



BOOK REVIEWS

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TORT LIABILITY OF PUBLIC AUTHORITIES

By Susan Kneebone

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As noted by Sir Anthony Mason in the foreword to this book, the tort liability of public authorities is a contentious topic. In this detailed account of the tort rules that affect public bodies, Susan Kneebone argues that the rules which limit tort recovery against such bodies represent an over-protective judicial attitude towards the protection of public funds. Accordingly, she argues that the restrictive rules should be abandoned and replaced by a more extensive liability regime.

The book is divided into nine chapters, all of which are characterised by an extensive review of case law in several Commonwealth jurisdictions. The first and last chapters identify and evaluate the policy grounds on which the liability of public authorities should be decided, and whether the reader agrees or disagrees with the author's approach will be dictated by the reaction to these chapters. The intervening chapters (which deal with negligence, breach of statutory duty, statutory authority and immunity, Crown liability, and claims against the Commonwealth and the states in the federal jurisdiction) critically analyse judicial decisions by reference to whether they support the author's preferred view, and to a large extent are dismissed or endorsed on this basis. Whilst this overview is helpful and wide ranging (for example, the detailed discussion of the often overlooked topic of Crown

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immunity in Chapter 7), the discussion leads back to the first chapter where the author sets out her argument in favour of more extensive liability.

Chapter 1 begins by noting the ‘basic’ rule that the liability of public authorities in tort is governed by the same principles and under the same headings which apply to private individuals. This basic rule, Kneebone submits, presupposes a rigid Diceyan divide between public and private law; what the author calls ‘an overly simplistic distinction between public (administrative) and private (tort) law’.¹ This is because the modern ‘green light’ conception of judicial review suggests that the functions of such review are to encourage better administrative practices and to improve official behaviour: government and administration must adopt the norms of ‘good government’. Thus courts involved in judicially reviewing an administrative decision are involved in making a normative judgment, suggesting that ‘too much is made of the legality–merits divide in limiting the scope of the tort liability of public authorities’.² Further, as the modern view of the role of administrative law challenges the primacy of legislative sovereignty as the defining feature of constitutional relations, it is possible to see a new relationship between an individual and a public authority by reference to concepts of representative democracy and citizenship. Some jurisdictions with entrenched rights have recognised this relationship by accepting the existence of directly enforceable *constitutional* rights against the government. In Australia (and by analogy, at least until the coming into force of the *Human Rights Act 1998*, the United Kingdom) such direct rights do not exist, but Kneebone argues that the fiduciary concept may be used to support such a right. If the relationship between an individual and a public authority exercising public powers is defined by the ‘public trust’ or fiduciary idea, the private law analogy may be inappropriate for determining the liability of public authorities. Rather, ‘it is possible to determine plaintiffs’ rights from the perspective of a concept of representative democracy and citizenship rather than strictly by analogy with private rights’.³

Kneebone then turns to consider how the courts have decided cases involving the liability of public authorities to determine the extent to which the public-private divide holds sway. She argues that the cases can be categorised in one of three ways: the core method, the administrative method, and the control reliance method. The core method is concerned with whether the factual situation has a private analogy (ie is one in which a private individual might be held liable), and itself makes use of three further divisions: misfeasance–non-feasance, duty–discretion, and policy–operational (acts of misfeasance, failure to comply with a positive duty, and operational activities within the authority’s discretion generally being actionable). The administrative

1 Susan Kneebone, *Tort Liability of Public Authorities* (1998) 6.

2 Ibid 18.

3 Ibid 23.

method is used where the tort claim indirectly questions the correctness of an administrative decision and it is queried whether a claim in tort is appropriate given the possibility of judicial review or challenge by other methods. It is argued that both of these categories share the same assumptions: a rigid divide between public and private law, and that the objective in private law is to encourage plaintiffs to be self-reliant on the basis that they are capable of protecting themselves. These allegedly retrograde approaches are contrasted to the control–reliance category (control of the activity by the public authority and reliance by the plaintiff) which is analogous to the fiduciary or public trust model and assumes that tort and administrative law have similar aims. Linked to these categories is the notion of justiciability, used in this context to limit liability. A public authority being sued for an activity which has a private analogy is likely to find a court holding the subject matter justiciable (ie appropriate for the court to adjudicate upon) whereas a failure to exercise regulatory powers may not be, a reflection, in the author's view, of overkill and floodgates concerns that attach to the latter role.

