The Law Commission

Consultation Paper No 187

Administrative Redress: Public Bodies and the Citizen

A response by the Association of Personal Injury Lawyers

November 2008

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 4,500 members in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

APIL's executive committee would like to acknowledge the assistance of the following members in preparing this response:

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Executive Summary

APIL's primary concern is for people who have been injured as a result of another person's negligence or breach of statutory duty. We believe in the polluter pays principle, namely, that it is right and proper that a negligent party should make recompense for that negligence. Innocent victims should be treated equally, no matter who the wrongdoer is.

APIL does not agree that liability against public bodies is continually expanding and the consultation paper provides no clear rationale as to why tort law, as it applies to public bodies, requires such radical reform.

APIL does not accept that the duty to repair and the payment of compensation has a different moral complexion in personal injury or death actions when a public body is the defendant rather than a private individual or body.

APIL does not agree that the torts of misfeasance in public office and breach of statutory duty should be abolished.

APIL does not agree that the principle of joint and several liability should be changed and we believe that introducing judicial discretion into such an area produces uncertainty and will give rise to satellite litigation.

APIL does not agree with the proposal to introduce a 'truly public' activity test into private tort law, nor should 'serious fault' on the part of a public body be necessary before liability can be established. Tort law is concerned with the protection of the rights of the individual and there is no justification for public bodies to be subject to a different scheme.

APIL believes that society as a whole benefits when duties are established and upheld and it can, in many cases, lead to beneficial consequences by encouraging a higher standard of care.

APIL strongly criticises the use of the figures in Part 6 of the consultation paper to justify the current scale of liability of larger government departments. The largest component of those figures relates to provisions for clinical negligence claims yet such claims are excluded from the proposals.[1] The figures are therefore completely irrelevant to this consultation paper.

Introduction

APIL welcomes the opportunity to respond to this consultation paper on administrative redress.

We have a fundamental concern, however, with the premise of the paper. Paragraph 1.7 of the paper indicates that the idea is to create a system of redress for individuals who have suffered '…substandard administrative action'. We believe that claims for personal injury and death should be fully excluded from any such system of redress. It is an abuse of language to suggest that personal injury and death claims can be classified as 'administrative redress'.

[1] Law Commission consultation paper No 187, page 54, paragraph 4.5

Preamble – the justification for reform

APIL believes that the principles underpinning reform set out in the consultation paper are fundamentally flawed, insofar as they relate to claims for personal injury and death.

The consultation paper suggests that liability against public bodies is ever expanding. For example:

- '… The uncertain and unprincipled nature of negligence in relation to public bodies, coupled with the unpredictable expansion of liability over recent years …' (Paragraph 2.7)
- '… Of particular concern has been the potential for state liability to expand uncontrollably…' (Paragraph 3.119)
- '… the legitimate concerns of public bodies faced with seemingly ever-expanding liability…' (Paragraph 4.34)
- '…liability has expanded over time and…there is no good reason to expect that this will not continue…' (Paragraph 4.40)
- '… we believe that the long-term trend is likely to be a continuing expansion of liability…' (Paragraph 4.52)
- '… illustrates the uncertain and unsettled nature of this area of law…' (Paragraph 4.53)
- '… Recent history has seen an increase in governmental liability…' (Paragraph 4.56(1))
- '… the current law relating to the liability of public bodies is uncertain and over complicated…' (Paragraph 4.207)
- '… we wish to avoid the catastrophic effects of a continual expansion of liability…' (Paragraph 6.2)

APIL strongly disagrees with these assertions. The annual statistics produced by the Compensation Recovery Unit (to whom all personal injury claims have to be notified) show that the number of claims settled in 2007/2008 was significantly lower than in 2006/2007 (784,043 as compared to 793,767).[1] Whilst those figures relate to all personal injury claims, not just those against public bodies, they show that there is a general downwards trend in successful claims being pursued. The trend is even more significant in 'public' cases settled – 78,993 in 2007/08 as compared to 94,621 in 2006/07. [2]

APIL suggests that the courts are managing the law in relation to liability well and preventing its unnecessary expansion. For example:

- *Tomlinson v Congleton Borough Council (2003) UKHL 47*
- *Cole v Davis Gilbert (2007) EWCA Civ 396*
- *Rowley v Secretary of State for Work & Pensions (2007) EWCA Civ 598*
- *Smith v Chief Constable of Sussex Police (2008) UKHL 50*
- *Trustees of Portsmouth Youth Activities v Poppleton (2008) EWCA Civ 646*
- *Perry v Harris (2008) EWCA Civ 907*

Additionally In *Rogers v Merthyr Tydfil County Borough Council*[3] Lady Justice Smith said: '… the figures produced by DAS show that, of the 5% of slipping and tripping cases which proceed to trial, about 70% fail.'[4]
DAS have a large market share in the 'before the event' (BTE) insurance market and their own figures tend to show that about 7 out of 10 slipping and tripping cases that proceed to trial are unsuccessful.

APIL does not agree with the suggestion in this consultation paper that liability against public bodies is ever expanding. The paper, at paragraphs 4.40 to 4.48

[1] http://www.dwp.gov.uk/cru/performance.asp
[2] Ibid
[3] (2006) EWCA Civ 1134
[4] Ibid, at paragraph 124

inclusive, sets out illustrations of this supposed expansion in particular areas to justify the need for reform. We do not believe that these illustrations justify the argument that liability against public bodies is ever expanding.

In the following paragraphs, using the same headings as set out in the consultation paper at paragraphs 4.42 to 4.48 inclusive, we will demonstrate that, in our opinion, the current principles applied by the courts shows a generally conservative approach.

