F W GUEST MEMORIAL LECTURE

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JUSTICE FOR THE JAINS: REMEDIES FOR BAD ADMINISTRATION

It is a real pleasure to be here in Dunedin at long last. We have heard so much from so many people about what an interesting and agreeable place it is but we just could not get so far south when we were last here in 2003. It is a real honour to be giving this lecture in memory of Professor Guest. He was obviously someone after my own heart, in that he believed that law was an academic discipline, not just a training for a trade. When I started teaching Law in the University of Manchester in 1966, there were still people who asked why there was a law school there at all. If there were any such people in the University of Otago in 1967, Professor Guest will have proved them wrong.

But in 1994 I left the academic world and embarked upon a career as a full time judge. A judge's life is rather different from an academic's. A judge's life is not about the bigger picture, although it should be informed by that. A judge's life is all about the individual stories: discovering them, telling them, and deciding how they should end. So I want to tell you three stories in which I have been involved, in order to illustrate my theme – which is whether the citizen should get damages from the state for treating him badly.

First is the story of Mr and Mrs Jain, owners of the Ash Lea Court Nursing Home in Nottingham, England. On 1 October 1998 a fleet of ambulances arrived at the home. No-one knew that they were coming. They took away the 33 residents, whose average age was 80, who were mostly physically infirm and suffering from dementia. Up until

then both residents and their relatives had been happy with the care they had received at the home. History does not relate what happened to the residents and how long they survived in their new and unfamiliar surroundings. But it is well known that uprooting elderly people from their homes is likely to lead to them dying earlier than they otherwise would.

History does relate what happened to Mr and Mrs Jain, who owned and ran the home. They were ruined. They had lost the only source of income for their business, the residents. They could not service their mortgage, which was large because they were improving the premises. The bank foreclosed and they were made bankrupt.

None of this should have happened. The regulatory authority had applied to a single magistrate for an immediate order to close the home down. He could only make such an order if it appeared to him "that there will be a serious risk to the life, health or well being of the patients in the home". These orders can be made ex parte – without notice to the people carrying on the home – but they do not have to be. They must be supported by a written statement of the reasons for making the application.

The statement put before the magistrate by the regulatory authority contained "misstatements, exaggerations and damaging irrelevancies" (trial judge, para 37). One paragraph was "quite mischievous", saying that there had been complaints about the inadequate care of residents, which was not true. Another paragraph implied that there had been suspicious deaths at the home, when there had been no such thing. The real concern about the home was that major refurbishment works were being carried out while the residents were still living there and these were taking longer than expected.

But the authority had taken the deliberate decision to allow this. All their previous formal requirements had been complied with and their current complaints could easily have been remedied. Only a week earlier they had written a normal post-inspection letter giving not a hint that they were contemplating action to close the home down, let alone emergency action without notice to the management.

The Jains appealed to the Registered Homes Tribunal whose members were so unimpressed with the evidence given by the authority that they held that the Jains had no case to answer for closing the home down, let alone for doing so as an emergency, and set aside the closure order. But this was more than five months later, by which time the damage was done. The tribunal had no power to award compensation. It could not even award the Jains their legal costs.

Should Mr and Mrs Jain be entitled to claim damages for their loss? The trial judge held that the authority owed them a duty of care, which the authority had breached. He also held that they had acted in a way that no reasonable public authority would act, in breach of their public law duties. But the Jains failed on appeal to the Court of Appeal and again to the House of Lords. One member of the Court of Appeal dissented: “In my view the injustice sanctioned by the majority in this court, if a true consequence of the law, should be sanctioned at the highest level”. But it was.[i]

The main reason for holding that there was no duty of care was that the regulatory authorities might then face a conflict between their duties to protect the safety, health and welfare of the residents and their duty to protect the financial interests of the home owners. They had been given their statutory powers in order to protect the

residents and might be inhibited in that task if they also had to protect the owners. The Law Lords also rejected the much narrower basis on which the claim was put before them: that the authority owed the same duties of care and candour to their opponents as they did to the court. Unfortunately, however, litigants owe one another no such duties. As my colleague Lord Rodger has put it:[ii]

"When parties embark on contested court proceedings . . . they are entitled to treat the other side as opponents whom they wish to vanquish. So they do not owe them a duty of care".

