515 n. Waline, A.J.D.A. 1976 p. 373 n. Daval.

The Thalidomide affairs is not a true case of government liability because, at a period before the establishment of the Committee on the Safety of Drugs, it is difficult to see how liability could be imputed to the government in any strict, legal sense. This does not render the decision not to intervene and take over liability less shameful; indeed, if any case invited government intervention on the basis of Equality before public charges, it is this case. The doubt over the prospect of successful litigation served, however, to deflect attention from society's obligations. Worse still, the remote prospect of litigation was used to stifle public comment and criticism of the defendants, and, indirectly, of the government. This immunity from publicity disadvantaged the plaintiffs considerably. The Sunday Times showed that, following its intervention on the side of parents, the defendants raised their offer of settlement from £3 to £20 million. But the saga was never really satisfactorily concluded. It resulted in legislation to amend the common law on a temporary basis (the Personal Injuries (Congenital Disabilities) Act 1976); a Royal Commission on Personal Injuries Litigation (the Pearson Commission); not to say protracted litigation finishing in Strasbourg between the Sunday Times and the Government over the law of contempt of court.¹ But it never really resolved the compensation issue. Some twenty years later, after an investigation by the ex-Ombudsman, Sir Alan Marre, a measure of State compensation was recommended. Significantly, Sir Alan found that the long delays in themselves constituted an injustice which had prejudiced some of the parties. This factor was taken into account in the settlements.²

1 A-G v Times Newspapers Ltd. [1973] Q.B. 710 (C.A.) [1973] 3 All E.R. 54 (H.L.); The Sunday Times case April 26 1979, Eur. Ct. of Human Rights. And see The Thalidomide Children and the Law, A report by the Sunday Times, 1973.

2 Statement by the Minister for the Disabled, 3 Aug. 1978, DHSS No. 78/79; Report on Thalidomide 'Y' children by Sir Alan Marre, HMSO, 1978.

By way of contrast, the popular campaign mounted in favour of the victims of vaccine damage, waged strategically in Parliament and the press rather than in the courts resulted in a rapid offer by the Government of £10,000 to any child who "on the balance of probabilities" had suffered vaccine damage.¹ Ironically, this settlement may have influenced the Government's decision to implement Sir Alan Marre's recommendations for some of the thalidomide victims.

It can, of course, be argued that the absence of any principle of law like the Equality principle which would have enabled legal liability to be imposed on the State was a decisive factor in the Thalidomide disaster. I doubt if that is so. Examination of the French caselaw suggests (i) that the Conseil is disinclined to use the Equality principle in cases where large sums of money are at stake or a multiplicity of defendants is involved and (ii) that the court is unwilling to impose liability in cases where the damage is totally independent of any governmental or administrative act or omission: in other words where the damage is not legally attributable (imputable) to the administration. The Sastre case itself illustrates this unwillingness.

The case of liability to vaccine damaged children provides an interesting example. Since vaccination is compulsory in France, there is a clear argument for state liability on the basis of mutual assurance or Equality before Public Charges. Liability in medical cases was, however, founded on gross fault or faute de service. During the 1950s, several administrative tribunals deliberately switched to risk liability in vaccination cases. The Conseil d'Etat, however, refused to move.² Finally, the legislature intervened in the

1 H.C. Deb. 14 June 1977 cols. 239-247. H.C. Deb 9 May 1978 vol. 949 cols. 973-985.

2 Especially influential were two cases noted by Savatier, an expert in the field of medical liability, Ascensio et Giraud T.A. Lyon 14 June 1963, D1964.343 n. Savatier. See also Dejous C.E. 7 March 1958, S1958.182 n. Gollety, and Lastrojoli C.E. 13 July 1962 D1962.727 n. Lemasurier.

dispute by providing a 'no-fault' compensation scheme.¹

The real lesson of the Thalidomide affair is to show that litigation is a relatively ineffective vehicle for compensation. Teff and Munro feel that "In Britain, court procedure compares unfavourably in many respects with, for example, the scheme for administering industrial injuries."² Even if it is true in the United States that under-privileged groups do better in the courts, because they "have no alternative access to the levers of power in the system",³ the same is emphatically not true of Britain, where litigation is the weapon of Goliath rather than David. The result of allowing the courts to dispense compensation may be that a costly and unsuitable court procedure is either substituted for, or incorporated as a step in, a political and parliamentary process.

In the Ocean Island case, for example, £ $\frac{5}{4}$ million was expended in costs before agreement was reached on a settlement. The fact finding procedure of the court, was cumbersome and largely irrelevant. In the Hoffmann-La Roche case, a dispute arose concerning a report of the Monopolies Commission, which accused Hoffmann-La Roche of pricing Librium and Valium too highly. £8 million was mentioned as the possible loss of profits and agreement was reached on the basis that the company would reimburse to the government £ $3\frac{3}{4}$ million of excess profit, and that the Government would in exchange revoke the Order implementing the offending report and allow an offset of £8 million in respect of supposedly diminished profits. The threat of interminable litigation was one strategic factor in inducing the Government to abandon a case in which their actions were probably both 'legal' and 'legitimate'.⁴

1 Law of 1 July 1964, see Bréchon-Moulènes, op.cit. above p. 223.

2 Thalidomide, The Legal Aftermath, 1976 p. 142.

3 Chayes, op.cit. p. 315.

4 See [1974] 3 WLR 104, 122 (Lord Wilberforce); H.C. Deb 12 Nov 1975 cols. 1544-6.

English critics have pointed out that 'exceptional' or 'abnormal' losses will prove exceptionally difficult to identify, and, in view of the fact that the Conseil apparently leans favourably towards the more trivial cases, their suspicion is probably correct.

Gilli believes that the Conseil d'Etat, despite its purported reliance on the Equality principle and its vaunted tradition of legal logic, is exercising a purely equitable jurisdiction in such cases. He says:

"Whenever [the court] grants compensation to the victim of a measure taken in the general interest he is making a direct application of equitable norms: conscience has passed directly into law, and morality becomes law."

The imprecise and vague formulations of the Conseil d'Etat with their unwillingness to make reference to the Equality principle certainly support this conclusion.

Since 1973³ the Divisional Court has possessed a power to award damages on an application for review where the applicant could have succeeded in tort. This could be extended. Such a power would automatically resolve a proportion, though not all, of the existing hard cases. It would be possible to extend the power by allowing the Divisional Court to award compensation where "injustice" or "exceptional loss", though not necessarily illegality, was shown. Such an extension of jurisdiction would admittedly necessitate legislative intervention, which, as successive governments have indicated, is hardly likely to be forthcoming. Whether such a power would be

1 Hogg, op.cit. p. 85; Street, Government Liability p.78.

2 "La Responsabilité d'Equité de la Puissance Publique", D1971 Chr.125,129. See also Berthélemy, Droit administratif, 7th edn. 1913, p.79.

3 Amended Order 53, Rule 7(1)(b).

4 For the reasons, see Law Comm. No. 20 Cmnd. 4059 (1969); Law Comm. Working Paper No. 40, Remedies in Administrative Law (1971); Law Comm. No. 73, Cmnd. 6407 (1976).

desirable is another matter. It is my personal view that the court might be left to struggle with difficult political decisions without any adequate guidelines as to the likely effect of their awards or as to the appropriate measure of compensation.

The Equality principle is a political principle and a principle of moral philosophy which has long dominated Western thought. That is not to say that the principle ought to be transmuted into a legal rule. As Dworkin remarks:¹

"When politicians appeal to individual rights they have in mind grand propositions about very abstract and fundamental interests like the right to freedom or equality or respect. These grand rights do not seem apposite to the decision of hard cases at law....and even when they are apposite they seem too abstract to have much argumentative power."

The Equality principle is just such a "grand proposition": it is too vague, too general and too ambiguous to be used in the resolution of legal disputes.

The bases of the Equality principle are not very secure.

As Scanlon says:²

".....considerations of fairness and equality are multiple. There are many different processes that may be more or less fair, and we are concerned with equality in the distribution of many different and separable benefits and burdens. These are not all of equal importance.....[and] do not seem to be absolute. Attempts to achieve equality or fairness in one area may conflict with the pursuit of these goals in other areas.....In such cases of conflict it does not seem that considerations of fairness and equality as such, are always dominant. An increase in equality may in some cases not be worth its cost....."

1 Op.cit. p. 89.

2 "Rights, Goals and Fairness" in Public and Private Morality op.cit. above p. 100.

This leaves for the Equality principle only those cases which Marshall suggests cannot be easily resolved by the political process because they cannot be made the subject of "political agitation". While these are not likely to be easily identified, I suggest that in precisely these cases the Conseil d'Etat does assume an equitable jurisdiction based on the Equality principle. To exemplify, in one case,¹ a canal syndicate responsible for the annual soaking of the vines quite properly prolonged the period in the interest of the majority of growers. Certain specially delicate vines succumbed. An indemnity of the value of the vines was awarded. A second case² implements a famous decision of the Conseil d'Etat concerning liability for the treaty making power. The applicants had let their flat to a UNESCO employee who absconded and when pursued in the civil courts claimed diplomatic immunity. The applicants claimed compensation from the French government and were, rather surprisingly, awarded damages which included loss of rent, costs in the civil proceedings and "troubles in the conditions of existence", a head of damage particularly associated with the civil law. In a third case,³ loss was suffered by a landowner when Electricité de France, after long delays, reversed their decision to expropriate his land. Compensation was awarded because the threat of expropriation had induced the landlord to refrain from exploiting his land over a period of many years.

It is hard to detect any stable legal principle which justifies intervention in such cases although some writers favour the principle of 'abnormal loss' which, Blaevoet argues, creates a presumption of fault.⁴

1 Syndicat du Canal de Submersion de Raonel et des basses plaines C.E. 5 Feb 1969 Rec 66.

2 Min des affaires étrangères c Burgat C.E. 29 Oct 1976 RDP 1977 p. 213 concl Massot.

3 Electricité de France c Farsat C.E. 23 Dec 1970, AJDA 1971.96 concl Kahn.

4 op.cit. above.

Obviously the absence of legal redress may leave hard cases. The mistake is to assume that the legal process is the only mechanism by which injustices can be rectified, and that it must be all-embracing. The parliamentary process has sometimes been effectively deployed in individual cases though the procedure is somewhat cumbersome.¹ We have also in England a longstanding tradition of ex gratia compensation. For these political mechanisms political principles are desirable, and it is in this field that Equality principle might be able to take root and even blossom.

¹ See H.C. Deb 1 Apr. 1977 cols. 829 and 833 (debate concerning compensation for wrongful imprisonment in the Glastonbury and Long cases) H.C. Deb. 1977 col. 1243 (debate concerning Whooping cough vaccination, the case of Tanya Price) H.C. Deb 7 Mar 1977 cols. 1143-1157 (Case of Constituent who had to use a nursing home because no hospital bed was available: no award).

CHAPTER SEVEN

Grace and Favour

There is a prevalent and not entirely inaccurate picture of public servants in England as secretive to the point of furtiveness and dedicated to the preservation of discretionary power under the guise of "flexibility". Recently, for example, discussing access to official information, the periodical "Public Administration" said:

"The greatest resistance to change in the civil service is not so much a habit of secrecy... but a desire to retain full flexibility in deciding what shall be disclosed to whom." ¹

When coupled with the traditional hostility of lawyers in this country to administrators and to the notion of discretionary power, secrecy may do the public service a disservice by creating a suspicion of arbitrary and underhand practices. Public lawyers are all too prone to dismiss ex gratia administrative compensation as a relic from the days of Crown immunity preserved in stubborn defiance of the wishes of the legislature embodied in the Act. Reflecting this opinion Lévy wrote of the Act:²

"English public servants were generally opposed to the Crown Proceedings Act. Accustomed as they were to deciding themselves on the liability of their own department, they were afraid that, in practice if not strictly in law, the intervention of the courts might bring about serious difficulties in the working of the public service".

1. (1978) 56 Pub. Adm. 257 (Editorial by Michael Lee)

2. Op. cit., above p.350

Lévy attempts no comparison with French practice, and in approaching this topic, I have found it necessary at the outset to restrict myself to England. Although the rules of French administrative law expressly provide that no action for damages can be brought against the administration in France without a demand for compensation being first made to the relevant public service, in order to allow an opportunity for administrative redress, a tradition exists that ex gratia payments are not made by the French public service. The scarcity of material makes it impossible to confirm or refute this. For example, the leading work on non-litigious administrative procedure¹ makes no reference to the subject and the well known administrative lawyer, Professor Drago, regrets the dearth of information, noting in his survey of the decisions of the Versailles tribunal that:

"It would be particularly interesting in this respect to know how many of the applications for ex gratia payments (recours gracieux) result in the satisfaction of the applicant and thus never arrive at the stage of litigation." 2

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1. Isaac, La procédure administrative non-contentieuse, 1968
 2. Drago, Etude relative aux décisions rendues par le tribunal administratif de Versailles, 1967-68 (1968) E.D.C.E. p. 165, 174.

No such figures seem to exist.

There are in fact a number of reasons why in France the administration might not be drawn towards *ex gratia* techniques. First, the low cost of administrative justice in France inclines public servants to treat it as the standard mechanism for dispute settlement. Secondly, the budgetary and disciplinary functions of the Cour des Comptes and the Treasury act as a distinct disincentive to settlement out of court or *ex gratia* payments. All *ex gratia* payments are checked annually by the Cour des Comptes and I was told¹ that the Court often criticises public servants who settle outside the limits of the decided caselaw and may also blame them for not litigating or even for not appealing. I was told also that the Cour des Comptes may recommend disciplinary proceedings and would not sanction payments made on behalf of an employee acting technically 'outside the course of his employment'. This practice contrasts greatly with the attitude of the Treasury Solicitor's office. Despite these disincentives, however, the majority of traffic claims in Paris are settled out of court (although the same is not true of municipalities and departments).