The last section of Chapter 1 concerns the role of tort law, which is described as corrective and distributive justice. In the author's account, corrective justice is concerned with balancing interests (and may address arguments of moral deterrence or efficiency), whilst distributive justice is concerned with allocating losses (and may appeal to arguments of justice, social welfare or economy). But, somewhat confusingly, it is then argued that it is clear that tort law's main practical objective is to compensate the victim of a tort. According to Kneebone, the restrictive approach to liability for public authorities does not serve the distributive goals of tort law and prevents any evaluation of whether more extensive public authority liability would aid its corrective aims. This 'protective culture' stems from misconceived or unproven concerns over the cost and effect of public authority liability. She concludes:

In the context of public authorities we need an approach which encourages administrative efficiency on the assumption that liability is in the general public or collective interest. We need to recognise that tort law can both deter a public authority and require it to provide a service. It must be accepted that over a period of time the distribution of costs amongst the public will be balanced by the benefit in terms of awareness of responsibilities on the part of public authorities and increased efficiency.⁴

The final chapter of the book, apart from reiterating the basic argument undertakes a more detailed critique of the reasons behind the protective culture (overkill, floodgates) which have been identified earlier. All arguments in favour of this

4 Ibid 46.

protective approach are found wanting. The author concludes by proposing three ‘golden’ rules to be applied when deciding the liability of public authorities. First, the judge must ask whether the defendant’s powers have been properly exercised (or proper consideration has been given as to whether the powers should be exercised). Second, is there a relationship of dependency between plaintiff and defendant? Finally, a broad concept of justiciability should be applied when deciding whether the court should hear the claim. The application of these rules would lead to a more ‘rational approach in determining issues of public tort liability’.⁵

Kneebone is to be congratulated for producing a thorough review of the law in this area. However, this reviewer remains unconvinced by the argument, perhaps because, in his view, the model of tort law that looks to encourage the self-reliant individual is not one to be dismissed as without merit. There are areas, however, where further discussion or analysis may have made the author’s case more convincing. Throughout the book there is discussion of the corrective and distributive goals of tort law. It is not clear whether the author thinks that these terms equate to corrective and distributive justice. In Aristotelian terms corrective justice refers to the correcting of a wrong done by one party to another. It looks to the past. Conversely, if one thinks that tort law embodies a deterrence goal, which the author considers to be ‘corrective’, this refers to the impact of a finding of liability on future conduct. It is hard therefore to see how deterrence can be worked into a theory of corrective justice. The author’s treatment of distributive justice, which she seems at times to equate with loss distribution, is also problematic. Certainly loss distribution may be seen as a *form* of distributive justice, but so may the denial of liability. (See for example the speeches of Lord Hoffmann in *White v Chief Constable of South Yorkshire*⁶ and Lord Steyn in *MacFarlane v Tayside Health Board*.⁷ Their basic point is that imposing tort liability might unduly privilege tort claimants in the overall distribution of compensation for incapacity.) Further difficulties arise from the author’s assertion that tort law’s main goals are corrective and distributive justice. Assuming this to be true (and leaving aside, as Kneebone does, the question of how these goals relate to the ‘main practical objective’ of tort law – compensation), are these goals compatible? The author frequently argues that what she terms the core and administrative categorisations do not promote these goals whilst the control/reliance categorisation does. There is, however, a wide debate on the extent to which tort law can or should aim to be instrumental.⁸ Put simply, the concepts of corrective and distributive justice and their relationship with the law of tort are more complex than their portrayal by Kneebone.

5 Ibid 396.

6 [1999] 2 AC 455.

7 [1999] 3 WLR 1301.

8 See for example Weinrib, *The Idea of Private Law* (1995).

Another area where further argument would have been welcome relates to the costs of imposing a wider tort liability on public authorities. Kneebone dismisses floodgates and overkill concerns as ‘overstated’. Floodgates arguments are the antithesis of distributive justice (loss distribution?), whilst overkill arguments assume that the conduct of the public authority cannot be corrected by means of tort law. Neither, the author argues, is there any empirical evidence to support these claims. Not surprisingly, there will be no empirical evidence of the effect of widening the tort liability of public bodies until such an expansion takes place. There is, however, empirical evidence in relation to other areas where liability has been expanded, and there can be little doubt that, for example, the number of claims for negligently inflicted psychiatric injury has significantly increased since a more relaxed approach was taken to the recovery of damages for such injury. There is also evidence that, at least in the United Kingdom, society is more litigious than it was.⁹ Whether this increase in litigation is justified or not depends on one’s point of view but that does not alter the fact that there are more actions being brought. Kneebone assumes that the ‘cost and nature of the litigation process will act as a filter to unmeritorious claims’.¹⁰ This appears to be based on no more empirical evidence than the floodgates fear. Similarly, there is much discussion of the importance of the deterrence goal of tort liability. In fact, very little empirical research has been done to justify the assertion that the imposition of tort liability does influence behaviour, and what little there is suggests that other factors may be more influential in determining behaviour.¹¹

Perhaps the most important point is, however, that appeals to empirical evidence are unlikely to convince those on either side of the debate because one’s view of the appropriate extent of liability for public bodies is a reflection of wider political views. The repeated assertions that more extensive public authority liability is in the general public interest and the arguments that support it are, ultimately, a political view. This, in fact, may not be a widely held view, as Kneebone notes: ‘there does not seem to be widespread acceptance of a philosophy of community or social responsibility to the victims of “public” torts as there is in the case of ordinary accidents’.¹² This may be because there is a widespread acceptance of the ‘self-reliant individual’ model; alternatively, it could be that it is thought unfair that the ‘victims’ of public torts be selected for high awards of compensation when those who suffer non-tortious injury are left either to their own devices or to whatever is provided by the state’s social

9 See Centre for Policy Research, ‘Courting Mistrust: The Hidden Growth Of A Culture Of Litigation In Britain’ (April 1999) and ‘A culture of compensation makes victims of us all’, *The Guardian*, 21 April 1999.