Education (Paragraph 4.42)

The consultation paper acknowledges that it has long been the case that schools should take reasonable care of pupils under their charge to prevent physical injury.[1] APIL believes that, as this principle is long-standing, dating from 1893[2], it is an extremely well established precedent and we believe that there is no justification whatsoever for interfering with it.

The consultation paper suggests that there is a new form of 'educational negligence' and several cases are quoted to support this hypothesis. All of the quoted cases, however, illustrate that there has to be some form of 'assumption of responsibility' towards the particular claimant(s) which would justify a finding of liability. For example:

- In *X v Bedfordshire County Council* [1995] 2 AC 633 the court was concerned with a claim against a headteacher and members of a Local Education Authority's advisory service for failing properly to assess and detect a child's special educational needs. The judgment makes it clear that the very purpose for which a child goes to school is education and a school which accepts a pupil assumes responsibility not only for his physical wellbeing but also for his educational needs.

[1] Williams v Eady (1893) 10 TLR 41
[2] Ibid

- *In Phelps v Hillingdon London Borough Council* [2000] 3 WLR 776 an educational psychologist was held liable, having been specifically called in to advise in relation to the assessment and future provision for a specific child.
- In *Robinson v St Helen's Metropolitan Borough Council [2002] EWCA Civ 1099* it was held that emotional and psychological damage resulting in failure by appropriate teaching to ameliorate the congenital condition of dyslexia was a personal injury.
- In *Bradford-Smart v West Sussex County Council [2002] EWCA Civ 7,* whilst it was held that there might be circumstances in which a headteacher could use his disciplinary powers against a pupil who attacked another child outside school and that failure to exercise those disciplinary powers might amount to a breach of the school's duty of care to another specific pupil, a school did not owe a general duty to its pupils to police their activities once they had left its charge.
- In *Kearn-Price v Kent County Council [2002] EWCA Civ 1539* the claimant pupil had been standing in the school playground at 8.40 am, just five minutes before the school day began, when he was struck in the face by a full-sized leather football. According to the school rules, pupils were to arrive at school at least five minutes early each morning. At the time of the injury there were 30 to 40 teachers in the staff room; no teachers were patrolling the school yard; and although full-sized leather footballs had been banned prior to the incident few, if any, steps were taken by staff to enforce the ban, apart from occasional reminders of the existence of the ban. This was despite the fact that several other injuries had been caused in a similar manner at the school. The court held that the school owed to all pupils lawfully on the premises a general duty to take reasonable measures to care for those pupils' health and safety.

APIL submits that none of these cases support the proposition that education claims are a 'consistently expanding field', as is suggested in the consultation paper.[1] The

[1] Law Commission consultation paper No 187, page 62, paragraph 4.42

Bradford-Smart case is used by the paper to support potential liability where pupils are bullied but the claimant actually failed to establish liability in the case itself and it was made clear that no general duty arises in such circumstances. The *Kearn-Price* case is used to support potential liability '… even when a pupil is injured on school grounds out of regular hours'[1] but the facts of the case show that such a bare assertion is misleading - the pupil was lawfully on the school premises as, indeed, he was required to be by the school rules.

Social Services (Paragraph 4.43)

The consultation paper refers to the case of *X v Bedfordshire County Council*[2] where the House of Lords refused to impose a duty of care towards children who had suffered abuse by their parents. The paper does not specifically comment upon that decision but does go on to quote later Strasbourg Court cases as an illustration that liability is expanding. For the reasons set out below, APIL believes that these later decisions are fully justifiable on their facts because they show that there had been an assumption of responsibility towards specific individuals, in particular children at risk.

In the House of Lords in *JD (FC) v East Berkshire Community Health NHS Trust and others*[3] it was held that health professionals responsible for investigating suspected child abuse did not owe a parent suspected of having committed the abuse a duty of care in carrying out the investigation.

Lord Nicholls of Birkenhead said:
"Until recently it would have been unthinkable that health professionals owed a duty to parents; they did not owe a duty even to the child. But the law has moved on since the decision of your Lordships' House in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. There the House held it was not just and equitable to impose a common law

[1] Law Commission consultation paper No 187, page 62, paragraph 4.42
[2] (1995) 2 AC 633
[3] (2005) UKHL 23

duty on local authorities in respect of their performance of their statutory duties to protect children. Later cases, mentioned by my noble and learned friend Lord Bingham of Cornhill, have shown that this proposition is stated too broadly. Local authorities may owe common law duties to children in the exercise of their child protection duties."[1]

The essential question in any case is to whom any duty is alleged to be owed. If it is the child, then, in our opinion, it is only right and proper that a duty of care should be upheld as there is an assumption of responsibility by the local authority to the individual.

On the other hand, if a duty is alleged to be owed to a parent who is accused (wrongly) of having harmed a child, there is no assumption of responsibility and a different result is justified, as Lord Nicholls went on to conclude in *JD*:
"In principle the appropriate level of protection for a parent suspected of abusing his child is that clinical and other investigations must be conducted in good faith. This affords suspected parents a similar level of protection to that afforded generally to persons suspected of committing crimes."[2]

One of the cases involved in *JD* subsequently went to the European Court of Human Rights as *R.K and A.K v The United Kingdom*[3]. It was held there that, although there had been a breach of Article 13 of the European Convention on Human Rights (the 'Convention') (the requirement to have an effective remedy before a national authority), there had been no breach of Article 8 of the Convention (the right to respect for private and family life). It was said that authorities, medical and social, have duties to protect children and cannot be held liable every time genuine and

[1] (2005) UKHL 23, paragraph 82
[2] Ibid, paragraph 90
[3] Application no. 38000(1)/05

reasonably held concerns about the safety of children *vis-á-vis* members of their families are proved, retrospectively, to have been misguided.