No-one suggested that there was any liability in negligence just because the authority had acted in breach of their public law duties, however egregiously.

My second story is about two children, whom I shall call Milly and Roxana. In September 1998, when Milly was two months old and being looked after by her grandmother, she was taken to the Royal Oldham Hospital where she was found to have a fractured left thigh. The consultant paediatrician decided that it was an inflicted injury. The police and social services were informed and proceedings brought to remove Milly from her parents. In October, she was discharged from hospital into the care of an aunt and in December, a judge having heard all the evidence concluded that the injury was non-accidental. But a few months later she was found to have two more fractures of the femur and it became plain that she had osteogenesis imperfecta. The interim care order was discharged in June 1999 and she was allowed to go home.

In March 1998, when Roxana was aged nine, her swimming teacher reported suspicious bruising at the top of her legs. She was referred to a consultant paediatrician who diagnosed sexual abuse. Her father and elder brother were prevented from visiting her in hospital and this became common knowledge in their community. They were also told that they would have to sleep away from home when Roxana was discharged from hospital. Fortunately, by the time that she was discharged, ten days later, it was discovered that Roxana had a skin disease which explained the suspicious marks and no further steps were taken.

Suppose for a moment that the doctors diagnosing abuse had been negligent. Should Milly and Roxana have been able to claim compensation for the harm that they suffered as a result of the negligent diagnosis?[iii]

Suppose, on the other hand, that the doctors had thought that the injuries were indeed accidental and so had failed to take action to protect the children. Suppose once again that they were negligent and the children suffered further physical or sexual abuse. Should they have been able to claim compensation for the harm that they suffered as a result of the authorities' failure to protect them?

Suppose, finally, that Milly's parents and Roxana's brother and parents suffered recognisable psychiatric injury as a result of having the children taken away from them in such distressing circumstances. Should they have been able to claim compensation for the harm that they had suffered?

The trial judge rejected Milly's negligence claim on the basis that eight months' separation from your parents when you are a baby is not an injury known to the common law (shame on the common law, say I, but that's a different story). Roxana's claim was for recognisable psychiatric injury, but the judge held that the authorities owed her no duty of care. The Court of Appeal overturned that decision and allowed her claim to proceed.[iv] The felt able to ignore an earlier House of Lords case holding that there was no duty of care in such cases,[v] because the advent of the Human Rights Act meant that the policy reasons for denying a duty of care did not carry the same weight these days.

However, the Court of Appeal also held that there was no duty of care towards the parents. The parents were not in any sense the doctor's patients. It was not "fair, just and reasonable" to impose a duty towards them when this might so readily conflict with their duty towards the children. In this the Court of Appeal was following one of the last decisions of the Judicial Committee of the Privy Council upholding a decision of the Court of Appeal in New Zealand.[vi] The parents' appeal to the House of Lords was dismissed by a majority.[vii]

My third story is about a young man from Zimbabwe whom I shall call Sammy. Sammy is not a good man. He came to this country as a student and overstayed his welcome. He committed criminal offences and was sentenced to one year in prison. The Home Secretary decided to deport him. So when he was due to be released from his sentence he was detained under the Immigration Act 1971 pending his deportation by the Home Secretary. On the face of it, the 1971 Act allows indefinite executive detention for this purpose. But it has long been recognised that there are limits – the

Government is not allowed to hold people indefinitely while it dilly dallies in making its decisions or once it becomes clear that it is not going to be able to send the foreigner home.[viii] So the Home Secretary has issued instructions requiring this executive detention to be regularly reviewed in order to see whether it should be continued. Sammy's case was not reviewed as it should have been. The Home Secretary accepts that this was in breach of his public law duty to comply with his own policy. The charitable explanation is that this was typical of the routinely bad administration of immigration control (the less charitable explanation, not found as a fact, is that the Government had adopted a secret policy of detaining all foreign nationals who were to be deported).