10 Kneebone, above n 1, 45.

11 See Sugarman, *Doing Away with Personal Injury Law* (1989); Dewees, Duff, Trebilcock and Dewees, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (1995).

12 Kneebone, above n 1, 46.

security system. If the latter, it might be said that the ‘protective’ culture serves the interest of distributive justice in that the wider community benefits from a more equitable distribution of available resources. One suspects, however, that this is anathema to Kneebone as the source of the right to sue a public authority derives legitimacy from the concept of citizenship. This right cannot be extinguished for the greater public good. It is a constitutional, or at least a quasi-constitutional right. The rights-based argument is interesting, and certainly provides a ground for departing from the core categorisation rejected by the author. However, it may be noted that in the United States the existence of an explicit Bill of Rights has not led to the creation of a constitutional right to sue public bodies in tort; indeed the liability of such bodies is at least as restricted as in any of the jurisdictions considered in this book. A more promising comparison may be provided by the reasoning in *Osman v United Kingdom*,¹³ where the European Court of Human Rights held the United Kingdom in breach of Article 6 of the European Convention on Human Rights (right to a fair trial) when the Court of Appeal struck out an action in negligence against the police. However, although it is not entirely clear, it may be that the objection to the United Kingdom’s law was to the procedure that was used (a preliminary strike out) rather than the substance of the law. If so, it cannot be seen as authority for the existence of a rights-based cause of action against a public authority in tort. More broadly, it may be doubted whether the arguments which support this wider right fit with the reality of tort litigation, where the party suing or being sued is frequently not the citizen or the public authority but their insurer. For example, in *Stovin v Wise*¹⁴ the majority of the House of Lords rejected a claim by the injured plaintiff in a car accident against the local highway authority for negligently failing to remove a bank of earth which obstructed the view from a road junction, a result of which Kneebone evidently disapproves. On paper the plaintiff appeared to be the innocent driver, but in fact it was the insurer of the negligent driver responsible for the accident who was attempting to minimise its loss by claiming contribution from the highway authority. It is hard to see how this attempt to replenish the coffers of a private insurer from the public purse adds anything to the concept of ‘citizenship’. At a time when local authorities are being asked to do more with less it may questioned whether resort to the rhetoric of ‘rights’ is the appropriate manner in which to determine the allocation of resources (although it should be noted that Kneebone argues that no empirical evidence has been produced to support the notion that the resources of local authorities are limited).

One final point may be noted. In Chapter 2, Kneebone traces the history of the tort liability of public figures and public bodies. She identifies the speech of Blackburn J in *Mersey Docks and Harbour Board v Gibbs*¹⁵ as expounding a wide principle of

13 [1999] 1 FLR 193.

14 [1996] AC 923.

15 (1866) LR 1 HL 93.

public authority liability. On one level, this is certainly correct; the argument that activities carried out in the interests of the general public should be immune from liability was rejected. However, it is equally clear that Blackburn J thought that such bodies should be liable to the same extent as private individuals:

It is well observed ... of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that ... the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works.¹⁶

If anything, this case provides support for the core categorisation that Kneebone ultimately rejects. More generally, it is also worth noting the inconsistent attitude taken by Victorian courts to those public bodies exercising powers which did not strictly have a private analogy,¹⁷ especially after the passing of the *Local Government Act 1888* which imposed duties on local authorities in respect of health. This is not surprising, as the Victorian period saw the creation of different types public authority: the private individual or corporation acting under statutory authority granted by a private Act of parliament, and incorporated civil authorities acting under broad public legislation. In this context the ‘retreat’ from *Mersey Docks* that Kneebone identifies may be more apparent than real.

There is much of interest in this book for both public and tort lawyers. However, if there is one overall criticism one might make it is that the public law and constitutional law discussion is more convincing than the corresponding sections dealing with tort law. If one is to argue, as Kneebone does, that the liability of public authorities lies at the intersection of tort and administrative law, any satisfactory hybrid that results from this merger must respond equally to the concerns of both judicial review and tort law. Whilst this book admirably deals with the former, more might have been said about the latter. It seems certain that, despite the efforts of Kneebone, the tort liability of public authorities will remain a contentious topic.

16 Ibid 107.

17 See McClaren, ‘Nuisance Law and the Industrial Revolution’ (1983) 3 *Oxford Journal of Legal Studies* 155.