The Court of Appeal has recently considered this area again in *Stephanie Lawrence v Pembrokeshire County Council*[1] where it was held, following *JD*, that a duty of care was not owed by investigating professionals to parents suspected of child abuse. The Court of Appeal specifically considered the impact of the Convention and held that the reasoning of the majority of the law lords in *JD* had not been affected by the advent of Article 8 into domestic law. As Auld LJ said:
"The public interest in effective and fair investigation and prevention of criminal behaviour has fashioned the common law to protect those suspected of it from malice or bad faith, but not from a well-intentioned but negligent mistake … This Court and the House of Lords have recently clarified in *East Berkshire* the relevant principles of the common law, including the effect or lack of effect in relation to this issue of the impact of the HRA, concluding that they preclude the existence of such a duty to the parent. That reasoning, with respect, still stands …"[2]

Planning (Paragraph 4.44)

The consultation paper suggests that this has been 'an area of contention over the past thirty years'. Whilst it is true to say that the decision in *Anns v Merton London Borough Council*[3] has proven contentious over the years, leading eventually to it being overturned by *Murphy v Brentwood District Council*[4], APIL does not believe it is the case that this has 'expanded' the liability of public bodies over that period.

Although the case of *Kane v New Forest District Council*[5] is quoted in the consultation paper as evidence of an expansion of liability, this was a case in which the local authority had a positive duty to act, as the authority had created the hazard in the first

[1] [2007] EWCA Civ 446
[2] Ibid, paragraph 55
[3] (1978) AC 728
[4] (1991) AC 398
[5] (2001) EWCA Civ 878

place. The general position, however, remains as set out in *Stovin v Wise*[1] in which the House of Lords held that breach of a statutory duty (in this case, in failing to cure visibility problems at a dangerous road junction) did not give rise to any private law cause of action. Whether the local authority should do anything (about the road junction) was at all times firmly within the area of the council's discretion. As it was not under a positive duty to act, no liability could attach for failure to do so.

Emergency Services (Paragraph 4.45)

The consultation paper suggests that there has been 'a movement towards expanding the liability of emergency services' [2] but quotes just one example, namely *Kent v Griffiths*[3], in which liability was imposed where an ambulance failed to respond to a 999 call within a reasonable time due to carelessness.

In *Capital & Counties PLC v Hampshire County Council*[4] the Court of Appeal held that the fire brigade was not under a common law duty to answer calls to fires or to take reasonable care to do so. Similar decisions were reached in *Alexandrou v Oxford*[5] in relation to the police responding to a 999 call and in *OLL Ltd v Secretary of State for Transport*[6] in relation to coastguards when making a rescue at sea.

The Court of Appeal in *Kent* distinguished these decisions, in relation to an ambulance responding to a 999 call, by holding that the duty is not owed to the public at large but to a named individual for whom the ambulance is called. This provides a 'specific' reliance, whereby the duty becomes focused on that named individual.

By contrast, with a fire or a crime there is a 'general' reliance upon the emergency service, where an unlimited number of members of the public could be affected. The police responding to a call from a victim of crime are performing their general role of

[1] (1996) AC 923
[2] Law Commission consultation paper No 187, page 63, paragraph 4.45
[3] (2000) 2 All ER 474
[4] (1997) 2 All ER 865
[5] (1993) 4 All ER 328
[6] (1997) 3 All ER 897

maintaining order and reducing crime. The fire brigade responding to a call is concerned also to prevent fires spreading. In either case, there would be no 'specific' reliance unless the emergency service, by its own actions, increased the risk of danger.

The consultation paper also indicates that the emergency services will be liable where they directly inflict physical harm upon a claimant. The relevant leading cases cited are from 1938, 1946 and 1959 respectively. These are therefore long, well-established precedents and APIL believes that there is no justification for interfering with them.

Highways (Paragraph 4.46 and 4.47)

The consultation paper accepts that the courts have traditionally adopted a restrictive approach to what amounts to 'maintaining' a road under the Highways Act 1980.

In *Goodes v East Sussex County Council*[1] the House of Lords held that the duty under s.41(1) of the Highways Act 1980 to maintain the fabric of the road in good repair did not encompass a duty to prevent or remove the formation or accumulation of ice and snow. This led to Parliament itself having to address the issue by inserting a new s.41(1A) into the Highways Act 1980 ensuring that a highway authority are under a duty to ensure, so far as is reasonably practicable, that safe passage along a highway is not endangered by snow or ice.

In *Stovin v Wise*[2] the House of Lords held that breach of a statutory duty (in this case, in failing to cure visibility problems at a dangerous road junction) did not give rise to any private law cause of action. The consultation paper suggests that, because this decision has attracted significant academic criticism, it is vulnerable in the long term. If that is the case, then it surely provides justification for changing the law in favour of an expansion of liability (similarly as to *Goodes*, above) rather than limiting such an expansion.

[1] (2000) 3 All ER 603
[2] (1996) AC 923

Policing (Paragraph 4.48)

It is well established that, in general, there is no duty of care in relation to general policing[1]. At the time the consultation paper was issued the House of Lords had not decided the conjoined cases of *Van Colle* and *Smith* but has now done so, reaffirming that the core principle of *Hill's* case remains intact[2].