Sammy may be a good man. But in a recent well-known case about Harry Roberts, one of our more notorious murderers,[ix] Lord Steyn quoted the famous words of Justice Frankfurter in 1950,[x] that "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people". Lord Steyn followed: "Even the most wicked of men are entitled to justice at the hands of the State". So should Sammy be able to sue for being locked up by the Government without any court order or the procedural safeguards which the Government itself had adopted to protect him and others like him from arbitrary detention?

I cannot tell you the outcome of Sammy's case as it has not yet been decided. The trial judge held that he was entitled to claim damages for false imprisonment. The apparently open-ended executive power of detention was subject to both substantive and procedural limitations. The substantive limitations had not been exceeded but the

Secretary of State was under a duty to abide by his policy on reviews, unless there was a good reason to the contrary, which there was not here. The duty to review was integral to the power to detain.[xi] The Court of Appeal disagreed.[xii] The case was heard in the Supreme Court last term, but judgment has been held back because we now have an appeal raising similar issues in another case and we do not want to reach inconsistent conclusions.

I have chosen these examples because they all stem from the existence of the coercive power of the State: to destroy our livelihoods in the case of Mr and Mrs Jain; to destroy our families in the cases of Milly and Roxana; and to take away our liberty in the case of Sammy. This makes them different from the many other cases in which people try to sue a public authority for damages and with such varying degrees of success. But whether this is a relevant difference in law remains to be seen.

It is obvious from the level of judicial disagreement in these cases that they are not easy to decide, even as the law now stands. Whichever way the decision goes, there is likely to be criticism. But by and large, holding public authorities accountable for the damage they do is more popular with commentators than not doing so. The courts, on the other hand, are more cautious. There are three possible routes to liability: two recognised by the present law, and one which has long been recommended by the most respectable commentators.

The first is the ordinary law of tort (or torts as the purists like to call it, because there is no unifying theory or principle). There is one tort which is specifically aimed at the harm which public authorities may do: the tort of misfeasance in public office. But

this is limited to the deliberate misuse of public power: so the claimant must show either that an official maliciously used the powers he did have to target a particular individual or that he knowingly or recklessly exceeded his powers. This is not easy to prove. Indeed, the tort dropped out of sight during most of the 20th century because the Court of Appeal held in 1908 that it did not exist.[xiii] However, in 1982 the Privy Council held, in a New Zealand case, that it was well-established.[xiv] It leapt into prominence when the liquidators of BCCI sued the Bank of England for reckless failures in their regulatory duties, ultimately and spectacularly failing at trial after expending many millions.[xv] The trial judge held that the conduct of the regulators in the Jains' case, though it bordered on the reckless, fell short of "malfeasance or bad faith".

Apart from misfeasance in public office, the general principle of the law of tort is that public bodies are in no different a position from private persons. Thus a Home Secretary who locks someone up without lawful authority is as liable in the tort of false imprisonment as is a kidnapper. False imprisonment is a tort of strict liability. The poor old prison governor who miscalculated a prisoner's release date, because he was relying on the law as it was then understood to be, was liable for false imprisonment when the House of Lords decided that the previous interpretation of the legislation was wrong.[xvi]

So the dispute in Sammy's case is about whether the Home Secretary's statutory powers of detention are constrained, not only by the substantive limits implied into the statute, but also by the procedural constraints he has imposed upon himself and which he is bound by public law principles to respect. No-one disputes that if an

immigration detainee is held in circumstances where he should not be held, he can achieve his release by way of judicial review or habeas corpus. No-one disputes that if the authorities fail to review his case regularly and at a sufficiently senior level, he can get an order obliging them to do so. The question is whether such public law failures also bring with them a right to damages for wrongful detention.

The question for the children, the parents and the Jains was whether they could establish liability in negligence or breach of statutory duty. Lord Hoffmann thinks that the law is very simple. A public authority is in the same position as a private person.[xvii] So if a public authority does things that a private person might do, it will be liable in the same circumstances as a private person would be liable, unless there is some special statutory defence. A police driver has to drive as carefully as anyone else. An NHS doctor has to treat his patients as carefully as a private doctor. More borderline are the cases where an authority only undertakes responsibility towards a person because of their statutory powers, but they may still be liable in the same way that anyone else undertaking an equivalent responsibility may be. A local authority which has assumed parental responsibility for a child is in the same position as a natural parent.[xviii] An educational psychologist assessing a child's special educational needs is in the same position as a private psychologist doing the same.[xix] But given the existence of a duty of care, the question is whether their statutory powers might provide some defence or their position some immunity.