This suggests that the practice of French Ministries may vary, something confirmed by the legal adviser of another Ministry who told me in an oral interview that, of approximately 450 claims in 15 years, she could remember only two negotiated out of court settlements. The practice of this Ministry is to rely strictly on their legal rights, including technicalities of procedure such as expiry of the limitation period. Even where they feel an administrative tribunal has made an error of law no settlement is made: indeed, only in cases of gross fault do they settle and then at as low a figure as possible. Although inconclusive, this

1. Oral information supplied by the legal adviser to a French ministry responsible for settlement of road accident cases. There are about 100 claims per annum in Paris. The State does not insure.

information bears out certain academic writers who allege that the administration employs litigation as a delaying technique to deter litigants.¹ Again it contrasts with the attitude of the Treasury Solicitor.

Occasionally the Conseil d'Etat may recommend an ex gratia payment in a case where no legal liability exists. If a case arises which seems to lie on the boundary or just outside the limits of legal liability - for example, because the plaintiff cannot prove fault though fault is suspected, or because statute does not seem to cover the case and hardship is caused - the court may report the case to the Conseil's Commission du Rapport² which may then negotiate a settlement with the department or public authority in question.

It may be that the practice of ex gratia settlement in France is more widespread than is commonly imagined and that, with the advent of the Médiateur, more information will emerge. In the meantime, it would be unwise to make general deductions from the scanty material. I shall confine myself, therefore, to noting in passing one or two interesting parallels with English practice.

1. Amson et Lindon, "Un Ombudsman pour France" (1970) J.C.P. pp 2322, 2453.

2. Oral information from President du Commission du Rapport. For the function of the Commission see Harlow, op. cit, [1976] P.L. at pp 128-130; Même, "L'intervention du juge administratif dans l'exécution des ses décisions", (1968) 21 E.D.C.E. p. 41.

In England the advent of the Parliamentary Commissioner for Administration, Health Service Commissioner (both for convenience abbreviated as PCA) and the Commission for Local Administration (CLA) is beginning to provide a wealth of information on the practice of ex gratia payment. This material casts doubt on some of the old prejudices. Ex gratia payments are not really arbitrary in character but formalised and structured by rules. Nor are they characteristically small-scale and individual in character. Often large numbers of identical claims are received and need to be processed.

One initial distinction can be made. Although negotiated settlements are sometimes classified as ex gratia payments, they are really a response to threatened legal liability. Ex gratia payments properly so called are made only in cases where no legal liability exists. It is convenient to discuss these two categories separately. It is not possible at the outset, however, to go much further in classification. I have therefore made a second division of convenience between 'individual' cases on the one hand and 'class' cases on the other, while admitting that the two classes necessarily overlap. I have then grouped the cases loosely together in order to see whether any general principles do in fact emerge from the cases or are applied consistently. I admit at the outset that these groupings are rough-and-ready.

A. Settlement in response to legal liability

It is the general practice of government departments in England to settle out of court all cases in which liability is admitted and no dispute over the amount of damages arises. I am informed that perhaps no more than 1% of claims actually get to court and probably as many as 50% are settled without even the threat of litigation. The Treasury Solicitor, who is normally consulted, believes that the Departments might settle more sympathetically than would an insurer;¹ for example, the Crown would not wish to stand upon technical points of limitation or Crown Immunity.² The Crown also acts in accordance with the principles of the Motor Insurer's Bureau Scheme³ although it does not insure its vehicles.

Whether a department will settle or refuse liability, seems to be entirely a matter of expedience.

On one occasion, when an Area Health Authority refused payment in obedience to advice from their legal advisers, the following exchange is recorded before the Select Committee on the PCA.⁴ The Chairman (Mr. Antony Buck) thought it surprising that no payment had been made and asked the authority whether, on mature reflection, the decision was right. He received the response:

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1. Information supplied by the Treasury Solicitor.
 2. See, for confirmation, 3rd Report of Public Accounts Committee H.C.447 (1971-2) paras. 2631, 2645.
 3. For the text of the Scheme which explicitly excludes the Crown at para. 6(1)(a) see Hepple and Matthews pp. 678-683.
 4. H.C. 372 (1977-78) p. 58 (discussed further below)

"I have said that in my opinion it would have been expedient to have made this payment immediately"

"I am a little puzzled by your use of the word 'expedient'. Would it not have saved you a lot of bother in coming here and being asked a lot of questions by Members of Parliament?"

"It would certainly have saved a lot of questions."

"It would have been expedient in the sense not only being convenient from your point of view but also the right thing to have done?"

"I do not know. I seem to have said this so often: we are very nervous of the consequences of making an ex gratia payment; I am referring to the long-term consequences. I repeat that in 20 years' experience in the Health Service we certainly have never made one. Perhaps others have."

This exchange also seems to confirm a public expectation that public authorities will act "as an honest man" and will bear in mind factors other than the question of legal liability. Public authorities in general do seem to live up to this expectation; for example, immediately after the Moorfields underground disaster, London Transport announced that they would not contest liability; again, the National Coal Board settled after the Aberfan Coal tip disaster.¹ On the other hand, there are many striking examples of legalism and ungenerosity.

To stand on legal rights may actually be considered maladministration. The case from which I have just cited concerned wrongful detention in a mental hospital. A consultant in a mental hospital had signed an order discharging a patient, upon which she went on a voluntary basis to a private nursing home. Due to an administrative muddle, she was subsequently arrested by the police, detained, readmitted to the

1. Oral information from the N.C.B.

original hospital as a formal patient and confined in a locked ward. The PCA found maladministration and recommended a substantial ex gratia payment on the basis of wrongful detention for 29 days.¹

The regional authorities in question agreed a figure of £150, on the basis of legal advice which admitted unlawful detention, only for one day. Their representatives were sharply questioned by the Select Committee, but refused to change their minds on the grounds (i) that a clinical judgment of a consultant psychiatrist was involved (ii) that the sum paid was in accordance with the legal adviser's advice (iii) that no maladministration was involved and (iv) that detention had been only for one day. In response to the last point a committee member observed drily that £100 per day was a dangerous precedent to establish.² The Committee expressed their great regret that the PCA's recommendation had been rejected³ and even hinted that the complainant's M.P. might take the matter up or register a second complaint⁴ of maladministration. In the absence of injunctive powers, they could go no further.

There is an interesting parallel to this hospital case in a case investigated by the French Médiateur. A patient was found wandering under the influence of anaesthetic and the staff tied her to the bed and left. The staff were dismissed, but only on condition that the patient initiated litigation. The Médiateur was greatly shocked by this attitude saying:

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1. Second Report from Select Committee on the PCA, H.C. 372 (1977-78) pp 9 - 25
 2. At p. 13 (Q73 Mr. Jones).
 3. At p. viii
 4. At p. 15, QQ 87-89.

"There is another aspect of the attitude of the administration to justice which merits comment, namely, that the administration withdraws behind the concept of justice in order not to pay his just dues to the applicant. Despite the fact that it admits the debt, the administration prefers to send the applicant to the courts.

Such practices are obviously very blameworthy and the Government ought immediately to issue an instruction to put a stop to them. The Médiateur intends to draw the practice - which particularly concerns Prefects - to the attention of the Prime Minister." 1

This passage suggests that the Médiateur may have been insufficiently aware of the difficult position of the public servant, trapped between his generous impulses and the power of the Cour des Comptes. The English public servant is in an equally ambivalent position. On the one hand, his training inclines him to give a high priority to thrift and scrupulous care with public funds. These attitudes are fostered by the rules of government accounting, by the activities of the Comptroller and Auditor-General and the control of the Public Accounts Committee. The intervention of the Parliamentary Commissioner (or Médiateur) and of the Select Committee creates a powerful pull in the opposite direction. This tension cannot always be resolved.

In cases where legal liability is not clear, the Department may stand on its legal rights. The attitude of the PCA is then that (i) he will normally exercise his discretion to investigate and (ii) if he finds maladministration, he will recommend a settlement. In one case² a county court registrar misfiled and mislaid a cheque with the result that

1. Annual Report 1976 pp 29-30 and Case No II-2429 p. 231.

2. Report of PCA for 1977-78 H.C. 246 (1977/78), Case 15/599/77, p. 232.

the complainant was unable to cash it before the company went into liquidation. The Treasury Solicitor advised against accepting liability. The PCA agreed to investigate and negotiated a settlement on the ground that hardship had been caused. He explained that, although the department:

"had formally denied liability they accepted that the legal position was by no means clear, and they considered in any event that it was wrong for them to stand upon a denial of liability since it was clear that the complainant's difficulties were caused substantially by carelessness in the County Court office."

In a second, rather similar case,¹ a blunder by the Department of Health led to a man being wrongly accused in affiliation proceedings. The suit was naturally dismissed and, the court, refusing costs, suggested a civil action against the DHSS. The man's legal adviser was dubious, and instead referred the complaint to the PCA. The DHSS admitted responsibility and suggested reimbursement of the costs of £43.20. But after further negotiation the PCA secured an ex gratia payment of £150, on the ground of hardship, worry and trouble, not to say possible injury to the complainant's reputation.

Probably the best known of such cases are the "Duck Vaccine case" and the "Green Honey case".² In both cases the complainants alleged that negligence on the part of the Ministry of Agriculture had led to financial loss. Although there was a strong possibility of legal liability and the PCA does not normally have jurisdiction where a court or tribunal affords an alternative remedy, he used his discretionary powers under section 5(2)(b)

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1. 1st Report of PCA H.C. 37 (1975-76) Case No. C130/V p. 142
 2. Annual Report of PCA for 1970-71, H.C. 261 (1970-71) case C 133/L pp 10-16 and C 694/L pp 16-23; 1st Report of Select Committee, H.C.240 (1970-71) pp. 39-43, 43-48.

of the Parliamentary Commissioner Act 1967 and investigated. Maladministration was found and ^{an} ex gratia payment recommended. At this stage a dispute broke out over the amount of compensation in the "Green Honey Case." To cite Gregory and Hutchesson:¹

"The Department eventually offered Major Wheeler £130; he estimated his losses at £1,400, and described the Ministry's offer as 'scandalous' and 'sheer impertinence'. After the M.P. concerned had made further informal representations to the Minister, the Department subsequently made a fresh offer, which the complainant described as a 'vast improvement'; though the actual figure was not disclosed." 2

Had no better offer been forthcoming, the position would have been very difficult. The complainant might have instituted legal proceedings or he might have tried a fresh complaint to the PCA about the amount offered. This is a doubtful remedy in the authors' view:

"In this situation - which has never yet occurred - it is not clear, however, whether the Commissioner would feel that it was in principle open to him to criticise the department for not providing a satisfactory remedy, or whether he would regard the department's decision about the sum to be offered as a discretionary decision immune from further criticism if it had been reached after due consideration and following the proper procedures."

Although this seems at first an unduly pessimistic view of the PCA's powers and probable reaction, later cases do suggest that the authors may have some grounds for their fears. In a later case where a complainant did complain of the adequacy of the sum offered the PCA concluded: "It does not rest with me to determine how large the offer of that ex gratia payment to the complainant should be." 3

1. The Parliamentary Ombudsman, 1975, pp 168-9

2. Ibid.

3. 1st Report of PCA, H.C. 49 (1974-75) Case No. C305/J pp. 173-4.

It may be that, in the particular case, the PCA felt inadequate to make an assessment or felt the sum offered was not inadequate. On other occasions, as with the case of wrongful detention referred to the Select Committee, he can be sharply critical of administrative parsimony. The difficulty does, however, illustrate a weakness of PCA procedure which often exasperates lawyers. In the strongest case, the PCA can go no further than a recommendation. He has no mandatory orders at his disposal to push recalcitrant departments into obedience.

A second case in which a department will settle in accordance with legal liability, though not strictly a negotiated settlement, is when a High Court judgment applicable to an individual case has implications for a wider class of people.

Following the decision in Judd v. Ministry of Pensions, for example, the Ministry reexamined its files to ensure that all pensioners who might have benefited from this decision were contacted and their pensions reassessed.¹ A later PCA report refers to the High Court decision in Marshall v. Ministry of Pensions. The PCA secured an ex gratia payment for an applicant who showed that, following the judgment in 1948, he had had no adequate opportunity to show that he should benefit from the decision.² We can probably conclude that a departmental failure to apply a High Court ruling generally rather than to the specific case will be considered a maladministration.

On occasion, the implication of a High Court decision may be extremely complicated. This is well illustrated by a series of cases

1. [1965] 3 All ER 642. See Annual Report for 1972, H.C.72 (1972) p.8.

2. [1947] 2 All ER 706. See 1st Report of PCA H.C. 49(1974-75) Case C.466/7 p.71.

concerning the application of the provisions of the Limitation Acts in the cases of certain industrial diseases. The original rule was that the right of action accrued and time started to run at the moment when the damage (i.e. the disease) was caused.¹ Statute and caselaw gradually amended this rule to the point that time started to run only when the material facts on which his action was based became known to the plaintiff i.e. when the plaintiff knew he had the disease.² Publicity given to the decisions in which this extension was sanctioned led to 30,000 claims against the National Coal Board by victims of pneumoconiosis alleging negligence and breach of statutory duty against their employers. The Court of Appeal³ then extended the law again by holding that time started to run only from the date when the plaintiff learned that he possessed a potentially worthwhile cause of action. A new class of potential litigants was immediately created, although the issue of liability was far from clear, because each plaintiff would need to prove negligence or breach of statutory duty. Settlement was difficult, because the Board was not prepared to admit that any one case was sufficiently typical to serve as a test case on the issues of liability or damage.