Nevertheless, as the consultation paper points out, the police have been held liable in other cases where there has been held to be some form of 'assumption of responsibility' or a special relationship. By analogy with the emergency services discussion, above, these are situations where there is some 'specific' reliance on the actions of the police, rather than 'general' reliance.

Even in the *Hill* case, it was clear that such situations could arise, despite the principle of there generally being no duty of care. As Lord Keith of Kinkel said:

'There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence. Instances where liability for negligence has been established are *Knightly v Johns (1982) 1 WLR 349* and *Rigby v Chief Constable of Northamptonshire (1985) 1 WLR 1242*. Further, a police officer may be guilty of a criminal offence if he willfully fails to perform a duty which he is bound to perform by common law or by statute: *Reg. v Dytham (1979) QB 722*, where a constable was convicted of willful neglect of duty because, being present at the scene of a violent assault resulting in the death of the victim, he had taken no steps to intervene.'[3]

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[1] Hill v Chief Constable of West Yorkshire (1989) AC 53; Brooks v Metropolitan Police Commissioner (2005) UKHL 24

[2] Chief Constable of the Hertfordshire Police v Van Colle; Smith v Chief Constable of Sussex Police (2008) UKHL 50

[3] (1989) AC 53, at p.59

The future

Paragraph 4.52 of the consultation paper asserts that: 'Whilst many cases have been unsuccessful, we believe that the long term-trend is likely to be a continuing expansion of liability'. We believe that this is simply not borne out by the case law and analysis discussed above.

In those cases that have been successful this is generally upon the basis of the public body having a positive duty to act in some way and where there has been 'specific' reliance upon it. The public body is thereby assuming responsibility sufficient to create a duty of care and there is a particular relationship with an individual or individuals. In our view, it is only right and proper that there should be tort liability attaching in such circumstances.

Paragraph 4.52 also suggests that a recent example of the expansion of liability is the decision of the Court of Appeal in *Smith v Chief Constable of Sussex Police*[1]. Since the publication of the consultation paper this case has been heard by the House of Lords, conjoined with *Van Colle*[2], where it was affirmed that the police owed no common law duty of care to protect individuals against harm caused by criminals, following the established principles in *Hill v Chief Constable of West Yorkshire*[3].

The facts of *Smith* are salient and were set out succinctly by Lord Bingham of Cornhill in the House of Lords judgment[4]. Whilst all of the Law Lords agreed, in the case of *Van Colle*, that the claim should be struck out, Lord Bingham dissented in *Smith's* case. As Lord Bingham said:[5]

"On the assumed facts as set out above, I am satisfied that the liability principle is satisfied and that the Brighton Police owed Mr Smith a duty of care. He, as a member

[1] (2008) EWCA Civ 39
[2] Chief Constable of the Hertfordshire Police v Van Colle; Smith v Chief Constable of Sussex Police (2008) UKHL 50
[3] (1989) AC 53
[4] (2008) UKHL 50, at paragraphs 20 to 26
[5] Ibid, at paragraph 60

of the public, furnished them with apparently credible evidence that Jeffrey, whom he identified and whose whereabouts were known, presented a specific and imminent threat to his life or safety. It has not been argued that death or injury was not a foreseeable result of a failure to assess the threat and, as appropriate, act. The relationship between Mr Smith and the police was one of close proximity, based on direct, face-to-face meetings. If, as some of the cases suggest, it is necessary to find a special relationship for a duty of care to arise, this relationship was in my view special as a result of Mr Smith's approach to the police and their response to it. If, as other cases suggest, it is necessary for responsibility to be assumed for a duty of care to arise, then in my opinion the police assumed responsibility by visiting Mr Smith, initiating what was regarded by them as an investigation, assuring him that the investigation was progressing well and inviting him to call 999 if he was concerned for his safety. Public policy points strongly towards imposition of a duty of care: Mr Smith approached a professional force having a special skill in the assessment of criminal risk and the investigation of crime, a professional force whose main public function is to maintain the Queen's peace, prevent crime and apprehend criminals. He was entitled to look to the police for protection and they, in my opinion, owed him a duty to take reasonable steps to assess the threat to him and, if appropriate, take reasonable steps to prevent it."

APIL agrees with Lord Bingham's views and believe that the House of Lords should have held, on the facts, that the police owed Mr. Smith a duty of care. Some of the other Law Lords clearly struggled with their decision in *Smith*:

- Lord Phillips of Worth Matravers:
    - "For these reasons I find myself reluctantly unable to accept the 'liability principle' formulated by Lord Bingham. I say reluctantly, because lack of action in the face of the individual facts that he postulates, and indeed the lack of action on the assumed facts of this case, comes close to constituting the 'outrageous negligence' that Lord Steyn contemplated as being potentially outside the reach of the

principle in *Hill's* case. I have not, however, found any principled basis for placing this case outside the reach of that principle."[1]

- Lord Carswell:
    - "The appeal of the Chief Constable in *Smith's* case has caused your Lordships greater difficulty, a difficulty which I share, but after careful reflection I remain of the view that the appeal should be allowed."[2]
- Lord Brown of Eaton-Under-Heywood:
    - "124. For my part I would acknowledge that the facts of the present case are vastly different from those either in *Hill* or in *Brooks* and that it is easier to contemplate civil liability here than in either of those cases. The particular reasons for rejecting the contended for duty of care in each of them were compelling: in *Hill* because it was surely unthinkable that the conduct of the entire Yorkshire Ripper investigation should be subject to minute examination; in *Brooks* because the main complaint was of psychiatric injury caused by the police's cavalier treatment of the claimant when they were first called to Stephen Lawrence's horrific murder, unsure at that stage whether he was a suspect or a witness, and intent above all on finding out who were the killers.