On the other hand, where a public body have powers or duties imposed upon them by statute for the public good, in Lord Hoffmann's view, they owe no duty of care for failing to exercise their powers unless the statute intended to impose upon them

liability for failure to act. So originally, highway authorities were under no liability to individuals for failing in their public duty to maintain the highway, until statute expressly imposed such a duty in 1961.[xx] Even then, a duty to keep the highway in repair did not require the authority to remove ice and snow, once again until statute expressly included this. [xxi] But a general duty to prepare and carry out a programme of measures designed to promote road safety[xxii] did not mean that they had to paint "slow" on the road so as to warn a driver to take special care when approaching the brow of a hill. There was no liability towards Mrs Gorringe when she lost control and skidded into a bus on the opposite side of the road.[xxiii] Similarly, there was no liability for failing to provide Mr O'Rourke with the accommodation to which he claimed to be entitled under the homelessness legislation.[xxiv]

Lord Steyn put it this way in Mrs Gorringe's case:[xxv]

". . . in a case founded on breach of a statutory duty the central question is whether from the provisions and structure of the statute an intention can be gathered to *create* a private law remedy? In contradistinction in a case framed in negligence, against the background of a statutory duty or power, a basic question is whether the statute *excludes* a private law remedy."

But what if the authority have not simply failed to exercise their statutory powers but have exercised them in a way which has caused another loss? Lord Steyn went on to suggest, not without some support from earlier cases,[xxvi] that the duty of care might depend upon whether public law would impose a duty to act or to act in a particular way: in other words whether the decision of the public body would be open to judicial

review on the ground of *Wednesbury* unreasonableness. The point which was being canvassed here was that breach of public law duties might import private law liability where otherwise there would be none. This might have had a dramatic effect on the Jains' case. There cannot be much doubt that the decision to bring the proceedings, and certainly to bring them without notice to Mr and Mrs Jain, was *Wednesbury* unreasonable.

Lord Hoffmann has disavowed this idea, both judicially in Mrs Gorringe's case and extra-judicially, in his Bar Law Reform lecture in November last year, where he called it "silly" and "ridiculous". Nevertheless, bodies of the highest distinction have argued for a long time that people who suffer loss or damage as a result of unlawful executive action *should* be able to claim damages irrespective of whether there is liability in the law of tort. Amongst these was the Justice-All Souls Review of Administrative Law, chaired by Sir Patrick Neill as he then was, with a stellar collection of members from the administration and academia. Their Report on *Administrative Justice – Some Necessary Reforms*, published in 1988, reached a very clear conclusion. They even drafted proposed legislation (para 11.83):

"Subject to such exceptions and immunities as may be specifically provided, compensation in accordance with the provisions of this Act shall be recoverable by any person who sustains loss as a result of either

(a) any act, decision, determination, instrument or order of a public body which materially affects him and which is for any reason wrongful or contrary to law; or

(b) unreasonable or excessive delay on the part of any public body in taking any action, reaching any decision or determination, making any order or carrying out any duty."

They were not troubled by the two arguments most commonly deployed against this proposal. They thought that the fear that public bodies would be "unduly inhibited" in carrying out their functions was "much exaggerated" (para 11.79). Mostly such bodies act in accordance with the public interest as they see it and take legal advice if they are in any doubt about their powers. But on the odd occasions when they get things wrong, why should it matter whether or not they have an ulterior motive? The damage done by the wrongful revocation of a licence or the wrongful grant of planning permission is just the same.

Nor were they impressed by the *in terrorem* argument that this would cost too much. They thought that the standards of administration were already so high that there was not much wrongful administration which would attract a damages award. The effect would simply be to improve what was already good (para 11.80). They also thought it anomalous that an injured citizen could obtain *ex gratia* compensation for maladministration by making a complaint to the Parliamentary or local government ombudsman. There can be maladministration without any unlawful action. So why may one be compensated for administrative inefficiency but not for the unlawful exercise of state power (para 11.81)?