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1. Cartledge v. E. Jopling and Sons Ltd [1963] A.C. 758
 2. Limitation Act 1963 s. 1(1)[†](3) as amended by Law Reform (Miscellaneous Provisions) Act 1971 s.1(1), 2(1)(2) discussed in Pickles v. National Coal Board [1968] 1 WLR 997; Smith v. Central Asbestos Co. [1973] A.C. 518
 3. Re Harper v. N.C.B. [1974] 2 WLR 775

A single decision¹ may have unseen implications for the destiny of many other individuals which the legal process cannot easily unravel. The parties are not all before the court, their rights have not been considered and legal decisions are not always adequately publicised. A test case of this type is thus capable of creating injustice through unequal treatment of like cases. Administrative intervention can often provide an effective answer. In the pneumoconiosis cases discussed above, the government at first authorised settlements by the Board to which it contributed. In the end, however, a statutory framework for state compensation was created.² Cases of this type are quite unsuitable for ex gratia settlement procedures because they involve vast sums of money and delicate policy decisions. It is wrong in principle for public servants acting on their own initiative to accept responsibility for making such decisions. Responsibility rests inevitably on the government and the legislature.

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1. Compare the Sastre case, discussed above, p.269
 2. See now the Pneumoniconiosis Etc. (Workers' Compensation) Act 1979. The information concerning claims, settlement and negotiation was kindly supplied by the National Coal Board.

B. Ex gratia Compensation

1. Individual Cases

The normal rule is that ex gratia payments are wholly exceptional in character and they will not be made in cases where there is neither legal liability nor, since 1967, evidence of maladministration. Departures from this rule are said to be few and far between - though official statistics do not seem to exist - and are usually based on "hardship" "exceptional circumstances" or "compassion". Thus each case is individual and it is hard to discern any common factor. In this sense, they closely resemble the small claims to which the Conseil d'Etat sometimes applies the Equality principle and which Gilli explains as cases of "Conscience and Equity".¹ The obvious danger is that the administration will in fact act in an arbitrary fashion and that the traditional constitutional checks will prove inadequate. This is the class of case in which Professor ^cMichell's denial that maladministration is "truly political" is most obviously correct and which, because of its small scale and 'one-off' nature, may escape the political process. Today, however, an additional check is provided by the Ombudsmen.

In several cases the PCA has been critical of the miserly attitude of government departments. In the Watchford Festival case,² a farmer suffered damage caused by visitors to a 'Pop Festival' which took place at Watchford. The Crown was advised that there was no legal liability

1. Above p.274

2.

and the Home Office thereupon refused to pay. The PCA felt that there was "a strong moral obligation" to reimburse the farmer who would probably be unable to recoup himself from the festival organisers and the Home Office then offered an extra gratia payment of £90. This case can only be classified under the heading of 'hardship' or 'abnormal loss'. Another very similar case¹ is that of a dairy farmer robbed by a burglar of a number of books of milk tokens which he had not yet cashed. Not only did the Department refuse to reimburse him but they tried to hold him liable for the cost of replacements. The PCA secured an ex gratia payment.

In one interesting case,² the PCA secured an ex gratia payment for intangible loss suffered by a prisoner on remand who had been wrongly classified and lost his privileges for a short period. The PCA was advised that "failure to observe the Prison Rules does not provide a basis for legal action." Nevertheless he secured a payment of £100 which, he explained, was "not confined to damage for loss measured in money but really for loss of character."

In individual settlements the French Médiateur has also criticised the administration for its legalistic attitude. In one case a young boy blown up by a mine or grenade in 1945 failed in the administrative courts to establish a right to a pension because he was himself held to be at fault in picking the object up.³ Consulted by the Médiateur, the Conseil

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1. 1st Report of the PCA 1970-71, H.C.261(1970-71) Case No. C.679/L (Scottish Home and Health Department), And see for a classic case, H.C.211 (1979-80) Case No.4/658/78 p.36 (Compensation for site development)
 2. Report of the PCA H.C. 129 (1968-69) Case No. C.442/68 p. 45; Report of the Select Committee H.C.385 (1968-69) p. 84.
 3. Annual Report of the Médiateur for 1974, pp 26-7, Case No. 1-291.

d'Etat upheld the correctness of the decision, but despite this opinion the Médiateur asked the Ministry to reopen the case. They declined on the ground that the caselaw was clear and to depart therefrom might be discriminatory. The Médiateur used his powers of recommendation with the result that the Ministry backed down and, thirty years too late, awarded a pension.

This French example closely parallels an English case in which a woman complained to the PCA because she had been awarded only £1,000 from the estate of her brother-in-law who had died intestate. The relevant statutory provisions invested the Crown with a discretionary power to make payments to relatives. The PCA's investigation revealed the existence of departmental guidelines. Grants should have:

"the object of redressing hardship. The granting practice is not a set of hard and fast rules, but it sets out grounds on which applications for grants can be considered so as generally to remove grievances and to avoid inconsistency of treatment between applicants."

Since the Department had adhered to its own guidelines, the PCA expressed himself satisfied.¹

It seems fair to conclude that administrators in general are very much concerned with the ideal of "class equality" or distributive justice. They are more prepared than courts, lawyers, and perhaps the general public to accept that individuals may have to be sacrificed on occasion to the public interest. They are more inclined, therefore, to see the shadow of a class claim behind any given individual application.

This leads us naturally on from individual cases which appear to the administration to raise any point of general

1. 4th Report of PCA H.C. 405 (1974-75) Case No. C 478/J p. 181. See, on this point, British Oxygen Co. v. Board of Trade [1971] A.C. 610.

principle and which are usually settled on grounds of hardship or maladministration to class cases, in the sense of cases which raise a point of general principle and which may affect the rights of third parties who are not involved in the original application for compensation.

2. Group or Class Compensation

To attempt a classification of class cases is a far more difficult task. The first general point to make is that all ex gratia payments (other than those made on the grounds of equity and hardship to government contractors) are subject to control by the Treasury except in the case that an individual department has, like the Home Office, delegated authority to settle certain cases itself within a given money limit. This control is said to be aimed not only at ensuring control of government expenditure but of ensuring broad uniformity of treatment between government departments.¹ Whether it is capable of achieving this last result is, one supposes, extremely doubtful.

(i) Negligence and Maladministration

As in the individual cases, compensation is always the exception and never the rule. Thus, the first principle applicable is that, except where compelling reasons to the contrary exist, the administration is unlikely to offer compensation where there is no evidence of negligence (which would in any event found legal liability) or of maladministration.

1. See "Treasury Control of Losses and Special Payments" reprinted in Epitome of the Reports from the Public Accounts Committee 1938-69, H.C.187 (1969-70) pp.426-431.

One of the areas in which this rule is most stubbornly and, I think, recalcitrantly applied is in the case of miscarriage of justice. I use the word 'recalcitrant' because it seems to me that not only are the criteria themselves stringent but they are applied harshly and without generosity.

In one case¹ an immigrant from Pakistan successfully contested in an Immigration Appeals Tribunal a decision to exclude him from the U.K. By the time the case was heard, however, the applicant had returned to Pakistan. The Home Office refused to pay his return fare and the PCA was unable to help. He reported:

"The Home Office tell me that any request for an ex gratia payment is considered on its merits, but it is normal practice to decline to pay for the return passage where the immigration officer had reached a reasonable conclusion on the evidence before him at the time.

It might well be different if a case should arise where it could be substantiated that the immigration officer had not applied his mind fairly to the passenger's case, or had been motivated by prejudice or discrimination, or had arrived at a wholly unreasonable conclusion. The Home Office maintain that this was not the situation in this case, pointing out that the immigration officer's decision was endorsed by the adjudicator and by one member of the Tribunal."

At first sight, no more than an extremely hard case,² this affair does involve a serious issue of general principle and the solution, however inequitable it may seem, is entirely in line with the attitude of the Home Office to loss caused by a miscarriage of justice.

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1. 1st Report of PCA H.C.49(1974-5) Case No. C311/J pp 127-8.
 2. Payments to immigrants seem to be extremely unusual: see H.C. Deb 30 June 1978/col. 707 written answer.

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Compensation for miscarriages of justice

The decision to exclude all liability for loss arising through the operation of the judicial services from the terms of the Crown Proceedings Act means that the only recourse is government bounty. In principle, this is an extremely unsatisfactory position and one which is out of line with the practice of other European countries where statute permits a measure of compensation in such cases.¹

Even if allowance is made for cases in which costs have been allowed on acquittal it is ludicrous to suppose that the tiny handful of cases in which compensation is awarded represents more than a fraction of the cases in which defendants in fact suffer serious loss from detention before trial or from wrongful conviction. The explanation lies in the extremely restrictive criteria for a grant. These criteria were revealed to the Select Committee on the PCA in 1971 by Sir Philip Allen on behalf of the Home Office. Sir Philip stated that of some 2,000 odd remands per annum there had been 5 cases of compensation in the last 3 years. He continued:²

"There is no statutory provision covering this. But we have with Treasury agreement over the years made ex gratia payments in certain circumstances and have had to devise rules in accordance with which those payments are made."

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1. Borchard (1913) 3 J. Crim Law 684 lists some early American State statutes. For Germany see Boing (1977) X Modern Law and Society p. 27. For France see Ardant, La Responsabilité de l'Etat du fait de la fonction juridictionnelle, 1954; Bréchon-Moulènes, op. cit. pp. 482-4. See also below.
 2. Report of Select Committee, H.C.240 (1970-71) pp. 70-71.

The guidelines Sir Philip gave were: that payments should be made in cases where a court or the Court of Appeal acquits and the victim can show particular hardship, or where there is some evidence that the case has been mishandled. When the Home Secretary grants a free pardon, however,

"...there is a feeling that the State has gone so badly adrift and the man has suffered so much, that compensation is payable quite apart from any question of negligence."

Questioned on the possibility of extending their practice, Sir Philip continued:¹

"...this is so small that I do not think anyone takes objection to this being handled ex gratia in this way.

If we were to go in for this in a big way or some sort of routine basis, one would need statutory powers."

The reason for the refusal to expand the scheme was expounded further in a parliamentary answer in 1968:²

"The Department decided that so long as the onus of proof remained upon the prosecution, it would be difficult to justify automatic compensation on acquittal, and that any procedure allowing for the payment of compensation only in selected cases would involve an invidious discrimination which would reflect upon those not compensated."

The Home Office have steadily held this line.

In 1976, asked by Mrs. Hayman to make a statement, the Home Secretary set out the following guidelines:³

1. At pp 74-5.
2. H.C. Deb 20 Mar 1968 Vol 761 cols 553-564 and see Annual Report of PCA for 1970, H.C.261 (1970-71) Case No. C.550/L at p. 127.
3. H.C. Deb 29 July 1976 vol 916, written answers; cols 328-9.

Ex Gratia Payments to Persons Wrongly Convicted
or Charged: Procedure for Assessing the Amount
of the Payment

A decision to make an ex gratia payment from public funds does not imply any admission of legal liability: it is not, indeed, based on considerations of liability for which there are appropriate remedies at civil law. The payment is offered in recognition of the hardship caused by a wrongful conviction or charge and notwithstanding that the circumstances may give no grounds for a claim for civil damages.

2. Subject to Treasury approval, the amount of the payment to be made is at the discretion of the Home Secretary, but it is his practice before deciding this to seek the advice of an independent assessor experienced in the assessment of damages. An interim payment may be made in the meantime.

3. The independent assessment is made on the basis of written submissions setting out the relevant facts. When the claimant or his solicitor is first informed that an ex gratia payment will be offered in due course, he is invited to submit any information or representations which he would like the assessor to take into account in advising on the amount to be paid. Meanwhile, a memorandum is prepared by the Home Office. This will include a full statement of the facts of the case, and any available information on the claimant's circumstances and antecedents, and may call attention to any special features in the case which might be considered relevant to the amount to be paid; any comments or representations received from, or on behalf of, the claimant will be incorporated in, or annexed to, this memorandum. A copy of the completed memorandum will then be sent to the claimant or his solicitor for any further comments he may wish to make. These will be submitted, with the Memorandum, for the opinion of the assessor. The assessor may wish to interview the claimant or his solicitor to assist him in preparing his assessment and will be prepared to interview them if they wish. As stated in paragraph 2 above, the final decision as to the amount to be paid is a matter entirely for the Home Secretary.

4. In making his assessment, the assessor will apply principles analogous to those governing the assessment of damages for civil wrongs. The assessment will take account of both pecuniary and non-pecuniary loss arising from the conviction and/or loss of liberty, and any or all the following factors may thus be relevant according to the circumstances:

Pecuniary Loss

Loss of earnings as a result of the charge or conviction
Loss of future earning capacity.
Legal costs incurred.

Additional expense incurred in consequence of detention,
including expenses incurred by the family.

Non-Pecuniary loss

Damage to character or reputation.
Hardship, including mental suffering, injury to feelings and inconvenience.