      125. I recognise too that the facts of the present case are really very strong as, indeed, I clearly recall having regarded the facts in *Osman* when originally that case was before the Court of Appeal in 1992: [1993] 4 All ER 344.

      126. But all that said, is it really possible to find a satisfactory basis upon which to distinguish this class of case (it would, of course, have to be distinguished on a class basis since, if a duty of care were found to exist, claims a good deal less meritorious than this one would inevitably be brought) from all the many other situations in which the *Hill* principle would clearly apply?

[1] (2008) UKHL 50, at paragraph 101
[2] Ibid, at paragraph 104

127. Not without hesitation - for Lord Bingham's opinion is undoubtedly persuasive and it is tempting to provide redress in as meritorious a case as this - I conclude not."[1]

The European Court of Human Rights (ECHR)

The consultation paper at paragraph 4.50 asserts that the ECHR decision in *Osman v United Kingdom*[2] continues to influence much of the jurisprudence in this area.

Before reaching the ECHR, the Court of Appeal in *Osman v Ferguson and Commissioner of Police for the Metropolis*[3] held that the case fell squarely within the principles laid down by the House of Lords in *Hill v Chief Constable of West Yorkshire*[4]. The police did not owe the plaintiffs a duty of care and was not liable in negligence to them.

It is important to consider the background to the domestic proceedings. The plaintiffs had issued proceedings and the second defendants had applied to strike out the claim as disclosing no reasonable cause of action. Sir Peter Pain, sitting as a Judge of the High Court, dismissed the application and the second defendants appealed to the Court of Appeal, which found in the second defendant's favour and struck out the plaintiffs' claim against the second defendant. Leave to appeal to the House of Lords was refused. The plaintiffs, therefore, did not succeed and the principles in *Hill's* case were upheld. Importantly, of course, this meant that the plaintiffs had not had an opportunity to have any sort of hearing of the merits of the case.

When the matter reached the ECHR the allegations included a breach of Article 2, namely a failure to protect the right to life, and a breach of Article 6, namely a failure to allow entitlement to a hearing by a tribunal.

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[1] (2008) UKHL 50, at paragraphs 124 - 127
[2] (2000) 29 EHRR 245
[3] (1993) 4 All ER 344
[4] (1989) 2 WLR 1049

In considering the allegation of a breach of Article 2, the Government alleged that any failure to take preventative action must amount to gross dereliction or willful disregard of their duty to protect life:

"The Government did not dispute that Article 2 of the Convention may imply a positive obligation on the authorities of a Contracting State to take preventive measures to protect the life of an individual from the danger posed by another individual. They emphasised however that this obligation could only arise in exceptional circumstances where there is a known risk of a real, direct and immediate threat to that individual's life and where the authorities have assumed responsibility for his or her safety. In addition, it had to be shown that their failure to take preventive action amounted to gross dereliction or wilful disregard of their duty to protect life. Finally, it must be established on sound and persuasive grounds that there is a causal link between the failure to take the preventive action of which the authorities are accused and that that action, judged fairly and realistically, would have been likely to have prevented the incident in question."[1]

The ECHR, however, did not agree – particularly as regards the 'gross negligence' or 'wilful disregard' argument:

"In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk

[1] (2000) 29 EHRR 245, at paragraph 107

must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case."[1]

The ECHR therefore soundly rejected the Government's argument that there was a requirement to prove 'gross dereliction' or 'wilful disregard' of duty. The ECHR did unanimously find that there had been a breach of Article 6, namely a failure to allow entitlement to a hearing by a tribunal, on the basis that the claim had never fully proceeded to trial and there was never any determination on the merits or on the facts. Simple adherence in this case to the principles in *Hill* amounted to the conferral of a blanket immunity on the police and an unjustifiable restriction on the right to have a determination on the merits of the claim.

The 'gross negligence' issue has recently been considered again by the Court of Appeal in *Savage v South Essex Partnership NHS Foundation Trust.*[2] Here it was held that, in order to establish a breach of Article 2, where it was alleged that there had been a failure to take reasonable measures to prevent the risk of suicide of a patient held under section 3 of the Mental Health Act 1983, it was only necessary to show negligence rather than gross negligence (such as would be sufficient to sustain a charge of manslaughter).

[1] (2000) 29 EHRR 245, at paragraph 116
[2] (2007) EWCA Civ 1375

The consultation paper may use the terminology of 'serious fault' as part of its proposals but we believe that this would introduce a similarly rigid standard that is too high, goes too far and effectively elevates the burden of proof in tortious claims against a public body to a criminal standard rather than a civil one. For example, if a police driver driving under a 'blue light' kills a pedestrian they will be held liable in tort (a civil action) only if their standard of driving is such that it would be sufficient to sustain a charge of manslaughter (a criminal action). APIL believes this to be fundamentally wrong.

Conclusions on duty of care

This consultation paper provides no clear rationale as to why tort law, as it applies to public bodies, requires such radical intervention as is proposed, apart from an assertion that liability of public bodies is expanding uncontrollably (and will continue to do so).

APIL very strongly disagrees with this assertion. Our detailed analysis of the current case law, above, shows that the courts are in fact, in our opinion, adopting a conservative approach. In those cases where claimants have succeeded, this has clearly arisen where the public body has assumed some responsibility. We believe that liability cannot be said to be expanding uncontrollably when the House of Lords refuse to find a duty of care in *Smith v Chief Constable of Sussex Police*[1], where the facts of the case suggest, in our opinion, a clear assumption of responsibility by the police.

