Compensation for Detention

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A person accused of a criminal offence may be deprived of his liberty between the period of his arrest and trial (or for parts of that time) and if he is ultimately convicted of the offence charged he may, if the circumstances are thought to warrant it, be given a custodial sentence. In addition to the loss of liberty the accused may suffer economic loss by reason of his being unable to work, with the result that his dependants suffer. If the accused is not convicted at trial or if his conviction is quashed on appeal he stands acquitted. Further, if he is convicted and given a custodial sentence he may be released before he has served his sentence by reason of executive intervention. For example, he may be released as a result of a referral of his case by the Home Secretary to the Court of Appeal under section 17 of the Criminal Appeal Act 1968, or he may be released from prison because the Home Secretary is concerned that a miscarriage of justice has occurred. In the latter instance he may be granted a pardon, but a pardon is not, at least in theory, an acquittal.

Where an accused person is not convicted at his trial, or where his conviction is quashed by the Court of Appeal or where part of his custodial sentence is remitted by executive action, it can be argued that the accused ought to be able to claim compensation for any deprivation of liberty he has suffered and economic losses incurred as a direct result of the criminal proceedings against him. He may have protested his innocence throughout the proceedings, and he is likely to feel aggrieved. Doubtless the person who believes himself innocent is likely to be more intensely aggrieved than the person who realises he has had a lucky escape. The intensity of feeling of grievance is also likely to vary according to the length of time during which he was deprived of his liberty and the extent of his economic loss.

In practical terms the only real relief which an ex-accused can hope to receive is an *ex gratia* payment from the government. Payments of this kind are sometimes made to persons who have been erroneously convicted and imprisoned. They are, however, limited to cases of hardship and particularly to those cases where detention has resulted from negligence by the police or some other official agent. The granting of an *ex gratia* payment does not indicate an admission of liability. In 1956 the then Home Secretary said:

> "Where a man has been imprisoned as a result of what turns out to have been a mistake it is right that the State should make some payment as a symbol of its desire to acknowledge the error and to do what is possible to square the account between society and the individual. The payment is not an acknowledgment of liability in law. It is made *ex gratia* and does not imply that there has been any fault or neglect on the part of the authorities. . . . Among the factors which have to be

> taken into account in deciding what *ex gratia* payment to make . . . are the length of imprisonment undergone in respect of the conviction in question, whether the character of the persons concerned is such that there has been any loss of reputation, whether they contributed by giving any untruthful evidence or otherwise to their own conviction, and their probable earning capacity in honest employment." [1]

Recently several cases of wrongful imprisonment have received extensive coverage in the press and this, coupled with fears that too many people are being remanded in custody before trial unnecessarily, has led to demands for the establishment of a scheme to provide compensation for persons wrongly detained. It seems unlikely that many people would object to the idea of compensation being given to the patently innocent victim of unfortunate circumstances, that is to say, where there has been a clear miscarriage of justice. Many people would like to see a statutory scheme introduced providing more widespread and generous compensation than that allowed under the present *ex gratia* payment arrangements. This might involve great difficulties, for before such a scheme could be established it would be imperative to decide on some practical definition of the circumstances in which compensation should be payable. It will be impossible to cover all conceivable cases. To give compensation to all those acquitted would inevitably lead to some guilty people receiving compensation, but to impose some restriction on the circumstances in which compensation becomes payable may deny compensation to the innocent. If, for example, compensation were to be denied where acquittal was the result of a procedural defect, some truly innocent persons might lose their right to reparation. In addition to this, the idea of giving compensation to those who have been remanded in custody awaiting trial and subsequently acquitted would be regarded as controversial by some. There can be very little theoretical objection, however, for it is simply compensating the person who throughout the proceedings against him was presumed innocent.

Such information as has been published provides no clear indication of the number of accused persons remanded in custody who are eventually acquitted of all charges, although A. K. Bottomley [2] notes that in 1970, 41 per cent. of those remanded in custody before trial received non-custodial sentences, and a further 5 per cent. were acquitted. That 5 per cent. represents about 2,000 persons. It is similarly difficult to establish the exact length of time spent in custody before trial. The official statistics do not include periods spent in police custody before the first court appearance. Any estimate of the period spent in detention must be approximate only. The figures published in the *Statistics of Judicial Administration 1974* indicate that in that year 41 per cent. of the persons pleading not guilty were brought to trial within eight weeks of committal. It should be noted that the actual periods in custody may be substantially less than eight weeks. There are considerable regional differences; in the Western Circuit, for example, the figure was 69 per cent. whereas in London the number brought to trial

[1] 584 H.C.Deb.C.C. 31247.
[2] *Decisions in the Penal Process* (1973), Chap. 3.

within that period was a mere 13 per cent. These London figures have a considerable effect on the overall figure for the country, which shows that 74 per cent. of all persons committed for trial were dealt with within eight weeks.

Mr. Clinton Davies M.P. recently suggested in the House of Common that provision might be made to bring the English system into line with those existing in continental countries, "where arrangements have been made to give generous compensation to people detained for long periods and ultimately acquitted." [3] His suggestion met with outright rejection. The February 1976 edition of *Frontsheet* [4] commented that there was "a desperate need to introduce compensation for a man remanded in custody who is later found to be innocent." They quoted the case of a man who spent four weeks in custody awaiting trial, during which relatively short time he lost his job and fell into arrears with his rent, as a result of which he and his family lost their home. At his trial he was found to be "completely innocent" of the offences with which he was charged. Cases with such distressing results of detention are by no means unusual, although the hardship may not often be as extreme as in this case.

Allowing that there may be substantial damage caused by the detention of the innocent, what practical difficulties must be solved before a statutory scheme of compensation can be introduced? There are perhaps four main questions:

(1) What type of detention justifies compensation?
(2) In what circumstances should a person *prima facie* qualify for compensation?
(3) What is to be the effect of contributory conduct by the defendant?
(4) What kind of damage is to be compensated?

In addition there are three important but subsidiary questions:

(5) Who may claim?
(6) Should there be a limitation period?
(7) How is the scheme to be administered?

(1) *What type of detention justifies compensation?*

This has been fleetingly discussed above. Other than imprisonment ordered as a sentence following conviction there are two other forms of detention that might justify compensation: (a) detention after charge by the police but before first court appearance (this period is usually quite short); and (b) detention following the refusal of bail by a magistrate or judge. In England it would probably be more acceptable to limit compensation to the latter form of detention because it is generally felt that little hardship will result from the comparatively short period in police custody. But it might be argued that the existence of a scheme of compensation for such detention

[3] H.C.Deb., Vol. 827, col. 643.
[4] Published by the National Association for the Care and Resettlement of Offenders.

might do much to deter the abuses of police powers of detention which it is feared may be on the increase.[5]

The German provisions [6] on the question of compensation are perhaps the widest in their scope, for they encompass not only custody awaiting trial and wrongful conviction but also in some cases arrest, detention in a hospital or asylum, and disqualification from driving. Holland, on the other hand, limits claims for compensation to those cases where detention has exceeded 10 days, thereby excluding any detention between arrest and charge. Most systems (*e.g.* Israel and Belgium) provide for compensation to be given only for periods spent in custody awaiting trial or sentence. The United States has limited its grant of compensation solely to those who have suffered detention following a conviction and have subsequently been pardoned.

(2) *Qualifying circumstances*

On moral grounds an almost irresistible case can be made for the proposition that the innocent should have a right to compensation. But in practical terms the idea that the "proof of innocence" should be the qualifying circumstance leading to payment of compensation is unworkable. The concept of "innocence" is not known to the law. Our law of criminal procedure and evidence is designed to indicate the circumstances in which a person may be labelled as guilty of a substantive crime and, as a consequence, dealt with appropriately. A finding of "not guilty" is not a finding of innocence, and neither is an order on appeal quashing conviction. Further, executive intervention of the type mentioned above does not have the effect of accrediting the accused as innocent. If it is accepted that the mere fact that the accused is acquitted, or has his conviction quashed on appeal, or is released from custody by executive action does not of itself give rise to a right to compensation, and if it is agreed that a requirement that the accused be innocent is unworkable, it is necessary to seek other acceptable criteria which might form the material facts upon which the right could be based.

In foreign countries various approaches have been adopted. Once again the German system is particularly liberal, for any termination of the proceedings in favour of the accused will found a claim to compensation. Other countries make a distinction between "proof of innocence" and "absence of proof of guilt." In Holland and Japan, for example, innocence must be positively proved if the defendant is to be compensated. The United States Federal system of compensation makes the possession of a pardon or certificate of innocence a prerequisite of any claim to compensation. In Switzerland two views of innocence are in conflict. The statute governing the question makes no reference to the need for such a strong degree of proof of innocence as that operating in Holland and Japan, but the judges in administering the system put great emphasis on any evidence which

[5] A. F. Wilcox, New L.J., November 18, 1976, p. 1132.
[6] *Gesetz über die Entschädigung für Strafverfolgmassnahmen*, March 8, 1971, hereinafter referred to as StrEG.

concretely proves the defendant's innocence. In France, too, although there is no statutory requirement of proof of innocence, the defendant's claim is strengthened by any evidence which points to his innocence or any fault on the part of the judicial or police authorities. In other countries the requirement of innocence is taken very seriously indeed, and although the trial court has acquitted the defendant, compensation will be refused if there is still any reason to suspect the claimant of being guilty of the offence charged. This approach is accepted in Norway and Denmark. It has been strongly criticised on the ground that it creates two classes of acquittal—real acquittals, and artificial acquittals with presumption of guilt. It has been said:

> "A group of people is hereby brought into an intolerable situation where the criminal court acquittal seems diminutive compared with the defamation which accompanies the presumption of guilt expressed in the decision to refuse compensation . . . fear of a stigmatising rejection often causes the acquitted party completely to forego submitting a compensation claim." [7]

It is questionable whether any country which purports to maintain a presumption of innocence can without betraying that principle demand positive proof of innocence before awarding compensation, especially where there has been an acquittal. But many countries find little difficulty in practice in reconciling these conflicting theoretical positions.

Whilst it might be morally preferable to offer compensation to all those who have been acquitted in any way following detention, it is unlikely that a totally unlimited definition of innocence and acquittal would be accepted at a time when the fears of eminent policemen and lawyers about the high acquittal rate of the professional criminal are receiving so much publicity. It may prove necessary to bar from compensation those acquitted on a technicality, in the hope that this might exclude the criminal with the "clever" lawyer from profiting from his crime. The question is by no means easily answered, however, and ought to be considered carefully, especially by those who make the often purely emotive demands for compensation for the innocent. Whilst the general desirability of compensation for detention is beyond doubt, the particular form of the provision will inevitably be a question for debate.

(3) *What is the effect of contributory conduct by the defendant?*

Where the defendant has contributed either by negligence or intentional act to his predicament (as, for example, where he has made a false confession, or claimed to have an alibi which is easily disproved) it is not unreasonable to provide that compensation should be reduced, or even excluded. Total exclusion without any regard for other circumstances may seem harsh, but reduction may be necessary to avoid abuse. Consequently some degree of discretion would be required, and this would presumably lie with the court or other body deciding the question. Whether the test should

[7] H. Gammeltoft Hansen (1974) 18 *Scandinavian Studies in Law*, pp. 29, 54.

be subjective or objective is difficult. Is the court to apply the objective standard of the reasonable man to the conduct of the accused, or to apply the subjective test of what is reasonable for this particular defendant? In particular, there is the question of false confessions by the easily suggestible suspect. The *Confait* case has revealed the difficulties that may arise in such a situation—but is a false confession produced in these circumstances an intentional or negligent act of the defendant? It might be said that no reasonable man would confess to a crime he had not done; the objective test would thus exclude the claimant from compensation. It might well be fairer, therefore, to adopt a subjective test although to do so would introduce considerable complications for those administering the scheme.

All the foreign schemes make provision for the exclusion or reduction of compensation where the claimant has by his own conduct brought the proceedings upon himself, or in some way worsened his position. In several countries (for example Yugoslavia, Norway, Rumania and Germany) exclusion is automatic where there is evidence of contributory conduct by the defendant. Other schemes provide for the discretionary exclusion of the claim in such circumstances—France, Japan and Sweden for example. Discretionary refusal of compensation is more equitable, for the circumstances of the individual case may mean that the defendant has unwittingly led to the proceedings being brought against him.

(4) *What kind of damage is to be compensated?*

The social, psychological and material effects of pre-trial detention and a prison sentence may be very serious. The present *ex gratia* payment system allows for a sum to be given in reparation for suffering caused by wrongful conviction and imprisonment. The idea of monetary compensation for non-material damage is well established in the English law of tort and there is not likely, therefore, to be any objection to compensation being awarded for both material and non-material damage. In *McGregor on Damages* [8] the possible heads of damage resulting from false imprisonment are said to include loss of liberty, indignity, mental suffering, disgrace and loss of social status. In many cases these heads are more important than the actual pecuniary loss suffered by the claimant. Assessment of damages is left to the court's discretion.[9] Damage to reputation is particularly relevant in such cases, and is a basis for compensation.[10]

In the foreign systems a distinction is often drawn between material and non-material damage, the latter including such matters as loss of reputation and disruption of family life. Such things are difficult to evaluate in pecuniary terms, and some countries have solved the problem by avoiding it; Rumania, Norway and Yugoslavia, for example, give compensation only for financial loss resulting from the detention. Other countries have imposed arbitrary limits. Germany, for example, limits claims for losses suffered through detention to 10DM per day. This may prove to be totally in-

[8] *McGregor on Damages* (13th ed., 1972).
[9] *Ibid.*, para. 1265.
[10] *Walter* v. *Alltools Ltd.* (1944) 61 T.L.R. 39 (C.A.).

adequate, and provision is made for the ex-accused to claim an additional amount provided he can show that he has suffered unusually high financial losses as a result of his imprisonment. There is no equivalent provision dealing with unusually severe emotional suffering, however.

In some of the Soviet countries the attitude towards compensation for non-material damage is particularly interesting. The notion of financial compensation for loss and injury does not fit in easily with the prevailing political philosophy. In an attempt to avoid possible profit-making by individuals, compensation for non-material losses is given in a more practical form. For example, where the claimant has lost his job he may demand reinstatement. Only Japan attempts any other form of non-monetary compensation—the successful claimant may have his award publicised in the Official Journal and three newspapers of his choice. The idea is a good one, providing some balance between the publicity afforded to a conviction and to an acquittal.

(5) *Who may claim?*

The claim for compensation should usually be made by the defendant himself or, in the event of him being incapable, by his representatives. The foreign systems have different attitudes towards the rights of third parties. The German solution seems the most likely to be accepted in England. This allows the heirs to claim on behalf of the deceased's estate only where he dies between the decision to grant compensation and the actual receipt of the award. Where time is taken to assess the amount payable, some delay is inevitable between the two events.

(6) *Should there be a limitation period?*

Most existing schemes provide a limitation period for claims, the most extreme being that of Denmark which requires a claim to be submitted at the time of the verdict of acquittal. It is suggested that a limitation period of six or 12 months might be acceptable in England. A short limitation period avoids claims where damage is slight and no immediate need for compensation is felt by the defendant, and also avoids the problem of stale evidence.

(7) *How is the scheme to be administered?*

This is another particularly difficult problem, the discussion of which could easily occupy another article of at least this length. The existing schemes are administered in a variety of ways. In some the decision as to whether compensation should be awarded is taken by the court finally acquitting the claimant and the amount assessed by an independent agency. In others both questions are determined either by the court or an independent tribunal. If the administration was assigned to the courts, this would place an additional burden on them at a time when further stress must be avoided. The establishment of a specialist tribunal to deal with the problem raises more questions. How is it to be constituted? How formal are the

proceedings to be? How much will it cost? At present something along the lines of the Criminal Injuries Compensation Board is envisaged, although it may not prove necessary to provide for regional hearings.

These are the practical problems which face those wishing to introduce a scheme of compensation in this country. The majority of demands for compensation are based on emotion; the feelings of injustice raised by a wrongful conviction are very strong. Many people are similarly disturbed by stories of hardship resulting from a pre-trial remand. The English sense of "fair play" and "equity" is easily aroused. However, many people, including some lawyers and the police, are opposed to any such system being established. Principles of English law provide remedies for the act of imprisonment which is unlawful, and not for that which is "wrong" in the moral sense. It is difficult for many lawyers to conceive of a right to compensation for an act which is not in itself unlawful. It is argued that a large number of guilty persons are already escaping justice, and to provide them with a possible means of profiting from their crimes is unthinkable. It is also felt that the existing remedies of English law, for example, *habeas corpus* and the torts of false imprisonment and malicious prosecution, are adequate. This view is perhaps somewhat optimistic, for the difficulties of the individual who sues an organised body like the police are immense, coupled with the fact that as most detention follows legitimate arrest, it is impossible to bring an action in tort. It is sometimes suggested that juries might be less willing to acquit if they felt that the defendant might be likely to receive compensation. However, juries should not in theory be in possession of any knowledge concerning the detention of the prisoner when they are reaching their verdict. It would also be rather disturbing if the need for a belief in guilt beyond a reasonable doubt should be subject to economic considerations.

There are other practical objections. The major one is perhaps the cost, but it seems unlikely that there would be a very large number of claims each year, especially if provision were made here, as abroad, for the exclusion or reduction of compensation in cases of contributory conduct by the defendant. Opponents of such a scheme quote examples of massive awards such as that of $600,000 to an American woman who claimed she had suffered emotionally after being falsely arrested for a shoplifting offence.[11] The statistics available from the foreign systems are few, but suggest that there has been no rush of claims. In France in the period 1971–73 there were only 36 claims of which 11 were accepted, and the usual amount given for a period of about six weeks' detention was 3,000–4,000FF. The present scheme was new in 1971 and claims have settled at an average of 25 each year. In Japan in the period 1950–1971 there were claims by a quarter of all acquitted persons of which the remarkable figure of 90 per cent. were accepted. The average period of detention was much longer, about 125 days. and payments averaged 200 yen per day. The German system, which is by far the most liberal, is estimated to cost about 3,000,000DM for an average of 1,000 claims a year. It seems unlikely that there would be a flood of

[11] Awarded in an action for damages in tort.

claims if such a scheme were to be introduced in this country, as it is most improbable that the system accepted here would be as liberal as that in Germany. Many of the claims submitted would fail to meet the conditions laid down by the scheme. Furthermore, if the amounts given in *ex gratia* payments are an example of policy, any awards given under the new scheme would be unlikely to equal those in other countries. Those countries which operate statutory schemes of compensation at the moment appear to be able to deal with the problems which have arisen without major financial burden or damage to the prestige of the judicial system. It seems to be a question of cutting one's compensation suit according to the quality of the Treasury's cloth.

Feelings of justice demand that those who have suffered wrongful detention as a result of judicial process should be compensated, although the difficulties attached to the implementation of such a scheme must be realised. The difficulties are not insuperable, however, as the experience of foreign systems shows, and it is hoped that further discussion might be given to this topic, and that in a better economic climate a statutory scheme of compensation might be introduced.

Dealing with the Problem of Bad Cheques in France

By Carlson Anyangwe*

A bad cheque is one which the drawee bank refuses to honour because the drawer has neither sufficient funds nor an overdraft facility to meet the amount drawn on the cheque. The problem of bad cheques is not the prerogative of any one country alone. True, the problem varies in degree. But its nature remains everywhere the same. Although England and some other jurisdictions choose to treat bad cheque cases as only a mode of fraud or deception, France, most European countries and recent American proposals make them substantive offences.

Legislation dealing with cheques in France seems to have three main themes:

I—Preventing the use of bad cheques

II—Bringing bad cheque offenders within the ambit of the criminal law

III—Protecting innocent bad cheque victims.

I—Measures aimed at preventing the use of bad cheques

If France, perhaps more than any other country, has often had to address herself vigorously to the problem of bad cheques, it is because, as one writer has rightly pointed out, the problem of bad cheques has become *un phénomène de masse* in France.[1] The realisation of this fact is one of the reasons why bad cheque offenders in France are allowed certain days of grace to make good the cheque. Statistics show that between 1971 and 1974 at least six million bad cheques were issued in France.[2] These statistics relate only to bad cheque cases of less than 1,000 francs each in value. So they do not tell the whole story.[3]

It is difficult to determine the number of cases involving bad cheques in England over the same period. This is so because offences involving bad cheques may be prosecuted either as forgery, fraud or deception under the Theft Act 1968. Available statistics subsume bad cheque cases either under the offence of fraud or forgery.[4]

However, there is little doubt, as the statistics in the British Parlia-

* Licence en Droit (Yaoundé), Diplôme de Droit Comparé (Strasbourg), LL.M. (London). I am most grateful to Dr. L. H. Leigh of the London School of Economics, who patiently read through drafts of this article, made valuable suggestions and rescued me from many errors.

[1] Christian Gavalda: "Une Étape? La Réforme du Chèque par la Loi du 3 3 Janvier 1972," J.C.P. 1973 I. 2587.

[2] In 1968, 650,000 bad cheques were issued; 850,000 in 1971; 1,100,000 in 1972; 1,500,000 in 1973; and 2,500,000 in 1974. See J. C. Groslière: "Clès pour la Reforme du Chèque: Loi No. 75-4 du 3 Janvier 1975," J.C.P. 1975 I. 2716.

[3] *Cf.* Benoist Paul: "Chèques sans Provision," ed. MAME, Paris, 1972.

[4] See the various Reports of the Commissioner of Police in the British Parliamentary Papers.

tive provision in the Act because, in his view, "they create more problems than they solve". He cites as an example the celebrated case of *Attorney-General* v *Ernest Augustus (Prince) of Hanover* in which the House of Lords had to consider an Act (1705, 4 Anne, c. 4) which provided that all descendants from Princess Sophia should be deemed to be natural born British subjects. The enacting words clearly provided that the Act applied to all descendants "born or hereafter to be born" but the preamble recited that it was "just and reasonable" that descendants from Princess Sophia "in Your Majesty's Life Time" should be naturalised suggesting that the Act was confined to descendants born during Queen Anne's lifetime. And on "detail" he agrees that sometimes this is unavoidable. He illustrates this with the equally celebrated case of *Fisher* v *Bell* which he thought might have been decided differently under a civil law system. The Court of Appeal, he thought, could have convicted by holding that the words "offer for sale" should not be given the same meaning in a criminal statute as in the law of contract but it did not.

In all fairness there can be no mistaking the true position of the author for he categorically states that he does not believe that as between civil law and common law statutes, it can be said that either is superior, one to the other. He has commendations and criticisms for both and believes that both can be improved and that each can profit from the other. He concludes with the hope that one day at least in Canada, English and French statutes will be drafted in one style that will not be designated as being in either common law style or civil law style, but simply Canadian style.

There can be no doubt that the Manual, with whatever defects it may have, and the reviewer has seen none, will be avidly thumbed by draftsmen on both sides of the drafting style argument and by teachers of legislative drafting and their students.

Commonwealth Caribbean Legal Essays: Decennial (1970 – 80) lectures, University of the West Indies Law Faculty: Francis Alexis, P. K. Menon and Dorcas White, Editors (Faculty of Law, University of the West Indies, Cave Hill, PO Box 64, Bridgetown, Barbados: 203 pp.: Barbados $10, Eastern Caribbean $10, Guyana $10, Jamaica $10, Trinidad and Tobago $10, United Kingdom £5, United States $10)

This publication is a collection of eleven essays written by persons connected with the University of the West Indies Law Faculty. Seven of these papers were delivered as public lectures in March 1981 at the Faculty to mark the Tenth Anniversary of the Faculty.

The subjects covered by these essays are as varied as they are interesting: the relevance of the "Rule of Law" to the Caribbean today; stimulating suggestions for Regional Land Law reforms; the juvenile problem in Barbados; materials on the Law of the Sea, quite timely to the Caribbean, considering the proposed siting in Jamaica of the United Nations International Sea-Bed Authority; Criminal Law; Public Law; the attitude of the Law to the Labour Movement; and the UWI Law Faculty Library. Legislative Drafting is demystified. The lecture on the resource needs of small Caribbean States is of such importance that its abridgment was published in the (1981) 7 *Commonwealth Law Bulletin.*

The authors are all experts in the law, all being specialists in the field on which they have written.

Their contributions are as follows—

The Labour Movement and the Law in Barbados (Dr. Francis Alexis).
The Third United Nations Conference on the Law of the Sea: Aspects of Settlement of Disputes (Prof. A. R. Carnegie).
UWI Faculty of Law Library: Ten Years (1970 – 80)—Assessment and Projection (Mr. John Dyrud).
Towards Reform in Commonwealth Caribbean Real Property Law (Dr. N. J. O. Liverpool).
Juveniles in the Barbados Society (Ms. Sandra Mason).
The Commonwealth Caribbean and the Development of the Law of the Sea (Prof. P. K. Menon).
Protection Against Partiality in the Adjudicatory Process in Nigerian Public Law (Dr. C. Okpaluba).
Legal Resource Needs in Small Caribbean States—The Need for New Initiatives (Prof. K. W. Patchett).
Legislative Drafting Course (LL.M.) at UWI (Prof. J. W. Ryan).
The Rule of Law (Mr. E. L. Thomas).
The Fault Element and Strict Liability (Miss Dorcas White).

Compensation for Wrongful Imprisonment: A Report by JUSTICE 1982 (JUSTICE, London 35pp.: £1.05)

The Report as the title suggests is concerned about the iniquities of the Criminal justice system in the UK in that people who suffer wrongful imprisonment are not as a matter of law entitled to compensation. This is despite the fact that Article 6 of the UN International Covenant on Civil and Political Rights, which entered into force on 23 March 1976 and was ratified by the UK in May 1976 established the right to compensation. The Home Office does however, make *ex gratia* payments without question in those cases where the Home Secretary has granted a free pardon under the Royal prerogative or the Court of Appeal has quashed a conviction following a reference by the Home Secretary.

This report gives a discussion of cases in which the people who suffered wrongful imprisonment received compensation and also those cases in which no compensation was made, to illustrate the inconsistency in the decision-making.

A summary of the conclusions and recommendations is as follows—

Conclusions

(i) There are no statutory provisions in the United Kingdom for the payment of compensation to persons who have been wrongfully imprisoned, such as are required under Article 14(6) of the UN International Covenant on Civil and Political Rights or are in force in other member countries of the Council of Europe.

(ii) It is neither right nor appropriate that decisions to grant compensation should rest with the Home Secretary if only because he is so heavily involved in the administration of criminal justice and the conduct of the police.

Recommendations

In the light of the above it is recommended that—

(iii) All claims for compensation should be determined, in respect of both eligibility and quantum, by an independent tribunal to be

called the Imprisonment Compensation Board. The Board would be similarly constituted and operate on broadly the same principles as the Criminal Injuries Compensation Board.

(iv) Persons who have been granted a free pardon under the prerogative of mercy or whose convictions have been quashed by the Court of Appeal on a reference by the Home Secretary would have an automatic entitlement to compensation as they effectively have under existing provisions for *ex gratia* payments.

(v) Persons whose convictions have been quashed on appeal should be automatically entitled to apply for compensation, but the Board would be entitled to refuse or reduce compensation if it considered that the conviction had been quashed on a mere technicality, or that it would be inappropriate in view of the claimant's conduct in respect of the matters which led to the criminal proceedings.

(vi) In respect of the above, the Board would be entitled to take into account matters which had come to light in the course of a subsequent investigation.

(vii) Persons committed for trial in custody and subsequently found not guilty or discharged for any of the following reasons—

(a) the prosecution may offer no evidence because new evidence pointing to the accused's innocence has come to light or the available evidence has been re-examined and considered too weak to justify a trial;

(b) the prosecution may decide not to proceed because one of its vital witnesses is no longer available;

(c) the trial judge may of his own volition, or on a submission by the defence, direct the jury to acquit on the grounds of insufficient evidence;

(d) the judge may stop the trial and direct the jury to acquit because one or more of the prosecution witnesses have been clearly shown to be giving false evidence;

(e) for a variety of reasons the jury may find the accused not guilty: should be entitled to apply for compensation if the trial judge grants a certificate or if counsel provides a written opinion in support of the application.

(viii) A convicted person who has had part of his sentence remitted by the Home Secretary because of serious doubts about the rightness of his conviction should be entitled to apply to the Board for compensation and the Board should have power to call for all the papers in the case.

(ix) In assessing quantum, the Board should award compensation under the following headings—

(a) expense reasonably incurred in securing the quashing of the imprisoned person's conviction;

(b) loss of earnings by the imprisoned person or any dependent person where such loss is a direct consequence of the imprisonment;

(c) any other expenses or loss which are reasonably incurred upon imprisonment either by the imprisoned person or any dependent person;

(d) pain, suffering and loss of reputation suffered by the imprisoned person or by the imprisoned person's dependents.

(x) Legal aid should be available to claimants for the presentation of claims and for appeals against refusals by a single member of the Board.

strengthen the regulation of manipulation. As regards the latter, the recent positive efforts of the Securities Commission[13] may well signal its fresh determination to tackle a phenomenon which is as old as the market itself.

[13] See The Bond Corporation International case, The Economist, Mar 7, 1987; South China Morning Post, Jan 15, 1987.

Notes and Comments

DAMAGES FOR DEFAMATION IN HONG KONG — AN UPDATE

IN A previous article on damages for defamation in Hong Kong,[1] an examination was made of the level of such awards, and the factors and principles relied on by the courts in their assessment. A number of conclusions were made as a result of that study, the major ones being that few defamation actions were taken to trial in Hong Kong and that the damages awarded tended to be relatively modest.

The purpose of this note is to look at the cases on this topic in the last six years to see if the conclusions reached still hold true. This note follows the same subject sub-headings as the earlier study for the sake of consistency and ease of reference.

The problem of assessment of damages for defamation

The courts in recent cases have continued to point out the difficulty of assessing damages for defamation. Deputy Judge Barnett in *Melvin Wong v Jockey Daily News Ltd*[2] compared it to the difficulty in assessing damages for pain and suffering in personal injury cases. In assessing damages for injury to one's feeling and loss of reputation, the court is being asked in effect to quantify the unquantifiable. This is very much akin to the assessment of damages for pain and suffering, where a monetary award must be made for a loss which is real, but which is not susceptible to proof in a conventional manner.

In the case of pain and suffering awards, the courts of Hong Kong have dealt with the assessment problem by using a scale of awards. Rhind J in *Li Yau-wai v Genesis Films Limited*[3] suggested a similar approach for damages for defamation when he stated:[4]

> 'Damages for injured dignity and pride are inevitably conventional in nature: there is no real correlation between injured feelings and dollars and cents.'

Thus, the courts in Hong Kong defamation cases have continued to look at the range of awards in other defamation cases in order to ascertain the accepted limits for such damages. They have then considered the facts of their particular case and attempted to fit their award into the acceptable or conventional scale of damages.

Some observations on the Hong Kong defamation decisions

The number of defamation actions taken to trial in Hong Kong continues to be small. In the six years since the last study, there

[1] Rhodes, 'Damages for Defamation in Hong Kong' (1981) 11 HKLJ 167.
[2] (1984) HCA No 2469 of 1984.
[3] (1987) HCA No A7610 of 1985.
[4] ibid.

appears to be only seven written judgments in which an award of damages was made for defamation. All of these cases were heard by a judge alone, despite the availability of a jury trial.[5] Nevertheless, these cases are important as they add to the body of precedent on damages for defamation in Hong Kong.

In these recent cases, the courts have continued to stress that the level of damages for defamation in this jurisdiction should be guided by the Hong Kong cases, and not by those from other jurisdictions. Sears J in *Kwing Shou Wendhal Ting v Robin Parke, Robin Hutcheon and the South China Morning Post* emphasised this point:[6]

> 'The fixing of damages is a matter of individual judgement, but I do not consider it right that I should have regard to any awards in defamation cases outside the jurisdiction of Hong Kong. What I have to assess is the libel which was published in Hong Kong and the damage to the plaintiff which occurred in Hong Kong.'

The level of damages awards

The awards in defamation cases in Hong Kong over the past six years have ranged from $1,000[7] to $125,000.[8] The remaining awards within these limits are as follows:

Li Yau-wai v Genesis Films Limited[9]	$25,000
Kazim Wilson Tuet Wai-sin v Nurudeen Ma Kwong-ming & Yaqub Lau To-ping[10]	$50,000
Kan Chung-nin v Li Kwong-ming[11]	$65,000
Melvin Wong v Jockey Daily News Ltd[12]	$75,000
Yu Kwong-chiu & Ma Yee-fun & Lam Chi-kwong v Consolidated Newspapers Ltd[13]	$120,000

In the previous study on damages for defamation it was found that awards ranged from $1,000 to $120,000, with the average award being $29,000. The more recent awards fall almost exactly within the same limits, although the average award stands at $66,777.

[5] *Rules of the Supreme Court* (cap 4, LHK 1981 ed), ord 33(5)(1). In *Yu Kwong-chiu & Ma Yee-fun & Lam Chi-kwong* (1987) HCA No A253 of 1986, Mortimer J suggested that it was regrettable that juries were not used in Hong Kong for defamation cases as they were uniquely qualified to set the standard for damages.
[6] (1986) HCA No 2229 of 1985.
[7] *Robin Miles Bridge v Wai Kin-bong* [1984] HKLR 225.
[8] *Kwing Shou Wendhal Ting v Robin Parke, Robin Hutcheon and the South China Morning Post* (1986) HCA No 2229 of 1985.
[9] (1987) HCA No A7610 of 1985.
[10] (1987) HCA No A1537 of 1985.
[11] (1986) HCA No A3199 of 1985.
[12] (1984) HCA No 2469 of 1984.
[13] (1987) HCA No A253 of 1986. The second and third plaintiffs in this case were each awarded $70,000.

The most striking feature of the recent cases is the extent to which they fall within the limits set by the previous cases. (This may be due largely to the fact that the courts refer to the earlier cases as guidelines.) Even though a number of the recent cases refer to the fact that damages should keep pace with inflation,[14] the courts (with one exception) have not exceeded that upper limit set by the earlier cases. Although the award of damages must be determined by the facts of each case, the courts in the recent cases have all been mindful of the Hong Kong level of awards. Sears J clearly articulated this when he said, 'The damages I award should fit into the general pattern or level of awards in Hong Kong. . . .'[15]

This adherence to the scale of awards set in the previous cases means that damages for defamation continue to be modest. This point was made by Rhind J: 'The courts in Hong Kong — rightly in my view — have not gone overboard with their awards of damages in defamation cases.'[16]

In contrast, the use of a scale for awards for pain and suffering has been subject to severe criticism recently in Hong Kong.[17] It has been argued that reference to categories of injuries and a conventional scale of awards has led to the award of damages for pain and suffering that are lower than is appropriate. No similar criticism has been made in any of the recent defamation cases about the similar practice followed in such cases.

Factors considered in the award of compensatory damages

The courts have continued to consider the injury to the plaintiff and the conduct of the defendant in assessing damages for defamation.[18]

Evidence in mitigation and the rules of procedure and evidence

Section 4 of the *Defamation Ordinance*[19] provides a complete defence[20] to a libel contained in any newspaper if the following conditions are met:

[14] *Melvin Wong v Jockey Daily News Ltd* (1984) HCA No 2469 of 1984.
[15] *Kwing Shou Wendhal Ting v Robin Parke, Robin Hutcheon and the South China Morning Post* (1986) HCA No 2229 of 1985.
[16] *Li Yau-wai v Genesis Films Limited* (1987) HCA No A7610 of 1985.
[17] See *Lee Ting-lam* [1980] HKLR 657 and comments in *Chan Yin-pan* (1986) 16 HKLJ 448; *Wong Yuk-kin v Yip Hing-keung* (1987) HCA No A1053 of 1985; *Tsang Yung-sang v Sanfield Building Contractors Ltd* (1987) HCA No 957 of 1984; *Chin Kwan-tai* [1987] 1 HKLR 1.
[18] See *Yu Kwong-chiu & Ma Yee-fun & Lam Chi-kwong v Consolidated Newspapers Ltd* (1987) HCA No A253 of 1986.
[19] cap 21, LHK 1964 ed.
[20] This should be contrasted with s 3 of the *Defamation Ordinance*, where an apology can be entered as evidence in mitigation of damages only.

'i. The libel was inserted in the newspaper without actual malice and without gross negligence; and
ii. That before the commencement of the action, or at the earliest opportunity afterwards, a full apology for the libel is inserted in the newspaper . . . ; and
iii. That the defendant has made a payment of money into court by way of amends.'

The substantive and procedural requirements of this defence were recently considered in *Robin Bridge v Wai Kin-bong*.[21] Mantel J pointed out that the courts had not really attempted to define gross negligence, but if he were forced to define it — which he was not required to do[22] — he would say that it was 'flagrant or glaring negligence.'[23] As far as the required apology is concerned, he held that '[t]he reparation required of the apology is for the injury done to the plaintiff's reputation, not to some abstract notion of truth.'[24]

With regard to the payment into court, Mantell J made a number of important statements as to the procedures to be followed. He held that the payment should be 'a sufficient sum to compensate the plaintiff for his injury.'[25] This sum should be determined by asking the jury or judge, as the case may be, to decide what is a sufficient sum before disclosing the amount paid into court. Unfortunately, in this case, the sum paid into court had been disclosed in one of the agreed documents.[26] Finally, any such payment into court must state, in the notice of payment into court, that it is made pursuant to section 4 of the *Defamation Ordinance*, before the section 4 defence can be relied on. In this case, a general notice of payment into court was issued and Mantell J held that, on the face of it, it simply appeared as a payment into court under order 22 of the *Supreme Court Rules*. Mantell J therefore treated this payment simply as one under order 22, and denied the defence under section 4 of the *Defamation Ordinance,* which the defendant had successfully proven but could not rely on because of the mistaken procedure followed.

The award of exemplary damages

The question of whether the *Rookes v Barnard*[27] limitations on the award of exemplary damages should be followed in Hong Kong[28]

[21] [1984] HKLR 225.
[22] Mantell J had found no evidence at all of negligence.
[23] n 21 above, at 227.
[24] ibid.
[25] n 21 above, at 228.
[26] Mantell J was prepared to overlook this by putting the disclosed sum out of his mind and independently assessing the damages that might be recoverable on the facts of this case: n 21 above, at 228.
[27] [1964] AC 1129.
[28] n 1 above, at 190.

was not considered in any of the recent cases. Rhind J in *Li Yau-wai v Genesis Films Limited*,[29] without referring to *Rookes v Barnard,* did consider the award of exemplary damages using the *Rookes v Barnard* criteria.

In a number of the recent cases, it was held that the defendant's conduct justified the award of an element of aggravated damages in the award.[30]

A few concluding comments

The recent cases on damages for defamation, although few in number, support the conclusion reached in the earlier study that such awards tend to be modest. The highest single award made by the courts now stands at $125,000.[31] It is interesting to note that the Chief Justice in a case that was brought to trial, and which was settled in the course of the trial, approved a settlement of $500,000.[32] This sum far exceeds the maximum award made by the courts in Hong Kong.

The plaintiffs in the recent defamation cases tend to be at the top end of the social scale. They have included actors, businessmen and solicitors. Their financial situation would suggest that vindication of their reputation was more important than financial compensation.

The small number of defamation cases taken to trial, and the level of awards made, vindicate the words of Huggins J (as he then was) that in Hong Kong defamation actions, 'the courts do not wish to encourage "gold digging". . . .'[33]

PETER F RHODES*

[29] (1987) HCA No A7610 of 1985.
[30] *Li Yau-wai v Genesis Films Limited* (1987) HCA No A7610 of 1985; *Kazim Wilson Tuet Wai-sin v Nurudeen Ma Kwong-ming and Yaqub Lau To-ping* (1987) HCA No A1537 of 1985; *Kan Chung-nin v Li Kwong-ming* (1986) HCA No A3199 of 1985; *Kwing Shou Wendhal Ting v Robin Parke, Robin Hutcheon and the South China Morning Post Ltd* (1986) HCA No 2229 of 1985.
[31] *Kwing Shou Wendhal Ting v Robin Parke, Robin Hutcheon and the South China Morning Post Ltd* (1986) HCA No 2229 of 1985.
[32] *Man For-tai and Eupo-Air Travel Services (Hong Kong) Ltd v Covered Ups Publishing Ltd, Lee Kam-shek, Lo Hai-ho and Law Kam-put*, South China Morning Post, Oct 28, 1981.
[33] *Chan Kwong-wai v Lo Sau-king* [1963] HKLR 692, 701.