When making his assessment, the assessor will take into account any expenses, legal or otherwise, incurred by the claimant in establishing his innocence or pursuing the claim for compensation. In submitting his observations a solicitor should state, as well as any other expenses incurred by the claimant, what his own costs are, to enable them to be included in the assessment.

5. In considering the circumstances leading to the wrongful conviction or charge the assessor will also have regard, where appropriate, to the extent to which the situation might be attributable to any action, or failure to act, by the police or other public authority, or might have been contributed to by the accused person's own conduct. The amount offered will accordingly take account of this factor, but will not include any element analogous to exemplary or punitive damages.

6. Since the payment to be offered is entirely ex gratia, and at his discretion, the Home Secretary is not bound to accept the assessor's recommendation, but it is normal for him to do so. The claimant is equally not bound to accept the offer finally made; it is open to him instead to pursue the matter by way of a legal claim for damages, if he considers he has grounds for doing so. But he may not do both. While the offer is made without any admission of liability, payment is subject to the claimant's signing a form of waiver undertaking not to make any other claim whatsoever arising out of the circumstance of his prosecution or conviction, or his detention in either or both of these connections.

This position was maintained in 1977 in the case of a police constable dismissed the force after conviction, and later acquitted by the Court of Appeal. The Under-Secretary of State explained:¹

"...it would be unrealistic to contemplate the compensation as a matter of course, of every acquitted defendant. I say "every acquitted defendant" because the same principle would logically apply to defendants acquitted at trial and to successful appellants. Reasons for acquittal are many and various. Sometimes the decision may depend on the interpretation of a difficult point of law; sometimes it may be a mere legal technicality. More frequently it is because the prosecution has failed to satisfy the jury beyond reasonable doubt.

Our legal system provides that in criminal cases the onus of proof rests upon the prosecution, and as long as an accused person is not required to prove his innocence it is difficult to justify automatic compensation on acquittal."

1. H.C. Deb. 1 April 1977 cols. 835-840.

Unsatisfactory as these reasons are, they do at least represent a considered policy decision, taken at a high level in the Home Office. What is harder to justify is the paltry sums awarded to successful claimants.

In their book "Wrongful Imprisonment"¹ Brandon and Davies listed the following awards:

Year	Number of Payments	Amounts
1956	3 (27 months in prison)	£400; £300; £300
1963	1 (7 months Borstal)	£200 (offer not accepted)
1965	3 (8 months prison)	£1,400; £1,850; £1,600
1969	1 (42 months in prison)	£4,000
1970	1 (10 months in prison)	£1,500

To this table we may add the following statistics given in answer to a parliamentary question².

	1968	3	£250; £23, £100
*	1969	1	£5,000
	1970	2	£850; £1,500
	1971	3	£750; £1,250; £2,250
	1974	1	£17,500
	1975	2	£1,500; £2,000
**	{ 1976	5	£500; £10,000
	{ 1977	13	£300; £1,100; £1,500; £2,550

* Appears not to tally with figure used by Brandon and Davies above

** Provisional assessments.

1. Brandon and Davies, Wrongful Imprisonment, 1973, p. 201.

2. H.C. Deb 6 July 1978, Written answers col. 247

At the date of writing, Brandon and Davies thought the sums paltry when compared with the awards of civil courts. They stated:¹

"The civil courts make even more generous awards against the police or prosecution witnesses on charges of false accusation; without imprisonment being involved at all."

and went on to cite two well-known cases of malicious prosecution in which sums of £5,200 and £8,000 respectively had been awarded with costs to successful plaintiffs in the civil courts.

Some order has been introduced into the chaos, however, by the appointment of the Chairman of the Criminal Injuries Compensation Board to act as independent assessor to the Home Office. His first task was to establish a starting point. This he did by asking members of the Bench and Bar to participate in assessing compensation for "a respectable man wrongly imprisoned for one year". The consensus figure was £5,000.

This figure may be adjusted to the facts of individual cases and joined to an additional sum for loss of earnings.² There, is however, no easy way to verify that the principles are being adhered to.

This suggests a far more sensible solution. All such ex gratia payments should be formalised in this area and jurisdiction given to the CICB which is well able to deal with it. The prerogative nature of the Scheme would preserve flexibility during a trial period - the main advantage of extra-statutory over statutory schemes - while participation of the CICB, which has acquired general respect and which issues regular reports, would allay public anxiety over injustices perpetrated.

1. At p. 203

2. Letter from the Chairman of the CICB to the author.

There are several principles which could be adopted as a basis for liability, some less generous than others. The French scheme currently uses the standard of "gross fault".¹ If this were selected - and the only thing to be said in its favour is that it is a start - then it would be only fair to distinguish between cases of detention and other cases, on the ground that imprisonment without good cause is a grave wrong. A more sensible criterion for compensation would be that of 'abnormal loss' or, in the English phrase, 'hardship'. Art. 149 of the Law of 17 July 1970 concerning pre-trial detention in France permits compensation in all cases where temporary detention in the course of a preparatory investigation by an examining magistrate ends in an order for discharge or acquittal and the detainee "has suffered manifestly abnormal and particularly grave hardship through the detention."

The joinder of these two requirements is severe and the test could with advantage be softened by an assumption comparable to that made by the Home Office at present in cases of free pardon: that every case of imprisonment constitutes abnormal hardship. Compensation would then be assessed on the basis of the tariff currently applied.

The standard justification advanced for the absence of a regular compensation scheme, that compensation cannot be general so long as the burden of proof rests with the prosecution, is not really a very good one. Yet it does contain within it the real explanation for the failure to institute

1. See Vedel op. cit. p 853. Addendum, where he argues that this codification represents a step backwards from the existing caselaw of the administrative courts.

reform of this long-standing injustice. There seems to be a widely held view amongst police and public that the rules of criminal procedure are designed mainly to facilitate the escape from the arms of the law of a large number of 'villains'. As Sir Robert Mark has put it:¹

"Because of its technicality and its uncertainty, the criminal trial has come to be regarded as a game of skill and chance in which the rules are binding on one side only".

To introduce compensation tends to be viewed as the presentation of prizes to successful players, an additional difficulty being that awards may contrast favourably with those made to policemen who suffer injury in the course of duty.² In addition, the Criminal Injuries Scheme is itself regarded by some as "a state-financed insurance scheme for the victims of intentional torts."³ To introduce compensation for miscarriage of justice would seem to tip the balance too far in favour of 'villains' and the best that can be hoped for is to pluck a handful of hard cases from the general run and permit an exceptional, ex gratia hand-out.

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1. In the Office of Constable, 1978, p. 157, a citation from his Dimbleby lecture delivered 3 November 1973.
 2. In 1974 1,557 awards to policemen on duty were made by the CICB; in 1975 the figure rose to 1,928 and in 1976 to 2,298. These awards represented respectively 14.7% , 15.4% and 16.9% of all cases resolved. Annual Report for 1976 (12th Report).
 3. Miers, Responses to Victimisation: a comparative study of compensation for criminal violence in Great Britain and Ontario 1978, p. 197. The CICB can ask to be subrogated to the victim's rights in a criminal court. In 1975-76 359 orders resulted in the recovery of £7,420; in 1976-77 540 orders resulted in recovery of £12,265; in 1977-78 735 orders resulted in recovery of £14,720. Whether the practice is economically justified is probably immaterial, the consideration being primarily a moral one.

There are nonetheless rational responses to these difficulties. There are several ways of excluding the thoroughly undeserving from the operation of the scheme. The present Criminal Injuries Scheme already uses the fault principle. Paragraph 17 provides that:

"The Board will reduce the amount of compensation or reject the application altogether if, having regard to the conduct of the victim, including his conduct before and after the events giving rise to the claim, and to his character and way of life it is inappropriate that he should be granted a full award or any award at all."¹

Surprisingly, this somewhat arbitrary provision has given rise to little obvious difficulty and the Working Party concluded that "the Board has the experience to evolve working rules, which demonstrate the principles which they apply within the broad framework of the [scheme]".² It would be perfectly possible to introduce a similar limitation in a scheme for compensation for the victims of miscarriage of justice.

A second solution could link recovery to the criminal trial itself by requiring a certificate from the trial court or Court of Appeal before the victim could apply for compensation. This would mean in effect that minor claims could be eliminated at a preliminary stage by compliance with the current Practice Direction on Costs³ which provides that costs should, as a matter of "normal practice" be awarded to a successful defendant "unless there are positive reasons for making a different order." Amongst such reasons, the Direction numbers the cases:

"(b) Where the defendant's own conduct has brought suspicion on himself and has misled the prosecution into thinking that the case against him is stronger than it really is...

and (c) Where there is ample evidence to support a verdict of guilty but the defendant is entitled to an acquittal on account of some procedural irregularity..."

1. This paragraph has been expanded in guidelines published by the CICB (Review pp 105-6). See also R v. Criminal Injuries Compensation Board ex. p. Ince [1973] 1 WLR 1334.

2. Review pp 62-63.

3. [1973] 1 WLR 718 and Thoresby, "Costs on Acquittal" [1973] 36 MLR 643.

The theoretical objections can thus be easily disposed of and the primary consideration must necessarily be one of cost. At present, the sums involved are trifling. Formalisation of the scheme would certainly increase the sums, by how much one does not know. It should not, however, be beyond the capacity of the Home Office to provide a reliable estimate. When this is done a reasoned policy decision will be possible.

(ii) Policy Decisions

The sentiment expressed by Sir Phillip Allen that the administration, like the courts, ought not to assume important policy decisions with serious financial implications, really represents a second criterion for administrative compensation: The administration serves in a purely operational or executive capacity and must not depart too far from the provisions of statute or regulations. Moreover, schemes which imply policy decisions or drastic change in policy ought normally to be made by the process of legislation or at least ministerial regulation.

A notorious battle between the Inland Revenue on the one hand, and the PCA and Select Committee on the other, admirably illustrates this point. The PCA became concerned at injustice caused to taxpayers through delays in assessment and refusal to waive back payment of taxes. He reported to the Select Committee¹ the Revenue practice, which was to make compensation only in cases where a departmental error had occasioned hardship to an individual. though this contrasted with the practice of other departments, the Revenue maintained that "they could pay nothing unless they were covered by a legal

1. 1st Report of Select Committee, H.C. 240 (1970-71) p. 23

enactment" and they found it impossible to draw up the terms of a legal provision to cover such a payment. A government concession later followed, the terms of which were rather strictly adhered to by an unrepentant Revenue department.¹ Whether the Revenue was justified in this case I find it hard to judge. A more valid example concerns a complaint of failure to pay compensation for destruction of stocks of pig feed after swine vesicular disease had necessitated slaughter of the pigs.² The department explained:

"The Government's policy on such consequential loss is long-established. It has been reviewed by two independent committees of Enquiry... both of which recommended firmly in favour of continuing to limit compensation to animals and things which had been destroyed on instructions from the Ministry's veterinary officers."

The PCA thereupon refused to find maladministration.

An example of a case in which a department took a rather stubborn line is that of the Home Loss payments initiated by the Land Compensation Act 1973³. This Act provided a limitation period of six months in respect of claims for Home Loss which subsequently proved to have been too short a period in view of the fact that the compensation was novel in type. A very large number of time-barred claims were received by local authorities some of which they wished to settle. The Department of the Environment, however, blocked their path, by using its powers under section 161(1) of the Local Government Act, 1972 to refuse permission for ex gratia payments by

1. Cmnd 4729 (1970-71). For a later case see 4th Report of PCA, H.C.413 (1976-77) Case No. C.346/K p. 175.

2. 1st Report of PCA H.C. 37(1975-76) Case C 320/J p. 4 at p. 9

3. For a fuller account, see Harlow, [1977] P.L. 301

a local authority. Complaints were made both to the PCA and CLA. The matter finally reached the Select Committee¹ where the Department argued that to permit settlement in all cases was to encourage deliberate circumvention of a recent statute and to create a statutory obligation not created by the statute to inform applicants of their rights in all cases. Somewhat ^{dis}ingenuously, they argued that it was up to Parliament to amend the law, though how this was to be done in the teeth of their own opposition was not explained. The explanation satisfied nobody and neither the CLA nor the PCA backed down.

For several reasons the departmental decision seems wrong. In the first place, it conflicted with a previous policy statement concerning the role of central government in connection with ex gratia payments by local authorities. In an earlier case² the Department had said that ex gratia payments were "a matter for the authority and not something on which the Department can exert more than moral persuasion". Secondly, the decision manifestly conflicted with the intentions of Parliament in establishing the CLA. This became clear shortly afterwards when section 161 was repealed by the Local Government Act 1978. Finally, while clinging to the letter of the 1973 statute, the department frustrated its spirit, a point made by the Select Committee very sharply in a later case of maladministration by the Department and the Ministry of Transport together in the operation of the same provisions.³

A complaint was made that inadequate publicity had been given on the occasion of road works in Bexley with the result that certain property owners in Rochester Way, Bexley, found their claims for Home Loss payments time

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1. Second Report of the Select Committee, H.C. 524 (1976-77)
 2. Report of the Select Committee H.C. 379 (1973-73) p.x.
 3. 6th Report of PCA, H.C.598(1977-78); 3rd Special Report of the Select Committee, H.C. 666 (1977-78); 1st Report from the Select Committee, H.C.91 (1978-79)

barred. The PCA upheld their complaint and recommended extra-statutory compensation but the two departments, claiming that they had taken legal advice and Treasury advice, refused to budge. The Committee accused the department of ignoring "Parliament's main intention [which] was that people should be enabled to claim compensation from funds set aside for that purpose." They recommended extra-statutory payments or, failing that, amendment to the Act.