APIL submits that the Law Commission in the consultation paper has provided no real evidence to justify reform of private tort law upon the scale proposed and reform is unnecessary. The law of negligence has developed over many years and we believe that the proposed reforms are likely to lead to more litigation, not less.

[1] (2008) UKHL 50

Consultation Questions

We would welcome views on the "modified corrective justice" principle which we have adopted to guide our options for reform in this Consultation Paper.

'Modified corrective justice' is defined as '… a model of "corrective justice" that properly reflects the special position of public bodies and affords them appropriate protection from unmeritorious claims'.[1]

We have no disagreement with the principle that public bodies should be protected from unmeritorious claims but we do not believe that this should be because of any 'special position' they may be in – our contention is that everyone should be similarly protected. A 'meritorious' claim, for example, an injured road traffic victim who can satisfy the 'ordinary' standard of negligence in proving fault, should not become an 'unmeritorious' claim simply because the wrongdoer is a public body acting in a 'truly public' way, for example, a police driver driving under a 'blue light'.

Economic theories of tort law, whereby costs from accidents are distributed in the most efficient fashion, do not accord with the polluter pays principle as liability might be placed on a party who had not 'caused' an accident in the normal sense. Corrective justice theories, whereby someone who injures another has a personal duty to put that person back in the position that they were in before the injury occurred, does accord with the polluter pays principle, as liability would rest with the party who had caused the accident.

Paragraph A8 of the consultation paper refers to A V Dicey's principle that state officials should be subject to the law on the same basis as the private citizen but then goes on, in paragraph A9, to refer to Daryl Levinson's analysis that attacks the

[1] Law Commission consultation paper No 187, page 4, paragraph 2.8

applicability of both economic and corrective justice theories where the state is the respondent in tort law. Levinson's central point is that compensation ultimately comes from the pockets of taxpayers.[1]

We are pleased to see that the consultation paper states, quite categorically, that Levinson's criticisms are rejected and accepts that, as a general principle, corrective justice survives as a justification for state liability in tort.[2] That would suggest that Dicey's principle, that state officials should be subject to the law on the same basis as the private citizen, would prevail - so we are concerned to see that Levinson's central point, namely that compensation paid by state bodies ultimately comes from the pockets of taxpayers, is stated as being important when considering the nature or content of the state's duty to put things right.[3] It is illogical to reject Levinson's criticisms whilst still accepting his central point.

APIL does not accept that the duty to repair and the payment of compensation has a different moral complexion in personal injury or death actions when a public body is the defendant rather than a private individual or body. Why should it matter to the badly injured victim of a road traffic accident whether the car that hit him was being driven by a police officer under a 'blue light' or by an unqualified drink driver – the latter may be more morally reprehensible but the consequences for the injured victim are exactly the same. Why, then, is there a moral case for limiting the liability of the police driver to particularly serious conduct, especially when they are a professional with a special skill, such that their standard of care should be much higher?

We believe there is no justification, in relation to claims for personal injury or death, to modify the principles of corrective justice to take into account certain features of the relationship between the state and potential claimants. In personal injury or death

[1] Law Commission consultation paper No 187, page 137, paragraph A.14
[2] Ibid, paragraph A.18
[3] Ibid, paragraph A.19

claims the relationship between claimant and defendant is no different whether the defendant is a public body or not. The claimant's expectation is that he will be free from (wrongful) injurious interference and that does not change because the defendant is a public body acting in a public way.

Part 4 – Liability in Public and Private Law

Overview of Current Problems

1.90 We would welcome comments on our analysis in paragraphs 4.36 to 4.57 of the development of the duty of care in relation to public bodies. (paragraph 4.58)

APIL does not share the Law Commission's analysis for the reasons set out earlier in the preamble.

The statutory powers of public bodies have expanded considerably over recent years, with greater involvement in the day to day lives of members of the public. APIL believe it is arguable, based on our analysis of the case law, that the law of negligence has, in fact, failed to keep pace with this expansion. In our view the law of negligence remains a step behind the vast regulatory powers now given to public bodies.

1.91 We invite comments on the operation of joint and several liability in the context of litigation against public bodies. (paragraph 4.71)

APIL strongly believes in the polluter pays principle and that innocent victims should be treated equally, no matter who the wrongdoer is. For example, if there are two private individuals who are jointly responsible for an innocent victim's injuries, and one is insolvent, the other would be fully responsible under the joint and several liability principle. This ensures the innocent victim is fully compensated. If, however,

we accept the arguments raised in this paper and the 'other' party responsible is a public body, and that public body is only responsible proportionately in some way, the innocent victim would suffer by not being able to recover full compensation. APIL believe this is fundamentally unjust.

We do not agree that the joint and several liability principle should be abolished, particularly in the case of personal injury and death actions.

1.92 We would welcome more data on the frequency of use of misfeasance in public office as a cause of action, and we would welcome views as to whether, and if so when, it remains a useful cause of action. (paragraph 4.91)

Misfeasance in public office is not encountered widely in personal injury actions, although there are limited examples of it having been used in child abuse cases. It remained a relevant legal issue in two recent cases. Firstly, in *Ashley v Chief Constable of Sussex*[1], a case which arose out of the death of James Ashley who was shot dead by a police officer during an armed raid on Mr. Ashley's home. Secondly, in the case of *Hussain v The Chief Constable of West Mercia Constabulary*[2], a case which questioned the nature and extent of the injury required as a component of the tort.