I wonder whether these optimistic thoughts would have been at all dented by the explosion of judicial review which took place in the following decade? In particular,

the administrative court began regularly to strike down decisions made by local authorities in the exercise of their housing and social welfare powers. What if the unfortunate grossly over-crowded Birmingham families, whom the local authority recognised as homeless because they could not reasonably be expected to go on living in their own homes, but decided to leave there until something more suitable turned up, had been able to claim damages?[xxvii] Would the Justice/All Souls Report's optimism have survived the expansion of local authorities' liability in negligence for their educational psychologists' failure to diagnose dyslexia? Lord Hoffmann discovered that one LEA faced 58 claims, only two of which went to court; one was abandoned at the door of the court and the other collapsed during the trial. The costs to the LEA of the proceedings (and of hiring a warehouse to keep all the educational records which they would otherwise have thrown away to guard against future cases) were enormous.

Nevertheless, the Law Commission returned to the subject in 2008, in their Consultation Paper on *Administrative Redress: Public Bodies and the Citizen* (LCCP No 187). They have had the interesting idea of bringing together public and private law into a coherent scheme. Damages would be available as an ancillary and discretionary remedy in judicial review proceedings against a public body, but on the same principles as damages would be available in a private law action brought against a body engaged in a "truly public" activity.

The main elements of the scheme would be:

(i) That the activity had to be "truly public" – this would not need to be stated for judicial review which is already limited to administrative action – but would define the type of activity to which their private law proposals applied. Ordinary activities which anyone can engage in – such as employing staff or ordering paperclips – would continue to be dealt with under the ordinary law. Bitter experience with the Human Rights Act, however, leads me to fear that in these outsourcing days, deciding what it is a truly public function is not easy.[xxviii]

(ii) That the scheme operated to confer a benefit on individuals and the harm suffered by the claimant was in relation to that benefit – the denial of housing to the homeless or of a licence to run a nursing home.

(iii) That the public body "acted in such a seriously substandard manner as to justify the court awarding redress" – in other words, that its behaviour fell far below the standard to be expected in the circumstances.

To explain what they meant by "serious fault", the Commission analysed all 310 judicial review cases in which there was a "substantive hearing in a relevant matter" in 2007. Of these 121 were successful. But the Commission found only 18 which met their test of "serious fault" (see Appendix D). Some of these were in the disciplinary field, akin to the Jains' case; but some were in the field of housing, including the Birmingham case; and others concerned social welfare or immigration detention. Unfortunately we were not given for comparison purposes a list of the successful

judicial review cases which would *not*, in the Commission's view, have yielded a finding of serious fault.

One problem, it seems to me, is that there is no necessary connection between the degree of seriousness of the illegality and the degree of seriousness of the consequences. Another is that the causal link between the illegality found and the damage for which the claimant would want compensation is not always straightforward. More fundamentally, it is striking that several of the administrative decisions thought particularly bad by the Law Commission, including the Birmingham homelessness case,[xxix] were in fact upheld by the appeal courts. In other words, the decision of the administrative court that they were unlawful was over-turned on appeal: thus they went from being particular egregious examples of administrative illegality to not being illegal at all.

The Commission's proposals would introduce liability in situations where currently there is none – an example might be a regulatory scheme such as the one involved in the Jains' case. The Commission clearly had in mind that the scheme was meant to benefit them as well as their residents. On this basis the parents as well as the children in the child care cases would be able to invoke this liability. But it would also introduce the "serious fault" requirement to cases where currently there is liability for simple negligence – such as in the case of children carelessly removed from their families.

Nevertheless it comes as little surprise that Lord Hoffmann thinks the Commission's proposals are an "absolutely terrible idea". The private law model of the individual

who has chosen to undertake some activity which causes harm to others does not fit the model of public powers and duties. The public body may have no choice about whether or not to provide a service but limited resources with which to do so. Spending priorities should be decided by democratically accountable bodies, not dictated by the courts. The courts see only one case and not the bigger picture. We have gone past the days when public authorities were seen as having "deep pockets". We now know that they have not.