The Ministry of Transport fell back on accounting difficulties, explaining¹ that *ex gratia* payments were "exceptional in character" and could not be used "on a general basis". In other words, "... there is a limit to which an accounting officer can go in authorising an ex gratia payment."

The Chairman asked whether this position squared with other cases of error and misleading advice and was told that it did:

"It is exactly in line with the rules laid down in Government accounting, as interpreted and expressed by the Treasury, and endorsed by repeated expressions of view over the years by the Public Accounts Committee. The doctrine is that an ex gratia payment can be made if the circumstances are genuinely exceptional... If there is a class of cases which I chose to try to treat as suitable for *ex gratia* payments, then I could start a line of expenditure not envisaged in the Act and not endorsed by Parliament, and expressed in Government accounting as to close that option off."

Sir Peter Baldwin concluded that, if he were to concede to the wishes of the Select Committee, he would expect to be rapped over the knuckles by the Public Accounts Committee (PAC). Legislation was therefore the only answer.

Despite the polite disbelief of the Select Committee, there is no doubt that this dilemma is a real one. It has been discussed by the Public Accounts

1. H.C. 91 (1978-79) pp. 13-14

Committee.¹ Following the pressure applied by the Select Committee, but before the Government's response, the PCA discussed the problem of large-scale tax concessions without statutory authorisation. The PAC expressed some concern that their control might be weakened because the concessions would be reported to the Select Committee on the PCA. There would in this way be a transfer of responsibility which would weaken parliamentary control over government expenditure.

In the Committee's view the recommendations of the PCA necessitated legislative intervention, "at the earliest possible moment."

(iii) Administrative Convenience and flexibility

In response to this suggestion, Sir Arnold France, Chairman of the Board of Inland Revenue suggested that it was not always convenient to legislate. Administrative compensation or, in this case concession, allowed the administration latitude to experiment. He told the PAC:²

"...You have got to give an extra-statutory concession a reasonable run before you would be in a position, anyhow, to legislate to see if you are dealing with the right kind of case. You get an example and you say: 'Yes, clearly there ought to be a concession here. This is not what Parliament meant at all.' You do not want to say: 'Right, we will legislate to deal with this,' because over the next year or so you may get other cases and you may need a wider area of concession. You have to see exactly what it is you need before you can legislate."

Procedural factors may also influence the decision whether to introduce legislation or to rely on the administrative process. In the Court Line affair,³ for example, the PCA found that certain statements made by

1. Reports of Public Accounts Committee; H.C. 300-I; 375-I; 537(1970-71) pp. 408-10.

2. Loc. cit p. 409

3. 5th Report of PCA, H.C. 498 (1974-75) pp 25-26.

Industry Secretary in the House of Commons concerning the viability of Court Line's travel agencies might have misled the public. He found therefore that the Government could not be "absolved of all responsibility for holiday makers' losses." But legislation had already been introduced and was before Parliament and the compensation question had been discussed with the PCA who explained that:

"... the redress is made from a Fund to be financed by payments made by the travel organisers... and ultimately by holiday-makers but started off by an interest free government loan... I should add, however, in view of my findings, that when the Bill was being debated in Parliament, government spokesmen made it clear that, if I were to allocate some measure of responsibility to the Government and if the Government decided that public funds should be drawn upon for the benefit of the customers of Court Line affected by my reports there was nothing in the Bill to prevent this."

Absconders from Borstals and Prisons

The administration does not always have recourse to legislation and it is difficult to see why the purely administrative character of some schemes is retained. The Home Office, for example, operates a number of wholly extra-statutory schemes of which the most interesting is that for the compensation of people whose property is damaged or stolen by absconders from Borstals and prisons. This scheme was originally devised in about 1947 and, it must be stressed, extends only to property since all payments of compensation in case of death or personal injury require Treasury sanction (and would today be covered by the Criminal Injuries Scheme).

The ground rules for the scheme are as follows:

- (i) Only cases occurring in the neighbourhood of the institution from which the escape was made will be considered.
- (ii) No payment is made when the loss or damage is covered by insurance except in cases involving damage to cars etc. where

compensation may be paid in respect of loss of "no claim" bonus.

- (iii) Escapes from outside hospitals, working parties or from escort when proceeding on transfer are treated in the same way as escapes from actual penal establishments.

Compensation under the scheme is based on the standard actuarial practices of insurance companies.

The question immediately arises how does this ex gratia scheme fit in with the decision in the Dorset Yacht case and why, if the scheme anticipated the courts by so many years, was litigation necessary? The answer is that the plaintiffs were insured - though in view of the small sum at stake, the decision to litigate still seems a strange one when measured against the psychological advantage to the Home Office of an absence of legal liability.

The Home Office believes that the Dorset Yacht case has had a negligible impact, the reason being in all probability that the scheme is wider than the legal liability imposed by the House of Lords. The Scheme in two respects presents a direct comparison to the French experience: first, the Scheme uses the original "neighbourhood" test of the Thouzellier decision; secondly, as with French law, this test has been replaced by a test of "causality", following a complaint to the PCA from a householder who found herself excluded from the scheme though living only 17 miles from a Borstal. The Select Committee was told:²

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1. All the information in the text has been supplied by the Home Office in letters to the author. The following payments have been made under the scheme in recent years:

Year	Number of Cases	Total amount paid
1974-75	74	£2,470.71
1975-76	65	£2,036.00
1976-77	43	£1,792.68

2. 1st Report of PCA, H.C.42(1973-74) Case No. C514/G p. 111; Report of The Select Committee, H.C.268 (1974) pp 14-17 (my emphasis.)

"...We have liberalised the geographical test and there is no absolute limit within which these damages occur on which we pay. It is more a question of time and how far this was in the actual escape process and how far it was the person going back to his ordinary criminal habits..." 1

Charged by the Select Committee with providing free insurance to people living near penal establishments, Sir Arthur Peterson explained that the scheme was more properly described as a public-relations exercise.

He said:

"The purpose of introducing the rule in 1950² was a reasonable one. It was to get people to accept more readily the setting up of an open borstal in the neighbourhood and I would say that the amount of money paid out has been very well justified over the years... In the sense that it has enabled borstals to be set up in different parts of the country which might otherwise not have been set up and the expense of the Government in having to maintain borstal boys would have been greater."

In some ways this explanation is entirely acceptable. Indeed, arguably it illustrates my point that it is for the administration rather than courts to assess this type of 'trade-off' or to balance the 'profit and loss' account. On the other hand, it does suggest the possibility of confusion and muddle arising from the proliferation of ad hoc schemes applicable to small sections of the community. In the case in point, it seems that the decision to retain the existing ad hoc arrangements may have actually disadvantaged the administration

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1. Not only does this principle tally exactly with the causal test used by the French cases which followed the Thouzellier decision, but it seems that in France, too, the administration may have voluntarily extended the Thouzellier ruling by administrative action. In one of the later cases the Government Commissioner, Madame Grévisse suggests this in a reference to the practice of the Ministry of Justice which she calls "A generous interpretation of the Thouzellier decision". Etablissements Delannoy, C.E. 19 Dec 1969, R.D.P. 1970 p. 787 concl. Grévisse.
 2. This date does not tally with the date supplied by the Home Office in correspondence.

because it has allowed the rules of legal liability, in both criminal and civil cases, to develop in a way which the administration would not have wished. Courts in this country are not allowed to look to the insurance position and exclude damage which is insured. Yet it is perfectly proper for insurance to be considered in drawing up an administrative scheme. It is, in fact, much simpler for the owner of property to provide for its insurance. On the other hand, so long as insurance is not obligatory, it is hard if uninsured losses rest on the victim. Formalisation of the existing administrative scheme together with better publicity would have led to greater efficiency and prevented the development of disparate standards of liability. Formalisation would in this case be extremely simple, as the scheme could be administered by the CICB, which would help to crystallise its position at the centre of all compensation caused by the operations of the criminal process.

In view of the strongly held administrative view that large scale expenditure merits legislative intervention as soon as is rationally possible, one wonders why the Criminal Injuries Compensation Scheme has itself never been put on a statutory basis. Very large sums of money, after all, pass through its hands.¹

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1. The total compensation paid between 1st August 1964 and 31 March 1978 was £50,526,013. Compensation for the Great Britain (the Northern Ireland Scheme being separate) in the last complete calendar years was:
- | | |
|---------|-------------|
| 1975-76 | £6,476,680 |
| 1976-77 | £9,677,389 |
| 1977-78 | £10,106,513 |

The sum is increasing and is expected to increase annually.

At the time of inauguration, the omission to legislate was justified to the House of Commons on grounds of informality and flexibility. The Home Secretary explained that "because of many imponderables," amongst which one might no doubt number the difficulty in predicting the number of claims and quantifying compensation, "the Scheme was to be started on an experimental basis so that it could be modified later." It was in fact modified on several subsequent occasions.¹

By 1978, ^{the} argument sounded increasingly thin and an Interdepartmental Working Party² set up to review the Scheme made the basic assumption that the Scheme should now be placed on a statutory footing. They admitted, however, that in practice such minor adjustments as finally seemed necessary could be introduced by amending the existing non-statutory Scheme.³

In the case of the Criminal Injuries Scheme (and, probably, the Property Compensation Scheme) there is a secondary motive, which is that of retaining full power over the amount of compensation and the modalities of payment in the hands of the administration and Government. This receives confirmation from Paragraph 4 of the Scheme which provides that:

"The Board will be entirely responsible for deciding what compensation should be paid in individual cases and their decisions will not be subject to appeal or to Ministerial review..."

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1. H.C. Deb vol. 694 col 1129. See further Hirschel "The Criminal Injuries Compensation Board" (1973) 26 Current Legal Problems 40.
 2. Review of the Criminal Injuries Compensation Scheme: Report of an Interdepartmental Working Party, HMSO 1978 p. 4.
 3. This has now been done: see further [1979] P.L. 4-20

The intention was obviously to limit parliamentary accountability to the occasion on which the annual report and accounts were debated by Parliament; together with such parliamentary questions as might be forthcoming. The worst suspicions of public lawyers are thus confirmed!

This intention was frustrated by the courts which held that, notwithstanding the ex gratia nature of the Scheme and the fact that it was established under prerogative powers, the Board was amenable to judicial review for error of law by means of application for a prerogative order.¹ The 1978 Review thought this a clumsy solution and proposed instead a formal right of appeal to the High Court, combined with supervision by the Council on Tribunals and the PCA (surely a clumsier solution?). If this recommendation were to be accepted, then the two main theoretical objections to a statutory scheme would fall - though that is not to imply that legislation would be forthcoming!

Before attempting to explain why, it is convenient to consider the sharply contrasting affair of compensation to the victims of vaccine damage.

Vaccine Damage Compensation

Following a skilful and ardent campaign by pressure groups, the Government recently announced that the principle of compensation to those who had been "seriously damaged as a result of vaccination" had been accepted. Since the Pearson Commission was sitting, however, the Government had referred the matter to the Commission and did not want to prejudice a more general solution. The campaign organisers very wisely kept up the pressure and, following

1. R. v. Criminal Injuries Compensation Board ex p. Lain [1967] 2 Q.B. 864; R. v. Criminal Injuries Compensation Board ex p. Schofield [1971] 1 WLR 926. A small but steady stream of cases has followed.

the preference expressed by the Pearson Commission for strict tortious liability in cases of vaccine damage¹ combined with their recommended general payment to all disabled children from social security funds,² the Government announced immediate interim payments. The Secretary of State told the House of Commons that there was no prospect of parliamentary time during the summer session but that a new vote would be inserted into the supplementary estimates to cover the estimated need of £7 million. Ex gratia payments of £10,000 would be made to any child who "on a balance of probabilities" had suffered vaccine damage. The ex gratia system had an added advantage because it did not affect either existing rights in tort nor potential rights which might accrue if the Pearson report were implemented.³

Legislation was quickly introduced to regulate the matter, receiving its second reading on 5th February 1979.⁴ During the debates, speakers made several unusually clear statements of the reasons for state responsibility which afford an interesting parallel to the theoretical arguments for liability in French administrative law discussed in previous chapters. Dr. Vaughan gave an exposition of the 'profit and loss' principle which Eisenmann would surely approve, when he said:

1. Pearson Commission, vol. 1 pp 292-298 at paras 1409-1413.

2. Ibid pp. 318-319

3. H.C. Deb 8 Feb 1977 col. 1227 et seq; H.C. Deb 7 March 1977 col 1129; H.C. Deb 14 June 1977 cols 239-147; H.C. Deb 9 May 1978 cols 973-985.

4. H.C. Deb. 5 Feb 1979 cols 32-86. The Bill became the Vaccine Damage Payments Act 1979 and the Scheme is operated under the Vaccine Damage Payments Regulations 1979 which came into force on 6 April 1979.

"A child is vaccinated partly for his own protection but also for the sake of society. We need to ensure that there is an adequate number of immunised children in the community to guard against epidemics. Society has asked for children to be vaccinated and the Government, representing society, have endorsed the procedure. It is therefore right that society should shoulder some of the responsibility when the procedure goes wrong." ¹

The Minister (Mr. Ennals), perhaps a modern disciple of Duguit, preferred the principle of Equality before Public Charges. He called the Scheme "a way in which the community as a whole has sought to share a responsibility for the hardship that has fallen upon [the victims]".² These passages suggest that the public does accept as the equitable or moral basis of administrative compensation the principle of mutual assurance even if the various theoretical explanations are too far divorced from the technical rules of legal liability to provide more than a very general explanation for the rules themselves.