Misfeasance in public office is a difficult tort to prove and whilst it does not create a huge burden on public bodies it remains a useful check on public servants. We would argue therefore that there seems very little justification for its abolition.

Options for reform

1.93 Should the torts of misfeasance in public office and breach of statutory duty be abolished? (paragraph 4.106)

[1] (2008) UKHL 25
[2] (2008) EWCA Civ 1205

For the reasons set out in the previous answer, APIL does not support the abolition of the tort of misfeasance in public office.

The consultation paper at paragraph 4.78 suggests that, as there were only 15 reported cases in 2006 and 2007 where a successful claim for breach of statutory duty was made this renders it close to obsolete in many areas of the law. This is a very misleading statistic as it relates purely to cases successfully concluded at trial and reported. The paper overlooks the fact that the vast majority of thousands of successful personal injury claims made by employees every year will include allegations of breach of statutory duty and so the number of successful reported cases is no true indicator of the number of successful cases pursued.

By comparison, the Compensation Recovery Unit (CRU) performance statistics for 2006/2007 show that there were 98,478 employer liability cases registered and 215,820 employer liability cases recorded as settlements with the CRU.[1]

APIL are pleased to see that the consultation paper recognises that breach of statutory duty remains important and useful in health and safety at work areas, and that public bodies should not be treated any differently to private individuals or companies.[2]

APIL contends that there are several other areas that also provide statutory duties where public bodies should not be treated any differently to private individuals or companies including, for example, the Highways Act 1980; the Occupiers' Liability Acts 1957 and 1984; and the Consumer Protection Act 1987. These statutory duties are aimed at regulating the rights of individuals against suffering personal injury and, again, public bodies should not be treated any differently to private individuals. Any statutory duty that is designed to protect the health and safety of individuals, whether employees or otherwise, should be similarly retained.

[1] http://www.dwp.gov.uk/cru/performance.asp
[2] Law Commission consultation paper No 187, page 72, paragraph 4.79

1.94 We would welcome comments from consultees on this formulation of "truly public" activity in relation to statutes and suggestions on other ways that such a test could be formulated (paragraph 4.124)

APIL does not support the notion of a 'truly public' activity being the criterion for an activity to be subject to the 'serious fault' regime. We contend that this is likely to lead to extensive satellite litigation on challenges as to whether an activity falls within or outside the scheme. It is anomalous to suggest that a 'truly public' activity may be carried out by a private company, for example where they are providing a prison.[1]

The situation may be particularly profound in child abuse cases – what are the principles that would apply to a children's' home run by the state as opposed to one run by a charity or private company – for example, Barnardo's?

The consultation paper asserts that the fact that the state's resources derive from taxpayers is important when considering the nature or content of the state's duty to put thing right.[2] Where a public body, though, is carrying out a 'truly public' activity (e.g. a police driver driving under a 'blue light', chasing a criminal) then they are acting in the public interest of all taxpayers (to catch the criminal), their activity is for the benefit of the public as a whole, and so if someone is injured as a result of the activity then the public 'as a whole' (i.e. the state) should be responsible, if 'ordinary' negligence can be proven. There is no justification for elevating the activity to the higher level of 'serious fault'.

1.95 We invite comments on our formulation of the "truly public" activity test in paragraph 4.131 and whether it would act as a suitable "gatekeeper" to our private law scheme. (paragraph 4.132)

[1] Law Commission consultation paper No 187, page 79, paragraph 4.114
[2] Ibid, page 138, paragraph A.19

APIL does not support the introduction of a 'truly public' activity test into private tort law for the reasons set out in the previous question.

Tort law is concerned with the protection of the rights of the individual and there is no justification for public bodies to be subject to a different scheme.

1.96 We invite commentary on the operation of the proposed "conferral of benefit" test, in the context of the scheme set out in this Consultation Paper. (paragraph 4.142)

APIL considers the 'conferral of benefit' test to be extremely confusing and likely to lead to extensive satellite litigation as to whether a particular statutory duty confers a 'benefit' on individuals. In personal injury and death actions it is generally well established whether a particular statutory duty is actionable by an individual - for example the Highways Act 1980 – and this should not be replaced by the confusing 'conferral of benefit' test.

1.97 We invite comments on the possible operation of a "serious fault" regime in the context of the scheme outlined in the Consultation Paper. (paragraph 4.167)

For reasons set out earlier, APIL does not agree that a 'truly public' concept should be introduced into private tort law.

APIL also does not agree that a requirement of 'serious fault' on the part of a public body should be necessary where the activity undertaken is one characterised as 'truly public'.

Section 1 of the Compensation Act 2006 states:
"A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a

standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might -
(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or
(b) discourage persons from undertaking functions in connection with a desirable activity."

This provision is adequate to protect public bodies and others from unmeritorious claims and the further 'serious fault' requirement is unnecessary. The factors to be taken into account to determine whether conduct amounts to 'serious fault'[1] are nebulous, particularly the 'social utility' of the activity. This goes much further than s.1 of the Compensation Act 2006, which talks about a 'desirable activity' rather than 'social utility'. How does one measure, for example, the social utility of the police apprehending terrorists if an innocent member of the public is killed or injured in the crossfire?

Paragraph 4.147 of the consultation paper makes it clear that the 'serious fault' requirement means that, even where clear fault has been established against a public body and this has caused harm to the claimant, this would not be enough to succeed. APIL has extremely serious concerns about such a proposition which constitutes a clear erosion of the rule of law.