But we now have a third basis of liability, under the Human Rights Act 1998. New Zealand has had this since the Bill of Rights Act 1990, or at least since the Court of Appeal held that compensation was among the remedies available for breach.[xxx] Interestingly, our Human Rights Act provides answers to some of the questions which the New Zealand courts have had to work out for themselves. Whether they are the right answers is another matter.

The 1998 Act provides that it is unlawful for a public authority to act in a way which is incompatible with the Convention rights (s 6(1)): these are the rights set forth in the European Convention on Human Rights which the 1998 Act has translated into rights in UK law (s 1(1)). Acts for this purpose includes omissions (s 6(6)). A person may either rely on his Convention rights in any existing proceedings or bring free-standing proceedings to vindicate his rights (s 7(1)). The court may grant whatever relief or remedy it thinks just and appropriate (s 8(1)). This includes damages, but only if this is necessary to afford the recipient "just satisfaction" (s 8(3)). Thus damages do not follow automatically as they do in tort.

The normal remedy to vindicate convention rights is to prevent or put right the breach: to set aside the conviction obtained in breach of the right to a fair trial, to exclude the evidence obtained in breach of the right to respect for private life, to return the children taken away from their families in breach of the right to respect for family life, to remove the children suffering inhuman or degrading treatment or punishment in their own homes. It may well be enough that the claimant's human rights have been vindicated by the court's decision: the system will be changed so as to prevent such things happening in future. All this seems consistent with the principles which the New Zealand courts have worked out for themselves.

When deciding upon compensation claims, the UK courts are told that they have to take account of the jurisprudence of the European Court of Human Rights in Strasbourg (s 8(4)). No-one has found it easy to discern the principles upon which Strasbourg decides these claims, but Lord Bingham did his best in *R (Greenfield) v Secretary of State for the Home Department*.[xxxi] Preventive and vindicatory action does not depend upon finding that the breach caused any harm: in finding that a right has been violated, Strasbourg does not inquire what would have happened if it was not. A prisoner such as Greenfield should not be punished in breach of his right to a fair trial under article 6(1) even if a fair trial would have made no difference. But if there is a claim for compensation, Strasbourg will normally look to find that the breach did cause the harm. And Strasbourg is very sparing in its awards for non-pecuniary damage, for such things as frustration and anxiety resulting from the breach of rights. Their levels of compensation are in any event very low compared with what an English court would award if there were liability in tort. The House of Lords has held that we should follow the Strasbourg line on this, rather than the measure of

general damages normally available in the law of tort.[xxxii] But the Court of Appeal, at least, has said that compensation may depend upon the degree of culpability involved: there should be no damages for maladministration unless it is very very bad.[xxxiii]

There is, of course, a great deal of governmental activity which does not involve a Convention right. But each of the examples with which I began does so. That is why I chose them. In the Jains' case, the House of Lords pointed out that two articles of the Convention might have been breached. Article 6(1) requires that "in the determination of his civil rights and obligations . . . , everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law". The right to carry on a trade or profession is regarded as a civil right for this purpose. The Jains did eventually get a proper hearing before the Registered Homes Tribunal but by then the damage had been done. Usually article 6(1) does not apply to interim measures but it may do so if their practical effect is to determine matters for good, as it did in this case.

Secondly, article 1 of the First Protocol provides that "no-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law . . . " Regulating the operation of care homes is of course in the public interest. But that does not mean that closing a home down when there was no good reason to do so was in the public interest. Not only might this be an unjustified intervention in the property rights of the people running the home – it might also be an unjustified interference in the residents' rights to respect for their homes under article 8.

There is, however, one problem: who was responsible for these breaches? Was it the regulatory authority which initiated the proceedings or the court which granted the order? Courts are public authorities for the purpose of the Human Rights Act and so have to act in compliance with the Convention rights. Strasbourg is indifferent to whether the victim's rights have been violated by the executive, the judiciary or the legislature. But the Act expressly provides that damages may not be awarded in respect of a judicial act done in good faith, except to compensate a person to the extent required by Article 5(5) of the Convention (s 9(3)). So were the Jains the victims of the regulatory authority or of the court? Should we distinguish between the possible breach of article 6 in denying them a fair hearing before determining their rights and the possible breach of article 1 of the first Protocol in depriving them of their property without justification?