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APPENDIX

Digest of Hong Kong Decisions (1981-87)

(NB All cases decided by judge alone)

Name of Case	*Name of Publication*	*Defamatory Statement*	*Award*
Bridge v *Wai Kin-bong* [1984] HKLR 225	Report in Tin Tin Yat Pao	It was reported that the plaintiff, a solicitor, had been ordered not to become a partner of any solicitors' firm or to commence his own practice within the next five years.	$1,000
Melvin Wong v *Jockey Daily News Ltd* HCA 2469/84	Magazine known as The General Weekly	The plaintiff, an actor, was alleged to be unwelcome by Singaporean and Malaysian audiences, that he was an immoral or improper artist, and that he had to rely on his wife, Chiu Ngar Chi, a famous actress, to obtain stage work for him.	$75,000
Kazim Wilson Tuet Wai-sin v *Nurudeen Ma Kwong-ming* HCA 1537/85	The HK Muslim Herald (issued monthly free of charge to Muslims on a mailing list)	It was alleged that the plaintiff was a hypocrite, that he claimed to be leader of the Muslims in Hong Kong, that he used his wealth to lure members of the Chinese Muslims' Association to vote him Chairman, and that he used this position for personal interests and for the promotion of his private business.	$50,000
Kwing Shou Wendhal Ting v *Parke, Hutcheon, & SCMP* HCA 2229/85	Article in the SCMP	It was alleged that the plaintiff had no idea of how to conduct himself in a professional manner when in charge of Harps, a Hong Kong First Division soccer team.	$125,000
Kan Chung-nin, v *Li Kwong-ming* HCA 3199/85	Letter distributed to all members of the Residents' Association of Sui Wo Court and posted up on three notice-boards	It was alleged that the plaintiff had been removed from the Hong Kong Home Ownership Scheme Housing Estate Affairs Association as a result of his behaviour, that he had damaged the reputation of the Residents' Association, and that he had exploited the Residents' Association for his own political ends.	$65,000

Name of Case	*Name of Publication*	*Defamatory Statement*	*Award*
Li Yau-Wai v *Genesis Films Ltd* HCA 7610/85	A Cantonese film, a bawdy comedy called 'Seven Angels,' shown in Hong Kong	Without the permission of the plaintiff (a life insurance salesman), the defendants used a photograph of the plaintiff in the film to represent the photograph in a shrine of a dead man.	$25,000
Yu Kwong-chiu & Ma Yee-fun & Lam Chi-kwong v *Consolidated Newspapers Ltd* HCA A253/86	Articles in the Wanchai Star, Tsuen Wan Star, Wong Tai Sin Star and Eastern District Star	It was alleged that the first plaintiff, the founder and elder of the Church of God, and the second and third plaintiffs, also elders of the church, were preaching evil and heresy. It was also alleged that by their preaching they influenced people to commit suicide, incest, immoral acts, and crimes. This behaviour was said to destroy family ties and endanger society.	$120,000 first plaintiff $70,000 second plaintiff $70,000 third plaintiff

PRIVATE INTERNATIONAL LAW IN HONG KONG: MARRIAGE

MANY distinguished commentators,[1] and others,[2] have discussed the theoretical aspects of the private international law of marriage. This article is not about those theories, but rather concentrates on certain more specific issues which have arisen before the Hong Kong courts. Yet even this slight analysis reveals a most worrying situation, for it is difficult to avoid the conclusion that those who drafted the relevant local legislation had a very limited appreciation of private international law.

In the past, any aspect of private international law might[3] in Hong Kong have been considered as a somewhat academic, even esoteric, topic. Yet, as a future Special Administrative Region of the People's Republic of China, Hong Kong will have ever-increasing contact

[1] Dicey and Morris, *Conflict of Laws* (11th ed 1987) ch 17; Cheshire and North, *Private International Law* (10th ed 1979) ch 21; Hartley, 'The English Conflict of Laws of Marriage' (1972) 35 MLR 571; Jaffey, 'The Essential Validity of Marriage' (1978) 41 MLR 38; and Fentiman, 'The Validity of Marriage and the Proper Law' [1985] CLJ 256.

[2] Smart, 'Interest Analysis, False Conflicts and the Essential Validity of Marriage' (1985) 14 Anglo-Am LR 225.

[3] Mistakenly, it is submitted.

COMPENSATION FOR UNJUSTIFIED IMPRISONMENT IN DANISH LAW

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ABBREVIATIONS USED EXCLUSIVELY IN THIS PAPER

CP	Code of Criminal Procedure (Yugoslavia)
CPP	Code de procédure pénale (France)
EL	Lag 13/4 1945 om ersättning i vissa fall åt oskyldigt häktade eller dömda m. fl. (Sweden)
F	Folketingstidende (Denmark)
Grpl.	Retsplejeloven (Denmark)
Gpl.	Straffeprosessloven (Norway)
GrEG	Gesetz über die Entschädigung für Strafverfolgungsmassnahmen (West Germany)
UfR	Ugeskrift for Retsvæsen (Danish reports and legal periodical)
UfR H	Supreme Court
UfR Ø	Eastern High Court
UfR V	Western High Court
VLT	Vestre Landsrets Tidende (Western High Court Reports, Denmark)

The following writings are cited by the names of the authors:

Bratholm	Anders Bratholm, *Erstatning til uskyldig fengslede*, Oslo 1961
Gammeltoft-Hansen	Hans Gammeltoft-Hansen, *Fængslingsforudsætninger*, Copenhagen 1973
Guradze	Heinz Guradze, *Die Europäische Menschenrechtskonvention. Kommentar*, Berlin 1968
Hjort	J. B. Hjort, in *Norsk Retstidende* 1957, pp. 1 ff.
Hoff	Helge Hoff, in *Ugeskrift for Retsvæsen* 1949 B, pp. 243 ff.
Huber	Barbara Huber, in *Die Untersuchungshaft*, pp. 133 ff.
Hurwitz II	Stephan Hurwitz, *Den danske Strafferetspleje*, 2nd ed. Copenhagen 1949
Hurwitz III	*op. cit.*, 3rd ed. Copenhagen 1959
Jeschek/Krümpelmann	Hans Heinrich Jeschek and Justus Krümpelmann, in *Die Untersuchungshaft*, pp. 929 ff.
Koktvedgaard	Mogens Koktvedgaard, *Lærebog i den danske Strafferetspleje*, Copenhagen 1968
Linckelmann	Wolfgang Linckelmann, *Entschädigung für ungerechtfertigte Strafverfolgung*, Munich 1968
Moos	Reinhard Moos, in *Die Untersuchungshaft*, pp. 347 ff.
Munch-Petersen	Erwin Munch-Petersen, in *Festskrift til Henry Ussing*, Copenhagen 1951, pp. 399 ff.
	Hans Munch-Petersen, *Den danske Retspleje, Femte Del*, 2nd ed. Copenhagen 1926
	Zvonimir Separovic, in *Die Untersuchungshaft*, pp. 275 ff.
	Forhandlinger på tredie nordiske Juristmøde, Bilag VI., Oslo 1879
	Die Untersuchungshaft im deutschen, ausländischen und internationalen Recht. Editors: Hans-Heinrich Jeschek and Justus Krümpelmann (Bonn 1971)

SCANDINAVIAN STUDIES IN LAW

1. A COMPARATIVE INVESTIGATION

1.1. *Introduction*

Special provisions on compensation for unjustifiable imprisonment can be found in most European countries. In what follows, in addition to Denmark, regard will be paid to the laws of Norway, Sweden, West Germany, England, France, and Yugoslavia.[1]

Like Denmark, all these countries, with the exception of England, have special legislation on imprisonment compensation. However, the formulas used for expressing the basic principle differ from one country to another. While the prisoner in Denmark, Norway and Yugoslavia has—under certain conditions—a *legal claim* to compensation, the French CPP sec. 149 provides only for the discretionary awarding of claims.[2] In Sweden, equity is part of the basis for compensation, too, since compensation can generally be refused if the circumstances do not justify awarding it (EL sec. 1(2)).[3] A combination of the two systems is employed in Germany, depending upon what the result of the case is. Even though the formal difference between an equity system and a system which gives the accused a legal claim to compensation is pronounced, it may reasonably be asked whether the practical result does not in fact verge on relative uniformity in so far as compensation claims *ex lege* are contingent on assumptions of a markedly discretionary nature.

In all the countries concerned, an imprisoned person may institute an action for compensation on the basis of the ordinary rules on civil compensation, possibly in combination with a privately instigated criminal action. Because of the costs involved, however, this remedy is of real significance only in countries where no special provisions exist. As mentioned, this

[1] Cf. in this connection Gammeltoft-Hansen, pp. 16 f.

[2] A similar system exists in Holland and in certain Swiss cantons and is planned in Belgium; cf. Jeschek/Krümpelmann, p. 981.

[3] Cf. Bratholm, pp. 89 f.

is the case in England, where complaints and compensation claims can be raised on the basis of "false imprisonment" or "malicious prosecution".[4]

In what follows, the substantive and formal conditions for compensation will be discussed (1.2 and 1.3). In addition, the injuries which are covered by the compensation and the guidelines for assessment will be touched on (1.4). Finally, there will be a short discussion of reform attempts which are under way in the countries in question (1.5). The section ends with a rundown of the provisions for imprisonment compensation in the European Convention on Human Rights (1.6).

1.2 *Substantive conditions*

1.2.1. *The action justifying compensation.* In Danish law, a distinction is made between unlawful and unjustified imprisonment. *Unlawful* imprisonment is dealt with in Rpl. sec. 1018 a; it means imprisonment in a case where no such measure should have been taken, e.g. where a person has been held in custody for an act which is not a crime. *Unjustified* imprisonment means imprisonment in a situation where imprisonment as such can be justified but should not have taken place in the case at bar, e.g. where a person has been charged with a crime but is acquitted for lack of evidence. The provisions on unjustified imprisonment are found in Rpl. sec. 1018 b. This distinction, which will be discussed in detail later on,[5] does not occur in corresponding explicit provisions in the law of other countries.[6] In England, compensation for unlawful imprisonment is attached to charges of false imprisonment, while unjustified imprisonment can lead to charges of malicious prosecution. Since it is in practice extremely rare that complaints of the latter kind are entertained,[7] one can therefore speak of a certain practical limitation of the accessibility of compensation for unlawful imprisonment. No similar limitation is to be found in the other countries investigated.

[4] It is also possible to receive an equity compensation from the Home Office or from Parliament through a private act; cf. Linckelmann, pp. 7 f. The Norwegian Parliament has a similar facility; cf. Hjort, pp. 9 ff.; Bratholm, p. 62.

[5] See, *infra*, 2.1.1.

[6] The Austrian compensation law (from 1969) is, however, based on the differentiation, sec 2(1)(a); cf. Moos, p. 516.

[7] Cf. Huber, p. 181.

For a comparative legal evaluation, it is important to know whether the basis for compensation for imprisonment differs from that used for other coercive measures, including imprisonment surrogates.

In France and Yugoslavia, compensation cannot be obtained for measures other than imprisonment. In England such compensation claims are handled as complaints of malicious prosecution; they are seldom entertained.

In both Denmark and Sweden, arrest is on an equal footing with imprisonment, though in Sweden this is so only in so far as the arrest is later succeeded by imprisonment, or has lasted more than 24 hours. The same rule applies in Swedish law to travel bans, although compensation for the other measures taken in the course of criminal procedure is not permitted. In Denmark, such encroachments are liable to compensation "according to the circumstances" (Rpl. sec. 1018 c). In Norway, too, encroachments other than imprisonment[8] are included in a similar provision. According to Stpl. sec. 469(1), the accused may receive compensation for substantial loss of welfare brought about by prosecution.

West Germany has gone furthest: there, complete correspondence between imprisonment and other measures has been established (StrEG sec. 2(2)).

In most countries, there is greater accessibility to compensation for wholly or partially *served imprisonment* than to compensation for remand. This applies to Denmark (Rpl. sec. 1018 b(4), Sweden (EL secs. 2 and 3), Norway (Stpl. sec. 469(2)) and France (CPP sec. 626). In Germany, the basis for compensation is, by and large, uniformly regulated. The same is true of Yugoslavia (CCP sec. 507). English law does not contain special provisions for compensation for sentences served, and therefore in reality places punishment on an equal footing with imprisonment.

1.2.2. *The verdict.* None of the countries investigated limits the accessibility of compensation to cases where absolute acquittal has taken place. Dropping the case because of lack of evidence (possible rejection of the case by the court) is in this way equal to acquittal.

1.2.3. *Reasons for exclusion from compensation.* An imprisoned person may have brought about imprisonment

[8] Including arrest; cf. Bratholm, p. 16.

through his *own behaviour*, in two ways: he may—for example by offering a false confession or other untrue explanation—have incurred grave suspicion; or he may by attempting evasion, collusion, etc., have created the basis for the imprisonment itself.

In Norway, Sweden and Yugoslavia, such action on the part of the accused causes exclusion from compensation.[1] Initially, this was the case in Germany, too. However, in contracting suspicion there has to be intent or flagrant negligence on the part of the accused.[2] If the accused gives incorrect evidence on essential points or suppresses evidence even though he has declared himself willing to submit an explanation, disqualification is not a necessary effect. Reduction of compensation may take place.[3] In Denmark, such circumstances involving the accused are generally regarded as grounds for discretionary reduction or exclusion from compensation.[4]

In Denmark and Norway, compensation is excluded if there are still grounds for presuming the accused to be guilty of the crime charged.[5] The Norwegian provision even requires that the evidence presented shall be refuted; in practice, however, the accused is not required to produce positive evidence of his innocence, only a certain attenuation of the prosecution's evidence.[1]

Swedish law contains no express provision to the effect that the accused's guilt shall be taken into account. An assumption of this, however, is contained in the general rule about refusal of compensation where in the circumstances it does not seem reasonable to give compensation.[2] In Yugoslavia, it is unclear to what extent CCP sec. 507 must be understood to require invalidation of guilt.[3]

Among the countries investigated, only Germany has, with StrEG, given up the idea of establishing special conditions concerning the accused's guilt. Mere acquittal or withdrawal of charges for lack of evidence is sufficient.[4]

[1] Stpl. sec 470; EL sec. 1(2); CCP sec. 507, cf. sec. 500(3).
[2] StrEG sec. 5(2) and (3). Cf. about Danish law, pp. 46 ff.
[3] StrEG sec. 6(1)(1).
[4] Rpl. sec. 1018 b(3).
[5] Rpl. sec. 1018 b(2)(a); Stpl. sec. 469(3).
[1] Cf. Bratholm, pp. 96 ff.
[2] EL sec. 1(2); cf. *S.O.U.* 1972:73, pp. 25 f., 37 ff., and 197 ff.; compare with this Jeschek/Krümpelmann, p. 980.
[3] Cf. Separovic, pp. 305 f.
[4] A similar adjustment now also exists in East Germany, Czechoslovakia, and in certain Swiss cantons; cf. Linckelmann, pp. 21 f.; Jeschek/Krümpelmann, p. 980.

Table 1. Grounds for exclusion from or reduction of compensation and their effects

Presumption of the accused's guilt	The accused's own causation of imprisonment	Effects
Denmark, Norway, (Yugoslavia?)	Norway, Sweden, Germany (partially), Yugoslavia	Obligatory exclusion
Sweden	Denmark, Germany (partially)	Discretionary exclusion or reduction
Germany (Yugoslavia?)		No exclusion

The different systems of compensation are shown schematically in Table 1.

1.3. *Formal Conditions*

1.3.1. *Competence*. Ordinarily, the court which administers the case (or where the case would have been administered, had it been advanced to trial) also decides the question of compensation,[5] with the assistance of lay judges, according to the circumstances. In Germany, the court decides only the question whether compensation should be granted or not; later, assessment is carried out by the *Landesjustizverwaltung* (an administrative authority of the *Land*) under civil appeal.[6]

French and Yugoslavian law differ from this general model. In France, the question of compensation is decided by a commission made up of three judges from the Cour de Cassation.[7] In Yugoslavia, too, the decision is placed under the jurisdiction of a higher authority—the supreme court of the province—though it has to be prepared by the investigating judge who tried the case in the first instance.[8]

In two countries, the possibility of an administrative decision is held open. According to the Danish Rpl. sec. 1018 h(2), the Minister of Justice may, after consultation with the prosecution, the counsel for the defence, and the court, approve the com-

[5] Cf. Rpl. sec. 1018 g (see also secs. 1018 i – 1018 l); Stpl. sec. 471; EL sec. 5; StrEG secs. 8 and 9.
[6] Cf. StrEG sec. 10.
[7] Cf. CPP sec. 149(1).
[8] Cf. CCP sec. 503.

pensation claim.[9] A similar system is prescribed under Yugoslavian law (CCP sec. 502): an administrative settlement has to be attempted in all cases before the question is brought to court.

1.3.2. *Procedural form.* Where the question of compensation is decided by a court, this is, as a rule, done according to criminal procedure. France is the only country where the question is tried under the rules of civil procedure;[1] the decision is not accompanied by an opinion.

1.3.3. *Time limits.* Ordinarily, the question is decided at the trial itself.[2] Possibilities have been opened, everywhere, however, for examination and decision to take place later, subject to certain time limits.

The time limits are calculated from the pronouncement of the verdict (or possibly from the moment when the decision is to be considered final) or from the announcement of the prosecution's abandonment of prosecution. In Yugoslavia the time limit is one year,[3] in France six months,[4] in Sweden three months,[5] and in Norway one month.[6] Most rigorous of all is the Danish provision, according to which the compensation claim must normally be submitted in direct connection with the verdict—in jury trials even before submission for judgment.[7] Only when the court decides to put off the question until it can be treated under a separate case is there provision for a postponement, subject to a limit of 12 weeks. The same time limit applies where the case ends in a withdrawal of charges.[8] The various time limits can be exceeded, however, if new information of major significance is presented.[9]

1.3.4. *Petition.* In the countries discussed above, the question of compensation can only be taken up at the request of

[9] The provision has not only formal, but also substantive significance, since compensation claims are regularly met for equity reasons, for example where the time limit for the application has been exceeded, where the accused has caused imprisonment, or where a certain presumption of guilt is present.

[1] Cf. CPP sec. 149–2.

[2] The exceptions are—because of the division of competence—France and Yugoslavia.

[3] CCP sec. 501.

[4] CPP sec. 149(2).

[5] EL sec. 5.

[6] Stpl. sec. 471(2).

[7] Rpl. sec. 1018 g(1).

[8] Rpl. sec. 1018 g(2).

[9] Rpl. sec. 1018 g(3).

the accused. Germany, on the other hand, has a system of its own. Examination is undertaken *ex officio* by the court concerned in connection with the trial.[1] When the case ends in a suspension of prosecution, an application from the accused is still required; this has to be filed not later than one month after the prosecutor's announcement.[2] As for the assessment, the claim for it has to be presented to the *Landesjustizverwaltung* within six months (or where a further delay is deemed justifiable, within one year) after the court's decision on compensation responsibility became final.[3]

1.3.5. *Appeal.* The compensation decision can be challenged by appeal in all the countries discussed except France, where the decision lies in the hands of the Supreme Court.

1.4. *Damages*

In Norway and Yugoslavia, the enactments on compensation for unjustified imprisonment cover only economic loss.[4] Compensation is claimed in pursuance of the ordinary civil compensation rules.[5] In England, extensive compensation is given for non-material damage in connection with deprivation of liberty.[6]

In Denmark, Sweden, and Germany, compensation for loss of revenue as well as for non-material damage is allowed.[7] In Germany and Sweden, the rules for non-material damage, however, contain special limitations. According to StrEG sec. 7(3), a maximum of 10 DM per day can be granted in indemnity, even where the individual circumstances might indicate a higher amount.[8] In Sweden, indemnity for non-material damage can be granted only when there are special grounds for so doing.

[1] StrEG sec. 8.

[2] StrEG sec. 9(1).

[3] StrEG sec. 10(1) and sec. 12.

[4] Stpl. sec. 469(3); cf. Bratholm, pp. 62 f., where there is, however, one example of a court being so generous in the assessment that it must be assumed that there had been an attempt to compensate for the non-material damage also. CCP sec. 507, cf. sec. 500(1); cf. *Collection of Yugoslav Laws*, vol. XIX, p. 184, note 135. Ivancevic, *Haftung des Staates für rechtswidriges Verhalten seiner Organe*, 1967, p. 400.

[5] Cf. Bratholm, p. 62.

[6] Cf. Huber, pp. 179 ff.

[7] Rpl. secs. 1018 a and 1018 b(1); EL sec. 4(1); StrEG sec. 7(1) and (3).

[8] Cf. Kleinknecht, *Strafprozessordnung mit GVG und Nebengesetzen. Kommentar*, 30th ed. Munich 1971, p. 1382.

In France, compensation can be granted for economic as well as non-economic losses.[9] But an important limitation is inserted in CPP sec. 149, which excludes compensation unless there is "un préjudice manifestement anormal et d'une particulière gravité". This limitation differs from the corresponding rule in Swedish law, since it also applies to economic loss.

1.5. *Reforms*

The French and the West German statutes on imprisonment compensation are of recent origin, dating in France from 1970 and in West Germany from 1971. In Yugoslavia, the law is also relatively new (1965); it is reported that a new statute is under preparation which will provide for indemnity for non-economic losses too.[1]

In England, there do not seem to be any plans for introducing special provisions for liability for unjustified imprisonment.[2]

In Denmark, amendments are being prepared by a commission; no report, however, has yet been presented.

In Norway, the Criminal Procedure Law Committee in its Report of June 1969 (pp. 52–3, 362–7) proposed several amendments of the present rules from 1917. The changes would mean that it would not be required that evidence of guilt be refuted; it would be sufficient for the accused to make his innocence seem probable.[3] In addition, there would be access to the granting of equity-orientated compensation, even where the ordinary compensation conditions have not been fulfilled. Non-economic losses would be compensated where special circumstances indicate the need for such compensation. The committee considered[4] making it possible to meet compensation demands administratively, but finally rejected this idea.

In Sweden, new laws in this area are under preparation. In Legislative Commission Report 1972 no. 73 (*S.O.U.* 1972: 73) there is included a proposal for a new law which would cover compensation for all deprivation of liberty within as well

[9] Cf. Linckelmann, p. 31, note 3.
[1] Cf. Separovic, p. 308.
[2] Cf. Huber, p. 137.
[3] In all important aspects, however, this is only a codification of practice up to now, cf. p. 32.
[4] On a Danish model, see *supra*, 1.3.1.

as outside the limits of criminal procedure. Compensation for imprisonment surrogates (travel bans) would also be covered by this prospective law. In relation to the present rules for compensation for imprisonment (EL from 1945), the most important change is that presumption of guilt is eliminated as a ground for exclusion from compensation. If the criminal case ends in acquittal, withdrawal of charges, etc., the imprisoned person has a proper legal claim to compensation, unless he caused the imprisonment himself.

1.6. *The European Convention on Human Rights*

The European Human Rights Convention contains in art. 5, sec. 5, the following provision: "Everyone who has been a victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."[5]

It appears from the wording that only actually liberty-depriving measures (arrest and imprisonment) are covered by the rule.

The formulation of the article differs from the national rules discussed here in that it attaches compensation liability to violation of the conditions for imprisonment alone—that is, the so-called *unlawful* deprivation of liberty—without regard to the final result of the trial.[6] On the one hand, this limitation is substantially narrower than are the national provisions which make responsibility dependent on acquittal or withdrawal of charges. On the other hand, the term "unlawful imprisonment" is fundamentally broader, since it covers all cases where the conditions for imprisonment were not fulfilled, regardless of the subsequent conviction of the accused. Most conditions for imprisonment in the Convention as well as in national laws are discretionary in character (qualified suspicion, danger of escape, danger of collusion, etc.). The Court on Human Rights has explained, however, that it will not hesitate to examine how the national authority concerned exercised its

[5] Conversely, the compensation question is not mentioned in the Council of Europe resolution of April 19, 1965, on remand.
[6] The U.N. Convention on Civil and Political Rights (1966), art 9, is also based on the term unlawful imprisonment; cf. here Triffterer, *Die Untersuchungshaft*, p. 906, note 101.

discretion. The Court will do so even where a case has ended with a conviction (as for example in the Ringeisen case).[1]

One can question whether only violation of the Convention's conditions for imprisonment can form the basis for compensation claims, or whether infringement of the national conditions for imprisonment is sufficient to bring art. 5, sec. 5, into effect. A literal interpretation shows that the Convention's conditions are decisive. The Court, however, has severely sharpened the conditions for imprisonment laid down in art. 5 by taking into account the respective national rules when evaluating the legality of imprisonment.[2] With this in mind, one may characterize the basis for compensation in art. 5, sec. 5, as follows: It is sufficient that either the Convention's or the respondent state's conditions for imprisonment shall have been violated.

This only goes for violation of the substantive conditions for imprisonment. If a formal condition was disregarded, compensation would ordinarily not be considered justifiable unless it seemed probable that the violation had a practical effect on the imprisonment decision.[3]

It is not clear whether art. 5, sec. 5, also includes non-material damage. The English expression "compensation" and the French word "réparation" are not in full accord on this point, since the meaning of the English word is somewhat narrower than that of the French one.[4] Legal writers in general seem to assume that "compensation" includes non-material damage.[5] An argument in favour of this interpretation is to be found in the wording of art. 50—the general provision for compensation for actions contrary to the Convention—where the broad expression "satisfaction" is used.[6]

In the remedy offered by art. 5, sec. 5, there is a limitation inherent in the requirement that all domestic remedies must have been exhausted before the complaint can be submitted to

[1] Cf. Gammeltoft-Hansen, *Juristen* 1973, pp. 401 ff.; cf. Guradze, pp. 48 f.
[2] This is especially true of art. 5, sec. 3, on duration of imprisonment.
[3] Cf. Guradze, p. 86; also see *infra*, 3.2.1.
[4] Cf. Fawcett, *The Application of the European Convention on Human Rights*, Oxford 1969, p. 118.
[5] Cf. Linckelmann, p. 49, notes 5 and 6; cf. Brückler, *Deutsche Richterzeitung* 1965, pp. 256 f.
[6] Cf. Herzog, *Zeitschrift für Ausländisches und Öffentliches Recht* 1961, pp. 239 f.

the Commission of Human Rights (art. 26).[7] If the complaint is about remand and the Commission finds that a violation of art. 5, sec. 1(c), or sec. 3, has taken place, the Commission cannot make a decision on the compensation question until the claim for compensation has been presented to the national authorities and rejected by them. Another procedure applies when the Court has established a violation. According to the Convention's art. 50, the Court has the authority to award compensation when it has held that there has been a violation of the rights of the Convention. It has been established clearly in the Belgian Vagrancy cases that compensation, according to art. 50, does not presuppose that the domestic remedies were exhausted.[8] Even so, the Court has followed the practice of postponing the decision on the compensation question in order to give the respondent state an opportunity to settle the case itself.[9] If this does not happen, the plaintiff may—if the Commission brings the case before the Court—have the compensation question decided by the Court. This happened in the Ringeisen case.[1]

2. DANISH LAW

2.1. *Substantive conditions*[2]

2.1.1. *Unlawful and unjustified imprisonment.* Danish law is based on the distinction between unlawful and unjustified imprisonment.

Unlawful imprisonment, which is dealt with in Rpl. sec. 1018 a, means imprisonment where imprisonment should not have been resorted to. This can be understood to mean that the conditions enumerated in the Administration of Justice Act (and the Constitution) were not present at the time of the initiation or continuation of imprisonment.[3] An important

[7] Cf. *Digest of Case-Law relating to the European Convention on Human Rights* (1955–1967), p. 82; Collection of Decisions from the European Commission of Human Rights, no. 36, p. 68.
[8] Cf. Publications A, vol. 14, pp. 7 ff.
[9] Cf. Publications A, vol. 10, p. 45; vol. 13, p. 46; and especially vol. 15, p. 7.
[1] Cf. Gammeltoft-Hansen, *Juristen* 1973, pp. 405 ff.
[2] For the formal conditions see the Administration of Justice Act, secs. 1018 g – 1018 m (reproduced in Appendix) together with the remarks, *supra*, 1.3.
[3] Cf. H. Munch-Petersen V., p. 154; *Kommenteret Retsplejelov*, pp. 1017 f.

modification, however, is that only such legal errors as may influence the imprisonment question are covered by sec. 1018 a.[4] Thus the substantive conditions for imprisonment should have been disregarded, directly or indirectly.

Unjustified imprisonment, which is dealt with in Rpl. sec. 1018 b, implies that the criminal case ends in acquittal for reasons of lack of evidence or withdrawal of charges without there being any grounds for disqualification such as presumption of guilt or "contributory fault" (cf. Rpl. sec. 1018 b(2)(a) and (3)).

In order to evaluate the significance of this distinction in practice, a three-part grouping can be set up according to whether, on the one hand, the conditions in sec. 1018 a or sec. 1018 b alone are fulfilled or, on the other, both sets of conditions are present together.

Group 1. Unlawful imprisonment, sec. 1018 a (disregarding of substantive conditions for imprisonment—either later conviction, or acquittal, withdrawal of charge for lack of evidence with presumption of guilt, or the accused's own causation of the imprisonment).

In all of the published judicial decisions since the Administration of Justice Act (1919) came into force, there seems to be only one example in the area of remand where compensation was given for unlawful imprisonment without the conditions for compensation for unjustified imprisonment being present:

> *Ufr 1931. 638 Ø.* F. was imprisoned, charged with insurance fraud and incendiarism; as ground for imprisonment the lower court cited danger of collusion. Four days later the High Court lifted the imprisonment since neither danger of collusion nor other grounds for imprisonment were indicated to a sufficient degree. The High Court stated further: "Accordingly F. is found . . . regardless of whether according to information now available there is a reasonable presumption of his guilt in those crimes for which he was imprisoned, to have the right to compensation in pursuance of the conditions in Rpl. sec. 792 (1), last point."[5]

This isolated decision of the Eastern High Court must be termed in direct conflict with a Supreme Court decision, pronounced a week earlier:

[4] Cf. Hurwitz III, p. 530.
[5] The present sec. 1018 a.

> *UfR 1931. 462 H.* In this case, too, the High Court (Western High Court) annulled the lower court's decision for imprisonment on the ground of danger of collusion. The accused was later convicted of the crimes cited (cf. UfR 1930. 945 H). Thereafter he applied for compensation for unlawful imprisonment, which was refused by the jury court. The Supreme Court rejected his claim.[6]

Group 2. Unjustified imprisonment, sec. 1018 b (withdrawal of charges for lack of evidence or acquittal without presumption of guilt or "contributory fault"—no disregarding of the material conditions for imprisonment).

This group is abundantly represented in the published collections of court decisions.

> To mention a few: UfR 1921. 965 H; 1927. 319 H; 1928. 831 Ø; 1929. 1024 H; 1930. 898 V; 1931.398 Ø; 1935.1087 H; 1938.975 Ø; 1947.553 H; 1947.995 H; 1948.1080 H; 1950.996 Ø; 1955.352 Ø; 1961.914 H; 1966.337 Ø; 1966.801 Ø; 1969.794 Ø; 1970.862 Ø; 1971.827 V.

In all the cases listed above, the accused was acquitted or the charge dropped. In none of the cases, however, does it seem to have been discussed whether sec. 1018 a could have been invoked, because the conditions for qualified suspicion[7] had not been fulfilled at the initiation or continuation of imprisonment. The same applies to published verdicts where compensation was rejected on the grounds of presumption of guilt or the accused's own causation of imprisonment, and where it had therefore been natural to consider compensation under sec. 1018 a as a subsidiary possibility.[8]

Group 3. Imprisonment is both unlawful and unjustified, secs. 1018 a and 1018 b.

In this group there might possibly be listed a few published decisions.[9] Nor can it be denied on the basis of the court reports that a number of the cases mentioned under group 2 include a sequence of events which makes imprisonment unjustified as well as unlawful.

[6] Cf., on the question of the extent to which incorrect usage of the special grounds for imprisonment can form the basis for compensation for unlawful imprisonment, p. 54.
[7] See *supra,* 1.2.3.
[8] Exceptions are UfR 1927.915 H and 1932.330, note 2.
[9] UfR 1935.1087 H and 1950.996 Ø, and VLT 1949.54.

Judging from published practice it must be noted that the distinction in law and legal writing between unlawful and unjustified imprisonment hardly has a similar effect on judicial decisions. Rpl. sec. 1018 a has little or no independent significance as regards imprisonment. A closer analysis of the terms "unlawful" and "unjustified" seems to explain why this is the case.[1]

2.1.2. *Acquittal, withdrawal of charges, etc.*

2.1.2.1. *Acquittal*. Even though Rpl. sec. 1018 b(1) deals with acquittal in general, it is implied that its main concern is acquittal for reasons of evidence. This is clear from the grounds for disqualification laid down in subsec. (2)(a) (presumption of guilt).

If the acquittal is the result of *objective reasons for exemption from punishment* (self-defence, *jus necessitatis*, valid consent) or of reasons for remission of punishment (expiration, withdrawal from attempt), the question of compensation is doubtful. Hurwitz proposes that compensation be given according to the same guidelines as are used in evidence-based acquittals.[2] In support of his interpretation, there can be invoked sec. 1018 b(2)(b), which expressly cites subjective reasons for exemption from punishment (insanity) as a reason why compensation should be excluded. In other cases, too, it must be assumed that compensation can be denied in pursuance of the reasons for exclusion, e.g. where there is a presumption of guilt or of self-causation of imprisonment. In case of acquittal on the ground of valid consent to imprisonment, it can be argued, in certain circumstances, that the accused has caused imprisonment by his own conduct. The concept of the accused's contributory fault, interpreted extensively, also covers cases where he was on the borderline of criminal activity before being charged.[3] The same point of view can perhaps be applied to certain cases of withdrawal from attempt. When a person is acquitted on the basis of expiration, compensation will ordinarily be rejected in pursuance of sec. 1018 b(2)(a) because of presumption of guilt.[4]

In sec. 1018 b(2)(b) it is stated, concerning acquittal or omission of charges because of *subjective reasons for exemption from punishment* such as the accused's insanity, that unjustified imprisonment cannot lead to compensation. But the other important subjective reason for acquittal in Danish law, minority (that is, being under 15 years of age), raises interpretation problems with regard to compensation provisions. It is a condition for criminal-procedure deprivation of liberty that a person shall have reached the criminal minimum age, Rpl. sec. 779 (2).[5] Consequently, should imprisonment of a child under 15 years take place, the imprisonment is unlawful and the state is therefore liable to compensation regardless of the ultimate result of the case.

The use of *grounds for annulment of punishment* implies that the accused has been found guilty of the crime charged and compensation is consequently excluded.[6]

Acquittal can also take place because the crime in question is *not considered punishable*. In these situations the accused will ordinarily have moved very close to the borderline of criminality; otherwise the case would hardly have been forwarded to indictment by the prosecuting authority. In such a case there is a strong tendency in practice to exclude compensation on the ground of the accused's own causation of imprisonment.[7] This practice flourished especially in traitorship and collaboration cases after the German occupation.[8]

Compensation after acquittal because of *technical* errors (for example the absence of the right to prosecute) may be solved along lines similar to those for rejection on the same basis.[9]

[1] See *infra*, 3.2.1.
[2] Hurwitz III, p. 535, note 19; cp. Schlegel, pp. 178 f.
[3] For more on this, see *infra*, 2.1.3.
[4] Cf. UfR 1964.710 H. For that matter the provision in sec. 1018 b(3) could equally well have been quoted.

[5] Cf. Hurwitz, *Den danske Kriminalret. Almindelig Del*, Copenhagen 1971, p. 282.
[6] Cf. Hurwitz III, p. 535; *Kommenteret Retsplejelov*, p. 1018. Another point is that in these cases there can be grounds for granting compensation because the procedural deprivation of liberty has surpassed the penalty; for more on this, see *infra*, 3.2.3.2.
[7] See further *infra*, 2.1.3.
[8] Cf. as examples UfR 1950.485 H; 1950.705 H; 1950.723 H; 1951.692 H; VLT 1946.127; 1946.193; 1954.279. In these cases the parties settled for a reduction of the compensation; cf. UfR 1946.1249 H; 1947.553 H; 1947.995 H. In an older decision—UfR 1935.1087 H—full compensation was granted; the accused had been imprisoned for violation of the Aliens Act, but during the case it was established that he should be considered to have acquired Danish citizenship in connection with the reunification of 1920. Also see Hurwitz III, pp. 538 f., which apparently overlooks traitorship cases in this context.
[9] On this, see *infra*, 2.1.2.2.

It cannot be required that the acquittal be final.[1] It should be mentioned that according to sec. 1018 m appeal against the compensation decision can take place separately as well as in connection with the appeal against the decision in the criminal case itself.[2]

2.1.2.2. *Release without trial.* The wording of sec. 1018 b(1)—"discharged without the case being brought to a verdict"—is very broad. The possible instances are withdrawal of charges for lack of evidence, the prosecutor's discretionary withdrawal of charges, and rejection.

Withdrawal of charges for lack of evidence can take place for the same reasons as those which can lead to acquittal.

Discretionary withdrawal of charges seems from the wording to be included in sec. 1018 b(1). But since the matter of guilt has usually been agreed on when withdrawal of charges is announced, compensation would be excluded in pursuance of sec. 1018 b(2)(a). The accused, naturally, is not prevented from bringing the question of compensation before the court, which thus must make an independent evaluation of the evidence in the case.

If the case is rejected because of a *technical error*, the question of compensation must depend on the nature of the defect. A temporary formal error (for example, presentation before the wrong court) cannot form a basis for compensation. If the rejection took place in a case where the public prosecutor lacked the right to prosecute because the crime was submitted to private prosecution, it will as a rule be permissible to grant compensation simply because the imprisonment was unlawful for that reason (Rpl. sec. 1018 a, cf. sec. 780).[3] The question of rejection on the ground that the crimes charged are not punishable must be resolved according to guidelines similar to those used in acquittal for the same reason.[4]

2.1.2.3. *Plurality.* A series of problems arise where the charge includes several crimes and only partial acquittal takes place.

[1] Cf. *Kommenteret Retsplejelov,* p. 1019; Bratholm, p. 27.
[2] On the re-opening of a case, sec. 1018 f(2) contains the provision that compensation granted must be paid back if the basis for the compensation disappears with the verdict of the re-opened case; cf. here VLT 1948.262.
[3] Cf. Gammeltoft-Hansen, pp. 32 f.
[4] See *supra,* 2.1.2.1.

Three situations can be distinguished:

Accused of	Imprisoned for	Acquitted of	Convicted of
(1) *a+b*	a+b	a	b
(2) *a+b*	a	a	b
(3) *a+b*	a	b	a

Situation no. 1. In this case there has to be an—often difficult—assessment of the extent to which imprisonment would have taken place even if the charges had only included crime b.[5] When the two crimes were of similar character, it will often be assumed that imprisonment would have taken place solely on the basis of the crime for which conviction took place,[6] and compensation must consequently be refused.

A special situation arises where the (possibly) unjustified imprisonment is compensated for by shortening the term to which the accused was sentenced. Here the need for compensation is slight. On the other hand, it cannot simply be assumed that full remission excludes compensation. Special economic loss can be suffered from the sudden imprisonment—loss which could have been avoided or at any rate reduced if sentence-serving had begun after ordinary notice. Often the person convicted has a not inconsiderable influence on the moment when service commences.[7] Remuneration for non-material damage, on the other hand, will hardly be granted, at any rate in the case of similar crimes.

Situation no. 2. It is clear that compensation must be given in these cases.[8]

Situation no. 3. This situation is without interest. The accused is here imprisoned for the crime for which he was convicted; thus imprisonment has not been unjustified.

Related to the cases mentioned above is the situation in which the accused is convicted for violation of a milder penal provision than that which brought about imprisonment.

As in situation no. 1, it is here necessary to assess the extent to which imprisonment would have taken place at all had the

[5] Cf. Bratholm, p. 30; Linckelmann, p. 67; *S.O.U.* 1972: 73, pp. 34 f. and 178.
[6] Cf. as example UfR 1964.206 Ø.
[7] Cf. Bratholm, p. 29, note 2; see also Hurwitz III, p. 530; *S.O.U.* 1972: 73, p. 38.
[8] Cf. UfR 1959.309 H; Hurwitz III, p. 535, note 20.

charges already at the moment of imprisonment only included the lesser offence for which conviction took place. Assessment will sometimes be easy, because the milder penal provision may not form the basis for imprisonment. In these cases there are grounds for an application of sec. 1018 b.[1]

Here, too, compensation can be excluded, if necessary, on the ground that the punishment was reduced by the period of imprisonment.[2]

2.1.3. *The accused's own causation of imprisonment.* The term "contributory fault" in connection with remand can be illustrated by three case-groups:

A. The conduct of the accused in connection with the charge casts a great deal of suspicion on him (for example, incorrect confession to the police or a third party, untruthful explanations on one or more points, etc.).
B. The accused indicates by his behaviour that one or more of the special imprisonment grounds are present (attempt to escape or collusion).[3]
C. The accused has, previously to being charged, exhibited behaviour which draws suspicion upon him.

The legislative history of the Administration of Justice Act indicates that only cases A and B were thought of as reasons for exclusion from compensation.[4]

In practice that limitation, however, has been ignored and cases falling under category C have also been brought in under the term "contributory fault". These have especially been cases of prosecution of traitors and collaborationists during the German occupation.

UfR 1950.324 H. During the occupation until August 1943 four defendants had committed a number of acts which on the surface had to be assumed to be friendly towards the Germans. In reality they took place as cover for an operation which, in accordance with an agreement with Danish authorities, served the interests of the Danish secret service. In August 1943, the agreement with the Danish authorities expired. However, the defendants continued with their activities until in October 1943 the operation was stopped by the Germans, partially through the leader's arrest and deportation.

The lower court found the accused guilty of crimes against the state and sentenced them to long periods of imprisonment. The High Court reversed the decision of the lower court on the ground that the actions had throughout taken place in the Danish interest. The accused were acquitted and given substantial compensation for periods of remand which had extended over 2–4 years. The Supreme Court, to which the question of compensation was submitted, refused compensation, because the accused had been found to have brought about their imprisonment through their own behaviour.

UfR 1951.692 H. During the occupation, an entrepreneur had allowed two of his trucks to serve the occupying powers. Further, he had participated in a partnership which produced concrete products for the occupying powers. He was prosecuted as a collaborationist, but the behaviour in question was not considered to be punishable; compensation for imprisonment was, however, refused since the accused was found to have given rise to the imprisonment through his own activity.[5]

UfR 1959.309 H. A lawyer was imprisoned, accused of agency fraud. The High Court set aside the order for imprisonment four days later, because suspicion did not seem to be sufficient well-founded. Some months later, the lawyer was accused of a series of crimes (among others, misuse of his former position as deputy judge) together with the same agency fraud. The accused was acquitted of agency fraud, but convicted of the other crimes. The penalty was set at six months less the period of remand. Compensation for unjustified imprisonment was refused, as the lawyer himself was found to have given rise to the imprisonment.