I have dealt with this scheme at considerable length because it seems to me to provide a good illustration of the advantages of political over legal resolution of problems of administrative liability. A High Court action takes on average three years or more.³ One year after the House of Lords ruling in the Anns case no settlement had been reached.⁴ The litigation in the Sastre affair was protracted over twelve years. By way of contrast, in a session when the legislative timetable was crowded

1. H.C. Deb 5 Feb 1979 col 40

2. H.C. Deb 9 May 1978 col 977

3. See Report of the Winn Committee on Personal Litigation cmd 3691 (1968) Section III; Atiyah op. cit. pp 274-6

4. Judgment was delivered on 12 May 1977; the case was reported unsettled on June 24 1978 (The Times).

less than two years elapsed between acceptance of liability and the final implementation of the Vaccine Damage scheme in published regulations. The scheme was well publicised by the Department of Health which circularised all health authorities and issued a simple leaflet which included a claim form.¹ By way of contrast, in the industrial injuries cases, several applications had to be made for extension of the limitation periods as information percolated only slowly to the public² while, in the Thalidomide affair, several parents only recognised that they might have claims at a late date.³

(iv) Causality

To return to the question of compensation paid by the State to the victims of crime, I suggest tentatively that the unwillingness overtly to accept responsibility, in sharp contrast to the Vaccine Damage Scheme, derives less from a malign desire to preserve discretion intact and free from control than from a wish to confine the responsibility of the administration to cases in which a causal link between damage and administrative action is clearly discernible.

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1. H.N. (79)7 LASSL (79) 1 and HB3/Augsut 1978
 2. See the Harper case (above)
 3. See Sir Alan Marre's report, op. cit. above. For the first report on the operation of the Scheme, see H.C. Deb. 24 Oct 1979, vol 975, col 51

The refusal of the Home Office to concede the point of responsibility in the Borstal and prison cases parallels the reluctance of the Government to admit overtly to anything more than a sense of generosity by putting the Criminal Injuries Scheme on a statutory basis. But it also closely reflects some of the legal reasoning in the Dorset Yacht case. In the Court of Appeal, for example, Lord Denning M.R.¹ referred to the difficulty that the damage might be thought too remote, "the chain of causation being broken by the act of the person who had escaped." In the House of Lords, Lord Dilhorne² seized upon this causal analysis to found his own dissenting judgment.

This type of reasoning is prevalent throughout the administration and the present PCA (who is a lawyer) is frequently guilty of it as well. On the other hand, the Select Committee seems less impressed. In a recent report from the Parliamentary Commissioner, for example, one finds the following case:

A complaint was made to the PCA of unreasonable delay by the Department of the Environment in coming to a decision to allow a rugby club's application for a new site on former agricultural land. As a result of the delay, the club had to pay development land tax on the sale of its former site. The investigation revealed that the inspector's report was available one year after the application was filed with the district council; but a further year elapsed before the decision was made, during which prolonged negotiations and meetings took place between the Department of the Environment and the Ministry of Agriculture. The PCA found lack of intervention at

1. [1969] 2 Q.B. at p. 424 (Lord Denning M.R.)

2. [1970] 2 WLR at p. 1163 (Lord Dilhorne)

ministerial level to settle this inter-departmental dispute; the excessive delays; and the Department's failure to keep the club fully informed amounted to maladministration.

But no compensation was forthcoming. The PCA thought the department's obligation was "to reach a Planning Act decision lawfully, fairly and with due regard to good planning practice and established government policies, after resolving any difference of opinion that might arise with other government departments about the application of those policies to the particular case." There was a "general duty of reasonable expedition" but this did not extend to consideration of the particular financial circumstances of any particular individual. In any event "a more expeditious decision could as easily have gone against the club as in their favour." To paraphrase this last point, the loss did not flow inevitably from the delay.¹

A second case involved a complaint that a reminder note sent by the Driver and Vehicle Licensing Centre misled some car owners into paying £10 more in duty than they should have done. The PCA thought the note misleading and recommended compensation but the scheme instituted by the Department of Transport led to further complaints on the grounds (a) that compensation should have been extended to anyone who claimed to have been misled whether directly or indirectly and not restricted to those who had received the misleading form and (b) that repayment should have been automatic.² The PCA, though he expressed a little token sympathy, made short work of this argument, finding it quite reasonable to restrict compensation to

1. H.C. 302 (1978-79) p. 15 case no. 4/898/77

2. 3rd Report of PCA, H.C. 247 (1978-79)

people "who had received that particular renewal form." The Department could not be criticised for "not extending the scheme to others who, if misled at all, had been misled not by a form thus sent to them but in some other way." The PCA's reasoning was based on traditional legal notions of causality. In the case of those who had not read the fatal form, it could be said that "Insofar as they had been misled, it was not demonstrably the Department themselves who had misled them."

A similar argument was put to the Select Committee¹ in a case where a disability pension was wrongly calculated. The Department accepted liability to compensate only in case of major error. In the particular case neither party was demonstrably at fault. A Committee member (Mr. Cope) remarked:

"The point I am raising is really the difference between those two phrases; 'through no fault of the recipient' and 'due to the error of the Department'. In the particular case where this arises it is my view it is not the recipient's fault he did not get the money at the proper time nor I admit was it the Department's fault. It arose from his mental condition and it was nobody's fault. Should the Department then pay compensation in a case of this kind? My view is that it probably should."

But Mr. Atkinson for the Department of Health was unable to accept this. He was quick to explain the implications in terms of risk liability, saying:

"I think that to pay compensation in all such cases has very wide implications. It would mean for example that if the claim were rejected initially and then succeeded ultimately on appeal that the initial decision would not only have been overturned but treated as wrong in the sense that the Department had made an error in making that decision. It seems to us it is more reasonable to look to see whether that decision was a decision which could reasonably have been

1. 3rd Report of Select Committee H.C. 544, 295 (1977-78) pp.30-31 (emphasis mine)

given on the facts, although another opinion might be held, and only in the cases where in the best judgment of our medical advisers could it be said the doctor who made the decision was not making a decision which was reasonable in all the circumstances, then would we regard it as being an error rather than a genuine difference of opinion."

The speaker urged on the Committee that large numbers of claimants might be affected throughout the social services and other arguments of administrative expediency, but the Committee was not convinced.¹ They recommended to the Government the substitution for the 'fault' or 'causality' test the 'abnormal loss' principle, remarking:

"Your Committee do not expect interest to be paid on arrears of benefit in every instance, but in the case under review the recipient was awarded thirteen years' back pay twenty years later, by which time the value of money and consequently the real value of his award, had fallen very greatly. Your Committee believe that cases such as this merit more generous treatment..."²

I believe this reasoning to be very significant because it demonstrates the way in which the traditional legal notions of fault and causality operate to restrict liability. This mechanism may be used by courts and administration alike. French administrative law has never yet broken the tenacious hold of these twin ideas. A leading text book denies the possibility of liability for losses which are not attributable to the administration saying:³

"For there to be liability there must be injury and that injury must originate directly in an activity of the public service. To put this in another way, the damage must have been caused by the branch of the public service administered by the defendant while the victim must prove a causal connection between the administrative activity to which he attributes his injury and the damage of which he complains."

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1. At pxiii, See also Report of the Select Committee H.C. 454 (1974-75) pp ix-xi and Cmnd 6442 (1975-76)
 2. Ibid
 3. Odent, op. cit pp 1073-4.

Laubadère confirms this statement of the law. Distinguishing 'administrative risk' or 'created risk' from 'social risk' or situations in which "the State is under an obligation to compensate for certain losses even though they are not attributable to administrative activity,"¹ he denies absolutely the existence of the second type of liability in French administrative law. Causality, in short, is a notion as restrictive as fault. The Select Committee is right in trying to break away from it. Indeed, if we fail to do this, the purpose of administrative compensation may be defeated.

(v) Distributive Justice and individual treatment

Lawyers rather than administrators perceive discretionary power as designed to promote individual consideration of individual cases.² Administrators are more alert to the injustices which may be perpetuated by hasty acts of compassion and frequently give priority to the principle of Equality of treatment. For convenience, I will set this principle out once more in Weale's definition, according to which:³

"(a) good reason has to be shown for treating one person or group of persons differently from any other person or group of persons. In the absence of such a reason all persons or groups of persons should be treated similarly.

(b) Like cases are to be treated as like and unlike cases as unlike

Stubborn and inflexible adherence to this principle has more than once brought the administration into sharp conflict with the PCA and the

1. Traité, vol 1. p. 679

2. Galligan, "The Nature and Function of Policies within Discretionary Power" [1976] P.L. 332. H. Lavender and Sons v. Minister of Housing and Local Government [1970] 1 WLR 1231; Sagnata Investments v. Norwich Corp. [1971] 2 Q.B. 614.

3. Weale, Equality and Social Policy, 1978, p. 2

the Select Committee, both inclined to give priority to the contrary principle that justice must be done in individual cases.¹ Yet it has to be admitted that, by a less legalistic and casuistic interpretation of its own principle, the administration could avoid blunders such as the Home Loss Compensation Scheme.

In one complaint referred to the Health Service Commissioner, an elderly lady, who could not obtain an NHS bed, had to enter a private nursing home. The PCA found that the health authority had a duty to admit the patient on the grounds of her urgent need. He further found that her life was only saved by the availability of a private nursing home bed. He therefore recommended that the fees paid should be refunded on an ex gratia basis. The health authority refused. Questioned by the Select Committee, the authority explained their refusal, saying "We are very nervous of the consequences of making an ex gratia payment; I am referring to the long-term consequences".² This position was supported by the Department of Health which explained that "there were other cases of a similar nature so that, if they approved one, they would have to approve them all." The Minister held this line on the floor of the House, where he distinguished between a moral or 'public' duty and a 'legal' duty enforceable by an action in damages.³

Both the PCA and the Select Committee took a diametrically opposed view. The PCA preferred individual treatment of individual cases and stated

"In my view each case ought to be judged on its own merits and I consider there were significant differences between this case and the others which were shown to my officer."

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1. 2nd Report of Select Committee H.C. 334 (1971-72) p. xiii
 2. 3rd Report of PCA H.C. 223 (1977-78) Case C257/K pp 88-91; 2nd Report from the Select Committee 1977-78, H.C. 372 (1977-78) ppxi, 57-58.
 3. Hospital (Emergency Beds) Debate, H.C. Deb. 7 Mar 1977, cols 1143-1157

The Select Committee endorsed this attitude.¹ Considering the cases submitted to them by the PCA, they found the complaint before them differed in character from the other cases, in none of which had there been any question of urgency. Also, in all the other cases, geriatric nursing would have been involved. Rejecting the Authority's attempt to break the causal link by attributing blame to the general practitioner involved in the unfortunate affair, the Committee blamed the Authority for its 'ungenerous attitude' and 'failure to rectify a mistake.' Thus the principle of justice in individual cases was preferred by both the PCA and the Select Committee. Neither gave much consideration to the danger of possible discrimination (breach of the Equality principle). Nor, despite the claims of the Department urged by its Minister, did either pay much attention to the real danger that a single, compassionate concession might escalate rapidly into a principle of automatic compensation bearing a marked resemblance to legal liability for breach of statutory duty.²

Again, in the Vehicle Licensing case to which I have already referred, the Department of Transport explained their initial refusal to make a refund in terms of the Equality principle. The Department feared that concession in a single case "would encourage similar refund requests, difficult to check for their bona fides but awkward in equity to refuse." They anticipated a possible 600,000 claims with a consequent loss of £4 million in revenue.

The PCA was not very impressed. He reported:

"I think the Department attach undue weight to the problems, the number and therefore the cost of the refund requests likely to have to be met in practice."

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1. 3rd Report of the PCA for 1976-77 H.C. 223 (1977-78) Case C 257/K pp 88-91; Second Report from the Select Committee, H.C. 372 (1977-78) p. ix.
 2. An attempt to claim that the 'public duty' was enforceable by mandamus subsequently failed. The case was apparently never reported.

And in any event it must be questioned whether any individual clearly shown to have suffered through maladministration, even though it involved his over-paying only £10, should necessarily be refused a tangible remedy in the shape of a refund merely because of official unwillingness to face coping with similar claims from others." 1

In manipulating the Equality principle, the administration has so far shown considerable adroitness, not a little expediency, and a tendency to reason imprecisely. It is clear that, by manipulating the boundaries of the 'classes' said to be affected, and by comparing like with unlike, liability to compensate can be reduced at will. As the Select Committee pointed out in the Hospital Admissions case, the administration has a regrettable tendency to compare sheep with goats. If they are to pray in aid the principle of procedural justice, they must first, classify more precisely and, secondly, recognise that the principle cannot be used in conjunction with the fault principle of legal liability. If the two are combined, a restrictive and inequitable result is inevitably achieved.

Conclusions

In the teeth of all the evidence, lawyers persist in believing that chaos can be transformed into order by a process of classification. Let me immediately admit that my system of classification is wholly without validity and about as useful as Munchausen's tales in guiding a traveller around the terrain of ex gratia payments. All that I have succeeded in

1. 5th Report of PCA H.C. 524 (1977-78) Case No. 3B/474/77 pp. 300-303. Compare Congreve v. Home Office [1976] 2 WLR 291.

piecing together is a map of a rather unsatisfactory country ^{in which} / disparate cases are grouped haphazardly together and there is very little understanding of the true purpose of extra statutory compensation or of the principles on which it ought to be based. Such principles as can be discerned are applied to wholly incompatible cases and (as in the case of the failure to provide an emergency hospital bed,) the fact situations for which principles are selected are often wrongly analysed. At the level of principle what is really happening is that the administrators are turning for support to an assortment of maxims, political, constitutional, legal and even equitable, to rationalise, or provide excuses for, decisions taken for purely expedient reasons.