The same problem arises in the child care cases. Article 8 protects the right to respect for the family life of both the children and their parents. So unjustified interference with their rights could attract liability – but the whole point of care proceedings is to decide whether or not there is a justification. So was the court to blame for separating Milly from her family or were the authorities to blame for asking it to do so and implementing the order once made? This difficulty does not arise the other way round – where there has been a failure to protect children who should have been protected. But establishing a breach of convention rights may be harder. There are positive obligations - under article 3, to prevent children being subjected to inhuman or degrading treatment, and under article 8 to protect their physical and mental integrity – although the severity of the treatment or the egregiousness of the failure required may mean that the children are now much better protected by the law of tort.

The child care cases, and the Jains' case, all concerned events which had taken place before the Human Rights Act came into force. But Sammy's case is more recent. He would still be in detention had he not been granted bail by the Asylum and Immigration Tribunal in 2008 (between the decisions in the High Court and Court of Appeal). So he has brought claims under both the common law tort of false imprisonment and for breach of his right not to be unlawfully deprived of his liberty, under article 5 of the European Convention. One of the questions, of course, is whether there is any difference between them.

The main one is causation. Article 5(5) requires that victims of arrest or detention in violation of article 5 shall have an enforceable right to compensation. Even so, it has to be shown that the violation caused the loss of liberty – so, for example, delays in arranging mental health review tribunal hearings did not lead to compensation unless it could be shown that an earlier hearing would have led to the patient's release.[xxxiv] Sammy might find it very hard to show that if his detention had been reviewed as it should have been reviewed he would have been released much earlier. That is why he is relying principally on the tort of false imprisonment where he does not have to show this. But some may think that it should affect the quantum of any damages should there be liability in tort at all.

Does this mean that, by a rather different route, we have arrived at the same place as New Zealand? Suppose that Mr Binstead did suffer a loss of livelihood as a result of the Panel's failure to give him a fair hearing before withdrawing his approval as a programme provider under the Domestic Violence Act 1995.[xxxv] This might be a

breach of article 6 or article 1 of the First Protocol. It was not the result of a judicial act, so that obstacle would not apply. But he would have to show that he would not have lost his approval if he had had a fair hearing. And his giant claim for loss of reputation and other kinds of damage would not have been met in the UK either. On the other hand, it looks to me as if the ex parte dismissal of Mr Chapman's criminal appeal was a judicial act, although the related refusal of legal aid may not have been.[xxxvi] And the success of his later appeal suggests that he would be able to show that without the breach he would not have been detained. In which case article 5(5) might entitle him to compensation at Strasbourg levels.

Does this also mean that we now have an acceptable system of liability for bad administration? I am inclined to think that we do. The public sector ombudsmen can investigate and recommend, but not order, redress for maladministration. The Law Commission have some sensible proposals for improving access to the ombudsmen and dropping the ban on cases which have or could have a remedy in the courts. We have a simple law of tort which means that public authorities are liable when they do things which a private person would be liable for doing, but not when they make policy choices in the exercise of their statutory powers. But where the State employs coercive powers which unjustifiably interfere with human rights we have the possibility of compensation for the damage caused if vindication and prevention are not enough. Justice for the Jains, perhaps, but do we need more?

I have a slight fear that if the risk of public authorities having to pay damages for the harm they do increases, the courts will increase their reluctance to find that their actions are unlawful. Not everyone takes the Hoffmann line, but many are uneasy

with the thought that public authorities may have to pay damages as well as to take corrective action. We do seem to be pretty sharply divided between those who thought that expanding the liability of public authorities in tort would do little harm and those who think it has been an unmitigated disaster. Which is the more important: a broad and generous interpretation and application of the rights themselves or an expansion of financial compensation which might inadvertently lead to a less expansive view of the rights? Or can we just accept that there are some cases, of which the Jains' must be one, in which justice requires that the victims be compensated for their loss?