UfR 1936.84 H. A person, F., was accused of incendiarism on three occasions. On the nights when the fires took place, F. had been drunk and away from his home. Later he tried to conceal his absence from home. After the charges were withdrawn, the High Court and Supreme Court refused compensation, referring to F.'s own causation of imprisonment.[6]

VLT 1949.74. A woman was accused of incendiarism, but the case closed without indictment. The rejection of compensation was explained, among other things, by the fact that before the fire she

[1] Cf. Hurwitz III, p. 538, note 29; Bratholm, p. 33.
[2] Cf. UfR 1940.48 H.
[3] Often this will be suspicious as well and will consequently also come under group A; cf. E. Munch-Petersen, p. 401.
[4] Cf. H. Munch-Petersen I, pp. 155 f.; Hoff, p. 246.
[5] Cf. further, UfR 1946.1249 H; 1947.503 H; 1947.553 H; 1947.995 H; 1949.817 H; 1950.485 H; 1950.705 H; 1950.723 H; VLT 1946.127; 1946.193; 1954. 279.
[6] See on this Hoff, p. 245.

had given the impression that she was mulling over the idea of setting fire to the property in question.[7]

Among legal writers, this extended interpretation has the support of Hurwitz.[8]

It should be maintained that the term "contributory fault" is limited in other ways. Rpl. sec. 1018 b(3) is a provision concerning the injured party's own participation in the occurrence of the injury, and ordinary civil rules on contributory fault should to a certain degree be taken into consideration, in the first instance those regarding *culpa, causation,* and *foreseeability*. Responsibility for unjustified imprisonment is strict. However, this does not imply a more rigorous exclusion of compensation on the grounds of contributory fault than that which is applicable when responsibility is based on the ordinary rule of negligence.[1] There is an additional reason for this view, namely the fact that refusal of compensation for remand will ordinarily have more far-reaching consequences than does the dismissal of ordinary suits for civil torts.

Some authors point out that not every "imprisonment-causing" action on the part of the accused should exclude compensation. The accused's behaviour in this case must be of a somewhat questionable character.[2] The view must be accepted in so far as the accused's behaviour must have been neglect according to ordinary compensation rules.[3]

Contributory fault in the law of tort covers also responsibility for omissions in certain situations.[4] Applied to compensation for unjustified imprisonment, this has significance for the judgment of the accused's behaviour after the charge was presented and imprisonment possibly initiated. It must be stressed that the accused's refusal to speak with the aim of

[7] Cf. E. Munch-Petersen, pp. 411 f.

[8] Cf. Hurwitz III, pp. 536 f.; cf. further E. Munch-Petersen, pp. 408 ff.; FT 1960–61 A, col. 544; Koktvedgaard, p. 200. On the corresponding discussion in Norway, see Hjort, pp. 1 ff.; Bratholm, pp. 44 ff.

[1] Cf. A. Vinding Kruse, *Erstatningsretten*, 2nd ed. Copenhagen 1971, p. 401.

[2] Cf. Bratholm, pp. 47 f., who, as an example of the opposite, mentions a person penalized for incendiarism, who appears at the scene of a new fire and is arrested as a suspect.

[3] The accused, however, cannot escape from an alleged contributory fault by referring to his own insanity, cf. Rpl. sec. 1018 b(2)(b); Ussing, p. 191.

[4] Cf. Ussing, *Erstatningsret*, Copenhagen 1962, pp. 184 f.; A. Vinding Kruse, *op. cit.*, p. 393.

clearing himself of suspicion can, according to the circumstances, be understood as contributory fault.[5] Conversely, the accused's failure to appeal against an imprisonment decision can never in itself exclude compensation.[6]

The accused's behaviour must be causal to the imprisonment.[7] This condition will only seldom give rise to doubt, except in case of concurrent causes. Here the main idea must be that, as far as possible, an isolated evaluation of the separate crimes be made in reference to their significance for the imprisonment decision as well as to the accused's behaviour.[8]

The doctrine of *foreseeability* has greater practical significance. As appears from the judgments cited above, the accused's own way of acting before the charge can cause suspicion in two separate ways. Where it is clear that a crime was committed, but uncertain who was the offender, the accused may have brought himself under suspicion through previous statements to the effect that he would like to commit a crime of the kind in question.[9] The situation, however, may also be that there is doubt as to whether there has been a crime at all, but not as to who in that case was the offender. For a period of time the accused has moved close to the borderline of criminality,[1] and his situation now becomes the object of a closer criminal investigation.[2]

While in the last group exclusion from compensation can hardly be contested, compensation should not be refused in the first-mentioned case. For a person who has for some time frequented a border area of the criminal sector, it must be a clearly expected consequence that he may be charged and possibly imprisoned. The same is true of someone who behaves suspiciously after the crime has been committed. However, it is different for someone who expresses threats or the like before a crime.[3] He can only expect imprisonment if a crime

[5] Cf. UfR 1940.883 Ø; 1959.949 Ø. *Kommenteret Retsplejelov*, pp. 789 f.; Koktvedgaard, p. 97; Gammeltoft-Hansen, pp. 66 f.; cf. perhaps VLT 1954. 283. The same view is held by Bratholm, p. 50. On German law, see Linckelmann, pp. 105 ff.; StrEG sec. 5(2).

[6] Cf. Bratholm, p. 51.

[7] Cf. Bratholm, p. 46.

[8] See further Bratholm, p. 53; cf. UfR 1921.1026 H.

[9] Cf. VLT 1949.74 (referred to above); E. Munch-Petersen, pp. 411 f.; Bratholm, p. 47.

[1] H. Munch-Petersen V, p. 155.

[2] Cf., as examples, UfR 1950.324 H and 1951.692 H (referred to above).

[3] Cf. Bratholm, p. 47, who almost seems inclined to disregard the limitation of foreseeability in these cases; see also Hjort, p. 8.

of the same kind does actually take place. And this must ordinarily be considered unforeseeable, provided he does not commit the crime himself. Exclusion of compensation based on the accused's circumstances before a crime committed by unknown offenders should not, therefore, take place on the basis of the contributory-fault provision, but, at best, on the basis of a continuously maintained presumption that the accused was guilty of the crime in question. It is presumably sufficient that the charge be regarded as foreseeable. That the imprisonment itself should be foreseeable cannot be insisted upon.

An extensive interpretation of sec. 1018 b(3) would mean that in a number of cases it is difficult to decide whether compensation has been refused on the ground of the accused's own causation of imprisonment or on the ground of presumption of his guilt.[4]

The provision in Rpl. sec. 1018 h(5) also erases this differentiation; according to this, the Court is not allowed to note expressly in its opinion that compensation was refused because of presumption of guilt. The Court must restrict itself to a statement "that the legal conditions for compensation in regard to the evidence put forward in the case are not deemed to be present". The result of this—well-intentioned, though slightly hypocritical—provision is that it is very rarely possible for a student of court decisions to prove with certainty that compensation was refused on the basis of presumption of guilt.[5]

If the question of compensation is decided by a jury court, it is usually even more difficult to establish what were the true grounds for refusal. According to Rpl. sec. 1018 1, the jury may only be asked "whether the accused has a right to compensation".

It is too much to say that the ground for exclusion, "presumption of guilt", has been swallowed up by the ground "contributory fault". Certainly, however, presumption of guilt has lost most of its significance because of an extensive interpretation of the concept "contributory fault" and because the differentiation as a whole is unclear.

This situation is all the more unfortunate as the Supreme Court has conferred decisive importance on the differentiation

[4] Cf., e.g., VLT 1949.74 (referred to above); see also the case mentioned by Hoff, pp. 243 f.
[5] Cf. E. Munch-Petersen, pp. 413 f.

in regard to the question of appeal. Already in the decision UfR 1948.1080 H, the Supreme Court established that the Court considers itself to be competent to try the question whether the accused himself caused imprisonment by his behaviour.[6] But in a later decision, UfR 1971.49 H, the Supreme Court established that the question whether compensation was justly refused on the ground of presumption of guilt could not be decided without an investigation of the reliability of the evidence, and by doing this took the case out of the competence of the Supreme Court.

From now on it will be decisive for prisoners whether the High Court refuses compensation on one or the other of the grounds. In view of the obscurity of the differentiation, this legal state of affairs must be termed unsatisfactory.

2.2 *The practice of assessment*

The assessment of compensation for injury and loss is in principle governed by the ordinary compensation rules: among these are the rules of causation, the doctrine of foreseeability, and of the injured party's duty to limit the loss together with the maxim *compensatio lucri cum damno*[7] It cannot be denied that there is in practice a certain tendency to assess the amount of compensation slightly more generously than in civil lawsuits. Such a practice must in any case be considered justifiable in view of the tortfeasor's (the state's) greater ability to bear the loss. Furthermore, the point that criminal procedure (and through this, deprivation of liberty) must be carried through at the state's risk[8] must be emphasized.

Table 2. Compensation per day. Court decisions

	Number of cases	Compensation per day
1961–65	8	Dkr. 68
1966–70	7	Dkr. 87
1971–72	6	Dkr. 107

[6] Cf. UfR 1950.324 H and 1950.723 H; Victor Hansen, *Retsplejen ved Højesteret*, Copenhagen 1959, p. 151; Hurwitz III, p. 544.
[7] Cf. here FT 1964–65, col. 1775; UfR 1950.996 Ø.
[8] Cf. for details on this, Bratholm, pp. 62 ff.; Linckelmann, p. 61.

Table 3. Compensation for remand. Decisions of the Ministry of Justice

	Number of cases	Compensation per day
1966–67	10	Dkr. 81
1968–70	11	Dkr. 102
1971–72	13	Dkr. 81

The following statistics are based on decisions published in Danish law reports and certain internal accounting performed by the Attorney General, to which the present author has had access.

It is possible only in a few decisions to see which portion of the amount was given for non-material damage.

The assessment in those cases which are decided administratively (cf. Rpl. sec. 1018 h(2)) exhibits a quite significant variation. Of late the average level seems to have declined to less than that of the courts. This can no doubt be attributed to the accused's often being unacquainted with the assessment practice, and therefore claiming a lesser amount that he could actually be awarded.

In the years 1966–72 the Ministry of Justice approved 34 applications for compensation for periods of remand of more than three days. The total sum awarded was about Dkr 75,000.

In 29 of these cases a specific amount was given for non-material damage.

The figures listed can, at best, give only an impression of the level. The small number of cases does not allow of comparisons or conclusions.

Table 4. Compensation for non-material damage. Decisions[9] of the Ministry of Justice

	Number of cases	Compensation per day[9]
1966–67	7	Dkr. 56
1968–70	10	Dkr. 35
1971–72	12	Dkr. 61

[9] See some similar figures from Sweden, *S.O.U.* 1972: 73, p. 210.

3. RECOMMENDATIONS ON THE LAW OF UNJUSTIFIED IMPRISONMENT

3.1. *General comment*

In formulating rules for compensation for remand, an attempt should be made to meet as far as possible the needs of those who have been imprisoned unjustly (or for an unjustly long term). The reason for this has often enough been emphasized in the centuries-long debate and needs no further elaboration here. Bentham's—often quoted, but nevertheless completely true—words are quite sufficient: "An error of justice is already, by itself, a subject of grief, but that this error once known, should not be repaired by proportional indemnification, is an overturning of the social order."

However, a reasonable assessment must also be made of other available possibilities of correcting or remedying an unjustified decision of procedural deprivation of liberty. It ought to be mentioned in this connection that a number of questions of significance for imprisonment in general would be suitable for re-examination by appeal. It is not, of course, to be assumed from this that appeal against the decision should be made a condition in such a way that the imprisoned person is prevented from claiming compensation where there was no appeal.[1] But it would seem reasonable to stress that discretionary questions in connection with the justifiability of imprisonment (for example, to what extent there is danger of escape) can often be evaluated better in a re-examination which follows instantly than in a later decision. It is also significant that appeal does in reality often take place in these cases, and that an obligatory assignment of defence counsel would probably strengthen the use of appeal further.[2]

Furthermore, there has to be a certain evaluation of the possibility of giving compensation through reduction of the punishment. Certainly, the area where compensation as well as reduction of the punishment appear as alternatives is very limited. Reduction presumes a sentence, compensation in general an acquittal or something comparable thereto. Overlapping can take place, however, where the charge includes several

[1] The German Act provides expressly that this shall not be the case: "Die Entschädigung wird nicht dadurch ausgeschlossen, dass der Beschuldigte . . . unterlassen hat, ein Rechtsmittel einzulegen." StrEG sec. 5(1)(3).

[2] Cf. on this Gammeltoft-Hansen, pp. 279 f. and p. 282.

crimes in respect of which there is acquittal for some and conviction for others,[3] and in the case of conviction for a less serious crime than that which led to the imprisonment.

3.2. *Substantive conditions*

3.2.1. *Unlawful imprisonment.* As noted above, *unlawful* imprisonment, which is dealt with in sec. 1018 a of the Danish Act, means imprisonment in cases where such measures should not have taken place. This means that one of the following conditions for imprisonment was not present:

(1) a crime subject to prosecution by the Prosecution Office (which as a general rule means that the penalty limit must include jail),[4] (2) concrete prospects of an imprisonment penalty, (3) qualified suspicion against the imprisoned person, and (4) special grounds for imprisonment (danger of escape, repetition, collusion or especially grave criminality).

The ascertainment of condition no. 1, whether the charge includes crimes which are subject to prosecution by the Prosecution Office, is very simple and is done almost automatically. Conversely, the other conditions contain considerations of a decidedly discretionary character.

As far as the special grounds for imprisonment are concerned (condition no. 4), Hurwitz[5] notes that the discretionary character of the conditions must mean that lack of legality can only be assumed where it is clear that the evaluation was incorrectly performed.[6] The same point of view must be applied as far as the condition of concrete prospects of imprisonment is concerned (condition no. 2).

In order for Rpl. sec. 1018 a to have independent significance in relation to conditions nos. 2 and 4, one must imagine the following situation:

- The court's evaluation of the concrete penalty prospects and the special grounds for imprisonment was *clearly incorrect.*

[3] See *supra*, 2.1.2.3.
[4] Minor offences are prosecuted by a police officer. The author's statement does not take into account the special provision in Rpl. sec. 780 (1)(1) on vagrancy, etc.
[5] Hurwitz III, p. 529, note t.
[6] Cf. here UfR 1931.462 H and 638 Ø, referred to above.

- This evaluation was possibly affirmed by a higher court upon appeal.
- The case did not end with a verdict of not guilty.

However, even though theoretically there is no reason why these conditions should not be fulfilled, it would be difficult to imagine them arising in practice. Subsequent proof of clear disregard (possibly in several instances) for clearly arbitrary conditions would hardly take place when, in addition, there has been a conviction and there is a possibility of a reduction of the penalty.[1]

The demonstration of qualified suspicion (condition no. 3) also often involves factors which are clearly discretionary. If sec. 1018 a were to have independent significance for this condition, this would presuppose that an originally unqualified suspicion was in the course of the case enlarged at least sufficiently to exclude compensation as a result of a reasonable presumption of the accused's guilt (sec. 1018 b(2)(a)). If presumption of guilt is rejected as a ground for exclusion, it is still necessary that suspicion reach the proportions needed for the pronouncement of a final verdict. In those—rare—cases where the accused is imprisoned on a vague suspicion which, however, is later strengthened to such a degree that a conviction can be made, reduction of the term of imprisonment is the adequate remedy.[2] From this it should not be understood that waiving the claim for qualified suspicion is acceptable: quite the contrary. In by far the greater number of cases such waiving would lead to later withdrawal of charges or acquittal, in which case compensation can be claimed according to sec. 1018 b.

Thus sec. 1018 a can be understood to have independent significance only in cases where the prosecuting authority did not have the power to order imprisonment (condition no. 1).

To maintain a special compensation provision for this situation alone seems superfluous. First, it would probably happen but rarely that there would be incorrect imprisonment in conflict with this distinct condition. And secondly, the basis for liability in these cases would be so clear that it could be dealt with administratively without difficulty.

That art. 1018 a is without substantial independent signifi-

[1] Cf. Guradze, p. 86; cf. Linckelmann, pp. 48 f.
[2] Cf. here UfR 1959.309 H.

cance in practice is clearly confirmed by the fact that it is seldom used.[3]

On the whole it seems right, therefore, to let the term "unlawful imprisonment" drop out of compensation provisions. Here it should be remembered, however, that the preceding analysis rests to a certain extent on two prerequisites:

- abolition of presumption of guilt as ground for exclusion;
- establishment of the possibility of giving economic compensation instead of a reduction where this is impossible because of the type of penalty (for example fines) or the length of imprisonment.[4]

3.2.2. *Presumption of guilt as a ground for exclusion.* A weighty and often-stated criticism of compensation exclusion on the ground of presumption of guilt is that this creates two classes of acquittal: real acquittals and artificial acquittals with presumption of guilt.[5]

A group of people is hereby brought into an intolerable situation where the criminal-court acquittal seems diminutive compared with the defamation which accompanies the presumption of guilt expressed in the decision to refuse compensation.[6] A provision like that in Rpl. sec. 1018 h(5) is of course quite insufficient to remedy this problem.

The argument becomes even more weighty when one considers that fear of a stigmatizing rejection often causes the acquitted party completely to forgo submitting a compensation claim.[7]

In favour of the author's proposition there can also be adduced another, more technical reason, namely the above-mentioned[8] terminological confusion between presumption of

[3] See *supra*, 2.1.1.
[4] See *infra*, 3.2.3.
[5] Cf. Koktvedgaard, p. 200; Axel Petersen, *UfR* 1921 B, pp. 286 f.; Troels G. Jørgensen, *UfR* 1923 B, pp. 50 f.; E Munch-Petersen, p. 403; Hjort, p. 9, who quotes the special intermediate form used in Scotland: "guilty but not proven"; Bratholm, pp. 85 f.; Linckelmann, p. 76; *S.O.U.* 1972: 73, p. 133.
[6] The Norwegian proposal of 1969 looks upon the situation differently. It states that, where the acquittal is accompanied by continued presumption of the accused's guilt, this will, as a rule, appear in the premises of the decision; p. 364; cf. Bratholm, p. 38. The argument has limitations. Statements of the type mentioned are usually formulated so indirectly that they are far from containing the same taint as the simple and tangible fact that compensation was refused.
[7] Cf. Hurwitz II, p. 782.
[8] See *supra*, 2.1.1.

guilt and contributory fault. As mentioned, it was not just out of a desire for analytical stringency that the author claimed that the distinction should be clarified; the question is decisive for the handling of appeals in the Supreme Court. If presumption of guilt is dropped as a ground for exclusion, this will have the satisfactory result that the Supreme Court can always try compensation questions.

In addition, there is the basic tenet that the accused must always be regarded as innocent until a final verdict of guilty is pronounced. If no such verdict is pronounced, the presumption of innocence should be maintained.[9] The weight of this abstract argument may perhaps be discussed. It must be noted that a great number of countries, all of which profess to follow the principle of the accused's innocence, in fact practise compensation exclusion on the basis of presumption of guilt. And the European Convention on Human Rights, where, as mentioned, the presumption of innocence is expressly stated (art. 6, sec. 2), cannot be referred to as a fixed point in the criticism cited.

The formal basis for putting into practice and maintaining two grades of acquittal can be found in the difference between the burden-of-proof rules in civil and criminal procedure, respectively. For the decision or the penalty question itself, the sentence *in dubio pro reo* is conclusive; but in a tort suit it is—unless something else is expressly decided—the injured party who usually bears the burden of proof for the compensation conditions. For one who is familiar with this situation, it comes as no surprise that, if there is a lack of evidence, the two burden-of-proof rules may lead to divergent results.[1] However, this should not be decisive where questions of compensation for unjustified imprisonment are concerned. The accused is not bound according to the present provisions to establish his innocence positively through a disproval of the prosecuting attorney's evidence.[2] Sec. 1018 b contains a compromise, as compensation can only be refused in so far as there is still a reasonable presumption of the accused's guilt. Thus, a special standard has been inserted in the probability scale for evidence assessment—a standard which at any rate

[9] Cf. further Hurwitz II, p. 782.
[1] Cf. Bratholm, pp. 85 f.
[2] Cf. as example the Norwegian provision, see *supra*, 1.2.3.

must be the same as that of "reasonable cause" (qualified suspicion) in Rpl. sec. 780, since otherwise imprisonment would have been unlawful (provided that important new remedial factors do not appear in the period between the initiation or continuation of imprisonment and the verdict).

Furthermore, it must be emphasized that when formulating the burden-of-proof rules regard should be paid to the fact that the consequences of a refusal of compensation for remand will often be far more severe than in a civil-court context. This special defamation, connected with the refusal, which, according to the circumstances, can be a far greater burden than a plain economic loss, is a powerful argument for placing the person who has been imprisoned in a more favourable position than injured parties in ordinary tort claims.[3]

For many, the decisive argument against repeal of the present rule on exclusion from compensation because of presumption of guilt is that a number of persons who are in fact guilty will thereby receive economic gains from the state for their crimes.[4]

On this point it must be emphasized that there is no question of profit, but only of *compensation*. In principle, compensation places the persons involved on an equal footing with the group whose crimes are never discovered, or who are never revealed to be the perpetrators; in addition, the group which is not imprisoned during the case and which is later acquitted. In step with the expanding recognition of the significant dimensions of hidden criminality, there disappears the basis for the feeling of intolerability in that a number of guilty persons are not sentenced although prosecution is initiated against them.[5] The same is true of compensation for deprivation of liberty during trial. It must be added that the increase in the number of guilty persons receiving compensation is hardly likely to be large. First, the absolute increase will be of small dimensions. Secondly, the extended interpretation of the term "contributory fault" actually applied has the effect that a number of cases where the exclusion of compensation probably rests, deep down, on a presumption that the accused is actually

[3] Cf. Bratholm, p. 86.
[4] See as example Getz, *5. Nordiska Juristmötet 1884*, p. 161.
[5] Cf. Greve, *Kriminalitet som normalitet*, Copenhagen 1972, pp. 153 f.

guilty of the crime charged are already subject to exclusion under the contributory-fault provision.[6]

Finally, one should not forget that the present procedure involves a risk that a number of innocent persons will not receive compensation.[7]

Two authors have contended that the proposed amendment would have an unfortunate influence on the general preventive effect of crime prosecution.[8] Even apart from the fact that general prevention as a whole must be considered to have an undefined effect, the view seems far-fetched. In part, it is hard to believe that anyone would refrain from criminal activity because of the possibility that he would not receive compensation for possible imprisonment when later acquitted. Incidentally, this view assumes that remand itself must bear the general preventive effect, a point which is elsewhere rejected convincingly by one of the two authors referred to.[9]

The argument that compensation payment is thought by the general public to represent a defeat for the courts, thus undermining the confidence felt in the authorities,[1] must also be regarded as extraordinarily weak. Compensation has been paid for decades without any such effect being noticed. It is more probable that a lack of confidence is entertained precisely for the kind of judicial system which feels that it is necessary to reject otherwise reasonable compensation claims in order to maintain confidence.

Greater emphasis must be given to the argument that compensation liability paid independently of the judging parties' presumption of guilt can lead to more convictions in cases where the evidence narrowly falls short of the necessary level.[2] Some legal practitioners say that this risk often exists in cases where lay judges take part. If an acquittal in fact means that the accused will be granted money out of the state treasury, courts may prefer to convict, possibly with a substantially reduced sentence.

[6] See *supra*, 2.1.3. See also Koktvedgaard, p. 200.
[7] Cf. Schlegel, p. 179; Hurwitz II, p. 782.
[8] Cf. Rump, *5. Nordiska Juristmötet 1884*, p. 151; Bratholm, pp. 86 f.; Linckelmann, p. 84.
[9] Cf. Bratholm, *Pågripelse og varetektsfengsel*, Oslo 1957, pp. 321 f.
[1] Cf. *Retsplejeudvalget, Rigsdagstidende* 1930–31 A, col. 5188; Linckelmann, p. 84.
[2] Cf. Bratholm, p. 86; Linckelmann, p. 84.

It is understandably difficult to evaluate the practical significance of this argument. In some ways the risk mentioned could perhaps be obviated if there were greater clarity in the deliberation of the judges. Support is lent to this view by the fact that it is especially the lay judges who tend to adopt a rigorous attitude.[3]

Of the arguments mentioned, those against repeal seem on the whole to be less weighty than those in favour of repeal. And, in favour of repeal, there is another, very important observation to be added.

To the extent that different material conditions are maintained for compensation for remand and for served sentences respectively, in the present circumstances an irrational and arbitrary discrimination is brought about. In many cases a not insignificant portion of the sentence is served in remand. The duration of remand is far from always dependent on the accused's crime: it is connected rather with the character of the case (for example, complicated crimes of gain, cases with mental investigations) and with whether or not there is an appeal. The acquitted party, after having been relegated to remand, is in reality placed in exactly the same position as one who has served a term of imprisonment of similar length. The former could be refused compensation on the ground of presumption of guilt, the latter could not.[4]

It cannot be regarded as a relevant difference, in this connection, that the prisoner's acquittal may possibly take place after the re-opening of the case. An acquittal in a re-opened case cannot have greater significance than acquittal in the course of the first prosecution.

The accidental element appears to be evident especially where compensation is given under sec. 1018 b(4) and the penalty is partially regarded as having been served through remand. Here, there is a continuing, established custom that the period of imprisonment must be decided according to the narrower

[3] See further the proposal for dispensing with the participation of lay judges when the compensation question is decided, *infra*, 3.3.

[4] E. Munch-Petersen, for that matter, also points out the unreasonableness of making a difference between the two categories, but comes close to concluding that the range of compensation for penalties served ought to be narrowed correspondingly; cf. pp. 416 ff. This view was also followed to a certain extent in an amendment of 1961 whereby compensation for penalties served can be denied to the same degree as in remand, if the accused himself has caused the conviction; Rpl. sec. 1018 b(4) *in fine*.

rules concerning remand, regardless of whether remand makes up a larger or smaller portion of the combined confinement period.[5]

The viewpoints mentioned lead to a proposal for complete repeal of exclusion of compensation on the basis of continuing presumption of the accused's guilt. No compromise seems possible. A general equity rule[6] would be subject to the same criticism as the present system, perhaps with the modification that the defamation connected with the rejection would be somewhat reduced.

A further limitation of the grounds for exclusion—for example, to "apparent reasonable presumption of the accused's guilt"—would hardly offer a practicable solution.[7] And even if such a solution could be devised in practice, the two most important arguments for total repeal—defamation in case of rejection and the difference between the conditions for compensation for a served sentence and for remand—would remain undiminished in strength; the first would even gain added weight.

That total repeal would not necessarily be a catastrophe for the administration of criminal justice is indicated by the facts that West Germany has decided to do without this limitation of compensation liability and that a similar proposal has been put forward in Sweden.[8]

3.2.3. *Conviction*.

3.2.3.1. *The structure of the problem*. The real need for compensation diminishes greatly when prosecution ends in a conviction. The main reasons for this are:

(1) the possibility of compensation through reduction;
(2) a need to deal with defamation caused by imprisonment does not arise.

The first point is weakened decisively, however, if the penalty imposed is a term of imprisonment shorter than remand (3.2.3.2.) or consists of a fine (3.2.3.3.).

The second argument is weakened somewhat if the accused

[5] Cf. Hurwitz II, p. 776; E. Munch-Petersen, pp. 418 ff.; *Kommenteret Retsplejelov*, p. 1022; UfR 1943.109 H; 1950.723 H; 1951.990 H; 1961.914 H; 1964.710 H. See also Bratholm, pp. 36 and 45; *Innstilling* 1969, p. 365.

[6] Cf. Hurwitz II, p. 782 with note 35.

[7] See, for an attempt along these lines, Troels G. Jørgensen, *TfR* 1923, p. 51.

[8] See *supra*, 1.5.

is convicted of a crime which is much less serious than the one forming the basis for imprisonment. If the conviction leads to imprisonment of at least the same length as remand under the milder penal provision, then full reduction can take place.[9] If the application of a milder provision would lead to a shorter period of detention or a fine, then compensation can be granted according to the special rules for this.[1]

3.2.3.2. *About duration in particular.* The main condition in this area of a special compensation provision must be that the sentence of imprisonment shall be for a shorter duration than remand.[2]

Special problems arise in the case of conditional sentences. If, however, the point of view is accepted that imprisonment should not take place where a conditional sentence can be expected,[3] it is reasonable to give compensation in these cases also. The special situation where the conditional sentence comes about, among other reasons, because a certain period of remand has been served,[4] reaches a fully logical and reasonable solution through a combination of conditional and unconditional sentences.

It can be discussed whether compensation for "excess remand" should be paid according to obligatory or discretionary rules.[5] The objection may be made to an obligatory provision that it could perhaps serve as an incentive, in certain cases, for the Court to circumvent the rule by imposing a penalty just covering the duration of the remand. Such a tendency is, of course, undesirable in itself. But in relation to the question of a choice between a discretionary or an obligatory rule of compensation the argument has, in a sense, no bearing. Let us compare the following two patterns:

(*a*) 6 months remand—4 months imprisonment—compensation for the two extra months refused discretionarily;

(*b*) 6 months remand—6 months imprisonment (in order to avoid paying compensation according to an obligatory rule).

[9] Cf. UfR 1940.48 H.

[1] Cf. UfR 1963.819 V.

[2] The provision will thus also be applicable in annulments of punishments. See *supra*, 2.1.2.1.

[3] See here Gammeltoft-Hansen, pp. 40 ff.

[4] And where remand is therefore not in conflict with the provision, an unconditional imprisonment penalty must be counted on as a concrete prospect, cf. Gammeltoft-Hansen, p. 42.

[5] Bratholm implies that the rule ought to be discretionary, p. 33.

It can be seen that there is no real difference between (a) and (b) apart from the appearance of the police record. In both situations the accused has been deprived of liberty for six months; and in both he receives no economic compensation.

It can be said in favour of the obligatory rule for compensation that if remand is in excess of the punishment sentenced the basic principle for the duration of imprisonment—the principle of proportionality[6]—is *ipso facto* set aside.

A difficult problem arises in the implementation of the exclusion grounds, "contributory fault", in case of "excess remand". With the new, extended interpretation of the concept contributory negligence[7] it will in a sense always be possible to contend that the accused has through his behaviour (which here the verdict has established as criminal) caused the imprisonment. Something can be said, therefore, for disregarding this ground for exclusion in the case in question. However, this would lead to unreasonable results. A person who has come close to criminality, though without entering into it, would ordinarily be denied compensation. If, on the other hand, he has entered into it and has been sentenced to a short term (possibly conditional), he would be able to receive compensation according to the circumstances.

Exclusion on the basis of the accused's contributory fault must therefore also be upheld in the case of "excess remand". Unlimited use of this ground for exclusion—whereby compensation will in reality rest on a discretionary basis—should not be allowed. Compensation cannot be refused simply because the accused has caused his imprisonment by his own behaviour; it can only be withheld where he has directly caused the imprisonment to be *extended* beyond the period which was comparable to the penalty sentenced.[8]

3.2.3.3. *Fines.* If the penalty imposed is a fine, there is a definite need for compensation for unjustified imprisonment. This can come about in two different ways.

Either a number of days comparable to the fine (or sentence)

[6] See, for further details, Gammeltoft-Hansen, pp. 180 ff.

[7] See *supra*, 2.1.3.

[8] Cf. here UfR 1951.990 H (dissent).

can be subtracted from the remand period in such a way that compensation can only be claimed for the excessive portion (the deduction method). Or the total compensation sum for the whole remand period can be estimated, but reduced by the amount of the fine (set-off method).

In practice the deduction method is likely to be used.[9] An unfavourable aspect of this is that the person sentenced is thereby compelled to pay the fine and thus is placed, in principle, in a far worse position than someone who, without previous imprisonment, is sentenced to the same penalty for a similar offence. In addition, the deduction method includes a possibility that the person sentenced will not receive compensation for his actual loss through imprisonment.[1]

> *Example.* A. has been imprisoned for 22 days; he is sentenced to a fine of Dkr. 600 with an alternative sentence of 12 days. A.'s daily documentable loss is set at Dkr. 120. His loss through imprisonment is thus Dkr. 2,640 minus the fine of Dkr. 600, which is assumed to have been paid through imprisonment, in other words about Dkr. 2,000. Computation according to the deducation method leads to a smaller amount: (22−12)×Dkr. 1,200.

If the alternative penalty is decided on the basis of daily earnings, there would be no difference between the two methods. But since this is hardly ever the case, the set-off method is preferable.[2]

3.2.4. *Imprisonment surrogates.* The present system, whereby compensation for unjustifiable employment of measures which replace custody is subject to a discretionary provision (Rpl. sec. 1018 c), is not satisfactory. Admittedly this is not important in practice, since imprisonment surrogates are on the whole very seldom employed. If, however, the use of surrogates becomes frequent, the question of compensation must be solved.

Among substitute measures which might be considered,[3] some will be characterized by actual deprivation of liberty, as

[9] Cf. UfR 1950.485 H; 1963.819 V.

[1] Cf. Bratholm, pp. 30 f.

[2] The set-off method also has the advantage that it is immediately viable. It would be preferable even if the present rigid system of alternative penalties were to be made more tractable; cf. Hurwitz, *Den danske Kriminalret. Almindelig Del*, Copenhagen 1971, pp. 404 f.

[3] See, for further details, Gammeltoft-Hansen, pp. 226 ff.

for example surveillance at home. The same compensation possibilities must apply for such measures as for ordinary remand. For that matter, it would be natural to establish a distinction between these measures and the less restrictive ones, so that only the first group would be subject to compensation rules.[4] Such a rule would seem unobjectionable, since compensation can ordinarily be refused or at any rate reduced in the case of less restrictive measures, as no substantial economic loss has been suffered.[5] Remuneration for non-material loss can hardly be considered within the context of this group, where possible defamation is probably attached to the charge itself rather than to the measure employed.[6]

3.3. *Formal conditions*

If the proposal for repeal of presumption of guilt as a ground for exclusion is followed, the court which tries the criminal charge must not be made the forum for the adjudication of the compensation claim. We are free to discuss the following questions: (1) Should lay judges take part in the decision? (2) What time limits should apply to the submission of the application?

If presumption of guilt is dropped as a principle, the lay-judge element must be said to be somewhat superfluous. This view is also supported by the practice of the Supreme Court, under which the question of the accused's own causation of imprisonment (in contrast to his presumed guilt) has been decided.[7] The compensation question will then on the whole be related to a civil suit.

The provision which states that compensation claims must normally be submitted in direct connection with the verdict—in jury trials even before the submission of the case for judgment[8]—seems questionable. Often it will be difficult for the accused to evaluate his situation at this point. As a minimum it must be required that the individual shall have the oppor-

[4] Cf. here the Norwegian proposal of 1969, p. 365.

[5] If release takes place with bail (cf. Rpl. secs. 786–8), compensation can be cut off without further ado.

[6] According to the present provision in sec. 1018 c, remuneration for suffering and pain can never be paid, not even for strict imprisonment surrogates.

[7] See *supra*, 2.1.3.

[8] Cf. sec. 1018 g(1); this provision is interpreted very rigorously in practice, see UfR 1958.972 Ø.

tunity of a relaxed study of the opinions of the judges on the bench before he decides whether compensation should be claimed.

On the other hand, there is no reason to cut off the possibility of deciding the compensation claim at the trial of the crime, if the accused clearly wishes this. A system which allows both possibilities is desirable.

The observations made above lead the author to present the following proposals:

(1) It should be made possible for the compensation claim to be lodged in connection with the trial (i.e. at the latest in connection with the verdict). The claim should be decided by a panel composed of the non-lay judges of the court.
(2) The accused should be allowed to choose to submit the claim within 12 weeks after the verdict (or the announcement by the prosecution that charges will be dropped). The claim in this case is to be decided by the court which first conducted the trial, without the participation of its lay judges.
(3) The provisions in secs. 1018 g(3), 1018 h(1)–(4), 1018 k, and (partially) 1018 m, should be retained.

APPENDIX

Administration of Justice Act

Chapter 93 a.
Satisfaction on account of prosecution

Sec. 1018 a.

An accused person who has been arrested or imprisoned has the right, where such measures should not have been employed, to compensation for economic injury, pain, and suffering caused by the deprivation of liberty.

Sec. 1018 b.

(1) A person who has been arrested or imprisoned and subsequently is acquitted or discharged without the case being brought to a verdict has a right to compensation for economic injury, pain, and suffering.

(2) This does not apply, however, when
(*a*) the information provided gives reason to believe that he is guilty of the charge which caused the arrest or imprisonment, or
(*b*) the acquittal or the withdrawal of charge is due to his insanity.

(3) Compensation can be refused or reduced if the said person has caused the imprisonment himself.

(4) A person who has served a penalty or any other sentence containing deprivation of liberty has, to the extent described in subsec. (1), a right to compensation, when the sentence is annulled after appeal or re-opening of the case. Compensation can be refused or reduced if the convicted person has caused the conviction himself through his behaviour during the case.

Sec. 1018 c.

The court can, in addition to this, according to the circumstances, award the accused compensation for economic injury caused by a measure as described in sec. 137(1), chapters 67–69, sec. 777(3); sec. 785, or chapter 73, when prosecution does not lead to a verdict, or when the trial ends with acquittal. The provision in sec. 1018 b(2) is employed correspondingly.

Sec. 1018 d.

(1) In the situations mentioned in secs. 1018 a–1018 c the accused, instead of claiming compensation, can demand a statement from the chief of police that it has been proved that the said measure lacked any basis and was not deserved in the accused's circumstances. If the chief of police finds that such a statement can be issued, it is to be prepared as quickly as possible. If during the case the court, in pursuance of sec. 137(2), chapters 67–69 and 71–73, has decided on certain measures against the accused, then the consent of the court must be obtained. The decision of the chief of police cannot be brought before a higher administrative authority or before the courts.

(2) In other cases, also, the person against whom prosecution has been initiated can demand a statement from the chief of police that it has been proved that the prosecution lacked any basis and was not deserved in the accused's circumstances. The decision of the chief of police cannot be brought before the courts.

Sec. 1018 e.

The rights mentioned in secs. 1018 a–1018 c in respect of economic injury after the death of the said person accrue to his spouse and heirs.

Sec. 1018 f.

(1) Compensation according to secs. 1018 a–1018 c is paid by the state treasury, but there can be recourse against the civil servant involved in so far as he is guilty of misuse of authority, negligence, or other unjustifiable conduct.

(2) When a case is re-opened and prosecution leads to a verdict involving the accused who has received compensation on the occasion of an earlier prosecution in the same case, it will be for the court to decide whether the basis for compensation has disappeared because of this, and whether compensation must be paid back to the state treasury.

Sec. 1018 g.

(1) A person who wishes to claim compensation according to secs. 1018 a–1018 c must, if the case is to be carried through to a verdict, present this in the court before the submission for judgment. In cases brought before the lower court or appealed to the High Court, the claim can also be presented in direct continuation of the verdict. The claim is decided upon during or in direct continuation of the trial, unless the court in carrying out its office or after a request from one of the parties decides that the question of right to compensation or of the amount of this should be deferred for special decision. The court's decision cannot be appealed.

(2) If the case has not been followed through to a verdict, the petition for compensation must be submitted within 12 weeks after the accused has been informed that prosecution has been withdrawn.

(3) After expiry of the above-mentioned time limits, compensation may only be paid when new information is provided which the court considers to be of substantial significance for the decision of the compensation question. Petition for compensation must be submitted within four weeks after the said person has acquired knowledge of the new information.

Sec. 1018 h.

(1) The compensation actions referred to in this chapter are to be handled under the forms of criminal procedure with such modification as are suited to the differences in circumstances.

(2) A petition for compensation action is to be submitted to the district attorney, who shall cause it to be brought to court. The compensation claim can be met by the Minister of Justice after statements have been received from the prosecutor, defence counsel, and the court.

(3) The case is to be set down for trial when the court has received the application of the district attorney. The person in question is to be given the opportunity to make his claim for compensation.

(4) Where the claimant so requests, an attorney will be assigned to him.

(5) Where compensation is refused on the ground mentioned in sec. 1018 b(2)(a), the court opinion must be confined to noting that the legal conditions for compensation in regard to the evidence put forward in the case are not deemed to be present.

Sec. 1018 i.

The case is to be handled and decided in the ordinary lower court with the participation of lay judges.

Sec. 1018 k.

The case is to be presented in the court where the criminal case has been set down for trial, or, where the criminal case has been a jury trial or has not been followed through to verdict, in the court in the district where the acts on which the claim for compensation rests have been executed. The provisions in chapter 63 (venue) are hereby given similar application.

Sec. 1018 l.

If the compensation claim is to be decided at a jury trial, the jury is to be asked whether the accused has a right to compensation. An affirmative answer is deemed to be given where at least eight members of the jury have voted in favour of the claim. The amount of the compensation is decided by the court.

Sec. 1018 m.

(1) Appeal can take place according to the ordinary rules in this book.

(2) If the compensation claim is decided at the end of the trial, appeal against it can take place either in connection with the appeal of the verdict or by special appeal of the compensation question. In the latter case, as well as when appeal takes place for cases which have to do exclusively with compensation, the time limit for appeal shall always be 12 weeks. Where the compensation claim is decided at a jury trial, appeal cannot be based on the objection that the decision of the jury is wrong, unless this is asserted to be due to an incorrect charge to the jury from the presiding judge, or errors in the questions to the jury resulting from an incorrect understanding of the law.

(3) Under appeal for the High Court, an award of compensation shall be made if at least four of the members of the court have voted in favour of the claim.

(4) Re-opening of a case in which compensation has been re-

fused can take place under conditions which correspond to those laid down in sec. 977. The petition is to be presented before the Special Complaints Court.

(5) After the death of the person in question, appeal and application for re-opening of a case with regard to compensation for economic injury can be initiated by his spouse or heirs.

THE NEW SWEDISH LEGISLATION ON ADMINISTRATIVE JURISDICTION

BY

KURT HOLMGREN

Former Justice of the Supreme Administrative Court of Sweden

McKINNEY'S
CONSOLIDATED LAWS
OF
NEW YORK
ANNOTATED

Book 29A

Judiciary, Part 2
Court of Claims Act
Uniform Justice Court Act

Practice Commentaries
By
David D. Siegel

With Annotations
From
State and Federal Courts
and
State Agencies

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Bailey v. State, 1979, 72 A.D.2d 889, 422 N.Y.S.2d 168.