Not only is there considerable confusion over principles of compensation, but also over methods. Unsuitable procedures are very often selected and, once again, the selection is not scientific but haphazard. Administrative efficiency is mentioned as a criterion for settlement but the data on which the choices are based are too often absent. In the Vehicle Licences Case, for example, the PCA was informed¹ that potential claimants might amount to 600,000 with a resultant revenue loss of £4 million. No calculation of the respective costs of (i) paying all claimants and (ii) assessing the claims of selected individuals accordingly to the unsatisfactory criteria adopted by the Department which ultimately caused a second PCA investigation were given. To encourage a proliferation of Ombudsman investigations - as in the Home Loss affair - may itself be administratively inefficient, but, as even the average cost of a PCA or CLA investigation has apparently never been accurately calculated, we are not in a position to judge.

Again, the choice of purely administrative schemes as opposed to machinery which contains a judicial stage seems to be haphazard. The Select Committee has had to consider this point during the debate over the

1. H.C. 524 (1977-78) p.303

"Sachsenhausen affair", where the Foreign Office was very much criticised for rejecting the claims of ex-prisoners of war to have been interned in Sachsenhausen and hence to be entitled to compensation. Sir Paul Gore-Booth explained to the Select Committee the system used for the payment of claims for compensation.¹ The Foreign Office, he said, relied on two methods: (i) a draft Order in Council entrusting regulation of claims to the Foreign Compensation Commission and (ii) administrative procedure. In the case of Sachsenhausen, administrative procedures were used partly for reasons of speed, because "the claimants had already been waiting a long time". In retrospect, Sir Paul regretted this decision. He said:

"It is arguable that it would have been better to put these cases to the decision of a judicial body, or on a judicial basis before a body separate from the Executive; but the view taken at the time was that the Foreign Compensation Commission had in fact concerned itself mainly with property claims and that claims that dealt with death and imprisonment and disability perhaps should be dealt with differently."

Why they should be dealt with differently, and why personal injury did not merit a judicial inquiry when property compensation did, Sir Paul did not attempt to explain. Pressed hard on the need for a tribunal, however, Sir Paul stuck to his views, arguing:²

"...in the compensation agreements where there was very considerable unclarity as to the issues and as to the value of evidence and so on, a moment came when it really was right to put the questions in front of a judicial authority rather than try to deal with it administratively. ...I think in general this really is a course of wisdom. Mr. Watts [a Member of the Select Committee] has reminded me that one thing that does happen in the Foreign Compensation Commission, which I think is also an advantage, is the possibility of having open oral hearings; that I think is an advantage which that process would have..."

1. Report of Select Committee, H.C. 385 (1968-69) pp 1-4 at p. 3

2. At pp 10-11

Not only are the suggested criteria themselves vague and amateurish but they appear never to have been applied to the case in point.

Another example of amateurishness might be taken from the use of actuarial methods. Today disablement and physical injury can be relatively accurately quantified; the Department of Health, for example, uses standard disablement tables.¹ Courts of law, on the other hand, are well known to be hostile to actuarial methods.² Yet the awards of the CICB are expressly tied to the antiquated common law concept of damages, with the result that we find the Chairman (a lawyer) indulging in assessment exercises with the Bench and Bar to ascertain whether their awards are roughly in line!

When ex gratia payments were thought to consist of a few individual handouts, the fact that they were not subject to any systematised control was perhaps not very important. The advent of the PCA changed this in two ways. In the first place, the actual extent of the practice was revealed and it became apparent that a very sizeable operation was involved. Secondly, the PCA himself and the Parliamentary Committee to which he reported, began to intervene in the process of compensation. Thus, while the PCA himself provided the safeguard of an outside supervisory element, his activities actually increased the need for supervision. At the same time, his lack of enforcement powers drew attention to his own insufficiencies as a control mechanism. At the present time, therefore, one must doubt whether the controls for ex gratia payments are adequate.

1. H.C. 246 (1977-78) Case No. 3B/354/77 pp 116-121.

2. Prevett "Actuarial Assessment of Damages: The Thalidomide Case" (1972) 35 MLR 140 and 257. See for a more complete survey, The Pearson Report, Cmnd 7054-I Ch. 12 pp. 79-105.

The advent of the PCA changed ex gratia compensation in another way. The system had always operated within the bounds set by legal liability on the one hand; ministerial responsibility and financial accountability on the other. The PCA now added the dimension of 'maladministration'. This concept does not exactly tally with legal liability; the cases show that the Select Committee often urges a greater spirit of equitable generosity. Nor do the PCA and his committee seem fully to appreciate the very real limitations on administrative action imposed by the rules of government accounting. Again, and curiously for a parliamentary body, they sometimes are seen urging civil servants to depart from their constitutional role and exercise governmental powers more properly exercisable by Ministers.

A final point which emerges very clearly from the cases is the overwhelming pull exerted by the principle of legal liability. These principles are all too easily incorporated. The civil servant's natural reaction when faced with a claim for compensation is to take legal advice and act on it. Indeed, not to do this may constitute maladministration. Throughout the system of ex gratia payments one finds references to the legal ideas of 'negligence' and 'causality'. A further factor here is once again the advent of the PCA with his jurisdiction based on the parallel concepts of 'maladministration' causing 'injustice'. As a result, in an area in which we are entitled to look for new ideas and novel principles we find instead the reasoning of a common lawyer.

I do not myself believe that administrative compensation will ever be tidy. In the nature of things the cases dealt with are likely to be heterogeneous. I do, however, think that a degree of rationalisation could be quite easily achieved. Indeed, the main reason why this has not already occurred seems to me to be that public lawyers and administrators alike have

been misled by the lack of information into under-estimating the extent of the practice. Over and over again one finds references to the limited and individual nature of ex gratia payments when all the evidence points to entirely opposite characteristics.

The first essential seems to me to be a regrouping of the cases. The first group of cases is correctly perceived as negotiated settlements of legal liability. These are not really amenable to control and the administration must be free to negotiate like the private litigant.

Once the administration decides not to litigate and not to settle, the claim may be considered for ex gratia payment. At this point it should be classified, either as a claim which seems individual in character, or as one which is likely to involve a considerable class of unseen applicants. Although the two categories do exist and the distinction is quite clear, cases may sometimes be difficult to classify, because most class claims first appear in individual guise presented either directly to the administration or indirectly through the Ombudsmen. Some may, therefore, be wrongly classified as individual claims. Again, it seems inevitable that some applicants will emerge as prizewinners in the forensic lottery.

Once a case emerges as an individual claim for an ex gratia payment, unlikely to be recurring or to cause a drain on public funds, the question of legal liability can be set aside. The two criteria on which compensation can most properly be based seem to be (i) abnormal loss and (ii) maladministration. It should be stressed that these are alternatives and not cumulative. 'Abnormal loss' is admittedly an imprecise concept which is difficult to define. I personally believe that society is entitled to leave small financial losses to lie where they fall. Moreover, insurance is a relevant factor. A general, overall threshold - as with the Criminal Injuries Scheme - ought not, therefore, to be entirely ruled out. I would urge that ^{On the other hand,} all loss of liberty should always be

considered abnormal. . . To borrow a rather colourful passage from Lord

Atkin:

"Grievous as is the wrong of unjust imprisonment of any alleged criminal, I apprehend that its colours pale beside the catastrophe of unjust imprisonment on an unfounded finding of insanity". 1

Intangible loss (injury to reputation, refusal of civil rights etc.) could also be considered for compensation in such cases.^{P//} A final factor would be the principle of Equality before Public Charges. If a loss is suffered in the public interest and falls - as in the Watchford Festival case - on a single individual, the loss is abnormal and compensation ought to be considered.

The principle of maladministration is simpler. Wherever an administrative blunder causes loss, the administration ought in principle to redress the injury. Where maladministration is revealed by an Ombudsman investigation the case is even stronger and refusal to conform to his findings should in itself be considered maladministration.

At this stage the question of finality arises. At present, the decision not to make an ex gratia payment is final, subject to any second finding of maladministration by an Ombudsman, which in turn would be unenforceable. It is not clear that this is right. These are precisely the type of claims we recognised in Chapter 6 as more suitable to the judicial than the political process. It seems logical, therefore, to introduce some sort of appeal. The two clear choices are of appeal to the Divisional Court on a point of law, which, because the Divisional Court is likely to introduce legal criteria, seems unsuitable; and appeal to an administrative tribunal - the solution

1. Everett v. Griffiths [1920] 3 K.B. 163, 211 (Atkin L.J.)

favoured by Sir Paul Gore-Booth in the Sachsenhausen affair.

If one were to decide on appeal to a tribunal, a secondary choice arises: either a centralised appeal tribunal must be instituted or appeals could be classified according to subject matter and jurisdiction given to existing tribunals already functioning in the area. Claims in respect of the criminal process would go the CICB, land compensation claims to a Land Valuation Court and Foreign Office claims to the Foreign Compensation Commission and so forth. The second solution seems on the face of it to have the advantage of expertise. It may, however, have unseen disadvantages and, in the absence of statistics of the number of claims received or likely to be received, a clear preference cannot be expressed.

Introduction of a judicial or quasi-judicial stage might, however, entail reconsideration of the PCA's view that the administration has a duty to trace third parties likely to be affected by individual judicial or tribunal decisions. A judicial decision is individual in character. It follows from this that justice should be done to the individual without reference to other potential claimants. It follows also that the decision must be implemented and ought not to be retrospectively overturned.¹ If the ruling is applied as a matter of course to third parties not before the court it may be that these arguments lose some of their force, while, if the principle is expanded from the decisions of a court of law into the area of ex gratia decisions, and if individual decisions are considered capable of creating precedents, general policy decisions are subsumed by the solutions to individual cases. This ought not to happen, both because it allows for a considerable transfer of political power to courts and tribunals and because it allows political decisions to be made obliquely rather than directly.

1. See for further discussion, Prosser, "Politics and Judicial Review. The Atkinson Case and its Aftermath" [1979] P.L. 59 and Partington, [1979] P.L.1.

Turning to the second category of class claims, it seems that the most useful criteria here are (i) the policy of the government (ii) the principles of government accounting (iii) the principle of abnormal loss and (iv) the mutual insurance principle. It would be wrong for administrators to assume important government decisions by instituting compensation schemes (e.g. by agreeing to compensate the victims of absconding prisoners or of criminal injury). If we wish to secure control of government finance through the principle of parliamentary accountability it would be wrong, too, to encourage civil servants to break through the constricting framework of the government accounting rules. We must accept, therefore, that there are some decisions which only the government can take.

In considering what recommendations to make to governments, however, I suggest that administrators allow themselves to be too much influenced by the legal criteria of 'negligence' and 'causality'. Per contra, they do not pay adequate attention to the principles of 'abnormal loss' or 'mutual assurance.' To illustrate, the Vaccine Damage Scheme seems to be based on the right principles because it considers effects rather than causes and gives priority to the victim's needs. Many compensation schemes break away successfully from notions of causality. To cite a single example: the decision to compensate farmers for loss of stock caused by abnormal weather conditions in the winter of 1978-79 was based on the mutual insurance principle, as was the similar case of the earlier East Coast floods.¹ By way of contrast, we could cite the misguided Home Office insistence that compensation will be allowed to the victims of miscarriage of justice only

1. H.C. Deb 1 August 1978 vol 955 col 223 (Scotland); H.C. Deb Mar 18 1953 col 32 (E. Coast).

in the case that serious error or negligence can be shown. A little imagination and goodwill would dictate a wholly different solution, in which the principle of compensation for abnormal loss was admitted, but the victim's own default was a barrier to compensation.

We are entitled to expect . . . a greater measure of experimentation and imagination in this area of administrative compensation. Some of the worst lacunae in the system of legal liability could easily and inexpensively be filled. Again, I will content myself with a single example. We have seen that the absence of strict liability places the victims of accident caused by the public utilities at a grave disadvantage.¹ In fact, most of these risks can be easily quantified, and economic analyses of civil liability show that models for optimum allocation of losses can be constructed. The Gas Board, for example, keeps accurate statistics of damage caused by explosions² and can estimate the cost of automatic compensation. The costs can be redistributed to consumers and the payments systematised by a simple scheme.

Once the principle of compensation is allowed, the choice of means by which it is to be implemented must be made. While I concede the need for experiment and flexibility on occasion, I feel that the normal model should be statutory, and resemble the Vaccine Damage Scheme more closely than the Criminal Injuries Scheme. It is not sensible, as Professor Atiyah points out, to allow compensation schemes to proliferate, even if

1. Dunne v. N.W. Gas Board [1964] 2 Q.B.806; Pearson v. N.W. Gas Board [1968] 2 All ER 669.

2. Report of the Inquiry into Serious Gas Explosions, HMSO, 1977

his ideal of "a single comprehensive system based on the existing social security system"¹ seems a little idealistic (or even inflexible).

A final principle seems important. At the third stage, after implementation when claims are submitted, a chance to contest decisions in individual cases should be given.

Once again there are two basic models: the judicial Foreign Compensation model with its administrative tribunal; and the administrative Criminal Injuries model with its two stage application. The latter is efficient, cheap and speedy.