1.98 Is the approach to causation outlined in paragraphs 4.168 to 4.172 satisfactory? (paragraph 4.173)

APIL are pleased to note that, in the private law scheme, the same principles of causation will apply as at present. The consultation paper says that these principles of

[1] Law Commission consultation paper No 187, page 85, paragraph 4.146

causation are "… very well established and the courts are accustomed to their application."[1]

The same argument can apply to the principles of negligence and breach of statutory duty in personal injury and death actions.

1.99 Should the discretionary nature of judicial review remedies be preserved for damages in the public law context? (paragraph 4.175)

APIL has no comments on this question.

1.100 Based on our discussion in paragraphs 4.176 to 4.188, we would welcome comments on the recovery of pure economic loss:
(1) In the public law scheme;
(2) In the private law scheme. (paragraph 4.189)

APIL has no comments on this question.

1.101 Do consultees agree that the courts should have discretion to abandon the joint and several liability rule in "truly public" cases, or do consultees prefer another technique for mitigating the rule? What factors do consultees think should guide the courts in exercising their discretion? (paragraph 4.196)

APIL believes that the joint and several liability principle should not be changed for reasons set out in the preamble.

Introducing 'discretion' into an area such as this produces uncertainty and would be ripe for satellite litigation.

[1] Law Commission consultation paper No 187, page 90, paragraph 4.169

Part 5 – Relationship between Ombudsman and court-based options

1.102 Do consultees think a stay provision would be a useful tool in ensuring disputes are dealt with in the appropriate forum? What problems do consultees see with the operation of the stay as described in paragraphs 5.31 to 5.37? (paragraph 5.38)

APIL has concerns about the operation of a stay, as suggested, as this could result in vital evidence needed to pursue a case being lost through the passage of time.

1.103 Do consultees think that the ombudsmen should have the power to make references to the court of points on law as described in paras 5.43 to 5.46? (paragraph 5.47)

APIL has no comments on this question.

1.104 Do consultees think that references from the ombudsmen should bypass the permission stage before proceeding to the Administrative Court? (paragraph 5.53)

APIL has no comments on this question.

1.105 Do consultees agree that the statutory bar should be modified both in cases where legal proceedings have been commenced and where there is a potential remedy before the court? Do consultees agree that this should be done so that the default position is that ombudsmen have discretion to investigate regardless of the availability of a legal remedy? (paragraph 5.75)

APIL has no comments on this question.

1.106 We invite the views of consultees on our provisional proposal to abolish the MP filter. Do consultees consider that the filter should be abolished outright, or that there should be a "dual system" which would allow complainants the option of making a complaint through an MP or of seeking direct access to the Parliamentary Ombudsman? (paragraph 5.88)

APIL has no comments on this question.

Part 6 – Effect on Public Bodies

1.107 We would welcome any further information from consultees on the quantitative and qualitative effects of imposing liability on public bodies. (paragraph 6.19)

APIL believes there is a clear undercurrent throughout the consultation paper that there is too much litigation against public bodies, that they are paying out too much in compensation and that this all needs, in some way, to be curtailed. This is evidenced very clearly in Part 6, where the effects on public bodies are discussed.

Paragraph 6.10 of the consultation paper puts forward figures to demonstrate the current scale of liability of larger government departments but there is no justification for including these figures, as presented, to support the proposals. As is quite clearly stated in paragraph 6.11, the largest component in the 'provisions' element of the figures includes clinical negligence and payments under the Coal Health scheme – the figure given for clinical negligence alone in March 2006 represents nearly 58% of the total 'provisions' for 2005 – 2006. Yet clinical negligence is not to be included within the reforms – see paragraph 4.5 – so these figures have no place within this paper. APIL assumes that the Law Commission are not proposing to include the Coal Health

scheme within the proposals either, which means that the vast majority of the 'provisions' element is completely irrelevant to this discussion.

APIL believes that society as a whole benefits when duties are established and upheld and it can, in many cases, lead to beneficial consequences by encouraging a higher standard of care. In *Kanidagli v Secretary of State for the Home Department*[1] Keith J said: "… It is said that imposing a duty of care would hamper the effective performance of the system of immigration control. I do not agree. Being required to take care in the administrative implementation of immigration decisions would enhance public confidence in the system, and the administrative implementation of immigration decisions is not an area of human activity in which the fear of being brought to account for one's mistakes is likely to affect performance. . . it is said that imposing a duty of care would trigger further claims, which
(a) would require funds to be diverted and time to be devoted to enable them to be resisted, and
(b) would be a drain on public resources if the claims were successful.
I am unimpressed by these assertions. If the claims are successful, it is only right that compensation should be paid…"[2]

APIL endorses this specific comment and the logic in relation to the imposition of a duty of care in appropriate cases.

In analysing the costs involved in implementing any of the proposals in the consultation paper, one has to remember to add into the equation the long term effects of serious personal injury. If an injured claimant cannot recover compensation from a public body because they cannot satisfy the requirements of this scheme (e.g. proving serious fault) then greater costs are going to be incurred by the state in

[1] [2004] EWHC 1585 (Admin)
[2] Ibid, paragraph 42

looking after that injured claimant for the rest of his life, for example, by the provision of continuing NHS care and state benefits.

1.108 We would welcome suggestions as to the feasibility and possible structure of a public law pilot programme for a limited number of central government departments. (paragraph 6.32)

APIL has no comments on this question.

1.109 We would be grateful for comments on the phenomenon of administrative disruption and its relevance to our provisional proposals. (paragraph 6.55)

APIL has no comments on this question.

-Ends-