Member of New York Army National Guard injured while attending regularly scheduled drills of his unit at State Armory at time when he was not in active service of United States Army by order of President was not entitled to recover under this section providing that state waives its immunity from liability with respect to torts of members of organized militia but providing that this section does not effect waiver of immunity from liability with respect to claim of any person in military service of state arising out of or in connection with his military service on behalf of state. Sadowski v. State, 1966, 51 Misc.2d 832, 274 N.Y.S.2d 368.

Any compensation received by member of New York Army National Guard from military authorities of United States was merely accommodation between federal government and state government and created no special relationship between United States Military Service and guardsman who had not been impressed into federal service and did not make guardsman an employee of federal government and he was not entitled on that basis to sue state under this section pertaining to torts of militia for injuries received while attending regularly scheduled drill of his unit at State Armory. Sadowski v. State, 1966, 51 Misc.2d 832, 274 N.Y.S.2d 368.

This section providing that nothing in the Act should be construed to effect waiver of immunity from liability and action with respect to claim of any person in military service of state arising out of that service absolutely barred liability of state for injuries received by National Guardsman allegedly as result of negligence of fellow soldiers while guardsman was undertaking directed and authorized unit training at Fort Dix, New Jersey. Halatas v. State, 1964, 43 Misc.2d 260, 250 N.Y.S.2d 934.

6. Operation of vehicles

New York has waived its immunity from suit for damages arising out of collision in which national guardsman was involved. Boyer v. Chaloux, D.C.N.Y.1968, 288 F.Supp. 366.

State's waiver of immunity with respect to tortious acts of members and employees of state militia applied only to acts in operation, maintenance and control of vehicles and claimant would not be entitled to recover for personal injuries sustained through alleged negligence of members of state militia in installation of rope barrier over which claimant fell while attending open house training session of unit of state air national guard. Gross v. State, 1966, 27 A.D.2d 621, 275 N.Y.S.2d 999.

National Guard member who flew at altitude of about 50 feet, acknowledged companion's warning of power lines, and tried to take corrective action too late was negligent, and state was liable for injuries received of companion, who had accompanied member on flight taken for military purposes. Ernst v. State, 1963, 38 Misc.2d 264, 237 N.Y.S.2d 458, affirmed 20 A.D.2d 608, 245 N.Y.S.2d 567.

This section whereby the State waived its immunity from liability and action with respect to torts of members of the organized militia in operation, maintenance and control of vehicles, did not authorize an action against the state by a pedestrian for injuries sustained when he was struck on the head by a falling object, which had been attached to armory building under the control of the militia. Long v. State, 1955, 208 Misc. 703, 145 N.Y.S.2d 433.

§ 8–b. Claims for unjust conviction and imprisonment

1. The legislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages. The

legislature intends by enactment of the provisions of this section that those innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned be able to recover damages against the state. In light of the substantial burden of proof that must be carried by such persons, it is the intent of the legislature that the court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, shall, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf.

2. Any person convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit may, under the conditions hereinafter provided, present a claim for damages against the state.

3. In order to present the claim for unjust conviction and imprisonment, claimant must establish by documentary evidence that:

(a) he has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and

(b) (i) he has been pardoned upon the ground of innocence of the crime or crimes for which he was sentenced and which are the grounds for the complaint; or (ii) his judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not guilty at the new trial or he was not retried and the accusatory instrument dismissed; provided that the judgement of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of the following grounds: (A) paragraph (a), (b), (c), (e) or (g) of subdivision one of section 440.10 of the criminal procedure law; or (B) subdivision one (where based upon grounds set forth in item (A) hereof), two, three (where the count dismissed was the sole basis for the imprisonment complained of) or five of section 470.20 of the criminal procedure law; or (C) comparable provisions of the former code of criminal procedure or subsequent law; or (D) the statute, or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the state of New York; and

(c) his claim is not time-barred by the provisions of subdivision seven of this section.

4. The claim shall state facts in sufficient detail to permit th court to find that claimant is likely to succeed at trial in provin that (a) he did not commit any of the acts charged in the accusator instrument or his acts or omissions charged in the accusator instrument did not constitute a felony or misdemeanor against th state, and (b) he did not by his own conduct cause or bring abou his conviction. The claim shall be verified by the claimant. If th court finds after reading the claim that claimant is not likely t succeed at trial, it shall dismiss the claim, either on its own motio or on the motion of the state.

5. In order to obtain a judgment in his favor, claimant mus prove by clear and convincing evidence that:

(a) he has been convicted of one or more felonies or misdemean ors against the state and subsequently sentenced to a term o imprisonment, and has served all or any part of the sentence; an

(b) (i) he has been pardoned upon the ground of innocence of th crime or crimes for which he was sentenced and which are th grounds for the complaint; or (ii) his judgment of conviction wa reversed or vacated, and the accusatory instrument dismissed or, i a new trial was ordered, either he was found not guilty at the ne trial or he was not retried and the accusatory instrument dismisse provided that the judgement of conviction was reversed or vacate and the accusatory instrument was dismissed, on any of the follow ing grounds: (A) paragraph (a), (b), (c), (e) or (g) of subdivision on of section 440.10 of the criminal procedure law; or (B) subdivisio one (where based upon grounds set forth in item (A) hereof), tw three (where the count dismissed was the sole basis for the impris onment complained of) or five of section 470.20 of the crimina procedure law; or (C) comparable provisions of the former code o criminal procedure or subsequent law; or (D) the statute, or appli cation thereof, on which the accusatory instrument was base violated the constitution of the United States or the state of Ne York; and

(c) he did not commit any of the acts charged in the accusator instrument or his acts or omissions charged in the accusator instrument did not constitute a felony or misdemeanor against th state; and

(d) he did not by his own conduct cause or bring about hi conviction.

6. If the court finds that the claimant is entitled to a judgment, i shall award damages in such sum of money as the court determine will fairly and reasonably compensate him.

7. Any person claiming compensation under this section based on a pardon that was granted before the effective date of this section or the dismissal of an accusatory instrument that occurred before the effective date of this section shall file his claim within two years after the effective date of this section. Any person claiming compensation under this section based on a pardon that was granted on or after the effective date of this section or the dismissal of an accusatory instrument that occurred on or after the effective date of this section shall file his claim within two years after the pardon or dismissal.

(Added L.1984, c. 1009, § 2.)

Historical and Statutory Notes

Effective Date. Section effective Dec. 21, 1984, pursuant to L.1984, c. 1009, § 4.

Short Title. Section 1 of L.1984, c. 1009, eff. Dec. 21, 1984, provided: "This act [adding this section and amending section 9] shall be known and may be cited as 'the unjust conviction and imprisonment act of 1984'."

Law Review Commentaries

A uniform approach to New York State liability for wrongful imprisonment: a statutory model. 49 Albany L.Rev. 201 (1984).

Library References

American Digest System

Consent to be sued for particular matters, see States ⇐191(1.19 to 1.25).
Liability for unlawful arrest or prosecution, see States ⇐112.2(7).

Encyclopedia

Consent to be sued for particular matters, see C.J.S. States § 302.
Liability for torts, see C.J.S. States §§ 196 to 200, 202.

WESTLAW Research

States cases: 360k[add key number].

Notes of Decisions

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1. Commission of acts charged

Plaintiff who was acquitted of charge of criminal sale of a controlled substance in the second degree stated a claim for unjust conviction and imprisonment; plaintiff provided documentary evidence, which established that he was convicted of a felony, that he served part of the sentence imposed by the conviction, that the conviction was reversed, that he was found not guilty at a new trial, and that the claim was not time barred. Solomon v. State, 1989, 146 A.D.2d 439, 541 N.Y.S.2d 384.

Allegations in claimant's complaint, that he had been convicted of rape based on testimony of complaining witness whom psychiatric evidence demonstrated was pathological liar and who suffered from distorted perceptions of encounters with men, were sufficient to

state cause of action under the Unjust Conviction and Imprisonment Act. Dozier v. State, 1987, 134 A.D.2d 759, 521 N.Y.S.2d 574.

Claimant who brought action to recover damages under Court of Claims Act for unjust conviction and imprisonment proved by clear and convincing evidence that she did not commit the acts charged or that her acts did not constitute a crime, considering extraordinary factors not caused by claimant which presented difficulties in presenting proof of her claim, including fact that she suffered from amnesia with regard to event and was unable to testify with respect to it. Reed v. State, 1987, 133 A.D.2d 107, 518 N.Y.S.2d 645.

Former prisoner's claim for unjust murder conviction and imprisonment alleged facts in sufficient detail and provided necessary documentary evidence to state cause of action under unjust conviction statute; prisoner alleged that he served approximately 26 months of sentence, that Appellate Division reversed conviction and dismissed indictment, and that he did not commit acts charged and did not cause or bring about conviction; and memorandum decision of Appellate Division reversing conviction was incorporated into claim by reference. Grimaldi v. State, 1987, 133 A.D.2d 97, 518 N.Y.S.2d 636.

Claimant was not required at pleading stage to submit documentary evidence supporting his claim of innocence in order to bring claim under Unjust Conviction and Imprisonment Act of 1984. Mott v. State, 1988, 138 Misc.2d 916, 526 N.Y.S.2d 331.

Claimant could not recover under New York's Unjust Conviction and Imprisonment Act, even though he had been convicted and imprisoned for acts committed by his identical twin brother, where defendant had known that his brother was the culprit prior to his conviction and yet never told officials, either before, during, or after his trial. Stevenson v. State, 1987, 137 Misc.2d 313, 520 N.Y.S.2d 492.

2. Conduct bringing about conviction

Claimant's failure to testify at his criminal trial did not "bring about his conviction" so as to bar his claim under the Unjust Conviction and Imprisonment Act. Lanza v. State, 1987, 130 A.D.2d 872, 515 N.Y.S.2d 928.

Defendant who was convicted, imprisoned and subsequently acquitted on retrial, was not entitled to recover damages against State under Unjust Conviction and Imprisonment Act [McKinney's Court of Claims Act § 8–b], where defendant's uncoerced confession, though subsequently shown to be false and illegally obtained, contributed to his conviction. Ausderau v. State, 1985, 130 Misc.2d 848, 498 N.Y.S.2d 253, affirmed 127 A.D.2d 980, 512 N.Y.S.2d 790, appeal denied 69 N.Y.2d 613, 511 N.E.2d 87.

3. Improper sentencing

Claimant, who was convicted of assault and burglary and improperly sentenced as second felony offender, could not recover under the Unjust Conviction and Imprisonment Act; claimant was improperly sentenced, not unjustly convicted, and the Act applied only to people convicted and imprisoned for crimes which they never committed, not to people improperly incarcerated. Abney v. State, 1987, 135 Misc.2d 409, 515 N.Y.S.2d 392.

4. Injury to claimant

Claimant who remained incarcerated on separate, unrelated conviction after another indictment was dismissed on double jeopardy grounds was not entitled to redress under Unjust Conviction and Imprisonment Act; necessary element of claim under Act is to establish injury as result of imprisonment, and mere damage to reputation does not suffice. Fudger v. State, 1987, 131 A.D.2d 136, 520 N.Y.S.2d 950, appeal denied 70 N.Y.2d 616, 526 N.Y.S.2d 436, 521 N.E.2d 443.

Evidence in action under Unjust Conviction and Imprisonment Act supported award of $40,000 for lost wages and award of $200,000 to compensate claimant for emotional distress while imprisoned and loss of reputation; claimant was known in community from being high school basketball star; claimant testified to mental anguish suffered from discomfort, fear, lack of privacy, loss of freedom while imprisoned, and separa-

tion from children. Carter v. State, 1988, 139 Misc.2d 423, 528 N.Y.S.2d 292.

5. Likelihood of success

Claim to recover for unjust conviction and imprisonment did not satisfy statutory pleading requirements because claimant failed to show that reversal of his conviction was based upon any of statutory grounds or factually demonstrate likelihood of success at trial in proving his innocence. McFadden v. State, 1989, ___ A.D.2d ___, 543 N.Y.S.2d 462.

Claimants failed to make sufficient allegations to meet their burden of proof in cause of action against State for unjust conviction and imprisonment, where they asserted they were convicted solely on basis of perjured testimony, without which convictions could not have been maintained; inability of People to meet their burden in criminal trial was not equivalent of statutory requirement that claimants state facts in sufficient detail to permit Court of Claims to find that they were likely to succeed at trial in proving that they did not commit acts charged in accusatory instrument. Piccarreto v. State, 1988, 144 A.D.2d 920, 534 N.Y.S.2d 31.

Claimant's conclusory allegations, that his confession was coerced and that he presented alibi defense at trial, were insufficient to factually demonstrate likelihood of success at trial in proving his innocence so as to warrant recovery against State under Unjust Conviction and Imprisonment Act; claimant was in effect simply restating trial evidence, and, although indictment was dismissed on double jeopardy grounds, claimant failed to carry burden of proving innocence by clear and convincing evidence. Fudger v. State, 1987, 131 A.D.2d 136, 520 N.Y.S.2d 950, appeal denied 70 N.Y.2d 616, 526 N.Y.S.2d 436, 521 N.E.2d 443.

Claimant seeking compensation under Unjust Conviction and Imprisonment Act is not required, on motion to dismiss, to submit documentary evidence to demonstrate likelihood of success at trial. Lanza v. State, 1987, 130 A.D.2d 872, 515 N.Y.S.2d 928.

Convict under McKinney's Court of Claims Act § 8-b regarding claims for unjust conviction and imprisonment failed to make prima facie showing that he was likely to succeed at trial, where claim merely recited that convict's acts or omissions charged in underlying accusatory instrument did not constitute a felony against State, reversal of convict's conviction and dismissal of accusatory instrument was based on legal insufficiency which did not mean that accusatory instrument was defective, convict's acts and omissions charged in accusatory instrument constituted felony of forgery in second degree, and claim did not contain some factual assertion that convict did not commit any of the acts charged in the accusatory instrument. Rivers v. State, 1985, 130 Misc.2d 544, 496 N.Y.S.2d 908.

6. Reversal of conviction

Claim against State for unjust conviction and imprisonment was not established; claimant neither factually demonstrated likelihood of success at trial in proving his innocence nor meritoriously showed that reversal or dismissal of indictment was based upon any enumerated ground. Forest v. State, 1989, ___ A.D.2d ___, 541 N.Y.S.2d 213.

Narcotics defendant could not recover for unjust conviction, though charges were dropped after appellate reversal of convictions, where accusatory instrument was not dismissed under any of the limited and specific grounds enumerated in unjust conviction statute, and defendant failed to establish, by clear and convincing proof, that he was unjustly convicted within meaning of statute. Heiss v. State, 1988, 143 A.D.2d 67, 531 N.Y.S.2d 320.

Claimant, whose conviction for second-degree murder was reversed and dismissed by Court of Appeals on ground that his guilt could not be established beyond a reasonable doubt by testimony of sole witness, who was either from moral or mental defects irresponsible, and who stated in his claim that he had no role whatsoever in murder and was painting his mother's apartment at time crime was committed, stated claim for relief under unjust conviction statute. Reed v. State, 1987, 133 A.D.2d 105, 518 N.Y.S.2d 643.

Claimant was not entitled to recover under Unjust Conviction and Imprisonment Act for alleged five-year incarceration at time of reversal, where conviction was reversed and vacated on ground that photograph selection and lineup procedures were unduly suggestive and case was subsequently dismissed in interest of justice as result of prosecution's lack of diligence; neither reversal nor dismissal satisfied grounds for relief specified in Act. Gordon v. State, 1988, 141 Misc.2d 242, 533 N.Y.S.2d 219.

County court's dismissal of indictment for legal insufficiency, following reversal of guilty judgment and failure to resubmit for new criminal trial, satisfied jurisdictional requirement for bringing claim under Unjust Conviction and Imprisonment Act of 1984; original guilty judgment was reversed because, inter alia, of prejudice that deprived defendant of fair trial and because judgment was procurred by prosecutorial misrepresentation. Mott v. State, 1988, 138 Misc.2d 916, 526 N.Y.S.2d 331.

Claimant failed to establish that he was unjustly convicted and imprisoned due to fact that his conviction for felony-murder and robbery was subsequently overturned, where conviction was overturned solely on technical ground that prosecution witness' testimony was insufficiently corroborated, and claimant caused conviction by giving false alibi to police. Moses v. State, 1988, 137 Misc.2d 1081, 523 N.Y.S.2d 761.

Claimant could not recover under unjust conviction statute, as federal court vacatur of claimant's 26-year-old conviction for robbery, on ground that claimant's confession was involuntary and constitutionally inadmissible, was by its terms not one of grounds specified by unjust conviction statute as prerequisite for recovery, even though facts supporting federal court's vacatur arguably could have justified a finding of duress by prosecutor, which was ground for recovery under statute. Lluveras v. State, 1987, 136 Misc.2d 171, 518 N.Y.S.2d 548.

Cause of action was stated for compensatory damages under Unjust Conviction and Imprisonment Act [McKinney's Court of Claims Act § 8-b], where documentary evidence established that claimant was indicted for murder and for possession of weapon, was found guilty of manslaughter first degree and possession of weapon, was sentenced to serve indeterminate terms of 15 years and four years, respectively, was confined in various county and state institutions prior to trial and after sentencing until she was paroled, and that subsequently, trial court's judgment of conviction, which had been affirmed by the Appellate Division, was unanimously reversed by the Court of Appeals. Reed v. State, 1985, 129 Misc.2d 517, 497 N.Y.S.2d 274, appeal dismissed 518 N.Y.S.2d 645, 133 A.D.2d 107.

§ 9. Jurisdiction and powers of the court

The court shall have jurisdiction: 1. To hear and determine all matters now pending in the said court of claims.

2. To hear and determine a claim of any person, corporation or municipality against the state for the appropriation of any real or personal property or any interest therein, for the breach of contract, express or implied, or for the torts of its officers or employees while acting as such officers or employees, providing the claimant complies with the limitations of this article. For the purposes of this act only, a real property tax lien shall be deemed to be an interest in real property.

2-a. To hear and determine a claim of any person, corporation or municipality, against the state for the torts of members of the organized militia and the employees in the division of military and

naval affairs of the executive department, providing that the claim is encompassed by the waiver of immunity and assumption of liability contained in section eight-a of this chapter, and providing, further, that the claimant complies with the limitations of this article.

3. To hear and determine any claim in favor of the state against the claimant, or against his assignor at the time of the assignment.

3-a. To hear and determine the claim for damages against the state for unjust conviction and imprisonment pursuant to section eight-b of this article.

4. To render judgment in favor of the claimant or the state for such sum as should be paid by or to the state.

5. To order two or more claims growing out of the same set of facts to be tried or heard together, with or without consolidation, whenever it can be done without prejudice to a substantial right.

6. To order the interpleader of other parties known or unknown whenever necessary for a complete determination of the claim or counterclaim.

7. To provide for the perpetuation of testimony.

8. To open defaults; to vacate, amend, correct, or modify any process, claim, order or judgment, in furtherance of justice for any error in form or substance; before entry of judgment, to reopen a trial and permit submission of further evidence; to grant a new trial upon any grounds for which a new trial may be granted in the supreme court.

9. To establish rules for the government of the court and the regulation of practice therein and to prescribe the forms of procedure before it, in furtherance of the provisions of this act and not inconsistent with law, and except as otherwise provided by this act or by rules of this court or the civil practice law and rules, the practice shall be the same as in the supreme court.

9-a. To make a declaratory judgment as defined in section three thousand one of the civil practice law and rules with respect to any controversy involving the obligation of an insurer to indemnify or defend a defendant in any action pending in the court of claims, provided that the court shall have no jurisdiction to enter a judgment against an insurer pursuant to this subdivision either: (i) for money damages; or, (ii) if the insurer would otherwise have a right to a jury trial of the controversy with respect to which the declaratory judgment is sought.

10. To provide for the regular or special sessions of the court, for such terms and at such places as it may determine and to prepare the calendar of cases therefor.

11. The court and the judges shall have all of the powers necessary to carry out properly the jurisdiction granted and the duties imposed by this act.

12. To hear and determine special proceedings for the distribution of moneys deposited pursuant to subdivision (E) of section three hundred four of the eminent domain procedure law.

(L.1939, c. 860; amended L.1942, c. 442; L.1946, c. 10; L.1953, c. 343, § 2; L.1962, c. 311, § 4; L..1962, c. 311, § 4; L.1977, c. 40, § 1; L.1980, c. 735, § 2; L.1984, c. 1009, § 3; L.1989, c. 487, § 1.)

Historical and Statutory Notes

1989 Amendment. Subd. 9-a. L.1989, c. 487, § 1, added subd. 9-a.

1984 Amendment. Subd. 3-a. L.1984, c. 1009, § 3, eff. Dec. 21, 1984, substituted "for unjust conviction and imprisonment pursuant to section eight-b of this article" for "of any person heretofore or hereafter convicted of any felony or misdemeanor against the state and sentenced to imprisonment, who, after having served all or any part of his sentence, shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which he was sentenced".

1980 Amendment. Subd. 12. L.1980, c. 735, § 2, eff. Sept. 1, 1980, added subd. 12.

Effective Date of Amendment by L.1989, c. 487; Applicability. Section 2 of L.1989, c. 487, provided: "This act [amending this section] shall take effect immediately [July 16, 1989], and shall be applicable to all actions pending on or after such date."

Derivation. Court of Claims Act of 1920, §§ 2, 12 to 14, 21, 22, L.1920, c. 922; amended L.1921, c. 474, § 1; L.1923, c. 671, §§ 1, 2; L.1936, c. 775, § 1. Said sections 2, 12 to 14, 21 and 22 were from L.1897, c. 36, § 1; L.1904, c. 16, § 1; L.1905, c. 370, § 1; L.1906, c. 692, §§ 1 to 3, 5; L.1908, c. 519, § 1; L.1911, c. 856, §§ 1, 3; L.1912, c. 545, § 1; L.1915, c. 1, § 1; L.1915, c. 100, § 1; L.1917, c. 669, § 1; L.1918, c. 180, § 1; L.1919, c. 157, § 1; L.1919, c. 208, § 1; L.1920, c. 404, § 1; L.1920, c. 482, § 1.

Cross References

Hearing and determination of appeals, see McKinney's Const. Art. 6, § 34.
Jurisdiction of court, see McKinney's Const. Art. 6, § 9.
Trial of actions and proceedings involving claims against state, see McKinney's Const. Art. 6, § 18.

New York Codes, Rules and Regulations

Appropriation claims; special rules, see 22 NYCRR § 206.21, set out in McKinney's New York Court Rules Pamphlet.
Public construction contract claims; special rules, see 22 NYCRR § 206.23, set out in McKinney's New York Rules of Court Pamphlet.
Small claims pursuant to article 6 of the EDPL; special rules, see 22 NYCRR § 206.22, set out in McKinney's New York Rules of Court Pamphlet.

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Court of claims, development and role. 40 St. John's L.Rev. 1 (1965).
Diversity jurisdiction in actions against municipal corporations, jurisdiction of special state tribunals. 48 Cornell L.Q. 192, 195 (1962).
History, jurisdiction and practice of court of claims. James H. Glavin, Jr., 21 N.Y.S.Bar Bull. 357 (1949).
Jurisdiction of court of claims to hear suits against the New York Thruway Authority. 25 Fordham L.Rev. 759 (1956).
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Library References

American Digest System
Jurisdiction and powers of court, see States ⇐184.2 to 184.5.
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Jurisdiction and powers of court, see C.J.S. States §§ 283, 286.
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States cases: 360k[add key number].

United States Code Annotated

United States as defendant, see section 1346 of Title 28, Judiciary and Judicial Procedure.

Notes of Decisions

For Detailed Alphabetical Note Index, see the Various Subdivisions.

I. GENERALLY

Subdivision Index

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1. Constitutionality

This section, conferring jurisdiction on Court of Claims to hear claims of contractors, subcontractors, and others, arising out of delays of state in construction of State Office Building, is not unconstitutional on ground that it withdraws from jurisdiction of Supreme Court authority to determine such controversies, and confers it on Court of Claims, since act is only permissive and in no way prohibits litigation of claims in Supreme Court. Seglin Const. Co. v. State, 1937, 249 A.D. 476, 293 N.Y.S. 205, amended 250 A.D. 818, 295 N.Y.S. 753, affirmed 275 N.Y. 527, 11 N.E.2d 326.

2. Construction

A cardinal rule to be applied in construing a statute is that it should be read according to the natural and obvious import of the language used without resort-

LAWS

OF THE

STATE OF NEW YORK

PASSED AT THE

TWO HUNDRED AND SEVENTH

SESSION

OF THE

LEGISLATURE

CONVENED JANUARY 4, 1984 AND

EXPIRED DECEMBER 31, 1984

AT THE CITY OF ALBANY

ALSO OTHER MATTERS REQUIRED BY LAW
TO BE PUBLISHED WITH THE SESSION LAWS

VOLUME III

PREPARED BY

THE NEW YORK STATE
LESISLATIVE BILL DRAFTING COMMISSION

dismiss the claim, either on its own motion or on the motion of the state.

5. In order to obtain a judgment in his favor, claimant must prove by clear and convincing evidence that:

(a) he has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and

(b) (i) he has been pardoned upon the ground of innocence of the crime or crimes for which he was sentenced and which are the grounds for the complaint; or (ii) his judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not guilty at the new trial or he was not retried and the accusatory instrument dismissed; provided that the judgement of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of the following grounds: (A) paragraph (a), (b), (c), (e) or (g) of subdivision one of section 440.10 of the criminal procedure law; or (B) subdivision one (where based upon grounds set forth in item (A) hereof), two, three (where the count dismissed was the sole basis for the imprisonment complained of) or five of section 470.20 of the criminal procedure law; or (C) comparable provisions of the former code of criminal procedure or subsequent law; or (D) the statute, or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the state of New York; and

(c) he did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state; and

(d) he did not by his own conduct cause or bring about his conviction.

6. If the court finds that the claimant is entitled to a judgment, it shall award damages in such sum of money as the court determines will fairly and reasonably compensate him.

7. Any person claiming compensation under this section based on a pardon that was granted before the effective date of this section or the dismissal of an accusatory instrument that occurred before the effective date of this section shall file his claim within two years after the effective date of this section. Any person claiming compensation under this section based on a pardon that was granted on or after the effective date of this section or the dismissal of an accusatory instrument that occurred on or after the effective date of this section shall file his claim within two years after the pardon or dismissal.

§ 3. Subdivision three-a of section nine of such act, as amended by chapter ten of the laws of nineteen hundred forty-six, is amended to read as follows:

3-a. To hear and determine the claim for damages against the state [of any person heretofore or hereafter convicted of any felony or misdemeanor against the state and sentenced to imprisonment, who, after having served all or any part of his sentence, shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which he was sentenced] *for unjust conviction and imprisonment pursuant to section eight-b of this article.*

§ 4. This act shall take effect immediately.

CHAPTER 1010

AN ACT to amend the civil service law, in relation to the procedure for the adoption of rules

Became a law December 21, 1984, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision two of section twenty of the civil service law, as amended by chapter three hundred four of the laws of nineteen hundred seventy-six, is amended to read as follows:

EXPLANATION–Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

CHAPTER 1009

AN ACT to amend the court of claims act, in relation to claims by persons unjustly convicted and imprisoned for crimes they did not commit

Became a law December 21, 1984, with the approval of the Governor. Passed on message of necessity pursuant to Article III, section 14 of the Constitution by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as "the unjust conviction and imprisonment act of 1984".

§ 2. The court of claims act is amended by adding a new section eight-b to read as follows:

§ 8-b. Claims for unjust conviction and imprisonment. 1. The legislature finds and declares that innocent persons who have been wrongly convicted of crimes and subsequently imprisoned have been frustrated in seeking legal redress due to a variety of substantive and technical obstacles in the law and that such persons should have an available avenue of redress over and above the existing tort remedies to seek compensation for damages. The legislature intends by enactment of the provisions of this section that those innocent persons who can demonstrate by clear and convincing evidence that they were unjustly convicted and imprisoned be able to recover damages against the state. In light of the substantial burden of proof that must be carried by such persons, it is the intent of the legislature that the court, in exercising its discretion as permitted by law regarding the weight and admissibility of evidence submitted pursuant to this section, shall, in the interest of justice, give due consideration to difficulties of proof caused by the passage of time, the death or unavailability of witnesses, the destruction of evidence or other factors not caused by such persons or those acting on their behalf.

2. Any person convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit may, under the conditions hereinafter provided, present a claim for damages against the state.

3. In order to present the claim for unjust conviction and imprisonment, claimant must establish by documentary evidence that:

(a) he has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence; and

(b) (i) he has been pardoned upon the ground of innocence of the crime or crimes for which he was sentenced and which are the grounds for the complaint; or (ii) his judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not guilty at the new trial or he was not retried and the accusatory instrument dismissed; provided that the judgement of conviction was reversed or vacated, and the accusatory instrument was dismissed, on any of the following grounds: (A) paragraph (a), (b), (c), (e) or (g) of subdivision one of section 440.10 of the criminal procedure law; or (B) subdivision one (where based upon grounds set forth in item (A) hereof), two, three (where the count dismissed was the sole basis for the imprisonment complained of) or five of section 470.20 of the criminal procedure law; or (C) comparable provisions of the former code of criminal procedure or subsequent law; or (D) the statute, or application thereof, on which the accusatory instrument was based violated the constitution of the United States or the state of New York; and

(c) his claim is not time-barred by the provisions of subdivision seven of this section.

4. The claim shall state facts in sufficient detail to permit the court to find that claimant is likely to succeed at trial in proving that (a) he did not commit any of the acts charged in the accusatory instrument or his acts or omissions charged in the accusatory instrument did not constitute a felony or misdemeanor against the state, and (b) he did not by his own conduct cause or bring about his conviction. The claim shall be verified by the claimant. If the court finds after reading the claim that claimant is not likely to succeed at trial, it shall

approach, it seems to me, is that there is insufficient awareness of the purpose of highway inquiries and the radically changed climate in which they have to operate. If the proceedings seem too unwieldy, then the solution lies in a re-thinking of the procedures; but, as long as Parliament has provided the inquiry as the means of objection, then the courts should ensure that objections are properly registered. Lord Denning summed up his view in these words:

> There has been a deplorable loss of confidence in these inquiries. It is thought that those in the departments come to them with their minds made up, and that they are determined to build the roads, no matter how strong or how convincing the arguments against them. The inspector is regarded as the stooge of the Department. He is just there to rubber-stamp the decision already made. . . . We must use our authority to see that inquiries are conducted fairly, in accordance with the requirements of natural justice.

I began this article by referring to the complexity of tribunals and inquiries generally; I have ended with a reference to the complexity of one case concerning one type of inquiry. My aim has been to give some indication of the tasks faced by administrative lawyers in the single area of formal administrative adjudication. They have to be concerned with the nature of tribunals and inquiries and the jurisdiction which they exercise and they also have to be concerned with how such bodies are to be supervised. It is, as always, easier to pose questions than to supply answers; but there is obviously much that can be done.

DAMAGES FOR "LOST YEARS"—RECENT DEVELOPMENTS IN THE UNITED KINGDOM

By

JOHN MESHER* and STEPHEN TODD**

MEDICAL advances have created many problems not only for lawyers but also for doctors and health authorities. More accurate diagnoses enable doctors to predict of more accident victims that their expectation of life has been shortened by the accident. Thus over the last 30 years the problem of compensation for the "lost years" has become more acute.[1] More victims who in the past would have died fairly quickly are being kept alive. Since it is generally cheaper for a defendant to kill his victim rather than maim him, the result can be very large sums of damages to support catastrophically injured plaintiffs.[2] A great deal of discussion has arisen recently in the United Kingdom over the question of the standard of liability for medical negligence, following the Court of Appeal decision in *Whitehouse* v. *Jordan*,[3] where the well-accepted principle that a mere error of judgment does not amount to negligence was repeated. But Lord Denning M.R. expressly linked fears about the amount of damages getting out of hand with what purported to be a limitation on the range of liability for medical negligence.[4] It is our view that the question of the amount of damages creates the most difficult legal problems, although as a matter of policy the continuance or abolition of a system of compensation based on fault is clearly the crucial question.

What we therefore wish to concentrate on are two recent decisions of the House of Lords, the one dealing with the lost years problem and the other with more general issues of the calculation of damages. These decisions are *Pickett* v. *British Rail Engineering Ltd.*[5] and *Lim Poh Choo* v. *Camden and Islington Area Health Authority*.[6] We shall not deal with all the issues raised in *Lim*, only with the major principles involved in reconciling the decision with *Pickett*. We shall criticise the principles

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[1] Fleming, "The Lost Years" (1962) 50 Cal. L.R. 598.
[2] See Lord Denning M.R. in *Lim Poh Choo* v. *Camden and Islington Health Authority* [1979] Q.B. 196 at pp. 215–216, and Lord Scarman at [1979] 3 W.L.R. 44 at p. 49.
[3] [1980] 1 All E.R. 650.
[4] It is incidentally an index of the extraordinary judge-centredness (and particularly Denning-centredness) of the media that what is scarcely news to doctors, lawyers or anyone who had read the Pearson Report produced leading articles and considerable correspondence on the basis of a few unexceptional judicial comments.
[5] [1978] 3 W.L.R. 955.
[6] [1979] 3 W.L.R. 44.

stated in these cases fairly strongly, but it seems that many of the Law Lords involved would share some of our opinions. For in *Lim's* case it was recognised that the system of common law damages needed a more fundamental reform than could be produced by a court deciding one individual case. Thus Lord Scarman [7] in *Lim's* case said:

> Lord Denning M.R. in the Court of Appeal declared that a radical reappraisal of the law is needed. I agree. . . . The course of the litigation illustrates, with devastating clarity, the insuperable problems implicit in a system of compensation for personal injuries which (unless the parties agree otherwise) can yield only a lump sum assessed by the court at the time of judgment. . . . The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering (in many cases the major part of the award) will almost surely be wrong.

However Lord Scarman suggested that the required reappraisal calls for social, financial, economic and administrative decisions which only the legislature can take. The task of the court is thus to provide guidance to produce reasonable and consistent awards until legislative reform occurs. Similarly, in *Pickett's* case there are statements about the legislature intervening to correct any anomalies created.

While we accept the limits within which the House of Lords could act we would argue that they failed to go as far as they would. Accepting for the moment the fault system, lump sum damages and the principle that compensation should as nearly as possible put the plaintiff in the same position as if he had not been injured,[8] then the House of Lords have left significant illogicalities and uncertainties. We shall elaborate these criticisms, aided by the experience of Commonwealth courts which have grappled with the same problems, within the common law framework. However, finally we shall say why we think that the existence of these problems should be regarded as yet another nail in the coffin of the fault system. First we describe the two House of Lords decisions in more detail.

PICKETT V. BRITISH RAIL ENGINEERING LTD.

In this case the House of Lords finally came to consider the much maligned principle laid down by the Court of Appeal in *Oliver* v. *Ashman* [9] that a plaintiff whose life expectancy had been reduced by the tort of the defendant could recover from the defendant for earnings lost only during the survival period and not for earnings lost in the years of which he had been deprived (the " lost years "). The principle had for

[7] *Ibid.*, at pp. 47–48. Lord Diplock, Viscount Dilhorne and Lord Simon all agreed with Lord Scarman's speech.

[8] See Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.* (1880) 5 App.Cas 25 at p. 39, cited by Lord Scarman in *Lim's* case [1979] 3 W.L.R. at p. 52.

[9] [1962] 2 Q.B. 210.

long troubled courts [10] and commentators [11] alike. In the result the majority of their Lordships [12] had no particular difficulty in exposing the *Oliver* v. *Ashman* rule as resting on a false premise and in concluding that the rule ought to be reversed. However in doing so the House raised, but failed to resolve adequately, a number of associated issues, leaving the law both uncertain in practice and unsatisfactory in principle.

The rule in *Oliver* v. *Ashman* had been criticised and the High Court of Australia refused to follow it [13] by reason of the hardship it could cause to the victim's dependants. This hardship arises because of the wording of section 1 of the Fatal Accidents Act 1976, which permits an action by the dependants where, if death had not ensued, the deceased would have been entitled to maintain an action and recover damages for negligence. Thus if the deceased had already recovered judgment or settled before he died he would no longer have been entitled to maintain an action, being barred by the principles of *res judicata* or estoppel. It follows that the dependants could not maintain an independent cause of action for loss of dependency, and yet under the rule in *Oliver* v. *Ashman* the deceased would have received nothing for loss of earnings in the lost years, out of which provision for them could have been made.[14]

The above argument appears well founded and has been accepted as correct in a number of cases [15] although it has not been determined by the House of Lords. The point was not in issue in *Pickett's* case as there was no claim under the Fatal Accidents Act. Lord Wilberforce, in cautious vein, was prepared to assume the argument was correct simply for the purposes of the appeal, in which case he concluded "it provides a basis, in logic and in justice, for allowing the victim to recover for earnings lost during the lost years."[16] Lord Salmon thought the argument was " probably correct " and for present purposes had to be accepted. His Lordship considered that in the overwhelming majority of cases a man works not only for his personal enjoyment but also to provide for the present and future needs of his dependants and so it would be " grossly unjust " to the plaintiffs and his dependants were the

[10] See *e.g. Murray* v. *Shuter* [1976] Q.B. 927.

[11] *Clerk and Lindsell on Torts* (14th ed.), para. 367; *Winfield and Jolowicz on Tort* (10th e.d), pp. 572–573; *Salmond on Torts* (17th ed.), pp. 572–573.

[12] Lords Wilberforce, Salmon, Edmund-Davies and Scarman, Lord Russell dissenting.

[13] *Skelton* v. *Collins* (1966) 115 C.L.R. 94.

[14] The hardship that may thereby be suffered is well illustrated in *McCann* v. *Sheppard* [1973] 2 All E.R. 881. The plaintiff sued on account of severe injuries incurred in a road accident and at the trial was awarded damages including, *inter alia*, £15,000 for loss of earnings. The defendants appealed on the *quantum* of damages. Before the appeal was heard the plaintiff died from an overdose of painkilling drugs on which he had become dependent since the accident. The £15,000 was reduced by the Court of Appeal to £400, representing the actual loss of earnings to the date of death. The widow and child could not maintain their own action under the Fatal Accidents Act as the plaintiff had recovered judgment before he died.

[15] *Read* v. *Great Eastern Railway Co.* (1868) L.R. 3 Q.B. 555; *Williams* v. *Mersey Docks and Harbour Board* [1905] 1 K.B. 804; *Murray* v. *Shuter* [1976] Q.B. 927.

[16] [1978] 3 W.L.R. at p. 959F.

law to deprive him from recovering damages for loss of remuneration in the "lost years."[17] Lord Scarman also thought the "social justification" for reversing the rule in *Oliver* v. *Ashman* was that it imposed hardship on dependants[18] thus accepting as correct the view that the dependants could not themselves maintain an independent action where a living plaintiff sued to judgment. However, Lord Edmund-Davies said that he preferred not to complicate the argument by considering the impact upon dependants of an award to a living plaintiff whose life had been shortened.[19]

Nonetheless this is a rather unsatisfactory basis for the decision itself which now rests on assumptions. Why could not their Lordships have said positively that the dependants cannot maintain an independent action if the deceased has already settled or sued to judgment? It would no doubt have been going beyond the proper judicial function to reverse this rule, which would have neatly avoided the lost years problem, in the light of the relatively clear words of the Fatal Accidents Act and because the point was not directly raised.[20] As it is we are left with a rule which after *Pickett* almost has to be accepted, but is not positively confirmed by the House of Lords.

Thus with the above argument as "background" in three of the judgments, their Lordships proceeded to examine the decision in *Oliver* v. *Ashman* in the light of the then existing authorities and also as a matter of principle. In the result it was found wanting in both respects.

As to authority, *Oliver* v. *Ashman* itself was founded primarily on a short passage in the judgment of Viscount Simon L.C. in *Benham* v. *Gambling*[21]:

> Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.

It was concluded in all the majority judgments that Viscount Simon was only dealing with a claim for loss of expectation of life and did not have in mind a claim by a living person for earnings during the lost years.[22] Once this was recognised, the balance of authority was in favour of the view that damages for loss of earnings in the lost years were recoverable.[23]

[17] *Ibid.*, at p. 965A.
[18] *Ibid.*, at p. 981A.
[19] *Ibid.*, at p. 973G.
[20] This is the solution advocated by McGregor in the *International Encyclopaedia of Comparative Law*, Vol. XI, cha. 9, para. 208. It is worth noting that the controversial decision of the U.S. Supreme Court in *Sea-Land Services* v. *Gaudet*, 414 U.S. 573 (1974) allowing the dependants of the victims of maritime accidents an independent action although the victim had already settled etc. depended on the fact that the wrongful death action there was judicially created, not limited by the wording of a fatal accidents statute.
[21] [1941] A.C. 157 at p. 167.
[22] [1978] 3 W.L.R. 955 at pp. 961B, 969A–H, 971G, 979H–980A.
[23] *Phillips* v. *London and South Western Railway Co.* (1879) 4 Q.B.D. 406; 5 Q.B.D. 78; *Roach* v. *Yates* [1938] 1 K.B. 256; *Pope* v. *D. Murphy & Son Ltd.* [1961] 1 Q.B. 222: *contra*, *Harris* v. *Brights Asphalt Contractors Ltd.* [1953] 1 Q.B. 617.

As to principle, the House sought to analyse what it is that a plaintiff whose life expectancy has been reduced has lost. Lord Wilberforce thought it not unfair to paraphrase the reasoning underlying *Oliver* v. *Ashman* in the following terms:

> Nothing is of value except to a man who is there to spend or save it. The plaintiff will not be there when these earnings hypothetically accrue: so they have no value to him.