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[i] *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 AC 853, [2009] 1 All ER 957.

[ii] *Customs and Excise Commissioners v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 4 All ER 256, at para 47.

[iii] This question may seem unreal in New Zealand, with its no-fault personal injury compensation scheme, but it is very real elsewhere in the common law world, where the tort system still prevails.

[iv] *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558, [2003] 4 All ER 796.

[v] *M v Newham London Borough Council*, one of the four cases decided at the same time and reported as *X v Bedfordshire County Council* [1995] 2 AC 633, [1994] 4 All ER 602.

[vi] *B and others v Attorney General of New Zealand* [2003] UKPC 61, [2003] 4 All ER 833.

[vii] Lord Bingham of Cornhill dissenting: [2005] UKHL 23, [2005] 2 AC 373, [2005] 2 All ER 443.

[viii] *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704.

[ix] *R (Roberts) v Parole Board* [2005] UKHL 45, [2005] 2 AC 738, [2006] 1 All ER 39, para 84.

[x] *US v Rabinowitz* (1950) 339 US 56, at 69.

[xi] *R (SK (Zimbabwe)) v Secretary of State for the Home Department* [2008] EWHC 98 (Admin).

[xii] [2008] EWCA Civ 1204, [2009] 1 WLR 1527, [2009] 2 All ER 365.

[xiii] *Davis v Bromley Corporation* [1908] 1 KB 170.

[xiv] *Dunlop v Woollahra Municipal Council* [1982] AC 158, [1981] 1 All ER 1202.

[xv] The tort was defined by the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, [2000] 3 All ER 1.

[xvi] *R v Governor of Brockhill Prison, ex parte Evans (No 2)* [2001] 2 AC 19, [2000] 4 All ER 15.

[xvii] *Geddis v Proprietors of Bann Reservoir* (1877-78) 3 App Case 430.

[xviii] *Barrett v Enfield London Borough Council* [2001] 2 AC 550, [1999] 3 All ER 193.

[xix] *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619, [2000] 4 All ER 504.

[xx] Highways (Miscellaneous Provisions) Act 1961, s 1(1).

[xxi] *Goodes v East Sussex County Council* [2000] 1 WLR 1356, [2000] 3 All ER 603, reversed by Railways and Transport Safety Act 2003, s 111.

[xxii] Road Traffic Act 1988, s 39(2).

[xxiii] *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057, [2004] 2 All ER 326.

[xxiv] *O'Rourke v Camden London Borough Council [1998] AC 188, [1997] 3 All ER 23.*

[xxv] *Gorringe* at para 3.

[xxvi] Drawing on remarks of Lord Hoffmann in *Stovin v Wise* [1996] AC 923, [1996] 3 All ER 801 and Lord Hutton in *Barrett's* case; see also *Home Office and Dorset Yacht Co* [1970] AC 1004, [1970] 2 All ER 294..

[xxvii] *R (Aweys) v Birmingham City Council* [2009] UKHL 36, [2009] 1 WLR 1506.

[xxviii] YL *v Birmingham City Council* [2007] UKHL 27, [2008] AC 95, [2007] 3 All ER 957.

[xxix] *R (Aweys)*, above.

[xxx] *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667.

[xxxi] [2005] UKHL 14, [2005] 1 WLR 673.

[xxxii] *R (Greenfield) v Secretary of State for the Home Department*, above, disapproving on this point *R (Bernard) v Enfield London Borough Council* [2002] 5 CCLR 577; *R (KB) v South London and South and West Region Mental Health Review Tribunal* [2003] EWHC 193 (Admin), [2004] QB 939; *R (Anufrijeva) v Southwark London Borough Council* [2003] EWCA Civ 1406, [2004] QB 1124.

[xxxiii] *R (Anufrijeva)*, above.

[xxxiv] *R (KB)* , above.

[xxxv] *Binstead v Northern Region Domestic Violence Approval Panel* [2002] NZFLR 832.

[xxxvi] *Attorney-General of New Zealand v Chapman* [2009] NZCA 552; the Supreme Court has given leave to appeal [2010] NZSC 31.