By allowing claims to proceed in the first instance to a single member who works from documentary evidence and holds no hearing, the Board is able to process up to 20,000 claims per annum at an average cost of £53. Contested claims are referred to a three man Board which holds a simple hearing; even then the cost rises only to £255.² The system seems to function relatively well, as the average figure for applications for judicial review remains constant at between 1 - 3 per annum.³

1. Op. cit. p. 572

2. For the most recent figures see Cmnd 7396 pp 5-7. In 1975-76 there were 16,690 applications; in 1976-77, 20,400; in 1977-78 20,826. The actual cost was: 1975-76, £911,165 (12.3% of total expenditure) 1976-77 £1,157,601 (10.7% of total expenditure) 1977-78 £1,266,789 (11.1% of total expenditure). The average cost of a single member decision in these 3 years was £49.65, £50.65, and £53.82 respectively. The average cost of a 3 man hearing was £220.62, £248.30 and £255.71 respectively. In its second report (Cmnd 3117 (1966-67) the average cost per case in the first 2 full years of operation was £119 and £41.

3. During the same period, 3 applications for judicial review are recorded: R. v. CICB ex p. Clowes 29 Mar 1977; R. v. CICB ex p. McGuffie 13 Oct. 1977; R. v. CICB ex p. R.J.C. Jan 21 1978.

Whether a final stage of judicial review should be permitted is a very controversial point, but one which in practice has a relatively simple if cynical answer. Since the courts will go to inordinate lengths to retain their jurisdiction and since no judge-proof clause has as yet been devised,¹ it may be better to legalise their privateering forays from the outset by precluding preclusive clauses.

It is pleasant to end on an optimistic note. When the administration really sets its mind to the matter it is able logically to evaluate the principles on which administrative compensation should be based, to break away from the tort system, to devise new formulae for assessment of compensation and to weigh the advantages of state compensation against the judicial process and insurance. This is demonstrated by a single administrative document, the report of a committee set up to consider compensation for property damage by criminal activity in the special circumstances of Northern Ireland². If this can be done in one case it can be done in others. Administrative compensation is the technique of the future and there is no need to feel pessimistic about its possibilities.

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1. Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 147;
R v. Criminal Injuries Compensation Board ex p. Lain [1967] 2 Q.B. 864.
 2. Report of a Committee to Review the Principles and Operation of the Criminal Injuries to Property (Compensation Act) (Northern Ireland) 1971, Belfast HMSO, 1976.

CONCLUSIONS

In England, coherent principles of governmental liability seemed at the start of the twentieth century almost out of reach. The common law viewed the transfer of losses from the victim to any other individual as an exceptional step which always needed to be justified. Loss normally rested with the victim, no matter how meritorious or blameless, except where justification for a transfer was provided by the existence of fault or wrongdoing. 'Wrongdoing' was traditionally defined as the breach of an obligation imposed by the law and the disparate character of the obligations which the law saw fit to impose left many gaps in the system of liability.

In the case of the State or Crown, this limited conception of civil liability was capable of working injustice. Citizen and State were by no means equal parties. The State was able to endow itself and its officers with wide-ranging powers, capable of causing considerable harm to private citizens. The traditional formula of personal tortious liability permitted the nature of these powers to be concealed behind the misleading metaphor of the public servant as a 'citizen in uniform', while the immunity of the Crown was theoretically incompatible with the idea of the sovereign as accountable and subject to the rule of law. These difficulties encouraged the growth of the idea that government liability was in some way special, that private law was incapable of dealing with the challenge posed by the special nature of state power, and that the citizen could never be adequately protected against loss or injury caused by the State unless special public law rules of liability were developed.

This proposition is not really as logical as at first it seems. It is not the existence of wide ranging powers which gives rise to tortious liability but their abuse or misuse. Some of those who protest at the limited scope of government liability are guilty of blurring this distinction and of confusing compensation for the lawful exercise of power with liability for its abuse or misuse. They are protesting about the existence and wide scope of statutory powers rather than about their abuse or misuse. Government liability is in this model invoked as an indirect means of review and a curb on the powers of the legislature.

It must nonetheless be admitted that, faced with abuse or misuse of power, the common law possesses deficiencies. In the first place, in contrast to the principles of liability for intentional and negligent wrongdoing, the concept of malicious wrongdoing is largely inchoate. The continental concept of abuse of rights is missing from the common law. Instead, our judges are left to manipulate the antiquated torts of conspiracy and of misfeasance in public office. This creates uncertainty and ambiguity. There is no doubt that this area of the law of torts needs urgent attention from the Law Commission and the legislature.¹

Secondly, because tortious liability in the common law was always exceptional, it was closely linked to fault. The idea of risk as a general basis for liability was discounted; indeed, until comparatively recently, strict liability was considered a medieval relic, unsuited to the conditions of a modern, industrial society.

1. Devlin, *Samples of Lawmaking*, 1962, pp.11-13.

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 It is tempting to see // gaps as necessitating a separate system of public liability. This could be created either by removing from the civil courts all jurisdiction in cases of administrative tort and contract or, less drastically, by allowing special principles of liability to develop in this area.

The French experience is valuable in helping us to weigh the costs and benefits of separate administrative courts. A dual hierarchy is seen to be an old-fashioned and cumbersome solution which brings in its train tiresome jurisdictional disputes. If an organic criterion for jurisdiction is selected, cases are classified arbitrarily according to the defendant's status. Parallel hierarchies are created and pressure to harmonise the substantive rules results. The object of the exercise may then be largely defeated. On the other hand, the search for a functional test is equally frustrating, since it is virtually impossible to identify any particular activity as typically governmental. Indeed, if our institutions continue to evolve as they have recently been evolving, public and private will increasingly be interwoven in the fabric of our society.

Turning to the alternative solution of special rules, two possibilities immediately suggest themselves. Liability could be imposed for all loss caused by illegal or invalid administrative action. This is really a form of risk liability, or, as some would say, a profit and loss theory of liability. Alternatively, or perhaps concurrently, a power to award compensation to those injured by legal or valid administrative action might be considered.

The Beaudesert decision alone¹ is sufficient to show us that a principle of liability for all invalid administrative action is not beyond the ingenuity of the judiciary; the question is not whether they can create such liability but whether they ought to do so. Clearly they ought not. Such a step is well outside the ambit of judicial legislation. It would have the effect of creating a large class of vested rights to compensation. This in turn would mortgage the resources and possibly limit the action of future governments. Such momentous decisions are for the government and not the judiciary.

To allow to the judges a power of compensation in the case of valid use of administrative power seems at first sight even more drastic. The French experience demonstrates, however, that this is not really the case. 'Legality' and 'illegality' are relative and flexible concepts; compensation and liability are really alternative routes to the same destination. The real difficulty is to isolate any definite principle on which the courts could base their awards. The French principle of Equality before public charges provides us with an illustration of the difficulties which our courts would face. Eminent philosophers find difficulty in explaining the principle in terms sufficiently precise for consistent application by the courts.² A generous interpretation may easily lead to the nullification of well-considered government policies, while even an administrative court as powerful as the Conseil d'Etat hesitates to intervene by the consistent use of the principle to impose liability in the case of governmental functions - such as the

1. Above p.

2. E.g. Rawls, *A Theory of Justice*, 1972, pp. 100-107, 258-283

judicial function, the defence powers and the police power – traditionally sheltered by sovereign immunity. Thus the principle is reserved by the court for a handful of trivial cases best dealt with by ex gratia payments. In any event, the allocation of such a power to a court would involve a substantial shift in our own traditional constitutional arrangements where the power balance is weighted in favour of the government and the legislature.¹

Even if we were to find such a reallocation of power politically palatable, those who seek to fashion the principles of tortious liability into a coherent whole mistake the nature of the legal process. The tort action is designed to single out from a large class of goats a few fortunate sheep to whom damages are awarded. In other words, the liability pattern and the criteria for reparation are deliberately complex, because loss lies normally on the victim and each individual transfer must be justified.² It follows that "a major part of the total system consists of legal costs. And it is the nature of the system which renders these legal costs necessary."³ It is apparent that English law and French administrative law share these characteristic features and that they are more similar than dissimilar. Compensation schemes, on the other hand, aim to reach a large class of claimants easily and cheaply. The criteria for payment are made as simple as possible while the schemes are relatively cheap to administer. For example, the administrative cost of the social security system, which

1. See for confirmation, Hailsham, *The Dilemma of Democracy: diagnosis and prescription*, 1977.

2. Blum and Kalven, *op.cit.*, p.30.

3. Atiyah, *op.cit.*, p.457.

reaches many more beneficiaries, is much less than that of the tort system.¹ To change English principles of liability for French principles is a minimal change. The real choice is between legal liability and administrative compensation.

Public lawyers have been inclined to see administrative compensation as an unsatisfactory substitute for legal liability. They will have increasingly to accept, in England as in France, that it is really the normal machinery for compensation. This does not mean, however, that government liability has been superseded by arbitrary and uncontrollable discretionary power.

It is generally accepted today that discretionary power is seldom if ever uncontrolled. Administrative law is largely perceived as a system of rules designed for the control of discretionary power.² These rules need to be extended to the area of administrative compensation, where, at present, system is notably lacking.

We are entitled to insist that the administration should formulate principles for the allocation of compensation which are applied in a systematic and equitable fashion. It is here that the principle of Equality could come into operation. Judges are bound to give a high priority to certainty; administrators are not. Even if it is too uncertain to be formulated as a legal rule, the ideal of Equality, in the sense of

1. The Pearson Commission Report, vol 2 pp. 205-8 and Table 158 tentatively estimates £47 million as the cost of administering the social security system and £175 million for the tort system. Too much reliance should not be placed on these figures, as the basis for the calculations is not entirely clear, nor are the two systems exactly comparable.

2. See further above, pp.

an understanding that losses suffered in the public interest ought not to rest on individuals but on the community, is capable of providing a basic principle for administrative action. It ought to be accepted that 'hardship' or 'abnormal loss' gives rise to a presumption that compensation should be made, even if 'hardship' and 'abnormal loss' are hard to define in general terms and must be assessed in the light of particular facts. Measured against this principle, some notable gaps appear in our compensation system and ought to be filled.

Secondly, because the importance of administrative compensation schemes has not hitherto been entirely appreciated, insufficient attention has been paid to structural questions. Schemes have been allowed to proliferate. Their structural suitability for their purpose has - as in the Sachsenhausen case - too often been ignored. Sometimes - as with the Land Compensation Act - compensation can be dealt with administratively and the only question will be whether to provide for appeals. In some cases, compensation is made available to a large class of victims: in this case, a model like the Criminal Injuries Scheme is eminently suitable. In other cases, a small amount of money must be shared between claimants each of whom must show that he conforms to complex criteria: in this case, an initial judicial hearing before a tribunal may be essential. Just as the Franks Committee imposed a modicum of order into^a varied system of individual tribunals, so we should insist on rationalisation and formalisation of ex gratia payments. Overlapping remedies and disparate procedures need not wholly be ruled out. But if we do not think carefully we shall create confusion and incidentally encourage 'forum-shopping' by the clever and unscrupulous.

Even if we envisage the administrative scheme as the normal method of providing compensation, this does not necessarily mean that the tort action can be allowed to decay, or that it should be brutally abolished. The central justification for every important theory of government liability is the protection of the individual from the power of the State and of its officials. It is true that we cannot at present demonstrate the efficiency of the tort action in providing redress in cases of abuse of power. On the other hand, we have not so far been able to devise any machinery which is noticeably superior. There are a few exceptional cases, as with the case of police brutality, where the tort action seems the best we can offer. Again, in the occasional case, the tort action provides a platform for the expression of political views which seem unable to find expression through normal political channels. The fact that the levers of the civil action are operated by individuals rather than officials acts as a safeguard against administrative abuse, while the status and independence of our judiciary lessens the danger of party political pressure. For these reasons, we need to retain the tort action at least temporarily and until we feel convinced that it can safely be abolished.

Retention of the existing system of shared responsibility for administrative liability is admittedly untidy. It is also open to the criticism that the lessons of history concerning the weaknesses of the political process have been ignored. On the other hand, the French experience does not suggest that the admixture can be avoided and, even if it could, systematisation brings its own dangers.

Government liability is only the obverse side of citizens' rights. In defining citizens' rights solely in terms of the legal process, we may be guilty of confusing litigation with legality and rule of the law courts with the rule of law. There is no perfect solution. We shall have to concede that "the best solution is no more than the least bad."¹

1. Groschens, "Réflexions sur la Dualité de Jurisdiction", A.J.D.A. 1963 p.536, 539.

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CORRECTIONS

- p. 3 note 3 should read: "op cit p. 352"
- p. 41 note 1 should read: "See H.C. Deb 1 Apr. 1977 cols 829 and 833
(debate concerning compensation for wrongful imprisonment
in the Glastonbury and Long cases); H.C. Deb 22 May 1977 cols
1243-54 (Case of Tanya Price (Whooping Cough Vaccination));
H.C. Deb 7 Mar 1977 cols 11143-57 (Case of constituent who
had to use a nursing home because no hospital bed was
available; no award)
- p. 93 note 1 substitute: Vicar of Writtle v. Essex C.C. (1979) 77 LGR 656
and p. 279 note 2 (Forbes J)
- p. 292 text 3rd line from bottom: for 'Watchford Festival Case' read
 'Watchfield Festival' case
- and note 2 Insert: Annual Report for 1977, H.C. 157 (1977-78) and case
 C 215/K 3rd Report for 1976-77, H.C. 223 (1976-77)