His Lordship was of the view that this reasoning ignored the fact that a man in good health and sound earning has in those things an asset of present value beyond the mere expectation of life which every man possesses. The argument that he would not be there to enjoy the fruits of those earnings could be answered because he had lost not only the opportunity to spend the earnings enjoyably but also to use them for dependants or for other persons or causes. His Lordship rejected the argument that the real loss was that of the dependants in the following terms:

> But I think that the argument fails because it does not take account . . . of the interest of the victim. Future earnings are of value to him in order that he may satisfy legitimate desires but these may not correspond with the allocation which the law makes of money recovered by dependants on account of his loss. He may wish to benefit some dependants more than, or to the exclusion of, others—this (subject to family inheritance legislation) he is entitled to do. He may not have dependants, but he may have others, or causes, whom he would wish to benefit, for whom he might even regard himself as working. One cannot make a distinction, for the purposes of assessing damages, between men in different family situations.[24]

Thus his Lordship concluded that the basis in principle for recovery lay in the interest which the victim had in making provision for dependants and others.

The basis for recovery was not expressed in the other three majority judgments in quite the same way. Thus Lord Salmon referred to the award of damages "to compensate [the plaintiff] for all the money he has probably been prevented from earning because of the defendant's negligence."[25] Lord Scarman thought that the principle that anything having a money value which the plaintiff has lost ought to be made good in money suggested that "a plaintiff ought to be entitled to damages for the loss of earnings he could have reasonably expected to earn during the lost years."[26] He went on to dispose of six objections to this rule. Lord Edmund-Davies said it was simply not right to say that when a man's working life and his natural life are each shortened by the wrongful act of another he must be regarded as having lost nothing "by the deprivation of the prospect of future earnings for some period extending beyond the anticipated date of his premature death."[27]

[24] [1978] 3 W.L.R. 955 at p. 962D.
[25] *Ibid.*, at p. 965G.
[26] *Ibid.*, at p. 980 A–E.
[27] *Ibid.*, at p. 973H–974A.

There are echoes in the reasoning of Lords Wilberforce, Edmund-Davies and Scarman of the approach of the Supreme Court of Canada in *Andrews* v. *Grand and Toy Alberta Ltd.*[28]. Dickson J. giving the judgment of the court views the victim's loss as loss of a capital asset, the loss of earning capacity rather than simply of earnings.[29] It is then clear that the value of the capital asset must be based on the victim's earning capacity as it stood before the accident. Although some recent English cases [30] have established loss of earning capacity as a separate head of damage in some circumstances this is a rather different line of argument. The House of Lords do not feel able to cut through the difficulties in the same direct was as the Supreme Court but the basis of their decisions is very similar. It is also worth noting that the High Court of Australia in *Skelton* v. *Collins* [31] talk in terms of destruction of earning capacity, although it is only Windeyer J.[32] who explicitly links that to the reasons for reversing *Oliver* v. *Ashman*.

Lord Wilberforce's approach that the plaintiff's true interest was in making provision for dependants and others entailed that the victim's probable living expenses in the lost years should be deducted from damages since he would have made that provision out of surplus once his living expenses were met.[33] Despite their slightly different approach the other three concurring Law Lords took the same view. Lord Salmon's explanation was that these expenses could never form part of victim's estate.[34] Lord Edmund-Davies thought that what the victim would have been likely to expend on himself should be deducted for in the lost years his living expenses will *ex hypothesi* be nil.[35] Lord Scarman simply agreed with the other three.[36] Their Lordships do not go into great detail on what they mean by living expenses, but from the analogies drawn with the Fatal Accidents Acts and from the statements about the amounts young plaintiffs might receive,[37] it appears that they mean it to cover everything the victim would have spent on himself.[38] This is one of the points on which Lord Russell of Killowen dissents, and is also raised in *Lim's* case and the recent trilogy of Canadian Supreme Court decisions. So we shall return to it in a separate section later. However, it is unfortunate that this point was not made more clearly. We shall

[28] (1978) 83 D.L.R. (3d.) 452 at p. 469. See Feldthusen & McNair, General Damages in Personal Injury Suits: The Supreme Court Trilogy, (1978) 28 U. Tor. L.J. 381.
[29] This principle was earlier established in *R.* v. *Jennings* (1966) 57 D.L.R. (2d.) 644.
[30] *e.g. Moeliker* v. *A. Reyrolle and Co. Ltd.* [1977] 1 All E.R. 9.
[31] (1966) 115 C.L.R. 94, *passim.*
[32] *Ibid.*, at p. 129.
[33] [1978] 3 W.L.R. 955 at p. 963E.
[34] *Ibid.*, at p. 966D.
[35] *Ibid.*, at p. 975A.
[36] *Ibid.*, at pp. 981H–982A.
[37] *Infra* p. 730.
[38] Lord Edmund Davies (*ibid.*, at p. 975) refer to s. 9 (2) (c) of the Damages (Scotland) Act 1976 which in similar cases requires regard to be had to " living expenses," but as yet there seems to be no decision on the meaning of this phrase in the Act.

argue later that only the expenses of basic necessities rather than more general pleasurable expenditure ought to be deducted. This might be what the House of Lords means by " living expenses,"[39] but further litigation will be needed to clear up what is really a small point.

A subsidiary matter dealt with by three of their Lordships is whether the loss of future opportunities of financial benefit other than earnings may also be compensable. Lord Russell, in his dissenting judgment, did in fact make specific reference to other types of lost financial expectations, such as where the victim is the life tenant of substantial settled funds, where he is entitled to a reversionary interest contingent upon him surviving another and where he is the beneficiary under the will of a relation with no intention of changing the will. His Lordship felt that the difficulties posed once allowance is made in assessing damages for " loss " which death forestalls made the matter more suitable for legislation than judicial decision.[40] The majority thought otherwise but failed to provide any clear guidance on any other types of prospective financial loss which might be taken into account. Lord Scarman's view that the plaintiff could recover for loss of his financial expectations during the lost years provided always the loss was not too remote [41] has the merit of simplicity if not of certainty. Lord Wilberforce left the point open while hinting that the principles of remoteness of damages could not in themselves provide an answer in his conclusion that the test could hardly be more accurately framed than as asking, " Is the loss of this something for which the claimant can and should reasonably be compensated?"[42] Lord Salmon and Lord Edmund-Davies did not deal with this matter.

LIM POH CHOO V. CAMDEN AND ISLINGTON AREA HEALTH AUTHORITY

The decision in this case followed closely upon the heels of *Pickett*. The facts were that the plaintiff, a senior psychiatric registrar, whilst undergoing a minor operation suffered irreversible brain damage caused by negligence for which the defendants were responsible. She was rendered only intermittently, and then barely, sentient and totally dependent on others. Liability was admitted and the only issue was as to the *quantum* of damages. The defendants contended, *inter alia*, that the plaintiff should not be awarded damages for loss of earnings, as well as for loss of amenities and cost of future care. The sum awarded for cost of care by the lower courts exceeded the plaintiff's estimated loss of earnings and covered all her needs. The additional award of damages for loss of earnings was duplicatory.

[39] *Lim's* case suggests otherwise. See *infra.*
[40] [1978] 3 W.L.R. 955 at pp. 976–977.
[41] *Ibid.*, at p. 981D.
[42] *Ibid.*, at p. 962C.

The argument has considerable force. Dr. Lim's position was similar to Mr. Pickett's in the sense that Dr. Lim would have no future living expenses to be met from her earnings, not because of her anticipated death but because the expenses would be met from another source *i.e.* the person or institution caring for her, and Dr. Lim had been separately compensated for the cost of that care. As Dr. Lim had no dependants and there was no evidence that she accumulated any surplus after meeting her working and living expenses, then, following *Pickett's* case, the living and working expenses saved would equal the earnings lost, so no damages should be awarded under this head.

The House rejected this line of argument. Lord Scarman recognised that in " lost years " cases and also in cases such as the present, two deductions fall to be made from the damages to be awarded. These were firstly the expenses of earning the income which had been lost and, secondly, the plaintiff's living expenses. In " lost years " cases a figure for living expenses is necessarily hypothetical since the plaintiff does not survive to earn the money. Where, as in the present case, expectancy of life is not shortened but incapacity exists and there is a cost of care claim as well as a loss of earnings claim, living expenses must also be assessed and deducted. However his Lordship considered that the court should not adopt a method of calculation like that in " lost years " cases and attempt an assessment of how much the plaintiff would have spent and on what, always a most speculative exercise. Rather, the " domestic element " identified by the Court of Appeal in *Shearman* v. *Folland* [43] as included in the cost of future care should be deducted.[44] The justification was that—

> This approach, being on the basis of a future actuality (subject to the uncertainties of life) is far less hypothetical than the former (which *faute de mieux* has to be adopted in " lost years " cases). It is a simpler, more realistic calculation and accords more closely with the general principle of the law that the courts in assessing compensation for loss are not concerned either with how the plaintiff would have used the moneys lost or with how she, (or he) will use the compensation received.[45]

By " domestic element " the House appears to mean board and lodging, or to put it another way, a " maintenance " element, although unfortunately the judgment does not reveal the actual amounts deducted to cover this. Living expenses in a " lost years " claim appears to mean, however, all that the plaintiff would have spent on himself during those years.[46] Thus if Dr. Lim had been killed, her estate would recover no damages for lost earnings. Likewise a plaintiff given to living in hotels, as in *Shearman* v. *Folland*, who has his life expectancy reduced and sued for lost earnings during the lost years would have to

[43] [1950] 2 K.B. 43.
[44] [1979] 3 W.L.R. 44 at pp. 55H–56D.
[45] *Ibid.*, at p. 56D–E.
[46] *Infra* p. 728.

set off the full cost of living in those hotels, not simply the " domestic " part of the cost. We shall consider below the merits of this distinction and of the arguments in support of it.

The defendants in *Lim's* case further argued that there was an overlap between the sum awarded for loss of amenities and that for loss of future earnings. Dr. Lim's lost amenities would have had to be provided for out of earnings in which case she should suffer a deduction of the cost of those amenities from her claim for lost earnings. The argument was founded upon the judgment of Diplock L.J. in *Fletcher* v. *Autocar and Transporters Ltd.*,[47] where he pointed out that to the extent that a plaintiff is rendered incapable of spending his damages for lost earning capacity on any particular activities of which he has been deprived, then unless that part of the damages representing such spending is taken into account in the assessment of compensation for loss of amenities of life, there will be some duplication in the damages awarded to him for deprivation of those activities. The learned judge continued:

> In the exceptionally severe cases where the life of the victim has been transformed by his physical injuries so that the only activities of which he is now capable are wholly different from his previous activities, the duplication may be considerable. If, for instance, he chose before the accident to spend the whole of his earnings on expensive food and drink and hospitality and expensive pastimes outside his home and is reduced by his injuries to the life of an invalid recluse, to restore to him the earnings which he formerly spent in these ways will not compensate him for the deprivation of his ability to enjoy good food and drink and hospitality or his former pastimes, although the amount he spent on them affords an indication of the minimum value which he placed on the activities of which he has been deprived. He is entitled to more than that, but if one assesses these deprivations under the separate head of loss of the amenities of life, one must bear in mind that what these amenities would have cost him must be deducted in converting into money the loss sustained under this head, for he will have already been awarded that sum under the head of loss of earnings.[48]

Lord Scarman felt that the issue did not arise for decision with respect to Dr. Lim's circumstances as the amount of damages awarded for loss of amenities was a modest sum and was not assessed by reference to any expensive pleasures or pursuits as postulated in *Fletcher's* case. In point of fact Diplock L.J.'s judgment clearly contemplates an overlap whenever a plaintiff can no longer spend damages for lost earnings on amenities previously enjoyed and simply gave extreme examples of such possible overlap. Further, it has been noted already that Dr. Lim spent all her money on herself. If Diplock L.J.'s opinion were followed to its logical conclusion all such spending beyond the domestic element should fall to be deducted from the damages for loss of amenities. By suggesting that the principle would only apply in the case of tastes and pursuits which were deemed sufficiently " expensive," Lord Scarman opens up the possibility of there being a third mode of calculating

[47] [1968] 2 Q.B. 322.
[48] *Ibid.*, at p. 342.

deductible expenses and that in certain cases a distinction must be drawn between non domestic personal expenses which are " expensive " and those which are not.

It does seem unlikely that the courts would wish to draw such refined distinctions. Lord Scarman added that on the point of principle whether damages for non-pecuniary loss can properly be reduced to avoid an overlap with damages for pecuniary loss he expressed no final opinion but doubted the possibility of overlap and noted that the Pearson Commission [49] considered it wrong in principle to reduce the one by reason of the other.[50] Further, Browne L.J. in the Court of Appeal in *Lim's* case [51] showed that Diplock L.J. did not rest his actual decision in *Fletcher's* case on his observations about overlap. Lastly, the courts do not in practice seem to make such deductions. On a direct challenge being made to the principle expounded in *Fletcher's* case, the courts would, therefore, be likely to overrule it. Lord Diplock himself would presumably concur as being one of the members of the House sitting in *Lim's* case, he expressed his agreement with Lord Scarman's judgment.[52] Deduction of the cost of amenities no longer capable of being enjoyed, even only " expensive " ones, would tend to outflank the decision of the Law Lords to deduct only " domestic " expenses in cases where there is a claim for cost of future care, rather than all expenses saved as in " lost years " cases. Certainly the drawing of the artificial distinctions apparently contemplated by Lord Scarman in his consideration of *Fletcher's* case would be undesirable. But it must also be questioned whether there is any good reason for there being different measures of deductible personal expenses in any cases where, for whatever reason, those expenses will no longer have to be met.

There are many other important issues raised in *Lim's* case, notably concerning the principles governing the award of damages for pain and suffering and loss of amenities in catastrophic cases and the effect of inflation, but these do not really touch the relationship with *Pickett's* case. Thus we now deal with a number of particular points raised by the two decisions.

THE DEDUCTION OF " LIVING EXPENSES "

In some ways the treatment of this topic is one of the weakest parts of both decisions. To begin with *Pickett*. There Lord Russell asks a penetrating question: " If a plaintiff is to be entitled to claim in respect of lost years earnings, why should his claim be reduced by what, no doubt enjoyably, he would have spent on himself?" The majority

[49] Cmnd. 7054-I, para. 759.
[50] [1979] 3 All E.R. 44 at p. 57A.
[51] [1979] Q.B. 196.
[52] [1979] 3 W.L.R. 44 at p. 47C. See also the decision of the High Court of Australia in *Sharman* v. *Evans* (1977) 13 A.L.R. 57.

solution, he suggests, attempts " to splice two quite separate types of claim: a claim by dependants for dependency and a claim by the plaintiff himself." Lord Russell's question is never really answered. References to the Fatal Accidents Acts and to the victim's interest in providing for his dependants only serve to illustrate the " splicing " process. Nor if one takes Lord Edmund-Davies' view is it explained why all that the plaintiff would spend on himself should be deducted rather than merely the " domestic element " of his probable expenditure. An " ordinary " plaintiff is not deprived of money which it is shown he would probably spend on riotous living rather than in properly providing for his dependants. A possible answer is that a claim which included the loss of the opportunity to spend pleasurably on oneself in the lost years amounts in substance to a claim for loss of expectation of life, already the subject of compensation as a form of non-pecuniary loss, albeit only a moderate conventional sum can be awarded. Any such reasoning was however unexpressed in the House of Lords.

Similarly it is hard to follow Lord Scarman's argument in *Lim's* case that the domestic element should be deducted from the cost of care. He argues that this is less hypothetical and is simpler and more realistic than deducting living expenses from the loss of earnings award. But the court still has to make a projection into the future in predicting the domestic element in the cost of future care. And what is more " realistic " about the *Lim* calculation as against the *Pickett* one? Indeed it seems remarkably unrealistic to assume that the victim's domestic expenses after being injured in an accident are the same as those he would have incurred had he not been injured at all. It may well be simpler to calculate the domestic element in the cost of future care (although in some cases this may be very difficult to disentangle) but this is not much of an argument if the method is contrary to principle. Here the deduction is justified as an expense saved as a result of the accident. It cannot be right then to deduct part of an expense actually caused by the accident. Finally why should the plaintiff in the *Pickett* situation be treated so much worse than the plaintiff in the *Lim* situation?

The approach of the Canadian Supreme Court is again instructive. *Andrews* v. *Grand and Toy Alberta Ltd.*[53] was a case where the plaintiff's expectation of life had been slightly reduced. The second case in the trilogy was *Thornton* v. *Board of School Trustees of School District No. 57 (Prince George)*[54] where the evidence was that the plaintiff was probably left with a normal life expectancy but the same rule on the deduction of living expenses was applied in both cases, with no distinction between the " lost years " claim and the ordinary case. The first

[53] (1978) 83 D.L.R. (3d.) 452.
[54] (1978) 83 D.L.R. (3d.) 480.

point is that by living expenses the court means "the expense of providing for basic necessities ... such items as food, clothing and accommodation."[55] In *Andrews* the trial judge had deducted the cost of basic necessities from the earnings award, the Appeal Court had instead deducted them from the cost of future care. The Supreme Court approved the trial judge's view:

> This is in accordance with the principle which I believe should underlie the whole consideration of damages for personal injuries: that proper future care is the paramount goal of such damages. To determine accurately the needs and costs in respect of future care, basic living expenses should be included. The costs of necessaries when in an infirm state may well be different from those when in a state of health.[56]

This reasoning appears to be cogent and much to be preferred to that of the House of Lords.[57]

It is not entirely clear how generally the Canadian courts will apply their rule. None of the decisions involved the estate suing on a lost years claim, but that should make no difference to the principle. However, in the third case in the trilogy, *Arnold* v. *Teno*,[58] where the plaintiff was only four and a half at the time of the accident, the calculations for cost of future care excluded the ordinary costs of living, yet the Supreme Court approved the awards without explaining the different approach. It may be that where, as with a very young plaintiff, an award for future loss of earnings is exceptionally speculative, it is better to make the deduction from the cost of future care.[58a] It is unlikely that any significant difference in result would be reached in such a case.

CHILDREN AND ADOLESCENTS

This is another area where the House of Lords in *Pickett's* case fall into error. There are a number of statements to the effect that an award for the lost years will only be significant in the case of a mature, wage-earning plaintiff. Thus Lord Wilberforce:

> In [the case] of a young child (*cf. Benham* v. *Gambling* [59]) neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking on the process of earning (*cf. Skelton* v. *Collins* [60]) the value of "lost" earnings might be real but would probably be assessable as small.[61]

[55] (1978) 83 D.L.R. (3d.) 452 at p. 468.
[56] *Ibid.*
[57] The general approach, taken in *Andrews*, *Thornton* and some later cases, is to deduct a percentage of the award for future loss of earnings. The figure was 5% per cent. in *Andrews* and this seems to have become the rule of thumb. See *e.g. Lindal* v. *Lindal* [1978] 4 W.W.R. 592 (Supreme Court of British Columbia).
[58] (1978) 83 D.L.R. (3d.) 609.
[58a] Feldthusen & McNair, *op. cit. supra*. n. 28, at p. 441, do not consider this a sufficient explanation.
[59] [1941] A.C. 157.
[60] (1966) 115 C.L.R. 94.
[61] [1978] 3 W.L.R. 955 at pp. 962H–963A.

And Lord Salmon:

> At one end of the scale, the claim may be made on behalf of a young child or his estate. In such a case, the lost earnings are so unpredictable and speculative that only a minimal sum could properly be awarded.[62]

Lord Scarman, the only other Law Lord to mention the matter, was more circumspect.[63]

Lords Wilberforce and Salmon's assertions are at first sight hard to understand. There are plenty of cases where the courts have awarded damages for loss of earnings to young plaintiffs whose expectation of life has not been affected. The calculations here are no less speculative than in a lost years case. The difficulties were set out by Lord Denning M.R. in *Taylor* v. *Bristol Omnibus Co. Ltd.*,[64] where the plaintiff was aged three and a half at the date of the accident. Lord Denning was tempted, because of the extremely speculative nature of prediction, to accept the suggestion that only a conventional sum of say £7,500 should be awarded, but concluded that the accepted practice [65] of trying to make an individual estimate had to be followed. The plaintiff's annual loss based on the father's earnings was set at £2,000 with a multiplier of 16, with the award then reduced by half for present payment. There are a great many cases where adolescents, whose character and intellectual ability can be ascertained somewhat more readily, have been awarded damages although they had not started earning. If one starts from the principle of providing full compensation for financial losses these cases are quite clearly right, as Spence J. explained in *Arnold* v. *Teno*.[66] It was stressed that the court should not free the defendant from having to pay something for the earnings it must be assumed the plaintiff would have received. And further if damages are not given the plaintiff would have to eat into her damages for non-pecuniary loss in order to pay her living expenses.

However, the difference comes with the application of the apparent *Pickett* rule that all that the plaintiff would have spent on himself is to be deducted from the amount for "lost" earnings. If the plaintiff is not yet financially independent and has no dependants of his own there is no way of knowing how he might have ordered his expenditure or whether there would be anyone else for him to spend his money on. Presumably the same assumption would be made as in *Lim's* case, that the plaintiff will spend all his money on himself in the absence of evidence to the contrary. None of this is expressed in *Pickett* but it seems the only argument that will produce the conclusions stated in the House of Lords.

[62] *Ibid.*, at p. 966A.
[63] *Ibid.*, at pp. 980F, 981B.
[64] [1975] 1 W.L.R. 1054.
[65] His Lordship cited *S.* v. *Distillers Co. (Biochemicals) Ltd.* [1970] 1 W.L.R. 114 and *Daish* v. *Wauton* [1972] 2 Q.B. 262.
[66] (1978) 83 D.L.R. (3d.) 609, 637.

If the rule of deducting all the plaintiff would have spent on himself is contrary to the fundamental compensatory principle, the conflict is at its clearest here, for young plaintiffs will be deprived of almost all the benefits of the reversal of *Oliver* v. *Ashman*. However, it must be remembered that the plaintiff is being predicted to die before the lost years begin and currently has no dependants. True his parents may have had some expectation of eventually relying on his support, but this will normally be far too tenuous to be taken into account. So why should the young plaintiff's estate receive the windfall of his " lost years " earnings? This is the logic of relying on the dependant's interest—a reliance which the House of Lords will not explicitly make. Instead they retain the notion of the individual plaintiff's interests, and are prepared to see double compensation in some cases, but do not follow that logic through in dealing with living expenses.[67]

CLAIMS BY AN ESTATE

It has been assumed in the preceding argument that a claim in respect of the lost years will survive for the benefit of the estate in an action brought pursuant to the survival provisions of the Law Reform (Miscellaneous Provisions) Act 1934. Although Mr. Pickett had died before the appeal to the Court of Appeal and thereafter to the House of Lords was heard, he had in fact survived to trial and judgment. An order to carry on the proceedings on appeal was made in favour of his widow as administratrix of his estate but this order did not need the 1934 Act to support it, the cause of action having merged in the judgment. The survival of the claim for lost years was not, therefore, in issue and was not expressly discussed. However, it is apparent from the following passage that Lord Wilberforce seemed to assume the same principles would apply:

> In cases, probably the normal, where a man's actual dependents coincide with those for whom he provides out of the damages he receives, whatever they obtain by inheritance will simply be set off against their own claim. If on the other hand this coincidence is lacking, there might be duplication of recovery. To that extent injustice may be caused to the wrongdoer. But if there is a choice between taking a view of the law which mitigates a clear and recognised injustice in cases of normal occurrence, at the cost of the possibility in fewer cases of excess payments being made, or leaving the law as it is, I think that our duty is clear. . . .[68]

[67] The result of deducting only the expenses of maintenance would not lead to extravagant awards for children. In *Skelton* v. *Collins* (1966) 115 C.L.R. 94 the plaintiff's earnings were £13 a week at the date of the accident, when he was aged 17, expected to rise to £20 by the age of 21 and to £2,000–2,500 a year by the age of 30. After taking account of the vicissitudes of life and the expenses of maintenance, his total damages for lost earnings were assessed at £2,000. Now see also *Gammell* v. *Wilson* [1980] 3 W.L.R. 591, where the plaintiffs' son was killed at the age of 15. The Court of Appeal were prepared to assume, in the absence of evidence to the contrary, that he would have been an average spender on himself and worked on a weekly " surplus " of £8 with a multiplier of 16 years.

[68] [1978] 3 W.L.R. 955 at p. 963A–B.

As the House was acting on the assumption that the possible duplication of recovery could not occur in the case of a claim by a living plaintiff [69] Lord Wilberforce here could only be referring to a claim by the estate. Lord Scarman in fact explicitly referred to the estate's claim in making the same point:

> If one must choose between a law which in some cases will deprive dependants of their dependency through the chances of life and litigation and a law which, in avoiding such a deprival, will entail in some cases both the estate and the dependants recovering damages in respect of the lost years, I find the latter to be the lesser evil.[70]

Indeed Griffiths J. has since decided in *Kandalla* v. *British Airways Corporation* [71] that the estate could recover damages for the deceased's earnings in the lost years.

The possible double liability contemplated would not commonly occur. If the estate could recover damages for the lost years and these damages devolved on the dependants then they would have to be brought into account in an action by the dependants under the Fatal Accidents Act as a pecuniary benefit acruing to them in consequence of the death.[72] That is what was done in *Kandalla* v. *British Airways Corporation*. If no action by the estate had been brought when the claim under the Fatal Accidents Act was made, the court would deduct damages which might be awarded to the estate and which would thereafter devolve on the dependants.[73] However, if the damages devolved on someone other than the dependants then there might be double liability because the dependants would have their claim under the Fatal Accidents Act which could not be reduced because someone else has got the " lost years " damages.[74]

The possibility of duplication of liability would, however, be avoided if the decision in *Pickett's* case were not applied to a claim by the estate. There is a sound reason for distinguishing the estate's claim from that

[69] *Supra* p. 721.

[70] [1978] 3 W.L.R. 955 at p. 981G.

[71] [1980] 2 W.L.R. 730, followed by the same judge in *Willshire* v. *Gardner* [1980] 3 C.L. 56 and by the Court of Appeal (Megaw L.J. dissenting) in *Gammell* v. *Wilson* [1980] 3 W.L.R. 591. In all three cases the main argument for the defendant was that recovery by the estate was precluded by s. 1 (2) (c) of the Law Reform (Miscellaneous Provisions) Act 1934. This argument (made in varying forms) being rejected, the strong indications of *Pickett* had to be followed.

[72] *Rawlinson* v. *Babcock and Wilcox* [1967] 1 W.L.R. 481.

[73] *Davies* v. *Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 601 at p. 608.

[74] It should be noted that the dependants could make a claim on the estate under the Inheritance (Provision for Family and Dependants) Act 1975 on the ground that the deceased had failed to make reasonable financial provision for them. It seems likely that it would usually be more advantageous for the dependants to bring their claim under the Fatal Accidents Acts where the damages would, of course, be payable by a third party and would be assessed without reference to factors limiting a claim for reasonable financial provision from the estate such as conduct, competing claimants and financial needs and resources of interested parties (s. 3 of the 1975 Act). It would be pointless to make a claim on the estate under the Inheritance Act as well, for any award would simply be deducted, from any damages received.

of a living plaintiff. A survival action is based upon the premise that the deceased had not recovered judgment before death. Thus a claim under the 1934 Act may be, and often is, combined with the dependant's claim under the Fatal Accidents Act. It was observed above that the reason why three of the judges in the majority were against the rule in *Oliver* v. *Ashman* was the hardship it might cause to the dependants. That reason is lacking in the case of an action by the estate since the dependants have an alternative claim, and so it could be argued that there is no justification for extending the decision in *Pickett's* case to include a claim by the estate. It is recommended both by the Law Commission [75] and by the Royal Commission on Civil Liability and Compensation for Personal Injury [76] that the right to recover for earnings in the lost years should not survive for the benefit of the estate and this indeed is the position in Scotland.[77] Further, the great majority of overseas jurisdictions deny recovery to the estate in addition to the dependant's claim.[78]

Whether the courts would feel themselves free to make the suggested distinction must be open to doubt.[79] Jolowicz's suggestion that the courts should simply forget that the damages recoverable by a deceased person's estate are the same as those which would be recoverable by the victim himself if he were still alive and should deny recovery for the lost years where the action is brought by the deceased's personal representative was in fact recognised to be wrong in law, although it provided the correct solution.[80] It flies in the face of the clear words of section 1 of the 1934 Act and is hard to square with the treatment of a living plaintiff's claim. It would resolve the problem of duplication, but probably could only be achieved by legislation.

There is, however, another option open to the courts. Given that damages for the lost years survive for the estate, the courts could deduct from these damages the victim's personal expenses *and also the expense he would have incurred in maintaining his dependants*. Taylor J. did in fact lay down such a principle in his leading judgment in *Skelton* v. *Collins* [81]:

> [I]n the case where an action is brought not by the injured person himself but, upon his death, by his legal personal representative for the benefit of his estate, the damages would be assessed having regard to the gain, if any, which would have accrued to the deceased from his future probable earnings, after taking into account the expenditure he would have incurred if he had survived in maintaining himself *and his dependants if any*.[82]

[75] *Report on Personal Injury Litigation—Assessment of Damages* (Law Com. No. 56), para. 105.
[76] Cmnd. 7054–I, para. 437.
[77] Damages (Scotland) Act, s. 2 (3). The same points are made in the cases cited in n. 17.
[78] See McGregor, *International Encyclopaedia of Comparative Law*, Vol. XI, Chap. 9, paras. 207–208.
[79] See n. 71.
[80] [1960] C.L.J. 160 at p. 163.
[81] (1966) 115 C.L.R. 94.
[82] *Ibid.*, at p. 114. Our emphasis.

In *Jackson* v. *Stothard* [83] Sheppard J., following the above principle, deducted these expenses with the result that no damages were awarded to the estate under this head as maintenance of the deceased and the plaintiff, who was living with and was dependent on him, would have consumed the whole of his earnings. His Honour, however, expressed himself to be unclear why earnings which would have been spent on the maintenance of dependants had to be excluded and thought the avoidance of the problem of double compensation did not provide of itself an explanation.[84] It is certainly true that Taylor J. plucks his rule out of the air with no explanation or authority. Nevertheless, it is possible to justify the making of the deduction. If the victim dies without having sued, it is true that the *cause of action* for damages for the lost years which survives for his estate is the same as that on account of which he could have sued while alive. However this does not mean that the *damages* are necessarily the same as those which would have been recovered by a living plaintiff. We do not think that principle can require in effect that earnings be recovered twice over. There is, after all, only one cake. Deduction of future payments to dependants resolves the issue in a simple fashion. This may be justified by returning to basic principle—that the object of tort damages, at least in the case of pecuniary loss, is *restitutio in integrum*.[85] In our view the correct application of this principle necessitates, in the exceptional case where two claims can be made on the one fund, that the court set off the one against the other. The dependants have a statutory right to recover their lost dependency, which would have been payable out of earnings, and to that extent the principle of restitution requires the exclusion of those payments from the damages recoverable by the estate. The dependants, independent statutory right means that there is nothing that needs to be restored to the estate. Usually claims under the Law Reform Act and the Fatal Accidents Act are brought at the same time but even if only a survival action is brought, if the dependants nonetheless have a right to sue under the Fatal Accidents Act, the above principle should apply. The beneficiaries under the will could hardly complain for no right of theirs has been violated. Had the deceased lived he might in any event have benefited quite different persons or causes.

It is widely asserted that damages awarded to a deceased's estate cannot be affected by anything which the dependants may recover in respect of a quite separate cause of action.[86] The authority relied upon—*Davies* v. *Powell Duffryn Associated Collieries Ltd.*[87]—does not in fact

[83] [1973] 1 N.S.W.L.R. 292. See also *Gannon* v. *Gray* [1973] Qd. R. 411, and *Sharman* v. *Evans* (1977) 13 A.L.R. 57.
[84] *Ibid.*, at pp. 298–299.
[85] *British Transport Commission* v. *Gourley* [1956] A.C. 185; *Parry* v. *Cleaver* [1970] A.C. 1 at p. 22 *per* Lord Morris.
[86] *Clerk and Lindsell*, para. 439; *Winfield and Jolowicz*, p. 547; *Salmond*, p. 582.
[87] [1942] A.C. 601.

determine this point. Lord Wright referred to his earlier opinion in *Rose* v. *Ford* [88] that duplication of liability was to be avoided, and continued:

> I may, however, seem to have thought that the damages under the Law Reform Act might be liable to abatement if damages came to the same beneficiary under the Fatal Accidents Act. I do not now see how this could happen because in theory the former damages must be taken into account in assessing the latter.[89]

It is certainly true that duplication cannot occur if the law is as it was then thought to be—that damages for the lost years are not recoverable either by a living plaintiff or by his estate. Now that that principle has been changed the problem arises once more where, as we have seen, the Law Reform Act damages do not devolve upon the dependants entitled under the Fatal Accidents Act. Lord Wright only resiled from his earlier opinion because duplication could not, as he saw it, occur. If it could then Lord Wright's opinion by implication supports abatement of Law Reform Act damages by the amount due to dependants under the Fatal Accidents Act. As in principle the defendant should be spared from double liability and as there are no authorities which prevent the making of the requisite deductions we think that the courts should adopt this solution.[89a]

CONCLUSIONS

In their decision in *Pickett* the House of Lords sought to base the claim for the " lost years " on traditional principle, that of restitution, and in fundamental respects the claim was treated similarly to an " ordinary " claim by a living plaintiff. We have seen, however, that even on this premise the House fell into error in the mode of calculation of deductible living expenses and in their passing consideration of claims by children. In other respects the position has been left uncertain, notably as to whether and how the lost years principle may apply to a claim by an estate and whether the loss of prospective pecuniary advantages other than earnings may be recoverable. There are, moreover, other serious problems inherent in the decision. Whereas the victim was seriously under-compensated by the denial of a claim for the " lost years " upholding that claim may now cause significant over-compensation. The victim's claim for damages for the lost years or that of his estate may be far more valuable than any claim by his dependants.[90]

[88] [1937] A.C. 826.
[89] [1942] A.C. 601 at p. 615.
[89a] This argument does not appear to have been made in any of the English post-*Pickett* cases. In *Gammell* v. *Wilson* Megaw L.J. says ([1980] 3 W.L.R. 591 at p. 603) that if the estate could recover " *presumably* the same principle of assessment would apply as applies in an action such as *Pickett* v. *British Rail Engineering Ltd.*"
[90] As was the case in *Willshire* v. *Gardner* [1980] 3 C.L. 56, where the deceased had no dependants at all and the damages for loss of earnings were £21,700, and in *Gammell* v. *Wilson* [1980] 3 W.L.R. 591.

This might be so, for example, where the sole dependants of a young man on a high wage with good prospects were aged parents unlikely to live for long. Further the victim may have no dependants at all. If that victim spent all his money on himself before his accident, then it appears that all such spending to be anticipated in the future would qualify as " living expenses " and be deducted, resulting in no damages under this head. However if he saved or spent money on persons and causes other than dependants, all such saving and spending would be recoverable. This would confer a windfall on the beneficiaries under his will or on an intestacy, who in many cases might not otherwise have been the recipients of the victim's bounty, simply to satisfy the victim's supposed interest in having earnings to give away to others with no legally recognisable interest in his continued well-being. That it is somewhat artificial to regard this as a " loss " suffered by the plaintiffs becomes even more apparent if the action is brought by an estate rather than by a living plaintiff. There is something of a paradox in the result that the victim's lost capacity to spend money enjoyably on himself may not be compensated but that a lost capacity to save or give money to non-dependants may be.

A solution to this problem of over-compensation would be to base the plaintiff's compensation squarely on his interest in making provision for dependants. This, indeed, was proposed by Lord Denning M.R. in the Court of Appeal in his dissenting judgment in *Lim's* case [91]:

> In my opinion when a plaintiff is rendered unconscious or insensible, fair compensation should not include an item for loss of earnings as such, but instead it should include an item for pecuniary loss suffered by the dependants of the injured man by reason of his accident. After all, if that is the compensation regarded as fair by the legislature in case of his natural death, it may justly be regarded as fair in case of his living death provided also that full compensation is also given for every expense that may be incurred on his behalf and every service that may be rendered to him by relatives and friends. The cost of keeping the plaintiff for the rest of his days will exceed by far the salary or wages that he would have earned if he never had been injured. It is not fair to the defendants to make them pay both.
>
> Similarly, if *Oliver* v. *Ashman* is overruled by the House of Lords and a man is given compensation for his loss of earnings during those " lost years," there again these should be calculated, not for loss of earnings as such, but for the pecuniary loss suffered by his dependants during those " lost years ".[92]

On a pragmatic basis, there is much to be said for this point of view. After all, the justification behind a lost years claim is to allow the victim to make provision for his dependants. However Lord Denning found no support for his point of view. The majority in the Court of Appeal [93] concluded that they were bound by authority [94] to hold that Dr. Lim

[91] [1979] Q.B. 196.
[92] *Ibid.*, at pp. 218G–219B.
[93] Lawton and Browne L.JJ.
[94] *Phillips* v. *London and South Western Railway Co.* (1879) 4 Q.B.D. 406; aff'd 5 Q.B.D. 78.

was entitled to recover for loss of earning capacity and pension rights as a separate item of damages. The trial judge having made an allowance for overlap between the cost of future care and the loss of future earnings both were recoverable. It made no difference that the plaintiff had no dependants so that she had no use for the money.[95] In the House of Lords the argument proceeded simply on the basis that there was a duplication of damages as between the loss of earnings and the cost of future care and Lord Denning's proposal to confine damages in such cases to loss of capacity to provide for dependants was not discussed, although Lord Scarman mentions it. Nor is Lord Denning's proposal expressly mentioned in *Pickett's* case although the Court of Appeal judgments were handed down before the House of Lords judgment (but after the arguments had been concluded). Lord Wilberforce might be thought to have given at least implicit support to the views of Lord Denning by his emphasis on the plaintiff's loss as being an inability to provide for others and by his comment as to the merit of bringing awards in lost years cases into line with what could be recovered under the Fatal Accidents Act.[96] However his Lordship nonetheless accepted that a victim has a compensatable interest in making provision for persons (or causes) *other* than dependants.[97] The others in the majority reached the same conclusion by a different route in speaking simply of the plaintiff's lost opportunity to earn.

With a little more boldness the House of Lords in *Pickett* could have adopted Lord Denning's proposal. It may cogently be argued that a " lost years " claim is different in nature from an " ordinary " claim simply by reason of the fact of the victim's death. A victim may have an interest in seeing to the support of his dependants after death but is it really necessary to extend his recoverable " loss " to include a theoretical interest in saving or benefiting non-dependants? Indeed in a claim by his estate, should non-dependent beneficiaries under the will indirectly receive damages for lost earnings which, had the victim lived, might never have been paid for them? To allow recovery for lost years on the basis proposed by Lord Denning would admittedly, be inconsistent with accepted principle in claims by living plaintiffs for loss during their lives. But given the special characteristics of a " lost years " claim, need " accepted principle " be applied to it? Lord Wilberforce at least recognised the desirability of assimilating the measure of damages recoverable in a claim for lost years by a living plaintiff with that recoverable by the dependants when the breadwinner has been killed. Lord Denning's proposal would avowedly achieve this end. It would furthermore resolve the difficulties and uncertainties in their Lordships' decision which have been exposed above.

[95] [1979] Q.B. at pp. 221–224, 230–232.
[96] [1978] 3 W.L.R. 955 at p. 963E.
[97] *Ibid.*, at p. 962E.

One of the alternative solutions proposed by the Law Commission for resolving the problems posed by *Oliver* v. *Ashman* was for a plaintiff to be enabled to join his dependants in his own action and for the sum awarded to compensate the dependants for what they would probably lose during the lost years to be paid into court.[98] It was rejected because it was felt it would greatly complicate the settlement of claims.[99] The solution proposed above, however, would not be unduly complicated. The amount of the dependency could be calculated without especial difficulty and it would simply be the victim, rather than the dependants, who would recover the appropriate sum. This result may now, of course, only be achieved by legislation. The opportunity could be taken, incidentally, to make it clear that the cause of action did not survive for the benefit of the estate of the victim.

We think that the problems raised by judicial recognition of the right to recover damages for the " lost years " could most simply be resolved in the fashion outlined above. More fundamental conclusions, however, deserve to be drawn from a consideration of *Pickett's* case and *Lim's* case. The very nature of a claim for lost years highlights the virtually insuperable difficulties faced by the courts in attempting to make a present lump sum assessment which accurately reflects the amount of an incapacitated plaintiff's future loss. One solution to these difficulties might be to give the courts power to award damages in the form of periodical payments. This, indeed, was a majority recommendation of the Pearson Commission.[100] Briefly, the scheme proposed was that in cases of death or serious and lasting injury future pecuniary loss should be compensated in the form of periodic payments unless the court was satisfied, on the application of the plaintiff, that a lump sum would be more appropriate.[101] Parties would remain free to negotiate lump sums by way of settlement although the plaintiff's professional advisers should be under a duty to point out the advantages of periodic payments.[102] The plaintiff should be able to apply for commutation at a later stage.[103] Payments could be reviewed but only on a change occurring in the plaintiff's medical condition. It was thought that a master or district registrar could fulfil this function.[104] There should be a fresh action for the dependants if the victim died prematurely in order to cater for their support during the " lost years."[105] The scheme should be administered by insurers.[106] Lastly the payments should be inflation-proofed by a fixed escalation scheme based on the contracting-out provisions of the Social Security Pensions Act 1975.[107]

[98] Law Com. No. 56 para. 58, proposal (C).
[99] *Ibid.*, at paras. 84–85.
[100] Cmnd. 7054–I, Chap. 14.
[101] *Ibid.*, at para. 576.
[102] *Ibid.*, at para. 578.
[103] *Ibid.*, at para. 582.
[104] *Ibid.*, at paras. 589, 591.
[105] *Ibid.*, at para. 594.
[106] *Ibid.*, at para. 597.
[107] *Ibid.*, at para. 608.

It may be that the scheme would work [108] although we doubt whether a court is well fitted to act as a kind of social security review tribunal. Further, the scheme would at best provide only a partial solution. In the 99 per cent of cases which do not actually reach the stage of litigation [109] the parties would remain free to negotiate a lump sum and many would be very likely to do so. Lawyers tend to be resistant to change and may for that reason favour the familiar lump sum calculation of damages, which attitude could rub off on their clients. Certainly insurers would be likely to prefer the finality of the lump sum to the trouble and expense in administering periodic payments which were subject to review and which would continue for an indefinite period.[110] Most importantly there is some evidnce that plaintiffs may prefer lump sums to periodic payments.[111]

We do not think that this is a matter which ought to be left simply to the choice of the parties. There is a public interest in the efficient resolution of claims made by accident victims. Since at the end of the day it is the community which pays for tort damages initially paid out by insurers, it is hard to justify an over-compensation of the plaintiff by a lump sum. On the other hand if the lump sum turns out to be inadequate it is the social security system (paid for by the community) which will provide support. It is only a system of periodical payments which can both provide adequate compensation for accident victims and avoid undue burdens being put on the community. It is our firm view that such a system can only effectively be run through social security rather than a system based on individual liability. It would take another article to argue out this issue, let alone all the other arguments in favour of no-fault compensation through social security. Suffice it to say that in our view the insuperable difficulties revealed by the lost years problem provide yet another reason for not only discarding fault as a criterion of liability but also the common law system of damages paid by individually liable defendants.

SUMMARY

1. The House of Lords has now decided that a person who suffers injury and a reduced life expectancy by the tort of another may recover damages for earnings lost during the years of which he has been deprived.

2. The premise for this decision is that the " lost years " claimant should be treated in the same way as the claimant whose life expectancy has not been affected and thus should be restored so far as possible to his pre-accident financial position.

3. The courts have not yet considered whether lost financial expectations other than lost earnings may also be recoverable. The uncertainty in this matter is likely to constitute fertile ground for future litigation.

4. In calculating damages for the lost years it is apparently necessary to deduct everything that the plaintiff would have spent on himself during those years, the rationale for such deduction being that the plaintiff will not be alive to spend money on himself.

5. In the analogous case where a plaintiff will have no future living expenses to be provided out of damages for lost earnings because his needs will be met out of his damages for the cost of future care, a different deduction should be made. This should simply be the " domestic " element in the cost of care, to be calculated by reference to the cost of board and lodging to be incurred by the person or body providing the care.

6. Deduction of a future domestic element is wrong in principle. Given the premise upon which the House was acting, there is in any event no good reason to differentiate between these two categories of cases in a way adverse to the " lost years " claimant when calculating expenses saved.

7. On the same premise a child should be able to recover damages for the " lost years " in the same way as with an adult. His claim should not fail simply because the damages may be difficult to assess.

8. It has now been held by the Court of Appeal that the estate of a deceased person may also recover damages for the lost years. In such a case there is a possibility that the tortfeasor's liability may be duplicated. This problem may be resolved by deducting the amount the victim would have spent on his dependents from his damages for lost earnings.

9. We doubt whether the premise identified in paragraph 2 above is, in fact, appropriate. It would be desirable to assess damages in " lost years " cases in the same way as in claims under the Fatal Accidents Acts. Lord Denning M.R. would be prepared to substitute a claim for loss of earning capacity during the lost years with a claim for loss of capacity to provide for dependants. In the absence of any clear support for such a proposal, it is apparent that this solution must lie in the hands of the legislature.

10. The problems inherent in the calculation of lump sum damages for future pecuniary loss, problems which are magnified in claims for " lost years," may be resolved by resorting to a system of periodical payments. We think it essential that this be achieved by replacing tort damages with regular social security payments for the victims of accidents.

[108] Fleming, " The Pearson Report: Its Strategy " (1979) 42 M.L.R. 249, observes that many countries, especially in Central Europe, have successfully operated such systems.

[109] Cmnd. 7054–I, para. 79.

[110] The Law Commission (Working Paper No. 41 (1971)) encountered widespread opposition " from almost every person or organisation actually concerned with personal injury litigation." The Pearson Commission apparently received a rather more favourable response. In particular the British Insurance Association gave evidence that the commercial insurance market could if necessary service a system of periodic payments. It did

[111] Cmnd. 7054–I, para. 619.

judicial function that has to be carried out after the information has been laid as part of the magistrate's duty not to issue a criminal process unless satisfied that there are sufficient grounds to warrant it.

The court issued writs of certiorari in two cases which were identical to the original *Gateshead Justices* case but warned defendants that the decision should not be taken "to give any encouragement to others to think at a late stage they can climb on this particular bandwagon". Attention was drawn to the requirement of RSC Ord 53, r 4 that applications for judicial review must be brought without delay and that certiorari is a discretionary remedy — "It is unlikely that this court would look favourably on any further applications based upon a practice [the delegation of the issue of summons to court staff] that we presume has now been corrected".

Justices' clerks have had to adapt their procedures, to take account of *Gateshead Justices* in so organising the workload to ensure that they or a magistrate considers the information. They will surely find now, after four months of uncertainty, that the parameters of their function are better defined and, importantly, workable.

Wrongful Imprisonment

On Friday, June 20, the Scottish Court of Criminal Appeal quashed the conviction of Mr John Preece who had served eight years of a life sentence for the murder of Mrs Helen Will of which he had been convicted by a majority verdict of the High Court in Edinburgh in 1973. At his trial in 1973 a Home Office forensic scientist Dr Alan Clift, gave evidence for the prosecution that the donor of the semen in the stains examined on items of clothing of the dead woman was of blood group A secretor, the same blood group secretor status as Preece and that when taken together with evidence of two hairs produced a coincidence that occurred only in one in 600 of the male population. What Dr Clift failed to tell the court in 1973 was that the dead woman Mrs Will was also a blood group A secretor. This omission was of such importance that as Lord Emslie said, "no reasonable jury would have convicted once it had become clear on a consideration of the serological chapter of his evidence that Dr Clift was discredited not only as a scientist but as a witness". Lord Emslie went on to say that Dr Clift had conspicuously failed to show the essential qualities demanded of an expert witness and for these reasons the appeal would be allowed and the conviction quashed.

The case is more disturbing for the length of time it took after doubts had been raised about Dr Clift's forensic credibility, which led to his suspension in 1977, before Mr Preece's case was reopened. The Scottish Office claim not to have been informed of Dr Clift's suspension in 1977. He was suspended after the Director of Public Prosecutions withdrew evidence provided by Dr Clift in an assault case as "he could not put forward testimony from Dr Clift as being reliable evidence of the quality required in a criminal trial". Following Dr Clift's suspension Mr Preece's solicitors approached the then Secretary of State for Scotland Mr Bruce Millan asking that Mr Preece's case be reviewed and pointing out that in June of that year the Court of Appeal had allowed the appeals of three men who had served three years of six-year sentences for robbery. Fresh scientific evidence challenging Dr Clift's evidence about a vital shoeprint had led to their appeals and their subsequently being set free. The Scottish Office concluded, however, that there were insufficient grounds to re-open Mr Preece's case. Following further allegations by fellow Home Office forensic scientists an inquiry was opened into six other cases where Dr Clift had given expert evidence. In February 1980, Dr Margaret Pereira, a Home Office forensic scientist produced an interim report on *Preece's* case which she submitted to Dr Alan Currie head of the Home Office forensic science service who found the "gross error" in Dr Clift's evidence. Despite this and having considered the Pereira report, the Home Office said that it found no evidence of an excess of zeal by Dr Clift. Finally some four years after Dr Clift's suspension, the Secretary of State for Scotland called for Mr Preece's case to be reopened.

Why did it take four years from doubts being raised about Dr Clift's credibility as a forensic scientist before Mr Preece's case was ordered reopened? Why were the Scottish Office not informed of Dr Clift's suspension by the Home Office? These are questions to which Mr Jack Ashley, Labour MP for Stoke-on-Trent, South, where Mr Preece is a constituent, is rightly demanding answers from the Home Secretary. Mr Ashley has also asked the Home Secretary to reopen all the cases in which evidence from Dr Clift had been crucial. Although Mr Whitelaw is unlikely to agree to that on the grounds of practicability, it is to be hoped that he will consider investigating those cases in which Dr Clift was involved where the convicted prisoner is still serving a sentence, and that where any element of doubt arises on the evidence, that he will immediately order those cases reopened. Mr Jeffrey Rooker, Labour MP for Birmingham Perry Barr, is concerned that during 1979 the Home Office was giving assurances that despite Dr Clift's suspension there was no cause for concern that anybody had been wrongfully convicted. Indeed in January 1980, when Mr Rooker asked the Home Secretary for information about the inquiries into the six cases involving Dr Clift then being investigated he was happy to accept his assurances that the inquiries were still continuing but they involved nothing of any great substance. These assurances have now proved inaccurate. If public confidence in the criminal justice system is to be maintained it is vital that in instances like this it is seen that full and complete investigations take place. Mr Whitelaw must now agree to widen the scope of the inquiries in order to put right any further wrong that the evidence of Dr Clift may have caused in other cases. It may prove to be the case that there are no further instances of wrongful conviction due to inaccurate evidence given by Dr Clift. If that is the case all well and good, but if Mr Whitelaw does not grant a fuller investigation into the whole affair, confidence in the expert witness will be badly shaken, the task of the courts will become harder and he will be doing the Home Office forensic scientists a great disservice.

Mr Preece's solicitors are now seeking "substantial damages" for his wrongful imprisonment. Although nothing can compensate for being wrongfully imprisoned for eight years, the damages may go some way to helping him reestablish himself in society. Mr Preece should then be encouraged by the record damages offered to the three wrongfully convicted accused in the *Confait* case, two days before his release. Colin Lattimore, Ronald Leighton and Ahmet Salih were fully exonerated last year by the Attorney-General, Sir Michael Havers QC although their convictions were quashed by the Court of Appeal in 1975. Lattimore who was convicted of manslaughter has been offered £25,000 compensation, Leighton £18,000 and Salih £22,000. The figures are worked out on the basis of £15,000 for hardship suffered, plus varying amounts for loss of earnings and expenses incurred in fighting the case. Until the £25,000 offered to Lattimore the highest ever payment for wrongful conviction in England was £21,000 accepted by Mr Albert Taylor after spending five years in prison having been wrongfully convicted of murder. *Justice* has set up a committee to look into compensation for wrongful imprisonment and hopes to publish its report by the end of the year. A set of guidelines to cover damages for wrongful imprisonment is long overdue.

Compensation for Wrongful Imprisonment

Peter Ashman

Imprisonment is the heaviest penalty exacted from wrongdoers by our society today. Apart from the loss of liberty and the harshness and indignities of prison life, it often involves loss of livelihood and home, break-up of family and loss of children, and loss of reputation. Because of this, the criminal justice system requires the highest standard of proof before someone can be convicted and imprisoned.

All legal systems, though, are fallible, as the experience of JUSTICE has shown over the past 28 years, in bringing to light human errors which have led to wrongful convictions. If those failings are caused by unlawful arrest or malicious prosecution, there is a remedy (albeit costly, time-consuming and uncertain) in a civil lawsuit. But most frequently they are caused by human weakness of all kinds, and for these the law provides no remedy. The Home Secretary, however, has a policy of making an ex-gratia payment of compensation where he considers that someone has been wrongly imprisoned in "exceptional circumstances", or where there has been serious default on the part of the police or some other public authority.

For many years, JUSTICE has considered that this situation was inadequate and that such compensation should be a legal entitlement enforcible (if necessary) through an independent legal tribunal. The Home Secretary's discretionary power was not a satisfactory remedy because he was, in effect, a judge in his own cause; he gave little guidance as to what he considered to be exceptional circumstances or default; he took advice on quantum but was not bound by this, and he did not give any reasons for refusing compensation, except that he regarded it as "inappropriate".[1]

In the recent past, similar views have been expressed by the Prison Reform Trust, the National Association of Probation Officers and the Labour Party Civil Liberties group. These criticisms led to the Home Secretary setting up a review of the present scheme.

One of JUSTICE's criticisms was that the present scheme failed to meet the UK's international obligations. Article 14(6) of the UN International Covenant on Civil and Political Rights (ICCPR) (by which we have been bound since 1976) reads as follows:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed, or he has been pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated *according to law,* unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him". (Our italics)

The UK's compliance with this, and the other provisions of the ICCPR, was examined by the UN Human Rights Committee in New York in April 1985. It doubted whether the present ex-gratia scheme complied with Article 14(6) and the UK delegate responded that the Government was reviewing the position.

On November 29, 1985, the Home Secretary made a statement to the Commons, in the form of a written reply to a question by Tim Smith MP, setting out the results of this review. The principal features were these:

1. He did not intend to change the basis of the scheme from an ex-gratia to a statutory one.

2. He would in normal circumstances continue to pay compensation to someone who applied for it, who had been wrongly imprisoned, and
   - (i) who had been pardoned by the Queen; or
   - (ii) whose conviction had been quashed by the Court of Appeal or the House of Lords
     - (a) after a reference back to those courts under s 17 of the Criminal Appeal Act 1968, or
     - (b) after the time normally allowed for an appeal by those courts had elapsed; or
   - (iii) where the Home Secretary was satisfied that the imprisonment resulted from a serious default on the part of a member of a police force or of some other public authority.

3. In future he would pay compensation to any person
   - (i) where this was required by the UK's international obligations; or
   - (ii) where he considered that there were exceptional circumstances, eg facts emerging at the trial or at an appeal brought within time that

4. He would not pay compensation simply because the prosecution was unable to sustain the burden of proof at the trial.

5. In future, he would regard himself as bound by the decision of the independent assessor as to the quantum of compensation. Michael Ogden QC has been appointed as the assessor for England, Wales and Northern Ireland.

In a letter to JUSTICE, the Home Office Minister of State set out the reasons for these conclusions which are worth considering in a little detail.

The Ex-Gratia Scheme

The Home Secretary considered that the ex-gratia scheme met the requirements of the UK's international obligations "in both spirit and purpose". Moreover, he was accountable to Parliament for the way it operated. A statutory scheme would impose an additional burden on the courts and remove this element of accountability. He did not consider that the decisions of an independent tribunal would improve upon his own decisions, nor would they meet with uncritical acceptance in view of the wide variety of cases and circumstances. More importantly, in his view, the present scheme retained an essential element of flexibility which enabled exceptional and complex cases to receive due consideration. Finally, the assessor was independent of him, and his undertaking to accept as final the assessor's advice as to quantum emphasised that independence.

The Criteria for Compensation

The Home Secretary rejected the suggestion that the court of trial, or of appeal, should be able to issue a certificate for compensation on the grounds that this would create two classes of degree of innocence. However, he accepted that where there had been default, he would consider the question of compensation.

Is the Revised Scheme now Satisfactory?

The new scheme has failed to meet most of the criticisms levelled at the old one. It has no legal force and can be

amended at any time by a future Home Secretary. Parliament has no power to approve or amend it, and, as in the present revision, may not even be given the opportunity to debate it. The Home Secretary, responsible for the conduct of the police and the running of magistrates' courts, is expected to judge whether they have been negligent or otherwise at fault, with no independent element in the investigation. He has not indicated that he will in future give reasons for either granting or refusing compensation. No case studies are to be published to give guidance to applicants or their advisers, nor are any more detailed guidelines to be issued. No information is given to people whose convictions have been quashed about how to apply for compensation, or whether they are likely to qualify for it. The scheme itself remains little publicised; how many legal practitioners read the written replies in *Hansard*, the only place where it has so far been set out in any detail?

The Home Secretary's reasons for rejecting an independent tribunal, or the involvement of the courts generally, are without merit. Surely every case that comes before the courts is given "full and separate consideration". Many are exceedingly complex, and even controversial, but it cannot seriously be suggested that, because of this, the courts have difficulty in determining whether or not there has been fault by any party, or to what degree, or that they cannot determine the quantum of damage which the injured party should receive. As for accountability, the courts are accountable to the law, and the requirement on them to give reasons for their decisions, which are subject to scrutiny on appeal, would suggest that they are more accountable even than the Minister, who suffers no such disabilities, and has, quite literally, the whip hand over his Parliamentary majority.

The objection that the courts might be required to assess degrees of innocence applies with equal, if not more, force to the Home Secretary, who does not have the opportunity to hear the witnesses and to see the evidence scrutinised. In any event, the courts are already called upon to express a view on this question of moral blame. Once the jury has determined the issue of guilt or innocence, the court may award costs on the basis of the conduct of the parties—a power which has been greatly extended by the Administration of Justice Act 1985.

Finally, the revised scheme clearly fails to meet the UK's international obligations. Article 14(6) of the ICCPR requires that compensation payable in the circumstances set out in it must be "according to law". That phrase also occurs in the European Convention on Human Rights and has been considered on several occasions by the European Court of Human Rights. Most recently, in the case of *Malone v the United Kingdom* (judgment of August 2, 1984), the Court re-iterated that this phrase required that the law must be adequately accessible so that the citizen is able to be aware of it. Moreover, something cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. If the law confers a discretion, it must indicate the scope of that discretion, and it must not be so wide as to permit arbitrary use. Lack of certainty in the provisions of the law will create doubts as to whether something is in "accordance with the law".

The present scheme has been through none of those procedures, statutory or customary, by which deeds or words become recognised in our society as law. It is not subject to review by the courts, nor by Parliament, and it can be changed at any time without anyone's leave. It contains none of those procedural safeguards of natural justice by which we measure the fairness and justice of the legal process. Indeed, the Home Office Minister of State has now conceded to JUSTICE that he is "not contending that political accountability of a Minister of the Crown to Parliament is to be regarded as conferring rights in law".

In his report on the *Preece* case,[2] Sir Cecil Clothier QC, the former Ombudsman, said that a miscarriage of justice by which a man or woman loses his or her liberty is one of the gravest matters which can occupy the attention of a civilised society. On the basis of the remedy now being offered for it, that sentiment does not appear to be shared by the Home Office. o

[2] *HC 191, 4th Report, Session 1983–4, para 38.*

Compensation for Wrongful Imprisonment

Any criminal justice system is vulnerable to abuse and to the possibility of human error and a study of the procedures for compensating the victims in the United Kingdom is long overdue. Such a study, however—like the associated study of the procedures for seeking a review of a criminal conviction in the light of fresh evidence after an unsuccessful appeal—is doomed to be little more than a search for a mythical beast. The simple truth is that whether it be a convicted man claiming that he has been wrongly convicted and can now prove it, or a man whose conviction has been quashed claiming compensation for the error, we have no open and clearly defined procedures for dealing with the matter. Perhaps this is illustrative of the low priority our lawmakers give to the plight of convicted men and of the fact that financial considerations and expediency combine to ensure that any action in such matters is a matter for executive discretion.

Again, Justice is one of the first into this no-man's land. In 1968, it published *Home Office Reviews of Criminal Convictions* which recommended the setting up of an independent review tribunal to sift and decide the thousands of petitions each year for reviews of criminal convictions. Eight years later, Lord Devlin's committee, in its *Report on Identification Evidence in Criminal Cases*,[1] supported a study of the idea, and, in 1982, the Home Affairs Committee of the House of Commons decided to examine the matter. Now, Justice has followed through with a report on *Compensation for Wrongful Imprisonment*.

There are numerous stages at which a prosecution can be aborted or fail and the accused released. Besides the loss of his liberty, he —or his dependants—may well by then have suffered loss of income, damage to reputation, and distress and he may have incurred considerable expense. There clearly ought not to be strict liability on the State to compensate everyone whom it fails to prosecute to conviction, and so the problem is to devise a forum and scheme which reliably and economically sifts the " proper " cases for compensation from the technical acquittals.

The problem is complex because of the variety of situations in which the defendant may be released after being charged. Principally, they are—with indictable offences—where:

(a) he is discharged by the magistrates at committal;
(b) he is acquitted at trial on direction of the judge or by verdict of the jury;
(c) his conviction is quashed on appeal by the Court of Appeal (Criminal Division);

[1] H.C. 338.

(d) his conviction is quashed after a reference of his case to the Court of Appeal (Criminal Division) by the Home Secretary pursuant to section 17 of the Criminal Appeal Act 1968;
(e) he receives a free pardon under the royal prerogative;
(f) he is released from prison early by order of the Home Secretary because of doubts about the propriety of his conviction which are, however, insufficient to warrant (d) or (e) above.

There are also a variety of reasons which may lead to an acquittal or to a conviction's being quashed in (a) to (c) above which are not necessarily consistent with innocence. For example, in (c) above, the Court of Appeal might quash a conviction because of an error of law by the judge or because of a material irregularity in the course of the trial (see s. 2 of the Criminal Appeal Act 1968). In (a) or (b) above, he may be discharged or acquitted because of a legal technicality. The mere fact, therefore, that a man is released in situation (a), (b) or (c) above does not invariably give rise to a compelling reason to compensate.

The Justice report illustrates, however, that the Home Office —in a bid to avoid the problem altogether—has made a policy of entertaining applications for compensation only in situations (d) and (e), and very occasionally in situation (c). Justice even refers to a letter of March 1978 from the then Minister of State at the Home Office which states that a payment from public funds will not " normally " be made " unless the circumstances are compelling and there has been default by a public authority."

It seems odd that if an appellant is able to produce fresh evidence pointing to his innocence prior to his appeal, and if that evidence is then admitted pursuant to section 23 of the Criminal Appeal Act 1968 with the result that his conviction is quashed, he is less likely to secure compensation for the time he has been imprisoned than a man who has lost his appeal, then obtained fresh evidence and had his conviction quashed after a Home Secretary's reference. It is also strange that the Home Office should regard " default by a public authority " as being an important factor in the decision as to whether or not to compensate. At best it should be material to the issue of quantum and exemplary damages. A miscarriage of justice, however caused, still brings the same consequences to the individual, although if he was contributorily negligent in bringing about the circumstances which led to his conviction, this would, no doubt, warrant a reduction in any compensation awarded.

In those few cases where the Home Secretary does entertain a claim for compensation, the practice is to appoint an independent

assessor who, recently, has tended to be the chairman of the Criminal Injuries Compensation Board. The Home Office letter to claimants states that the assessor "will apply principles analogous to those governing the assessment of damages in civil wrongs." Sometimes the sum assessed can be reasonably substantial. John Preece, for example, who was wrongly convicted of murder, was awarded £70,000, whilst three South London youths wrongly convicted of the killing of Maxwell Confait were awarded a total of £68,000.

If the claimant accepts the *ex gratia* payment offered by the Home Office, he is required to sign a written undertaking not to institute civil proceedings arising out of the same matter. If he does not accept the offer, then he is free to embark upon a long journey through the civil courts and to sue for wrongful arrest or malicious prosecution. The task, however, is formidable.

JUSTICE points out that, despite its ratification of Article 6 of the International Covenant on Civil and Political Rights, "the United Kingdom is the only member country of the Council of Europe with no statutory scheme for compensating those who unjustly suffer loss through the malfunctioning of the criminal law." JUSTICE, rightly, is keen to regularise the procedure for applying for compensation and returns to the popular concept of an independent tribunal as providing the answer. In JUSTICE's scheme, a claimant in situation (d) or (e) above would have an "automatic entitlement" to compensation, whilst a claimant in situation (c) and (f) would have an "unrestricted right to apply." A claimant in situation (b) above would have a "conditional right" to apply dependent upon securing the agreement of the trial judge or a favourable written opinion from counsel. JUSTICE expressly did not consider situation (a).

JUSTICE proposes that the tribunal should be known as the Imprisonment Compensation Board. Since, however, the present chairman of the Criminal Injuries Compensation Board is already the assessor in many cases, it would seem more logical and economically acceptable to enlarge the responsibility of the Criminal Injuries Compensation Board so as to embrace the victims of the criminal process as well as the victims of crime. The scheme—and its filters—proposed by JUSTICE is, however, commendable in its simplicity. It is to be hoped that Parliament will now support a move towards the dispensation of justice by tribunal in those few remaining instances in which an individual currently depends on securing a fair deal through a Home Office department.

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THE BROADCASTING COMPLAINTS COMMISSION

PUBLICATION of the First Report of the Broadcasting Complaints Commission [1] enables us to consider the effects of a change made upon the recommendation of the Annan Committee.[2]

The history of complaints bodies for these media [3] goes back to 1971 when the BBC set up an independent Complaints Commission, whose first members, a triumvirate of unimpeachable impartiality, were a former Speaker, a former Lord Chief Justice, and a former Parliamentary Commissioner for Administration. The decision was taken in the aftermath of the *Yesterday's Men* programme, which had upset relations with the Labour Party. There was anxiety in government circles over television's reporting of Northern Ireland, and concern expressed by some of the public about sex and violence in programmes. It was partly to pre-empt the creation of a body like the Press Council, or something worse, that the Governors acted.

The jurisdiction of the BBC's Commission was over "complaints from individuals or organisations claiming themselves to have been treated unjustly or unfairly" in programmes. Not to be outdone, the Independent Broadcasting Authority immediately established its own Complaints Review Board. This had a wider jurisdiction, as it could consider general complaints about content if the Authority referred these to it, as well as complaints of unfair treatment or infringement of privacy. However, the Board had less appearance of independence, for it was to consist of a member of the Authority, the Deputy Director-General, and three members of their General Advisory Council.

These measures did not satisfy. Annan inferred that there was "widespread public dissatisfaction" with the arrangements for dealing with complaints.[4] This was because the broadcasting authorities were arrogant and cavalier, and the complaints bodies perceived as ineffective and not fully independent. But there are two sorts of complaints, which are different in kind, as Annan observed. Complaints about standards, taste and general content, it was thought, were rightly matters for the broadcasting authorities to deal with, although they should be "more open to this kind of complaint than they have been in the past." [5] However, for complaints of misrepresentation or unfair treatment, which are quasi-judicial in nature, Annan recommended the creation of a single, independent complaints commission.[6]

[1] 1982; H.C. 478.
[2] *Report of the Committee on the Future of Broadcasting*, Cmnd. 6753 (1977). Hereinafter, "Annan."
[3] See this author's *Television, Censorship and the Law* (1979), Chaps. 2 and 3.
[4] Para. 6.11.
[5] Para. 6.16.
[6] Para. 6.17.

This recommendation, heeded by the Government, has resulted in the establishment of the Broadcasting Complaints Commission, under the Broadcasting Act 1980, quickly superseded by the Broadcasting Act 1981. Of the five commissioners first appointed, three had previous broadcasting connections. The Chairman, Baroness Pike, was chairman of the IBA's General Advisory Council from 1974 to 1979; Professor Thomas Carbery was a member of the Authority from 1970 to 1979; and Mr. Hardiman Scott was a broadcaster and then Chief Assistant to the Director-General of the BBC. This is not to suggest that they will be less than impartial, but then Annan's objection to the two earlier review bodies was not that they were not impartial, but that they did not *appear* to be impartial. If appearances are so important, the composition of the body appointed by the Home Secretary is perhaps a little surprising.

The Commission's function is to consider and adjudicate only upon complaints of " unjust or unfair treatment " in broadcast programmes or " unwarranted infringement of privacy in, or in connection with the obtaining of material included in . . . programmes " from persons of bodies affected or their representatives.[7] This jurisdiction is similar to that which the BBC's Complaints Commission had, so it has been disbanded. The IBA's Complaints Review Board has ceased to consider complaints which fall within the new Commission's jurisdiction, but remains in being to carry out a general review of complaints, and report on that to the Authority.

The new Commission's first report covers a 10-month period in which 114 complaints were received. However, 91 of these fell outside their jurisdiction, and 12 others fell at hurdles created by the Act, 10 because the complainant was not thought to have a sufficiently direct interest,[8] and two because they were thought frivolous.[9] Another discretionary bar, that the complainant " has a remedy by way of proceedings in a court of law . . . and . . . in the particular circumstances it is not appropriate for the Commission to consider the complaint," [10] was not used, although it could have been applicable to two of the complaints considered. Only five complaints had been dealt with, and six were under consideration.

The five dealt with are a very mixed bag. A complaint by the National Anti-Fluoridation Campaign of bias and misrepresentation on the BBC's *Medical Express* programme was rejected. An error by LBC's *AM* in reporting the Southall disturbances was the subject of a complaint by the National Front. A correction had been broadcast, and the Commission left it at that. An LWT programme on London schools, in an item about admission to Roehampton Church School, was held to have contained " a minor inaccuracy," but the Commission made no directions requiring the publication of their findings.[11]

[7] Broadcasting Act 1981, ss. 53–55.
[8] s. 55 (7).
[9] s. 55 (4) (*d*).
[10] s. 55 (4) (*c*).

Two grievances were more serious. A Southern Television programme about the marriage of Harold Nicolson and Vita Sackville-West had centred upon their sex lives, but their son, Mr. Nigel Nicolson, had participated in the programme and given access to copyright material under the impression that it was to be about his parents' work. The Commission upheld his complaint of unfair treatment. They accepted that the programme had evolved in the making, but condemned the failure to keep Mr. Nicolson informed of intentions.

The other complaint involved Radio 4's *Checkpoint*, on which one item had concerned a woman against whose defunct theatrical agency allegations of financial mismanagement had been received. Reference was made to her current involvement with a fringe theatre club, where it was said an actor had not received the expenses he was promised. The director of the theatre club complained of unjust treatment, in particular in a suggestion that the club was run by the woman, and not himself, and in the allegation of the actor. The Commission admitted to difficulty in finding the truth of the matter, but upheld the complaint because it thought the programme makers had taken insufficient care in considering contrary evidence before publishing.

That is the sum total of the Commission's first period of work, and one cannot help but wonder whether the mountains have been in labour to bring forth a mouse. No doubt the Commission will offer to a few aggrieved persons each year the opportunity of public vindication without the necessity of going to law, but whether that small gain is sufficient to justify its existence might be debated.

Certainly the Commission is an inappropriate object for the extravagant hopes and fears expressed concerning it. Parliamentary friends of the broadcasters prophesied darkly that, were the Commission to come into existence, various programmes would not be shown or made,[12] but this seems implausible. A commentator has suggested that " it possibly will provide, against the recommendation of the Annan Report, for a tribunal of taste," [13] but this seems quite unfounded. Conversely, one may doubt whether the operation of the Commission will do much to assuage the " widespread public dissatisfaction " which, according to Annan, exists. Of course, one may also doubt whether there is such dissatisfaction, for Annan seems to have listened to too many interest groups. But, if there

[11] For its powers in this respect, see s. 57.
[12] See, *e.g.* H.L.Deb., Vol. 413, col. 1310.
[13] M. Elliott (1981) 44 M.L.R. 683, 689.

is, most of it probably relates to standards and taste. With regard to unfair treatment, over a period of 10 years, three adjudicating bodies have upheld a remarkably small number of complaints in proportion to the broadcast output. This testifies to the high standards of care and responsibility generally observed in broadcasting and one may be sure that other publishers would not fare so well.

Finally, on a point of usage, the Commission should be told that a complaint is not "refuted" when it is merely denied. Mistakes like that are apt to feed the paranoia of complainants.

COLIN MUNRO *

THE HUNT REPORT

A FOURTH channel, debated, fought over, and planned for the last 10 years, reached television screens in 1982. Cable television, to which the Government gave its blessing in the same year, could be operating in some areas by 1984, and will bring some 20 or 30 channels into the home. As well as channels for entertainment and information, the new wideband cables will carry two-way or "interactive" facilities, paving the way for home shopping, electronic mail, and new methods of working.

The Government's enthusiasm is understandable, for surely jobs will be created and the economy stimulated by the two or three billion pounds of investment needed to provide cable systems. Better still, the country's salvation can be privately financed, for a populace which has embraced electronic games and video cannot but be attracted to cable, and on the backs of the entertainment packages, the entire infrastructure can be laid.

The immediate problem is to make the project attractive to the institutions providing the risk capital. To the hard-nosed businessmen, rules about programme content and restrictions upon advertising may seem unnecessarily limiting, and the IBA's monitoring of services tiresome. Perhaps the answer lies in providing a sort of broadcasting enterprise zone?

It was in this context that the three-man committee under the chairmanship of Lord Hunt of Tanworth, whose report was published in October,[1] had been appointed by the Home Secretary in April 1982 to consider the questions affecting broadcasting policy which would arise from an expansion of cable systems, and "to make recommendations by September 30, 1982."

Lord Hunt, as a former Cabinet Secretary, might be expected to have his ear close to the ground. Not only was the Report, urgently

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[1] *Report of the Inquiry into Cable Expansion and Broadcasting Policy*, Cmnd. 8679.

required, presented in time, but it effortlessly reflects the policy assumptions of the present Government, thus giving itself, in the short term, a better than average prospect of acceptance. So, for example, the model of a nationwide cable grid laid by British Telecom is dismissed "as it is inconsistent with the Government's policy on competition and its expressed view that cabling should not make significant demands on public expenditure." [2]

A complete free-for-all, however, is not recommended. The committee suggests that a central authority be set up to award franchises to cable operators, who would enjoy an effective local monopoly. It would be a new authority, for the IBA might be, or appear to be, over-protective of its two existing channels.

Franchises should be awarded for eight years, the committee thought, but the initial franchises should last for 10. Central and local government, political organisations and religious bodies should be excluded from ownership of companies operating cable systems, but foreign companies and press, radio or television companies should be allowed to participate, provided that they do not hold controlling interests. No objection was taken to a cable operator's involvement in either cable provision or in programme provision. Once given the franchise, cable operators should be allowed to provide as many programme channels as they choose, and their income would be derived from rental charges for the basic package, subscription charges for additional channels purchased, and advertising.

However, as compared with the careful restrictions imposed by law upon the IBA and conventionally observed by the BBC, a freer régime is proposed for cable. Cable operators, it is thought, should be subject to the obligations not to offend good taste or decency, to be likely to encourage crime or lead to disorder or to be offensive to public feeling (except in regard to an optional subscription for so-called "adult" material, which would have an electronic locking device). News would have to be impartial, but this would not be required of other programmes. No restriction on the amount of overseas material is recommended, and no restrictions upon the showing of cinema films. No requirements of range, balance or quality are thought appropriate. No restriction on the amount of advertising is proposed, and sponsored programmes are to be allowed. Furthermore, the franchising authority is not to be involved in continuing regulation or vetting of programmes or advertisements, but is to play only a background role of receiving complaints and exercising "oversight only from a distance." [3] The committee suggests that this minimum of constraints will encourage "the initiative and diversity that will be both inherent and desirable in a cable system." [4] Critics,

[2] *Ibid.* para. 22. [3] *Ibid.* para. 99. [4] *Ibid.* para. 9.

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CONTENTS — SOMMAIRE

ARTICLES

Dragoslva VUJAKLIJA UDK 343(497.1)

COMPENSATION OF DAMAGE DUE TO UNJUSTIFIED CONVICTION AND DEPRIVING OF LIBERTY WITHOUT GROUND

Requiremnts for acquiring the right to compensation of damage in case of unjustified conviction and depriving of liberty without ground are elaborated in detail in the Law on Criminal Procedure which otherwise establishes this kind of tort liability, as the specific liability for damage caused by legal entities regardless of fault of the agency of the legal entity, i.e. of the state whose actions were the cause of damage. These requirements have the character of elements needed for the existence of tort (delict) liability (namely, action causing damage, unlawful character, causal relationship). If the provisions of the Law on Criminal Procedure do not contain, necessary indices as to the elements of this type of liability, the rules of tort liability are to be applied, contained in the Law on Obligation Relations (article 24), so that the application of the provisions of the Law on Obligation Relations in such cases is of a supplementary character.

While, in other words, the elements for the existing of tort liability in case of unjustified conviction and depriving of liberty without ground are regulated in necessary details, the issue of compensation of damage thereof is not regulated in this way. The Law on Criminal Procedure provides only for "the right to compensation of damage" (articles 12, 541, and 545), which is in fact only the repetition of the principle set forth in article 181 of the Constitution of the SFRY, while the damage and its compensation (namely, kind, form, determining, and the amount of damage) are not regulated in the particular way. Accordingly, all issues related to damage and compensation of damage in case of unjustified conviction and depriving of liberty without ground

are to be regulated according to the general rules of tort liability, which are provided for in the Law on Obligation Relations (article 23). We are going to treat here therefore only some of the issues of damage and compensation of damage which are directly related to the tort liability in case of unjustified conviction and depriving of liberty without ground. We shall begin, naturally, from the principles of our system of regulation of damage and of compensation of damage, as far as it is provided for in the Law on Obligation Relations.

I. DEVELOPMENTS IN THE REGULATION OF DAMAGE AND OF COMPENSATION OF DAMAGE DUE TO UNJUSTIFIED CONVICTION AND DEPRIVING OF LIBERTY WITHOUT GROUND IN OUR POSITIVE LAW

The first positive legal text which recognized in our legal system after the liberation of the country the right to compensation of damage mentioned in the subtitle was the one providing only for such compensation in favour of persons unjustifiedly convicted for a criminal act. These provisions provided only for the property damage.[1] This text was the Law on Criminal Procedure, enacted on September 10, 1953 (article 472). This was the same text as the one in article 466 of the Law on Judical Criminal Procedure for the Kindgdom of Yugoslavia, enacted on February 16, 1929.

Although the Constitution of 1965 (in its article 50) speaks only of "compensation of damage" to a person which is unjustifiedly convicted for a criminal act or has been deprived of liberty without ground, the provision of article 472 of the Law on Criminal Procedure of 1963 has been coordinated with the Constitution only by means of the Law on Amending the Law on Criminal Procedure enacted on November 26, 1970. Thus articles 8 and 500 of mentioned text speak of "the right to compensation of damage", which includes every kind of damage, namely not only the property but also the non-material, i.e. non-property damage.[2] It should be noted that our theory in the 1963—1970 period held that even without amendments of article

[1] "According to the regular application of the provision of article 8 and article 506 of the Law on Criminal Procedure, the person who has been unjustifiedly, convicted in the criminal proceeding because of commiting a criminal act, may be granted in the criminal proceeding only the compensation of property damage due to the fact that such person was in prison, and not the compensation of non-property damage too (as, for instance, on the ground of spiritual anguish suffered, harm to his reputation, disturbed peace, harm to the health)" — The decision of the Supreme Court of Yugoslavia, Kž-42/65 of February 2, 1966, published in the review "*Pravni život*", nr. 2/66, p. 80.

[2] The decision of the Supreme Court of Yugoslavia, Kž-6/69, of March 4, 1971.

472 of the Law on Criminal Procedure of 1953, and taking into acoount mentioned provision of the 1968 Constitution, one should recognize the right to compensation of not only the property but also the right to compensation of non-property damage. Some courts' decision too were decided along these lines.[2]

The present-day text of the Law on Criminal Procedure (article 541) speaks of "the right to compensation of damage". It contains thus the same provisions as the Law on Amending the Law on Criminal Procedure of 1970, just as the text of the Constitution of the SFRY of 1974 (article 181) related to this issue is the same as the text of the SFRY Constitution of 1963 (article 50). The Law on Criminal Procedure enacted on December 24, 1976 provides for an exception to that rule only in relation to the kind of damage inherited by the successors of the person suffering damage. The successors namely inherit only the right of the person suffering property damage (article 544 of the Law on Criminal Procedure), which has been provided also by the Law on Amending the Law on Criminal Procedure of December 3, 1970 (article 503). This solution corresponds in a general way to article 204 of the Law on Obligation Relations.

It is clear that our positive las developed in the direction of extending the kinds of damage which were recognized in case of unjustified conviction or depriving of liberty without ground. The conception that this kind of liability is but a form of civil law delict liability (tort liability) has been met with resistance for quite a long time. The very fact that the duty to make compensation falls onto the budget acted as a limiting element in recognizing the right to compensation of damage.[4] This was why at the beginning only the property damage was recognized as fit for compensation. However, with the developement of the conceptions on the positon of man, on the protection of his personality, freedoms and personal rights, the idea was accepted as to recognize the right to compensation in its full scope.

Due to such manner of regulation of this subject matter in the previous texts of our legislation, which related only to the kind of damage which is to be recognized, and not to other issues too in relation to damage and to the compensation of damage, judicial practice dedicated much more attention to the questions of requirements for the existence of liability because of unjustified conviction or depriving of liberty without ground, than to the ones related to damage and to its compensation. The case law shows that the courts were more restrictive when

[3] M. Grubač, *Naknada štete za neopravdanu osudu i neosnovano lišenje slobode* (compensation of damage due to unjustified conviction and depriving of liberty without ground), Belgrade 1979.

[4] M. Stefanović-Zlatić, *Naknada štete zbog neopravdane osude i neosnovanog lišenja slobode* (see translation in footnote 3), review "*Anali Pravnog fakulteta u Beogradu*", nr. 3—4/70, p. 274.

deciding on the questions related to the very existence and amount of damage, while they were more extensive regarding the requirements for payment of compensation. Therefore the cases are more numerous in the sphere of determining the fact of existing of requirements for compensation of damage, but they are not so numerous as far as graning adequate compensation is concerned. This is, naturally, not acceptable. It is undoubtedly useful for the damaged person and a good satisfaction to have court's decision on his being convicted unjustifiedly or deprived of liberty without ground, as well as on ascertaining his right to compensation of damage. But it is equally important to him to obtain from the court adequate compensation, both as regards the kind and the amount of damage — which was not always the case in judicial practice until now. The implementation of the Law on Obligation Relations should mark significant turn in the future courts' practice.

II. COMPENSATION OF DAMAGE CAUSED BY UNJUSTIFIED CONVICTION OR DEPRIVING OF LIBERTY WITHOUT GROUND

The compensation of damage caused by unjustified conviction or depriving of liberty without ground is a specifically regulated case of civil law delict liability (tort liability), where it is essential that there exists a damage and accordingly, the compensation of that damage which was caused directly by the action of unjustified conviction or depriving of liberty without ground. Therefore, all rules expressed until now on the cases of compensation of damage relate only to damage caused by unjustified conviction or depriving of liberty without ground.[6]

This fact has to be emphasized since in course of criminal proceeding, parties or other participants in the proceeding may suffer damage due to the work of the court or other agencies participating in the proceeding (for instance, maltreating in course of the proceeding, damage caused by not abolishing the warrant for arrest or by issuing a warrant for coming to court without fulfilling legal requirements, expenses incurred by the party due

[6] T. Vasiljević, *Komentar Zakona o krivičnom postupku* (commentary of the Law on Criminal Procedure), p. 607; T. Vasiljević, *Sistem krivično-procesnog prava SFRJ* (the system of criminal procedure law of the SFRY), p. 727; M. Grubač, op. cit., p. 75; along these lines is for instance, the verdict of the Supreme Court of Yugoslavia Kž-34/71, of January 26, 1972 which states as follows: "Since in the proceeding on the ground of the provisions of chapter XXXII of the Law on Criminal Procedure only the compensation may be awarded of the damage due to unjustified conviction or depriving of liberty without ground, i. e. staying in custody or being arrested during investigation, and not the compensation of damage due to instituting and effecting criminal proceeding, the claim in the above terms is in that part without ground".

to postponinig of main trial or undertaking procedural moves because of judge's error, damage caused in seizing property and storing such property etc.). In all mentioned cases there is a duty of the state to compensate damage, but the requirements for effecting such duty, and accordingly the materialization of the right to compensation, are not determined according to the provisions on compensation of damage caused by unjustified conviction and depriving of liberty without ground, but according to general prescriptions covering liability of socio-political communities for the work of their bodies and agencies and having regard to the rules set forth in article 199 of the Constitution of the SFRY.[6]

The need to particularly delimit the scope of application of specific rules of compensation of damage caused by unjustified conviction and depriving of liberty without ground is dictated by the fact that this is a specific case of tort liability based exclusively on objective circumstances, independently of any subjective elements on the part of the socio-political community as the liable subject, i.e. on the part of the agency (or body) of the socio-political community whose work caused the unjustified conviction or depriving of liberty without ground. Otherwise, in all other cases of tort liability of the socio-political community and of its bodies and agencies subjective elements are taken into consideration on the part of the damage-feasor. The conclusion is that the interests of the person damaged by the acts of the socio-political community and of its bodies or agencies are protected if these acts consist in an unjustified conviction or depriving of liberty without ground, which is all a consequence and the expression of the tendency in the contemporary society of greatest protextion of rights and property of individual, meaning integrity of his body and his personal freedom.

The enacting and developement of specific rules of tort liability due to unjustified conviction and depriving of liberty without ground is made possible, in other words, to quite a degree by the changes in course of the present century in the ideas on the state and on other socio-political communities as protagonists of power, as well as by the extension of possibilities for establishing tort liability without the fault of the damage-feasor. In course of last several decades the tort liability expanded in its scope as far as the state and other socio-political communities were concerned, which included the cases of strict liability, i.e. liability without fault of the damage-feasor (the principle of objective liability). This is undoubtedly positive as

[6] B. Ivančević, *Odgovornost države za štetu nastalu građanima protupravnim ponašanjem službenih osoba* (liability of state for damage caused to citizens by unlawful behavior of state officials), review "*Naša zakonitost*", nr. 1—2/64, pp. 24—38.

to the fact that this compensation of damage should be paid out of socially-owned means, or that the liable subject is the state, should influence either recognizing the right to compensation or the kind and amount of damage in cases of unjustified conviction or depriving of liberty without ground. We do think that this should be particularly emphasized, since there were cases in the former practice, and especially in pleadings by the attorneys general which were somewhat detrimental to the interests and full protection of persons suffering damage. This protection is at present in the interests of our society as well, and as such it is set forth in our constitutional order.[11]

2. *Non-property Damage.* — While the right to compensation of property damage in case of unjustified conviction and depriving of liberty without ground has been recognized since the beginnings of the introduction of this kind of liability (although here too the right to lost profit had to come long way to be recognized by the courts) that right for a long time did not include the non-property damage. This failing to recognize non-property damage was not based on any grounds of principle, but on the reasons of protection of state property and of specific authority of the state.[12] In practice, on the other hand, property damage frequently was caused directly as a consequences of unjustified conviction and depriving of liberty without ground, taking into consideration the reactions of the person suffering damage, as well as the reactions of society towards a person convicted unjustifiedly or deprived of liberty without ground — both at the time of serving of sentence or detention, or afterwards. In such situations the person involved suffers both physical and psychical pains, and this may amount to various forms of non-property damage, which forms may vary in their intensity. Therefore, when our legal system accepted the possibility of compensation of that kind of damage, it became understandable and justifiable to accept also the claims for recognizing such compensationn of damage which directly emerges out of unjustified conviction or depriving of liberty without ground.[13] And this was done by mentioned Law on Amending the Law on Criminal Procedure which was enacted in 1970.

[11] M. Belčić, *Za izmjenu odredaba Zakona o krivičnom postupku o naknadi štete neopravdano osuđenim i nezakonito zadržanim u pritvoru ili istražnom zatvoru* (for amending the provisions of the Law on Criminal Procedure on compensation of damage to persons unjustifiedly convicted and kept in custody or in investigation detention), review *"Naša zakonitost"*, 1964, p. 212; S. Cigoj, *Enciklopedija imovinskog prava i prava udruženog rada* (encyclopaedia of property law and of law of associated labour) book II, Belgrade, 1978, pp. 528—529.

[12] M. Grubač, op. cit., p. 77.

[13] Professor S. Cigoj, *Enciklopedija imovinskog prava i prava udruženog rada* (for translation see footnote 11), pp. 528—529.

As already said, the provisions of the Law on Obligation Relations apply to non-property damages in cases of unjustified conviction and depriving of liberty without ground. Particularly important in recognizing this type of damage is article 200 of mentioned Law (on Obligations), which points at the values of human personality whose violation and endangering may provoke physical and psychical pains or fear on the part of the person which is unjustifiedly convicted or deprived of liberty without ground. The violation of these values amounts to limiting activities of man, the violation of his reputation, honour, freedom or rights of citizen, due to which pains of mentioned kinds may arise, so that the court shall take into consideration all these elements and decide on just compensation, especially in case of intensive pains and fear whose elimination has to be recovered in such a way. The court shall do that regardless of deciding on property damage in the case. While deciding on the claim for compensation of non-property damage, as well as on its amount, the court shall take into account the significance of violated value but also shall not act contrary to the nature and social purpose of that compensation (article 200, paragraph 2 of the Law on Obligation Relations).

Legal rules on the notion, foundations, amount and way of compensation of non-property damage shall apply also in cases of tort liability (i.e. civil law delict liability) due to unjustified conviction or depriving of liberty without ground. In this respect particularly important is the judicial practice since the legal text contains mainly general notions and legal standards, so that their real scope in general, and more particularly, in the issues of non-property damage shall be determined by courts' decisions. We do think that from now on, after having the provisions of the Law on Obligation Relations, non-property damage should be decided upon favourably in much wider scope and variety. Therefore the idea of professor S. Cigoj is entirely justified, i.e.: "It is thus necessary to take a stand of principle from the aspect of the entire legal system that the task of the judiciary is to further study the issue of legally recognized non-property damage, as well as to find out new solutions dictated by new situations, and more particularly the ones required by development and advancement."[14]

The kinds and the scope of non-property damage, and particularly the cases in which damage shall be recognized due to unjustified conviction and depriving of liberty without ground, shall be decided in the future in accordance with the provisions om the Law on Obligation Relations. The ensuing consequence

[14] *Komentar Zakona o obligacionim odnosima* (commentary of the Law on Obligation Relations), edited by B. Blagojević and V. Krulj, book I, *"Savremena administracija"*, Belgrade, 1980, p. 431.

will be wider recognition of cases of non-property damage, as well as higher amounts of compensation than in the preceding period. That conclusion is based on our considerations of judicial and other practices until now. Although, as far as we are concerned, Yugoslav judicial practice should make a significant turn in this area, it is necessary to point out that there already were cases of deciding non-property damages, but the persons which were damaged were not satisfied with the amounts (we found that on surveying a series of judicial decisions). To illustrate, we are going to quote several judicial decisions which covered the issue of the right to compensation of non-property damage:

A) »The medical expert for neuro-psychiatry asserts that the plaintiff suffered intensive psychic pains during his detention, which applies to psychical suffering in cours of investigation, and these sufferings are even stronger if one considers that one is detaind and convicted without ground. The expert also stated that plaintiff's reputation was undoubtedly diminished by the very fact of his detention and walking through the town with handcuffs, while his reputation was particularly harmed in newspapers, since there was an article against him.

Having in mind that the plaintiff was detained for fourty seven days without sufficient reason and without ground, and that in course of his detention and at the time of his arresting he suffered intensive psychical pains, the court decided on the compensation in the amount of 4,000 dinars on that ground. The court did not accept the standpoint of the defendant that the plaintiff was not entitled to claim compensation of damage on the basis of psychical pains and spiritual anguish because of the fact that the expert, specialist for neuro-psychiatry, to whom the court completely believed, confirmed that the plaintiff suffered spiritual anguish of strong intensity in course of his detention and also at the time of his arrest. Since this is a non-property damage, the court decided, at its discretion, and applying article 212 of the Law on Civil Procedure, on the amount of 4,000 dinars to be granted on that ground, while it denied plaintiff's claim for higher amount as being without ground — as explained in the assignment of reasons in more detail — and as being considered too high.«[16]

B) »In spite of the fact that the plaintiff was arrested during investigation, and that proceedings were called off against him, the court found that there were no ground for the compensation of damage claimed by him. Such kind of non-property damage has no ground in the legal rules of property law. According to these rules the plaintiff would be entitled to such compensation of non-property damage only after he proved that he suffered

[16] Verdict of the District Court in Novi Pazar, P-41/73, of May 6, 1974.

pain, fear or some other kind of non-property damage. The very fact that the plaintiff was detained during investigation was not sufficient as a ground to grant damages to the plaintiff. This is why the claim has been denied as being without ground.«[16]

C) »Due to unjustified conviction, and until the rendering of verdict of acquital, the person who has been liberated spent in detention two years, two months and thirteen days, although in course of criminal proceedings against him he did not contribute, by his behaviour, to be suspected of the act he did not commit. By such an action, his personality and himself, and particularly his honour and reputation, were harmed, so that he was entitled, on the ground of articles 500 and 505 of the Law on Criminal Procedure, to compensation of that damage.«[17]

D) »In relation to non-property damage, and to the findings of the expert that the plaintiff is emotionally oversensitive person and in terms of affects an unstable person, and in relation to emotional stress he suffered due to his depriving of liberty without ground, while applying article 212 of the Law on Civil Procedure, the court granted to the plaintiff as this kind of claimed damage the amount of 20,000 dinars, believing that the granted amount corresponded to just compensation for all sufferings of the plaintiff because of his depriving of liberty without ground, and the one he was still suffering as the remnant of experienced psychicall unpleasent and serious anguish.«[18]

E) »The legal standpoint of the District Court is erroneous when finding that the plaintiff is entitled, according to the rules of property law, to the right of compensation on the ground of two different kinds of damage, namely: for psychical sufferings due to his arrest during investigation and due to diminished reputation in his civil life and within the ranks of the Yugoslav People's Army, since it is determined that the investigation has been instituted against the plaintiff after the suspicion that he committed a criminal act provided by article 324, paragraph 2 od the Criminal Law, and that detention during investigation has been ordered, so that the plaintiff has been deprived of liberty, spending in detention during investigation the period between March 15 and April 15 of 1969. It is further determined that an article was published in the newspapers covering the trial of a falsifier of driving licences and trade in driving licences, where among other names of defendants, the name was mentioned accomplice, due to which he was under suspension as a major of the plaintiff as a major of the Yugoslav People's Army and the of the Yugoslav People's Army until December 1, 1970. However, due to the lack of evidence as to the possibility that the plaintiff

[16] Verdict of the District Court in Niš, P-312/72, of April 24, 1973.
[17] Verdict of the District Court in Požarevac, P-271/73.
[18] Verdict of the District Court in Kragujevac, P-222/74.

committed the criminal act at issue, the public prosecutor abandoned the accusation against the plaintiff for the mentioned criminal act, so that the District Court denied the accusation against the plaintiff. Accordingly, the Supreme Court finds that the palintiff is entitled to the right of compensation of damage in terms of the legal rules of property law on compensation of damage in relation to article 505, paragraph 1, point 1 of the Law on Criminal Procedure, the corresponding ground being psychical sufferings af a consequence of groundless detention of the plaintiff during investigation, publishing of his name in daily newspapers as an accomplice in committing a criminal act at issue, as well as the suspension of the plaintiff from his duties as a major of the Yugoslav People's Army. Psychical sufferings of the plaintiff could have been even more intensive since he had his family at the moment of his arrest during investigation, because of which the plaintiff could have suffered psychically too. Such psychical state of mind caused by arresting the plaintiff during investigation undoubtedly led to the emotions which were manifested as spiritual anguish. The publishing of plaintiff's name in daily newspapers as an accomplice to committing of a criminal act at issue, according to the finding of the Supreme Court, can not be considered as a particular kind of damage, but only as intensifying of already existing sufferings and pains of psychical nature on the part of the plaintiff, which may be of influence in assessing the amont of compensation of damage due to psychical sufferings."[19]

IV. DETERMINING THE AMOUNT OF DAMAGES

Having in mind the specific position of the person suffering damage due to unjustified conviction or depriving of liberty without ground, and with the purpose of ensuring in such cases an efficient compensation, our law (just as some other foreign laws, such as for instance Austrian law) provides for a particular proceeding of out-of-court (i.e. by reaching an agreement betwen the parties) determination of the kind and amount of relevant compensation. Article 542, paragraph 2 of the Law on Criminal Procedure provides that the person suffering damage is under a duty, prior to addressing the court with his claim for compensation of damage, to address with his reiuest the agency (or body) which is designated by the republic, i.e. procincial statute, in order to reach an agreement as to the existonce, kind and amount of compensation of damage.

In practice, although such preliminary proceeding for reaching an agreement for damages should speed up the procedure and

[19] Verdict of the Supreme Court of Serbia, Gž-3157/72.

ease the position of the damaged person, one can not say that there are many cases of effective reaching agreement between the competent agency and the person suffering damage, so that this preliminary porceeding in many a case amounted to delay in clearing the request for compensation of damage. In case of not reaching the agreement in the preliminary proceeding, the person suffering damage may address the court in order to realize his claim in a litigation. Due to such a situation in practice, there are some critioism in the theory regarding the compulsory preliminary proceeding as described above.

In determining the existence, kind and amount of damage in the litigation proceeding, the critoria for qualifying both property and non-property damage, as well as presenting evidence thereof, are governed by the general rules of civil law as provided for in the Law on Obligation Relations. The particularities are, naturally, taken into account as far as the case of damage due to unjustified conviction or depriving of liberty without ground is concerned.

The former judicial practice did exactly the same while determining the kinds and amounts of compensation of damage. However, specific criteria did emerge as to determining non-property damage. A series of objective and subjective circumstances have been used, especially in deciding on the amount of damage, such as the following: the length of time in detention, circumstances in course of detention (such as being put into a solitary cell and the like), publishing the case in the mass media, intensity of psychical sufferings in relation to the qualification of criminal act at issue, the treating of the person deprived of liberty as a rowdy, desertion of such a person directly because of serious qualification of the criminal act charged against him, lost reputation in his work organisation, excluding from the membership of the Leage of Communists of Yugoslavia, compulsory separation from life environment, personal and family situation, the position of such a man in society, the fact that he was not sentenced before, fear for personal safety, effective instability in the service in the Yugoslav People's Army, nervous breakdown due to staying in detention, despondency, depression, the feeling of helplesness, and the like.[20]

Mentioned circumstances which were used by the former judicial practice as far as damages for non-property damage were concerned in favour of persons unjustifiedly convicted, or deprived of liberty without ground, amount to sufficient series of criteria to be used in future while implementing the provisions of the Law on Obligation Relations. In doing that it is of utmost importance to use as much as possible those criteria for each particular case in order to determine not only the very existence of damage, but

[20] Verdict of the Supreme Court of Serbia, Gž-3157/72, of February 23, 1972.

also its kind and the amount of damages. It is also, necessary for the court to determine the kind and amount of damage in each particular case according to mentioned objective and subjective criteria, while the amount of non-property damage should be determined at the discretion of the court in terms of article 223 of the Law on Civil Procedure. This is to be applied, naturaly, only if mentioned indices and yardsticks do not provide sufficient ground to ascertain concrete non-property damage. Along these lines the legal standpoint should be understood adopted at the conference of judges of the civil law section of the Supreme Court of Yugoslavia and the judges of civil law departments at the republic and provincial supreme courts, held on February 12 and 13, 1970 at the Supreme Court of Yugoslavia, namely: "The amount of monetary compensation of non-property damage is determined at the discretion of the court in terms of article 212 of the Law on Civil Procedure. The court is under a duty while doing that to take into consideration and to assess all relevant circumstances of the case and to explain in the assignment of reasons which circumstances and in what directions it had employed in basing its decision."

The issue of determining the amount of monetary compensation both of property and non-property damage is one of the most significant questions in judicial practice of every state, including ours.[21] It has particular moral significance and effect in cases of damage due to unjustified conviction or depriving of liberty without ground. Such importance of the issue of compensation of damage in these cases means that it is necessary in practical application to dedicate utmost attention to such questions in order to ensure, particularly in case of non-property damage, "at least only a just compensation according to the circumstances of the case, since psychical sufferings and spiritual anguish as such can not be compensated by any sum of money."[22] This is particularly so in cases of determining the very fact of existing of non-property damage and of its amount in terms of money as far as unjustified conviction and depriving of liberty are concerned. Unfortunately, our former judicial practice did not proceed entirely like this. This is why our legal literature criticized such practice. Thus, for instance, N. Srzentić considers: "As a matter of principle, one can safely say that both in legislation and in judicial practice the standpoint prevails, and an open tendency,

[21] Two studies have to be consulted in our legal literature in relation to this issue, namely: O. Stanković: *Naknada imovinske štete — iznos naknade kod delikтne odgovornosti* (compensation of property damage — the amount of compensation in torts actions), Belgrade, 1968, p. 106; and *Novčana naknada nemovinske štete* (compensation in terms of money of the non-property damage), fourth edition, Belgrade, 1972, p. 318.

[22] Decision of the Supreme Court of Serbia, Gž-3157/72, of February 23, 1972.

that the damage suffered should not be granted full redress... Reducing of compensation is most frequently motivated by financial reasons, but there are still other reasons justifying low amount of compensation. It is thus emphasized that all citizens enjoy benefit from the general struggle against crime, which includes those persons unjustifiedly convicted, i. e. deprived of liberty without ground, so that they are not entitled to full compensation... These trends both in the legislation and in judicial practice show that the standpoints are not yet firm on complete compensation of persons unjustifiedly convicted and deprived of liberty without ground, in spite of the idea on the need for redress being accepted in principle. Today, when it is considered that the right to compensation of damage on the part of those persons is their basic and inalienable right, there are no serious reasons against including all kinds of such compensation, as well as against giving full amounts of compensation."[23] Along the same lines M. Stefanović-Zlatić states the following: "It happens in the practice that a person convicted unjustifiedly does not obtain even the compensation of the entire property damage."[24] Having in mind former insufficient practical experience in this subject matter, one should expect that by implementing the Law on Obligation Relations the amount of compensation in terms of money, both of property and non-property damage, shall be determined in a more equitable way, since only a full compensation of such damage determined according to specificities of each particular case corresponds not only to the principles of our legal and constitutional order, but also to the principles of our socio-political system.

[23] N. Srzentić, *Naknada štete zbog neopravdane osude i neosnovanog lišenja slobode* (compensation of damage due to unjustified conviction and depriving of liberty without ground), *Zbornik radova o stranom i uporednom pravu* (collection of works on foreign and comparative law), Institute of Comparative Law, Belgrade, 1966, pp. 437—438.

[24] M. Stefanović-Zlatić, op. cit., p. 84.

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CONTENTS — SOMAIRE

goslav idea and spirit in the sphere of professional and academic cooperation, he always met a welcoming reception, since he was all the time able to find the ways which made people most cooperative.

The second, also significant characteristic of professor Blagojević in his work at the Faculty and at the Institute relates to studing and encouraging young research workers. There is no generation of assistants at the Faculty of Law which was without his help and professional support in its development. A whole pleiad of young scholars working once at the Institute of Comparative Law became well-known jurists, university professors, research asociates at institutes, judges and other outstanding lawyers. Professor Blagojević always considered that the fact of a great number of its young scholars leaving the Institute in order to join other institutions and take other work positions, meant a contribution to the reputation of the Institute and went to its credit only as a success. He was not hesitant with the so-called transient workers. Just the contrary, he considered that the Institute should be a source for young scholars and that tradition was still present in regular activity of the Institute.

To quite a degree professor Blagojević contributed to the reputation of Yugoslav legal science and this is more particularly true as far as comparative law is concerned. Professor Blagojević actively participated in the work of many international organisations, conferences, symposia and institutions, such as the International Institute for the Unification of Private Law in Rome, the International Academy of Comparative Law in the Hague, International Faculty of Comparative Law in Strasbourg, the International Law Association and others. Professor Blagojević invested efforts to include many Yugoslav lawyers into that kind of international cooperation. Many of us who for the first time participated with him to such international events, hesitant at the beginning, with his help continued gradually to take an active part. Under his authority many Yugoslav jurists acquired first international reputation.

There are so many things worth mentioning now and it is difficult to make a list of them. While limiting ourselves only to the sphere of professor Blagojević's activity at the Faculty of Law and in his capacity of director of the Institute of Comparative Law, we can say that we are all going to miss him. There is emptiness after him which is difficult to be erased. Therefore in the name of Yugoslav jurists, and more particularly in the name of all research associates and workers of the Faculty of Law and of the Institute of Comparative Law, we express great gratitude for all he had given to us from all his heart and mind until the very end of his life.

ARTICLES

UDK 342.(497.1.)

Dr. Dragoslav VUJAKLIJA

DEVELOPMENT OF CONSTITUTIONAL AND STATUTORY REGULATION OF THE RIGHT OF REDRESS FOR UNJUSTIFIED SENTENCE AND FOR GROUNDLESS DEPRIVATION OF LIBERTY IN YUGOSLAV LAW

Instituting and development of the right to redress of persons unjustifiedly sentenced and deprived of liberty without ground are closely connected to the development of the constitutional systems in various countries, and more particularly to the recognizing and development of the individual rights of citizens as the constitutional categories. The degree of that development is but an expression of the level of democratic element in the constitutional systems, so that the struggle for democracy meant in the largest posible measure the struggle for individual rights and integrity of man. And vice versa, extending of individual rights, of protection of integrity and ensuring of these rights meant a degree in the realisation of democratic system. Therefore a review of the instituting and development of the right to compensation of damage of persons unjustifiedly sentenced and deprived of liberty without legal ground would, in a way, mean also a review of the development of some basic institutions of contemporary constitutional law although this is not the task of the present study. We shall therefore dwell only at those elements of that development which are more or less directly related to the institute of redress to persons unjustifiedly sentenced and deprived of liberty without ground, in order to point out in this way at the circumstances of creation of that kind of compensation of damage.

This kind of compensation, on the other hand, could have been instituted, and was in fact instituted, in some other situa-

tions similar to the one we are dealing with (for instance, compensation of damage due to non-performing or irregular performing of public services; compensation of damage caused by ecological disturbances of human environment, and the like), only when and to a degree by which conditions became ripe in society, meaning the creation of social relations which would make possible raising the question of compensation of damage to persons unjustifiedly sentenced and deprived of liberty without ground. Therefore this is but another proof of a need for an integral consideration of legal institutes within the time and space, since this case of compensation of damage is an institution which, in its creation and development, was considerably influenced by the entirety of the development of legal norms which were related to the position and status of man, and more particularly to recognition and development of individual freedoms and personal rights as constitutional categories and legal categories in general, and more specifically as categories of the civil law.[1]

The basic starting point for the instituting of the right to compensation of damage, as viewed in a historical way, consisted of submitting and recognizing of two requests, namely: a court decision may be incorrect, namely not in concordance to the law, so that, accordingly, it may be abolished or changed at a certain moment and in a determined way; the state, namely its agencies and bodies, i.e. institutions, may become liable in a particular way for compensation of damage, due to legal acts and legal actions of competent agencies and bodies, which could be found at given moment invalid or unlawful, and even more particularly if such bodies were courts.

I. POSSIBILITY THAT ACTS AND ACTIONS OF STATE AGENCIES BE DECLARED IRREGULAR, NAMELY UNLAWFUL

A long way in the history has been traversed until these two requests became effective. Viewed in terms of time, the first one was the first to be fulfilled, namely the possibility has been recognised that the acts and actions of state agencies or bodies be proclaimed irregular, invalid, and, in the final analysis, unlawful — both entirely or partially, so that as a consequence they could be abolished (annulled) or revised. Such a conception was rather early recognized as the ruling one, which meant that the fact was recognized that a court decision too may be declared erroneous or unlawful. This can be determined as a fact only

[1] On such development of individual rights, and more particularly as a category of civil law, see: S. Krneta and V. Vodinelić, *Enciklopedija imovinskog prava i prava udruženog rada* (encyclopaedia of property law and of the law associated labour), Belgrade 1978, volume I, pp. 904—936.

after the decision becoming final, but also after the executing of the court decision, both entirely or partially. In order to determine the above mentioned fact in every legal system the procedure or procedures have been instituted which were falling in the category of extraordinary legal remedies. They are all aimed at checking up the issue of regularity, namely of lawfulness of a court decision, so that such a decision could be entirely or partially annulled or revised if it was found that it was irregular or unlawful. This means that one departed from the principle of infallibility of work of the state bodies and agencies, even if they were courts.

In the constitutional development of contemporary world almost without exception the possibility of fault was recognized, in the activity of any agency or body, and in all walks of the activities of the state. Because of that, the system of constitutional courts has been developing, namely the one of protecting of constitutionality and legality, in general, as far as statutes and laws are concerned. On the basis of such conception the decisions of courts could not stay inviolable. The number of remedies, namely the system of extraordinary legal remedies, has been more and more developing, while the grounds for the use of these remedies extended more and more too, as well as became more available. In relation to this one should, however, take into account the need for legal stability and permanency of legal situations once established on the ground of a valid court decision, due to which there exist numerous time limits and a system of the statute of limitations in relation to the use of legal remedies of extraordinary character, the overall aim being the protection of human personality, of his individual freedoms and other freedoms, if such values would be violated by a court decision which should be found irregular, namely unlawful.

One legal development, and more particularly the development of criminal, civil, administrative and administrative-court procedures, undoubtedly serves as a proof for what has been stated above, and more especially concerning the extension of the system and grounds for the use of extraordinary legal remedies. Only viewed from this angle it is possible to understand and justify that development and to see in the means aimed exactly at increasing legality and protection of human rights, without decreasing legal security and the confidence in regularity and correctness of judicial decisions.[2]

[2] N. Srzentić *Naknada štete zbog neopravdane osude i zbog neosnovanog lišenja slobode*, Zbornik radova o stranom i uporednom pravu (compensation of damage due to unjustified sentence and groundless deprivation of liberty, collection of works on foreign and comparative law), Institute of Comparative Law, Belgrade 1966, p. 433.
See, P. Marina: *Preventivno lišuvanje od sloboda za obvinetot vo krivičnata procedura* (preventive deprivation of liberty of the accused in criminal proceedings), *Godišnik na Pravniot fakultet vo Skopje* (Annual Review of the Law School in Skopije), 1955, pp. 383—385.

II. POSSIBILITY OF INVOKING LIABILITY OF STATE FOR IRREGULAR ACTS OF ITS AGENCIES

With the change in structure and in ideas of applying the principle of legality in the functionning of state and of its agencies, as already mentioned above, the issue arose of eventual liability of state, of other territorial-political organisations and, eventually, of their agencies and institutions, in relation to damage caused due to their unlawful and irregular work, which included also their unlawful and irregular acts and actions, regardless of whether they consisted of positive actions or ommitting to act, as provided for by the statute. Even after recognising that there may be mistakes in the work of the state and of its agencies and institutions — which in the final analysis meant enacting of irregular acts — material responsibility of state for its work and for the work of its agencies did not take place at once. To quite a degree, as has been already pointed out, the struggle for recognizing and introducing of such liability of the state was closely connected to the struggle for human rights, and more particularly for respecting man's personality, integrity and freedom. These two activities, namely, developed almost in a parallel way.

In course of developement of the request, and later on of the institution of substantive liability of the state, which is a world-wide phenomenon, in many countries the constitutional provision has been enacted by means of which such liability of the state was recognised. By means of the statute and courts' practice (for instance, in France) there exists at present an entire system of that liability, which is based most frequently on the principle of risk, namely as a form of liability, although in many other countries that liability is still made dependent of the subjective elements in the acting of the state agency which issued the act which was declared irregular or unlawful (for instance, the requirement includes the existing of intent or gross negligence by the agency).

Undoubtedly, such material liability of the state, when recognized at all, should be based as much as possible on the principle of risk, so that it should have the character of strict liability, which is the trend of future development of that type of liability, while encompassing in such a way all faults of the state agencies and bodies, regardless of the reason behind such faults (except, naturally, in case of a fault by the person suffering damage). In other words, one should not take into account any subjective elements of fault by the person who acted in the name of state, of its agencies, bodies, or institutions. Only in such a way one can fully ensure the protection of subjective rights of physical and juridical persons, persons in relation to acts issued by the state, by its bodies, agencies and institutions,

which is particularly true for ensuring the efficiency and respect for the subjective constitutional rights of man and, especially, of his individual constitutional rights. In such a way also utmost socialisation of risk would be effected, which is otherwise general in relation to citizens of every country in the world regarding the possibility of fault, in the widest sense of the word, and more particularly due to irregular or unlawful acts of state agencies. This is, at the same time, in concordance to the relationship of isurance and liability for damage, namely in accordance with the ideas on equal sharing of general risk and socialisation of negative consequences of actions by the state, by its bodies, agencies, and institutions.[4]

This was the direction of development of constitutional solutions in our country, beginning with the 1946 Constitution until the present. Thus the Constitution of the SFR of Yugoslavia, enacted in 1974, provided in its article 199 that everybody was entitled to redress for damage suffered in relation to performing of duty or other function of the state agency, namely of the organisation performing affairs of public interest, which damage was done by unlawful or iregular work of a person or agency acting in the above mentioned way. Damage shall be compensated by a socio-political community, namely by the organisation where such activity or duty (service) are performed. Person suffering damage is entitled, in accordance to the statute, to raise his claim also directly against the person committing the damage.

Such constitutional regulating of the material liability of the state in our present-day Constitution is a system which to quite a degree makes possible the protection of subjective rights of physical and juridical persons, although it contains certain limitations in terms of the nature of acts giving the ground for acquiring the right to redress. This is especially true if one has in mind many specific statutory provisions by means fo which the constitutional system of material liability of state is elaborated in detail and made operational (i.e. material liability for the work of courts; material liability in the Yugoslav People's Army; material liability in the administrative agencies and bodies, and the like). It is not possible here to elaborate in more detail further putting into effect and functionning of the general constitutional system covering material liability in relation to performing duty and service, or performing other activities of state bodies or agencies, including the organisations performing duties and affairs in the interest of general public, namely to further elaborate the system of liability of the state — to put it shortly. However, it is necessary to state what is essential for the purpose

[4] Dj. Tasić: *Odgovornost države po principu jednakosti tereta* (liability of state on the principle of equal burdens), review *Arhiv*, Belgrade 1921, p. 245.

of the present study. Namely, there exists a principle of liability of the state for irregular and unlawful actions by its bodies and agencies, and this principle is at the constitutional level. That solution is the same as the one recognized in the area of constitutional law as a constitutional principle according to which a final court decision may be erroneous, so that the system has been instituted of extraordinary legal remedies designed for correcting and eliminating of fault in such court decisions. By this solution the requirements have been met for raising the question of liability of the state for irregular or unlawful work, and then also for faults, in general, of the judicial bodies and agencies.

III. THE POSSIBILITY OF INVOKING LIABILITY OF STATE FOR IRREGULAR ACTS OF THE COURTS

The constitutional and statutory system of liability of the state for the work of its bodies and agencies, either the general or a specific one, which related to the work of the courts, raised greater or smaller possibilities in various legal orders to consider within relevant frameworks the issue of compensation of damage of persons unjustifiedly sentenced and deprived of liberty without ground. This is one of the possibilities which provides under particularly determined conditions and in specific situations at least partially positive results (such situation existed in Yugoslavia too since the Liberation of the country until the Constitutional Law and the Code of Criminal Procedure of 1953), but in the second half of the nineteenth century more and more request was raised for specific regulation of material liability of the state, namely of compensation of damage due to an unjustified sentence and groundless deprivation of liberty. That was also followed by requesting that the conditions for the materialisation of that liability and the relevant procedure provide wide possibilities to persons suffering that kind of damage to effect compensation thereof in order to eliminate damaging consequences due to irregular and unlawful decisions of the courts. In course of that century that idea gradually gained an increased application. First such statute was enacted in Austria in 1892, and the principle was introduced, with more or less particularities and with pruding different degree of recognition to redress, in to the majority of the countries of the world, so that at present this institution became an integal part of the legal orders.[5]

[5] See, N. Srzentić, quoted work, p. 434; M. Belčić: *Za izmjenu odredaba Zakonika o krivičnom postupku o naknadi štete neopravdano osuđenim i nezakonito zadržanim u pritvoru ili istražnom zatvoru* (for the change of provisions of the Code of Criminal Procedure covering compensation

The most significant stage in this development is undoubtedly the transforming of the right to compensation of damage to persons unjustifiedly sentenced and deprived of liberty without legal ground into a constitutional principle. That was achieved together with recognizing of dignity of man, of his freedoms, integrity and individual rights as constitutional categories, which is more and more a reality to be found in contemporary constitutions. Therefore many constitutions, and more particularly those enacted after the Second World War, contain as a constitutional category a constitutional principle of the right to compensation of damage to persons unjustifiedly sentenced or deprived of liberty without ground.[6]

In such a way this institution becomes one of the basic institutions of contemporary law which ensures protection of rights of man, and more particularly of individual rights. In such a way also a parallel system developed of the so-called material subjective public rights, namely the system of constitutional rights of man (and more particularly those related to personality of man and to his individual freedoms), which included the system of protection of these rights, one of the means of protection of these constitutional rights being also the right to redress of persons unjustifiedly sentenced by court and deprived of liberty without legal ground.

Although the revie1 of development of that system is not the subject matter of this study, we pointed at some basic characteristics of that development, in order to emphasise the significance of that kind of civil law liability of tort nature (in essence, this is exactly this type of phenomenon and institution, regardless of the fact that it is regulated in Yugoslavia and in many other countries within the law on criminal procedure which by any means is not the best solution, so that many authors suggest that this kind of liability be regulated in an all-inclusive way by specific statute.[7] This may serve also for the understandig of various solutions existing in individual legal order, and also of different solutions which do appear in one and the same country even if the statutory texts remain the same. The reason is found in changing of the constitutional essence in some countries, which has, and

of damage to those unjustifiedly sentenced and unlawfully detained in preliminary confinement), review *Naša zakonitost* (Our Legality), 1964, pp. 1964, pp. 207—210, where an extensive review is offered of the development and the system of regulation of that kind of liability in Hungarian, Austrian, Italian, Romanian, Swiss, English, Soviet and Czechoslovak laws.

[6] See on this topic: N. Srzentić, quoted work, p. 435.

[7] M. Stefanović-Zlatić: *Naknada štete zbog neopravdano osude i zbog nezakonitog lišenja slobode* (compensation of damage due to unjustified sentence and groundless deprivation of liberty), *Zbirk Pravnog fakulteta u Beogradu* (Annals of the Law School in Belgrade), 1970, no 3—4, p. 292.

has to have, direct bearing on the statutory solutions, as well as on the interpretation and implementation of statutes regulating this kind of liability. We have considered along these lines the contemporary position and implementation of this kind of liability in Yugoslav law too.[8]

Finally, the development of the institution of liability to cover for damage to persons unjustifiedly sentenced and deprived of liberty without ground meant also the recognizing of that institution as an essential part of inalienable rights of man at the international legal level too. The well-known Declaration on Human Rights, together with the Declaration on Political Rights of Man, recognize the right to compensation to anyone who was a victim of unlawful arrest or of limiting of liberty.[9]

IV. THE LIABILITY OF STATE FOR IRREGULAR ACTS OF ITS BODIES AND AGENCIES ACCORDING TO THE CONSTITUTION OF THE SFRY

Similar development took place in Yugoslavia too. This extended both to the development of constitutional subjective rights of man and to the liability of the state for damage done by means of irregular and unlawful acts of the state bodies and agencies, and more particularly to the liability of the state for damage done by means of unjustified sentence and by groundless deprivation of liberty.

The Constitution of Yugoslavia of 1946 contained a separate chapter which was dedicated to the rights and duties of man. The conception on rights and duties was not essetially different than the ones known in other contemporary constitutions. That Constitution was enacted immediately after the war, namely in the period of stabilisation of the system of people's power and of the preparation for deeper socio-economic transformations, followed by inevitable and decisive role of the state.[10]

The list of rights set forth in the 1946 Constitution remained until the enactment of the Constitution of 1963, which particularly elaborated and protected the rights related to the person of man and citizen. However, the highest degree in the relevant development was achieved by the 1974 Constitution. This instrument contains basic freedoms and basic rights and duties of citizens, while individual rights of man are placed at the highest position.

[8] M. Derenčin: *Odšteta za zlo nedužno pretrpljeno u kaznenom postupku* (compensation of innocently suffered evil in the criminal proceedings), *Mjesečnik* (monthly review), IX, 1883, pp. 257—271; see also S. Maksimović: *O naknadi štete nevino osuđenih* (on compensation of damage of those sentenced innocently), *Branič* (a review), 1889, pp. 209—216.

[9] N. Srzentić, quoted work, p. 435.

[10] I. Djordjević, *Ustavno pravo* (constitutional law), Belgrade 1977, p. 366.

While assigning such importance and constitutional character to the position and individual rights of man, and within their framework to individual freedom and personal integrity of man, it is entirely understandable that the constitutional system of Yugoslavia, already since its first constitutions, had to contain also the rules covering liability of the state for irregular and unlawful work of its bodies and agencies. That development, just as in other states too, followed two directions. At the one hand, the work has been regulated of the bodies and agencies, and at the other, seperate rules have been set up on the liability of the state for irregular work and for unlawful acts of specific kinds of state agencies and bodies to cover for the specific cases, and more particularly for the cases of violation of the constitutionally guaranteed individual rights and freedoms of man.

The first form, namely the general liability (responsibility) of the state, has been instituted as a constitutional principle already by means of the federal Constitution of 1946, according to which the citizens were entitled, on the ground of statutory requirements, to request from the state and from the responsible individuals the compensation of damage done to them by unlawful and irregular performing of official duties (article 41).

Identical to that is the provision of the 1953 Constitution, according to which the state is liable for damage inflicted by officials through their unlawful work to the citizens or to juridical persons. The state is entitled to redress from the official who inflicted the damage by his work (article 99).

Considerable extension of this liability of the state and of its bodies, agencies and institutions are introduced by the 1963 Constitution, according to which everyone is entitled to compensation of damage done to him, in relation to performing of official duties or of other activity of the state body or agency, namely of the organisation performing duties and services in the interest of general public, by unlawful and irregular work of the person or of the agency (body) performing such official function or activity. The damage shall be compensated by the socio-political community, namely by the organisation where such official duty or activity are taking effect. Person suffering damage is entitled, on the ground of statutory provisions, to request compensation also directly from the person inflicting damage. Person who was unjustifiedly sentenced for a criminal act, or who has been deprived of liberty without legal ground, is entitled to effect redress out of socially owned means to cover the above described damage article 199).

The Constitution of the SFRY of 1974 contains in essence the same rule as above, folowed by some extending of rights of the person suffering damage. Thus the Constitution provides that a person unjustifieldly sentenced for a criminal act or the one

deprived of liberty without legal ground is entitled to be rehabilitated, as well as to compensation of damage out of the socially-owned means, including other rights as determined by statute (article 181, para. 5).

By means of such constitutional solutions, the right to redress has been raised to the level of a constitutional principle, conceived in the most general manner, and that corresponded to the trends of protection of individual rights of man and of protection of man's integrity, as well as to the development of this institution in contemporary legal systems. One should emphasize here also that in terms of the degree of constitutional development in Yugoslavia in this respect, this solution is one of the most progressive ones in that development in general. Moreover, the solution contained in the 1974 Constitution is particularly significant since it differs, in its scope and quality, both from the solution in the 1963 Constitution and from the ones found in the majority of constitutions and statues in the world covering this matter. One should emphasize also that the 1974 Constitution does not recognize to the unjustifiedly sentenced person or to the one deprived of liberty without ground only the right to compensation of damage along the lines of the general responsibility of the state to cover for damage done, namely, of the liability which is — let us mention that again — a significant achievement in the development of constitutionality and protection of man's personality in modern society. In Yugoslavia, too, in addition to the general liability of the state for the compensation of damage due to unlawful and irregular acts of its bodies and agencies, there existed specific regulation of particular cases of that liability, together with prescribing specific conditions for such cases, and both at the level of the constitution and of the statute.

This is the case with the liability for unjustified sentence and for the groundless deprivation of liberty too. True, at the beginning it was considered, probably under the influence of the Soviet legal system, that the liability of state for the case of unjustified sentence and groundless deprivation of liberty should and has to be regulated and settled according to the constitutional principles and statutory rules which have to be particularly prescribed for the general liability of the state to cover for damage done due to irregular and unlawful acts of its bodies and agencies. Therefore, there is no, in the Constitution of 1946, particular provision covering the liability for unjustified sentence and groundless deprivation of liberty, since it was considered that such a liability should be regulated by means of general legislation on liability of the state for irregular and unlawful work of its bodies and agencies, namely, in accordance to article 41 of the 1946 Constitution. The situation did not change, at least as

far as the constitutional solution was concerned, even by enacting the Constitutional Law in 1953. Only the federal Constitution in 1963 sets forth the principle and a rule that a person who has been unjustifiedly sentenced for a criminal offence or who has been deprived of liberty without legal ground, was entitled to compensation of damage to be effected out of the socially-owned means (article 50).

The real significance of the general rule on liability of the state for unlawful and irregular work of its bodies and agencies has to be viewed in relation to a whole series of legal prescriptions which were enacted in order to put into effect these constitutional principles. One may not regarding to that a trend towards an ever more intensive objectivisation of conditions for invoking such general liability for compensation of damage, which undoubtedly provided wide possibilities for protecting individual rights of citizens and of juridical persons. Such a system provided in many a case an important protection of individual rights of citizens, but it always presupposed unlawfulness and irregularity in the activities of the bodies and agencies, which proved to be not sufficient in quite a number of cases when citizens sufferal damage by work and acts of state bodies and agencies. This was particularly true in relation to violations of individual freedoms of citizens, to whom only what mattered, for instance, was the fact that they were deprived of liberty without ground, or, as the case could have been, that they were unjustifiedly sentenced, regardless of the quality of work of the bodies and agencies (in this case, particularly the courts) due to whose act or action they were unjustifiedly sentenced or deprived of liberty without ground. However, it is worth noticing that the introduction of the general rule on liability of the state for unlawful and irregular work of its bodies and agencies which caused harm to citizens, as a constitutional institution, has been the essential prerequisite in searching for new and specific solutions of compensation of damage in specific cases, including the case of unjustified sentencing and groudless depriving of liberty.

One may therefore say that the introduction of these specific forms of liability of the state in order to compensate damage, including the liability of the state to compensate damage which may be caused by unjustified sentence and groundless deprivation of liberty, has been an inevitable necessity, particularly having in mind that general principle has been accepted on the liability of the state for the work of its bodies and agencies. Together with the compensation of damage out of socially-owned means (regardeless of the width of the notion and volume of that damage in terms of compensation of material and non material damages), one should also and the specific according of the "right to rehabilitation" "as well as of other rights to the person who was unjustifiedly sentenced and deprived of liberty without legal

ground, in order for such person to re-establish his personal integrity in the most complete maner".[11]

This undoubtedly amounts to a constitutional achievement of utmost importance in the sphere of protection of human personality, whose elaboration and realisation should be accorded particular attention, and in any case quite greater attention than was formerly the case in the sphere of legislation, in the general activity of society or in the field of science. We should not be satisfied with relevant legislative approach and elaboration of that institution of our constitutional system, while still less with its putting into the day-to-day practice. This is why we are going to dwell more particularly on that issue, too.

V. THE GENESIS AND DEVELOPMENT OF THE RIGHT TO REDRESS DUE TO UNJUSTIFIED SENTENCE AND GROUNDLESS DEPRIVATION OF LIBERTY IN THE POST-WAR YUGOSLAV LAW

The right to compensation of damage suffered by persons unjustifiedly sentenced and deprived of liberty without ground has been, for the first time, regulated in Yugoslav positive-legal system in the Code on Judical Crimial Procedure of the Kingdom of Yugoslavia, of February 16, 1929 (Chapter 25, Articles 466—475). In terms of substance, that first regulation was efected mainly in accordance with the system existing at the time in the Austrian law, whose essential characteristic was the recognition of that particular form of compensation of damage suffered only by unjustifiedly setenced persons.[12]

In the Law on Criminal Procedure, which was enacted in our country on October 12, 1948, the question of compensation of

[11] See: the Constitution of the SFRY (title in Serbo-Croatian: *Ustav SFRJ*), edited by *Privredni pregled*, Belgrade 1975, pp. 329—330.

[12] See: M. Blečić, quoted work in footnote 5, pp. 206—207.

A thorough review of the entire system and of the 1929 Law is offered by M. Čubinski in the work *Naučni i praktični komentari Zakona o sudskom i krivičnom postupku* (scientific and practical commentaries of the Law on Judical and Criminal Procedure), Belgrade 1933, pp. 771—785, and by M. Molenc, *Teorija sudskog krivičnog postupka za Kraljevinu Jugoslaviju* (the theory of judical criminal procedure of the Kingdom of Yugoslavia), Belgrade 1933, pp.. 334—337; similarly also I. Matijević and J. Vesel: *O odgovornosti države i sudija za štetu* (on liability of the state and of the judge for damage), Zagreb 1930, p. 156; see also the reports by J. Silović, M. Dolenc and J. Vesel on the subject: *naknada štete za nepravedno određeni pritvor i istražni zatvor* (compensation of damage for unjustifiedly determined detention and pre-trial confinement) for the Second Congress of Jurists SHS, held in Ljubljana in 1926 (commemorative volume of the Congress, pp. 150—175); see also the article by M. Dolenc: *Problem naknade štete za nepravedni pritvor i istražni zatvor* (the problem of compensation of damage due to unjustified detention and pre-trial confinement), at the mentioned Second Congress in Ljubljana, published in the review *Policija*, Belgrade 1926, nos 19 and 20, pp. 873—884.

damage to unjustifiedly sentenced persons, and more particularly to persons deprived of liberty without ground, was not treated at all, which applies to its regulating, too, since the prevailing conceptions was that the state in such cases may and should be liable on the ground of the general rules of liability of state in order to compensate the damage done to citizens by its bodies and agencies. Such conception was to quite a degree adopted under the influence of the Soviet law which kept such solution even up to the present times. In relation to this, it would be interesting to raise the question whether — through the general system of material liability for compensation of damage done by the state bodies and agencies in case of invoking such liability in connection with the unjustified sentence — the courts have applied, in an analogous way, or at least have taken into account of them as an intention, the legal rules of our pre-war law (namely, those contained in the 1929 Code). Moreover, this would be interesting since these rules acorded to such persons more favourable protection than was the case with the general state liability rules formulated in the 1946 Constitution. Unfortunately, we were not able to find judicial decisions from that time, where such a tendency would be conspicuous. Just the contrary, a small number of known decisions from that time predominantly took negative standpoint in relation to the right of unjustifiedly sentenced persons to compensation of damage.

Although the right to redress of persons unjustifiedly sentenced and deprived of liberty without ground, as a constitutional category and as a subjective right of citizens, has been introduced into our legal system by the Constitution of 1963, as a legislative institution it has appeared already in the Code of Criminal Procedure of 1953 (Article 8 and Articles 472—479). This was caused to quite a degree under the influence of the criticism of the existing state of affairs in this sphere exerted by our legal theory, which critism was in accordance with the entire social development in our country. By means of these provisions the following has been determined, among other things: which persons are considered unjustifiedly sentenced and, in relation to that, who was entitled to compensation of damage; the right to compensation due to unlawful keeping in custody and in pre-trial confinement, but not due to unjustified depriving of liberty; the subject of liability in such cases was the republic, namely the autonomous province which ha also the obligation to compensate damage; the duty of the person suffering damage to address the competent agency of administration prior to submitting his claim to the court, in order to reach agreement on the existence for damage and on the kind and amount of compensation; the claim by person suffering damage is decided upon by the Supreme Court of the republic and in the particularly provided procedure; only the specific group of successors are entitled after the death of

the person who suffered damage, to continue an already instituted proceeding within the limits of the claim previosly set forth; the time limit provided in the statute of limitations is one year after the decision became final by means of which the accused has been found not guilty or by means of which the accusation has been denied, namely after the ruling by means of which the criminal proceedings are suspended, and, which is most important, the person suffering damage is entitled only to compensation of material (property) damage.[13]

Such a solution was of a relatively narrow scope, both in the cases of recognizing the right to redres to persons unjustifiedly sentenced and deprived of liberty without ground, and, more particularly, in relation to the kind and scope of damage which was recognized as existing in such cases. That solution, in fact, presupposed a modified form of the general system of material liability the state for the work of its bodies and agencies, which, as that specific form too, was based on the fact of an unlawful action of the state agency (i.e., body), while it encompassed only the property damage as a form of compensation. However, that was, let us mention this again, in accordace with the general trend in the rules in the basis of our system of compensation of damage, while the account has been particularly taken of the position and role of the state, whose interests were intensively present. On the other hand, and in spite of all what has been said, such a solution has been a successful step forward in order to realize the protection of subjective rights of man, of his personality and individual freedoms, a step effected in concordance with our general social and legal development. The ensuing result of that process made possible the introduction into our legal system of an institution of great importance. In course of time, that institution has been developing through the legislation, through judicial practice, through legal theory and was constantly improved until finally reaching the present- day form (which is determined by the provisions of the Law on Criminal Precedure of 1976 and of the Law on Obligation Relations, of March 30, 1978).

The Constitution of 1963, for the first time in Yugoslavia, regulated the right to compensation as a constitutional institution and as a constitutional right of citizens. In relation to the statutory solutions found in the Code of Criminal Procedure of 1953,

[13] See: Z. Milosavljević, *Odgovornost društveno-političke zajednice za štetu koju trećim licima prouzrokuju njeni organi i lica u službi, sa posebnim osvrtom na naknadu štete zbog neopravdane osude i neosnovanog lišenja slobode* (liability of the socio-political community for damage caused to third persons by its bodies and agencies, as well as by its officials, with particular emphasis on the compensation of damage due to unjustified sentence and deprivation of liberty without ground). *Ugovorno i odštetno pravo po Zakonu o obligacionim odnosima* (contract and tort laws according to the Law on Obligation Relations), *Zbornik radova* (collection of works), Belgrade 1979, p. 405; see als M. Belčić, quoted work, p. 210.

that constitutional solution represented a considerable improvement. That Constitution recognizes the right of compensation not only to persons unjustifiedly sentenced for a criminal offence (which right was, otherwise, recognized to such persons also by the Code of Criminal Procedure of 1953), but also to the persons "deprived of liberty without ground" (while, as has already been said, under the Code of Criminal Procedure of 1953, that right was recognized, in addition to persons unjustifiedly sentenced, only to persons unjustifiedly retained in temporary custody and in pre-trial confinement). This undoubtedly represented an important change of the foundation of the system, although not also a more considerable extending of the number, i.e. categories of persons which were entitled to that right of compensation of damage. However, from the stand-point of the substantive right to compensation of damage, particularly significant change was the one in relation to the qualifying the act of the state agency (body) by means of which an individubal was deprived of liberty. According to the provisions of the Code of Criminal Procedure of 1953, the right to compensation of damage was recognized to the person suffering damage only due to the unlawful keeping in temporary custody and in the pre-trial confinement, while the 1963 Constitution recognized that right to a person who has been deprived of liberty without ground. This is an essential difference of approach, which extends particularly to the procedure of submitting relevant evidence. While acording to the Code of Criminal Procedure of 1953 the person suffering damage had to prove that the act, namely the proceeding, of the agency, on the ground of which such person was kept in temporary custody and in the pre-trial cofinement (namely, a case of depriving of liberty), were unlawful — according to the constitutional solution of 1963, the agency executing the act of depriving of liberty was under a duty to prove the legality and general regularity of the ground which served as a basis for taking the action of depriving of liberty, naturally if such a person has been released from custody without a final judicial decision on the punishment of depriving of liberty, which included that previous depriving of liberty too.[14]

The second significant novelty brought about by the 1963 Constitution, in relation to the solutions contained in mentioned Code of Criminal Procedure of 1953, as viewed from the standpoint of the tort liability, relates to the kind and scope of damages

[14] At that time a wide discussion was going on in Yugoslav literature concerning the essential significance of distinguishing the criterion of "unlawful keeping in detention" and the "deprivation of liberty without ground". Often conceptions were expressed which favoured the extending of the possibilities of persons suffering such damage. For more details see M. Belčić, quoted work, pp. 213—219.

which can be extended to persons unjustifiedly sentenced and deprived of liberty without ground. Namely, according to the Code of Criminal Procedure of 1953, only the right was recognized of compensation of property damage, while the Constitution of 1963 quoted only the right to "compensation of damage", conceiving along these lines the notion of damage (kind and scope) in concordance with the general conception of damage, which prevailed at the time in our judicial practice and legal theory.

As is known, both our judicial practice and legal theory of the time held that the damage inclueded both the property (material) and the non-propertic (non-material) damage. This was the foundation of constructing the principles determining when and in what cases the compensation of damage should be recognized, then in what forms and in what amounts. Such constitutional solution, which was essentially different than the one contained in the 1953 Code of Criminal Procedure (that solution, to be true, does not mention specifically the non-property damage, but it does not mention the property damage either, instead speaking only of compensation of damage), provoked discussion related to practice since the provisions of this Code have not been essentially changed (by means of amendaments to the Code of Criminal Procedure, which were enacted on March 15, 1965, only in Articles 8 and 513 the word "unlawful" was replaced by the words "without ground", but nothing was changed regarding the kind of damage which was determined in Article 472 of the 1953 Code of Criminal Procedure, namely in Article 500 of the final text of this Code, of November 9, 1967), especially as far as the kind of damage to be compensated was concerned.

However, the judicial practice, while having in mind the constitutional text, and more particularly practice in the sphere of compensation of damage in general, which applies also to legal theory, in most cases began to recognize to persons unjustifiedly sentenced and deprived of liberty without ground also the right to compensation of non-material damage, while adhering to the solutions which were applied in many other cases where the issue of compensation of damage of non-material nature was adjudicated. This represented extraordinarily significant creative act of the judicial practice in the sphere of more thorough protection of personality of man.

Although through the judicial practice, and in accordance with the constitutional solutions in the matter, the grounds for compensation of damage and the kinds of that compensation were extended, there was a need and a necessity of revision of the provisions of the Code Criminal Procedure in order to eliminate every possible doubt in settling relevant claims. This was done by the Law on Amending the Code of Criminal Procedure, which

was enacted on November 26, 1970,[15] by which statutory solutions were put in concordance with the constitutional principles. By these amendments to quite a degree the system was regulated of compensation of damage, while particularly changed was the character of the claim by the authorized person, which claim more and more assumed the form of the property law claim of a general nature, and was realized, in the final analysis, under the rules of litigaton (civil) procedure. The most essential was, on the one hand, the re-establishment of already instituted rule (the Law on Amending the Code of Criminal Procedure of 1970) according to which the right to compensation of damage was recognized in favour of the person unjustifiedly sentenced, but also to the one who was deprived of liberty without ground. On the other hand, instead of the term "property damage" (which existed in the 1953 Code of Criminal Procedure and which was valid as a statutory rule until the amendments to the above Code, of November 26, 1970, although in the meantime, as we have already said, that term was in many cases denied by the courts' practice and criticized by legal theory), the rule was introduced on the compensation "of damage which was inflicted to him in this way". This rule already assumed general idea of including all kinds of damage, meaning the non-matreial one too. One should emphasize here that by the Law on Amending the Code of Criminal Procedure of 1970 the system of compensation of that damage was considerably completed by way of changing of previous solutions, and more particularly by introducing a series of innovations by which the right of damaged persons has been extended. These innovations essentially consisted of the following:

— the right to compensation pertains also to the person found guilty while exempted of punishment, if in course of the extraordinary legal remedy new proceedings have been suspended or if such person was released of accusation by a final verdict, or, as the case may be, if the accusation was denied;

— in case of a sentence for criminal offences in concurrence, the right of compensation may relate also to individual criminal offences which meet the conditions set forth by statute;

— the right to compensation expires after three years;

— provisions of Chapter XXXII of the Law on Criminal Procedure relate also to the unjustified sentence, namely to unfounded deprivation of liberty by military courts (formely, this

[15] It is worth noting the considerable length of time since setting up of new constitutional principles on this question in the Constitution of 1963 and up to their transforming into a legal (statutory system. This caused many difficulties in the realisation of these constitutional rights of citizens, which, to be true, have been partially eliminated by progressive attitudes of the judical practice, which, however, was not always able to ensure the utmost protection of the constitutional rights of citizens in this respect.

was decided according to the provisions of Article 76 of the Law on Military Courts of 1965 and 1967, which Article ceased to be valid by entering into force of that Law);

— the claim is filed against the republic, namely the autonomous provinces where the first instance court — against the Federation;

— at the request by the person whose reputation is seriously damaged due to an unjustified sentence, and more particularly if the case has been published in the mass media, the decision shall be published which shows the unjustified character of previous sentence (entitled to submit such a request are the spouse, the children and the parents after the death of the convicted person; this request has no connection with the request for compensation of damage and it may me submitted also when, by a subsequent verdict, legal qualification of the criminal act has been changed, so that due to that the reputation was seriously damaged);

— the right to compensation belons also to a person who was in temporary custody, and there was no criminal proceedings afterwards, then to a person who served his sentence, while in the subsequent proceedings or in course of an extra-ordinary legal remedy proceeding, the punishment has been decreased, as well as to a person who, due to a mistake or unlawful work of the agency (body), was unfoundedly deprived of liberty or has been detained longer in temporary custody in a penal-correction institution.[16]

By such solutions, first of all from the stand-point of the law of criminal procedure, and to quite a degree also from the stand-point of the principles of tort liability, the statutory text which was enacted in 1970 ensures full protection of interests of the person suffering damage. Thus the achieved system of compensation of damage to the persons unjustifiedly sentenced and the ones deprived of liberty without ground represents undoubtedly one of the best solutions as compared to the legislation of other countries. In the new Law on Criminal Procedure of December 26, 1976 largely the provisions are taken out of the 1970 Law, while the provisions are introduced, too, which are aimed at implementing into practice, as far as possible, the principles of the Constitution of 1974 according to which (Article 181, para. 5) the person unjustifiedly sentenced for a criminal offence or deprived of liberty without ground is entitled to rehabilitation and to compensation of damage out of socially-owned means, as well as to other rights determined by the Constitution. In such a way already developed system of classical (i.e. traditional) compensations which are accorded to persons whose rights were eventually infringed upon, has been supplemented by these measures which primarily served for rehabilitation of violated rights of the person

[16] See: Z. Milosavljević, quoted work, p. 407.

YUGOSLAV LAW / DROIT YOUGOSLAVE, 1/1986 — Dragoljub Vujaklija, Development of Constitutional and Statutory Regulation (p. 5—24)

suffering damage. The aim of these measures is the restoring, as far as possible, of the state of affairs which existed prior to the unlawful or irregular act by means of which the right of a person has been violated, namely, of that state of affairs which would have existed in course of regular events, if there were no irregular or unlawful act.

It is necessary here to emphasize two features. On the one hand, the right is extended of the person suffering damage to publishing of the statement on the decision which shows that the sentence was unjustified or that deprivation of liberty was without ground, if these facts were previously published in the mass media. According to new text there is no need any more that the reputation of such a person has been "seriously harmed" by such acts; it suffices, namely, that it has been "harmed". The corresponding procedure is that the court shall issue at the request of the person suffering damage, not only the coresponding statement in the mass media means (when the case has been reported in these mass media), but also, in some cases, relate this statement to the body (agency) or organisation where the person suffering damage is employed, namely to a social or other organisation, if this should prove necessary for the rehabilitation of such a person.

On the other hand, by the provisions of the Law on Criminal Procedure of 1976, which regulates this matter, it is expressly provided (which in the former practice was sometimes controversial) that the person suffering damage is entitled, in case of termination of labour relationship or of the status of insured person on the ground of social security scheme, due to unjustified sentence and to groundless deprivation of liberty, to uninterrupted running of his labour relationship, namely of the status of insured person during the period of time which was lost for him due to the unjustified sentence or groundless deprivation of liberty, provided the running of labour relationship includes also the unemployment period eventually ensuing due to such acts, and which was not the fault of such person. At the same time, competent agency (body) or organisation is bound to take into account all relevant circumstances, while deciding on the employment period and on other rights which are influenced by the length of employment period, namely, by the period covered by social insurance scheme.[17]

By these new solutions a relatively developed system of extending protection in the form of compensation to persons unjustifiedly sentenced and deprived of liberty without ground, from the stand-point of the tort liability (but of the criminal law liability, too) has been added by the system, perhaps not entirely complete one ,of measures aimed at direct rehabilitation of the status of persons suffering damage.

[17] See: Z. Milosavljević, quoted work, p. 409.

be done by, to or before any magistrates' court ing for the same petty sessions area as that court". t will be seen that by these provisions magistrates not expressly in any way restricted in their sdiction to the petty sessions area. The provisions rely provide explicitly that magistrates may ourn or remand or otherwise continue ceedings before a different court within the same ty sessions area. It may, however, be argued from that the express inclusion of this wider sdiction limits them by implication in other pects to the petty sessions area rather than the nty.

clusion

s already noted, certain of the statutory isions refer specifically to the petty sessional ion. There are other examples, such as the ing over jurisdiction. Binding over hearings may djourned but cannot be the subject of a remand. It will not be easy on a legal examination to circumvent these statutory references to the petty sessions area.

One possibility for solving the problem would be for magistrates to rely on their county commission jurisdiction and to pretend to act for whatever petty session is seized of the matter. While this may offer a technical legal solution, it is difficult to regard the operation of such a form of pretence as a satisfactory answer.

There are major issues involved and it will be interesting to study the arguments adduced in the Divisional Court when they have been finally marshalled. It will also be interesting to see the conclusion because a large number of arrangements of convenience will depend on the outcome.

[Since this article was written, *R.* v. *Avon Magistrates' Court, ex parte Bath Law Society* has been heard in the Divisional Court, on July 15, last, and will be reported in *J.P. Reports*].

COMPENSATION: A LAME DUCK?

A.M. WESSON*

he Criminal Justice Act 1982 placed a new hasis upon the award of compensation in the istrates' court. Is this new initiative being lated into action by the courts? It would appear ppily that it is not the case. I would venture to est that most victims are not primarily erned with the sentence imposed by the court. ever, compensation which is awarded to a victim e one direct way that he or she can be in some certain that the court has considered his or her ion.

reminder of the law with regard to the award of pensation. Under s.35 of the Powers of Criminal ts Act 1973 a court may, *instead* of or in ion to dealing with the offender in any other make a compensation order requiring the dant to pay compensation for any personal y, loss or damage resulting from the offence or ther offence taken into consideration. It will be that compensation may, therefore, be imposed order ancillary to a sentence or as a sentence in n right. Also I would draw to your attention A) of the Powers of Criminal Courts Act which that where the court considers (a) that it be appropriate both to impose a fine and to a compensation order, but (b) that the der has insufficient means to pay an priate fine and appropriate compensation, the shall give preference to compensation ough it may impose a fine as well).

compensation order may be made on cation *or on the court's own initiative.* The amount shall be of such a sum as the court considers appropriate having regard to any evidence and to any representations that are made by or on behalf of the accused or the prosecutor.

By s.35(4) of the Powers of Criminal Courts Act, in determining whether to make a compensation order against any person and in determining the amount to be paid by any person under such an order, the court shall have regard to his means so far as they appear or are known to the court. This is an important factor since the High Court has indicated that in general the sum should be one which can be reasonably expected to be paid within one year, although a longer order may be appropriate in exceptional circumstances. This has particular application to unemployed defendants, although £5 a week may be deducted from future payments of social security where fraudulent claims have been made.

It is inappropriate to make a substantial compensation order, together with a significant sentence of immediate imprisonment, because of the temptation to resort to crime to pay it. If, however, there is substantial capital, an order may be appropriate.

Where there are a number of claimants for compensation and the offender has insufficient means to satisfy them all, as a general rule the compensation should be apportioned pro rata. This principle may be departed from where there are strong grounds, for example, where it would lead to one or more small claimants being compensated to a wholly inadequate degree. Similarly, all co-defendants ought to be ordered to pay pro rata unless one of them is more responsible than the

esson is Clerk to Luton Justices

others or where the ability to pay is markedly different.

Normally there are few difficulties in assessing compensation for damage or other sums which are relatively easy to quantify and are usually the subject of a specific application. However, in relation to personal injuries, the difficulty the court faces is that there is relatively little information upon which to base the decision. Indeed, in many cases the only fact that is presented to the court is that an injury has been caused. The danger is that, with such a lack of information, the court will overlook the question of compensation in its consideration of the case. This is most unfortunate and can lead victims to feel that their interests are not recognized by the courts.

The Magistrates' Association, in a paper approved by Council in March 1984 (June edition of *The Magistrate*, 1984) suggested some guidelines in such cases and stated that three separate factors should be considered:-

(i) pain, suffering and inconvenience, terror and distress;
(ii) incidental loss or expenses and
(iii) the means of the accused.

They then issued in table form specific guidelines to be applied in such cases which it was stated should be increased in the case of the elderly and the infirm or where the part of the body involved is particularly sensitive, and decreased in the case of trivial injury or where there has been evidence of provocation.

This table has been criticized in the edition of *The Magistrate*, 1985, as being set too low (see Michael Ogden, Q.C., January edition - "Compensation Orders in Cases of Violence"). A table with slightly amended figures is suggested for consideration (the Magistrates' Association figures are in brackets).

Type of Injury	*Assumption re Pain*	*Suggested Sum*
A GRAZE	Considerable pain for a few days, a little after a week	£35 (£[illegible])
A BRUISE	More variable. Generally speaking the closer to a bone the more painful. Likely to be painful for a couple of weeks	£50 (£[illegible])
A CUT	Depends on size and whether stitched. Pain likely to have gone in two weeks	£50 - £150 (£[illegible])
A SPRAIN	Likely to be painful for three or more weeks	£75 - £150 (£[illegible])
FRACTURES	Arms around four weeks. Legs or ribs around six weeks	£250 - £750 (£[illegible])
HEAD INJURIES	Headaches unpredictable, average of a month. More serious if KO'd	£200 - £500 (£[illegible])
SCARRING	Important to consider position and likelihood of permanency, especially on face and if young	£250 - £1000 (£[illegible])
LOSS OF A TOOTH/ TEETH	Depends on position and age of victim	£75 - £200 (£[illegible])

To the above figures, it is suggested that the following amounts should be added:

(i) loss of earnings;
(ii) expenses incurred in engaging a deputy or someone to care for house and/or children,
(iii) cost of dental or exceptional medical treatment;
(iv) additional expenses incurred in travelling to hospital;
(v) breakage of spectacles, damage to clothes, watches, jewellery, etc.

Compensation has been given a new significance by recent legislation. Indeed, and in a future Criminal Justice Bill, it is proposed that magistrates will be required to give reasons if compensation is *not* awarded in appropriate cases. This may have the effect of focussing minds upon this important power.

WESTERN AUSTRALIA

LAW REFORM COMMITTEE

PROJECT NO. 12

PAYMENT OF COSTS IN CRIMINAL CASES

REPORT

Law Reform Committee,
R. & I. Bank Building,
593 Hay Street,
PERTH W.A. 6000

24 August, 1972

REPORT ON

PAYMENT OF COSTS IN CRIMINAL CASES

To the Hon. T. D. Evans, M.L.A.,
ATTORNEY GENERAL

TERMS OF REFERENCE

1. "To consider whether any alteration is desirable in the law relating to payment of costs to persons acquitted in prosecutions for criminal offences".

GOVERNMENT POLICY

2. Before the Committee had settled a working paper, the Premier announced at a press conference on 14 April 1971 that the Government intended to introduce legislation making the Crown liable to pay costs when it failed in a prosecution.

3. Following this announcement the Committee submitted a draft working paper to the then Attorney General, Mr. R. E. Bertram, for his instructions. The Committee felt that the Government might not wish it to take the matter further in view of the Premier's announcement. On 2 March 1972 the Under Secretary for Law informed the Committee that you wished the working paper to be issued in the ordinary way and accordingly this was done on 21 March. A copy of the working paper as issued is attached.

4. You have since indicated that the Government intends to confine the scheme initially to summary trials and within that area costs would be awarded to acquitted persons except in special circumstances. The Committee has assumed that you mean this rule to apply to all offences (simple offences and indictable offences triable summarily) dealt with in Courts of Petty Sessions and Children's Courts. You asked the Committee to set out in its report how it thought that this policy could best be implemented. You also invited the

Committee to give its views on the possible application of the scheme to trials in the Supreme Court and District Court.

5. Although possibly not now of major significance in view of the Government's intention as expressed by you, it may nevertheless provide a useful background to outline the features of the working paper and to summarise the comments received, before going on in paragraphs 15 to 30 below to give the Committee's views on how to implement the Government's policy.

WORKING PAPER AND COMMENTS THEREON

6. The present law and practice in Western Australia is summarised in paragraphs 3 to 11 of the working paper. Put briefly, the law is that, subject to provisions such as s.72 of the Traffic Act (which in effect gives an immunity to certain officials against payment of costs), in summary trials the court has a discretion to award costs to acquitted persons. In practice it does not award costs in cases where a police officer is the complainant. On appeals from summary trials the appellate court has a discretion to award costs, except against a police officer. In trials on indictment the law is that the Crown neither receives nor pays costs.

Thus in fact the cases where acquitted persons are reimbursed the legal costs of their defence are very few, and are largely confined to unsuccessful prosecutions by officers of statutory bodies who are not protected by statutory immunity and to the rare case of a private prosecution. An accused person may in some circumstances qualify for payment out of the Suitors' Fund.

7. In the working paper (paragraph 39) the Committee set out its tentative views as follows -

> "At this stage the Committee is of the view that ideally an accused should be awarded his costs on every charge on which there is no conviction but that this right of the accused should be subject to the discretion of the court limited along the lines laid down for the awarding of costs in civil cases ..".

8. Because the Premier's announcement could be construed as including a proposal for the payment of costs by convicted

persons, the Committee briefly discussed this question in paragraphs 46 to 48 of the working paper.

9. Comments on the working paper were received from -

The Hon. Mr. Justice Wallace
The Hon. Mr. Justice Zelling (Chairman of the South Australian Law Reform Committee)
The Solicitor General
The State Crown Solicitor
Mr. E. G. F. Stewart, Q.C., a member of the Scottish Law Commission (his letter did not express any attitude to the proposals and related only to the law in Scotland)
Mr. R. Iddison, S.M.
Mr. B. G. Tennant (State President of the Miscellaneous Workers Union)
The Law Society
The Police.

10. No commentator disagreed with the broad view that costs should be awarded to acquitted persons in a wider range of circumstances than at present. The Law Society, Mr. Justice Wallace, Mr. Justice Zelling and Mr. Tennant agreed with the proposals expressed in paragraph 39 of the working paper. On the other hand the Solicitor General and the Crown Solicitor urged that greater limitations be placed on the awarding of costs than those proposed in that paragraph.

11. The Solicitor General's views can be summarised as follows -

(a) In the case of trials on indictment the court should be given an unfettered discretion to award costs to those acquitted, but for offences tried summarily, particularly traffic and regulatory offences, costs should "follow the event" in cases in which the accused was summoned to appear, but should only be awarded when the court considered it just and reasonable to do so in cases following arrest. In the case of appeals from courts of petty sessions as a general rule costs should follow the event.

(b) The question was not one of the availability of finance but of principle. The question whether the accused was guilty of an offence and the question whether he should be reimbursed his costs were quite separate. He said -

> "The importance of a criminal prosecution not resulting in a conviction is that the accused person is not liable to suffer any prescribed disability or penalty in respect of the charge. It is quite irrelevant whether he is in fact innocent or merely fortunate not to have been found guilty. The significance of an acquittal or a conviction is confined to the consequences. When one comes to consider the question of costs, it is really a question of compensation that is to be determined. This necessarily requires a consideration of the merits of the particular case. I cannot see that it is irrelevant in considering this question to recognise that many verdicts of acquittal in trials on indictment are sympathy verdicts, or verdicts which depend on a reasonable doubt albeit attended with grave suspicion, or verdicts which are plainly perverse. It must be remembered that having regard to the committal procedure, no one is required to stand trial on indictment unless there is evidence on oath which if believed would justify a conclusion of guilt beyond reasonable doubt. Another aspect of the matter is that referred to briefly in paragraph 1 hereover, namely, the truth that very few accused persons have anyone but themselves to blame for the charges made against them".

(c) He quoted the view of Virtue J. in *Q. v. Jackson* [1962] W.A.R. 130 at 133, which he said represented the correct approach to the exercise of a judicial discretion as to costs in favour of an acquitted person in so far as trials on indictment were concerned -

> "I may say that even if I had taken a different view of the legal position I would have concluded that this was not a proper case to award costs.

The view which I expressed to the jury and to which I still adhere is that the case against the accused was a weak one. Nevertheless there is no doubt that it was a prima facie case and there would have been no justification for taking it away from the jury. There was no absence of reasonable cause for this prosecution. There was no suggestion of want of good faith or oppression or any wrongful motive in launching it and, under the circumstances, I would accordingly have had no hesitation in rejecting this application on its merits if I had not concluded that it was in any event insupportable in law".

(d) He also approved of the English Practice Direction (see paragraph 17 of the working paper) but would prefer that the criteria were laid down in a statute, as in New Zealand (see paragraph 21 of the working paper).

(e) He did not give any reason for his view that in summary trials of summons cases, and in appeals from courts of petty sessions, costs should "follow the event". However he said that the award of costs on successful appeals from courts of petty sessions would "go a long way to meeting the public concern that gave rise to the initial reference of the matter to the Committee".

12. The State Crown Solicitor's views are as follows -

(a) He noted that the estimated costs would be substantial and would compete with other demands on public money such as housing and hospitals, and was concerned that this extra burden would by and large be caused by the wrongful or improper, whether or not criminal, conduct of the accused which attracted police attention in the first place. Generally speaking accused persons are the authors of their own misfortune. He gave the example of a person acquitted of the offence of causing death by failing to use reasonable care in the use of a motor vehicle. In his view there is "always some highly negligent driving on the part of the accused which warrants his being indicted" and it is "impossible to predict

whether any particular jury will be satisfied that the negligence amounted to criminal negligence".

(b) He cannot agree with the suggestion that costs in criminal proceedings should be awarded "as in the trial of a civil action". Acquittal is not a matter of the accused establishing his innocence but is a result of the prosecution failing to satisfy the court of the accused's guilt beyond reasonable doubt.

(c) However, he considers that "where an entirely innocent man has been the victim of unfortunate circumstances resulting in his being wrongly charged with an offence, or where the Police have acted negligently or injudicially in the initiation of charges against an innocent person ... the community owes it to the acquitted person to bear the burden of his legal costs". To accomplish this the courts should be empowered to award payment of costs to an acquitted person out of funds appropriated for that purpose.

13. One commentator appeared to have mistaken the Committee's intention. He assumed that it involved the awarding of costs against police officers and traffic inspectors personally. However the Committee suggested that such a step was undesirable. Paragraph 30 of the working paper states -

"On principle it may be argued that costs should not be awarded personally against officers of the Crown or the police and other statutory authorities acting pursuant to a duty to lay complaints and prosecute ... If costs are to be paid to accused persons in such cases they should be awarded to be paid out of State funds or the funds of the authority concerned".

The Committee emphasises that its view is that if costs are to be awarded they should not be awarded against police officers or other officials acting in the course of their duty.

IMPLEMENTING THE GOVERNMENT'S DECISION

14. In the following paragraphs the Committee discusses suggestions to implement the Government's decision as expressed in paragraph 4 above.

Criteria

15. In the Committee's view the accused should be entitled to his costs if he is acquitted, and the court should be required to order costs in his favour. However the court should be empowered to deny an accused all or part of his costs in the following circumstances -

(a) If the charge was dismissed under s.669 of the Criminal Code dealing with first offenders.

Section 669 operates if the accused pleads guilty or the court thinks the offence is proven and it would seem no injustice to deny the accused his costs in such a case.

(b) If an accused has done or omitted to do something (other than an act or omission the subject of the charge) which was unreasonable in the circumstances and which contributed to the institution or continuation of the proceedings.

This qualification is broadly similar to that contained in s.3(1)(b) of the Costs in Criminal Cases Act 1967 of New South Wales (see paragraph 24 of the working paper).

An acquitted person might be denied his costs under this head for example if he had deliberately provoked his arrest or had confessed to the offence and had later retracted the confession or had in some other way misled the police in their investigation.

The exception of conduct which is itself the subject of the charge seems necessary if an award of costs is to be the general rule rather than the exception. It is commonly held (see paragraph 12(a) above) that in most cases the conduct of the accused although not found to constitute an offence, is nevertheless blameworthy.

(c) If the accused has done or caused to be done some act during the course of proceedings or in the conduct of

the defence calculated to prolong the proceedings unnecessarily or cause unnecessary expense.

> An accused who obstructs or unnecessarily lengthens the proceedings, for example by adducing false evidence as to an alibi, should have to accept the additional costs incurred by his action, and the court should therefore be empowered to deprive him of part or all of his costs of defending the charge.

16. A strict application of these criteria so as to deny an accused his costs may operate harshly, and the legislation should leave the court with a residual discretion to award him all or part of his costs, notwithstanding that any of the above grounds have been established.

17. You asked the Committee to consider whether the dismissal of a charge on a technical point should constitute a ground for denying costs. In the Committee's opinion there would be danger in such a course, due to the wide meaning of "technical point". On the one hand it would cover the situation in which the prosecution fails because of the neglect to establish some matter requiring only formal proof (e.g. the proof of relevant regulations). In such a case it may seem improper to allow an accused his costs. On the other hand the term could include a situation where an acquittal is obtained because it has been sought to establish some element of the offence by evidence which is inadmissible. There seems no reason why the accused should be denied his costs in this sort of case.

The Committee is of the view that it would be very difficult if not impossible to define precisely those circumstances in which an accused should be denied his costs because of the failure of the prosecution on a technicality. It would therefore recommend that this should not be made a ground for denial of costs.

Funds for paying defence costs

18. Under s.152 of the Justices Act any order for costs in favour of an acquitted person must be made against the complainant personally. The Committee suggested in paragraph 30 of its working paper that in the case of official prosecutions the award should be made directly against the Crown or other authority employing the complainant.

19. The Committee now thinks the better course would be to establish a special statutory fund and to empower the court

to order that an accused's costs be paid directly from that fund in cases where it is feasible to do so. The English Costs in Criminal Cases Act 1952 (as amended by the Courts Act 1971) and the Costs in Criminal Cases Act 1967 of New Zealand both make provision for a statutory fund.

20. There may however be administrative difficulties in including all statutory bodies within the ambit of the statutory fund suggested in the previous paragraph, particularly if, as would seem desirable, these bodies were required to reimburse the fund for payments made in respect of their unsuccessful prosecutions. It may be advisable therefore to confine the statutory fund to prosecutions by the police and officers of Government departments and State instrumentalities and, in the case of other official prosecutions, to provide that costs are to be awarded against the authority concerned and recoverable as a debt.

21. It would also be necessary to enact legislation ensuring that any existing statutory immunity as to costs (see for example s.72 of the Traffic Act, s.61 of the Transport Commission Act and s.365 of the Health Act) did not prevail against an award of costs out of the statutory fund or, where applicable, against a statutory body.

Appeals

22. The Committee is of the view that it would be desirable to extend the Government's proposal to include appeals from summary trials by giving the appellate court the same power to award costs as is given the court of first instance. The appellate court's power should also extend to awarding costs in proceedings in the court below.

23. Section 219 of the Justices Act provides that no costs can be allowed against any justice or police officer in respect of any appeal under that Act. There is no reason why this prohibition should not remain if the statutory fund suggested by the Committee in paragraph 19 is established.

24. It is suggested that the proviso to s.219 of the Justices Act should be amended if the statutory fund is established. The cases where the acquittal is confirmed on appeal would be covered by the proposals in this paper and in a case where the acquittal is not confirmed but the respondent is nevertheless awarded costs it would seem simpler for payment to be made out of the statutory fund, rather than the Consolidated Revenue Fund.

Scale of costs

25. It would seem desirable for the legislation to empower the Governor in Council to prescribe a scale of costs, which would include provision for a solicitor's fee and for any necessary disbursements including court fees and witnesses expenses. There should however be provision for the court to depart from the scale whenever it thought fit. The Committee has been informed that the Law Society is preparing a scale of costs for legal aid for accused persons under the Legal Contribution Trust Act 1967. This scale could probably be adapted to provide a scale for payment of costs to acquitted persons.

Consequential matters

26. The following consequential questions arise -

(1) One question relates to the payment of costs in certain circumstances to a person notwithstanding that he has been convicted. This was adverted to in paragraph 32 of the working paper although it was not strictly within the Committee's terms of reference. No comments dealing with this point were received but the tenor of the remarks of the Solicitor General and the Crown Solicitor suggests that they would not approve of the Committee's views in that paragraph. However if these cases are to be covered, the following provisions would be necessary -

(a) A provision enabling the court to grant the accused part of his costs notwithstanding that he has been convicted of a lesser offence than that with which he was charged if he can satisfy the court that additional costs were incurred in defending the more serious charge.

(b) Similarly, in cases in which the accused is charged with several offences in the one complaint and acquitted of one or more of the charges and can prove that additional costs were incurred in defending the charges on which he was acquitted, the court should be given a discretion to award the accused the extra costs incurred in defending such charges.

These situations are unlikely to occur frequently in summary trials, but they can occur (see for example s.94B(7) of the Police Act and s.43 of the Justices Act).

(2) A further question relates to the hearing of applications for costs. The Solicitor General suggested that applications should be heard in chambers after an appropriate period after the trial had elapsed. It is desirable to keep the procedure as simple as possible. Accordingly the application for costs should generally be dealt with by the magistrate as soon as the trial has ended. In most cases the question would be disposed of by simply applying the scale of costs (see paragraph 25 above). The magistrate should however be empowered, if he thinks necessary, to adjourn the application to chambers and grant leave to adduce further evidence, whether by affidavit or orally.

(3) Finally, paragraphs 15 to 25 above refer to persons who are acquitted of a charge. There is no reason why the Government's proposal should not extend to cases where a charge is not proceeded with or is withdrawn and the Committee recommends accordingly.

Supreme Court

27. You asked the Committee to include in its report a discussion of whether the proposals should extend to persons acquitted in the Supreme or District Courts. In paragraph 40 of its working paper the Committee expressed the tentative view that if insufficient finance was available the scheme should be limited in the first instance to indictable offences. The reason for this suggestion was that the number of indictable offences is much less than that of summary offences, but that the cost of a successful defence against a charge of an indictable offence is likely to be much greater, and so bear more harshly upon the individual concerned. The first line of the table in paragraph 43 of the working paper gives an estimate of the cost.

of the power to order that a convicted person pay the costs of the prosecution (the Committee's views are set out in paragraphs 46 to 48 of the working paper).

Draft legislation

31. The Committee has not attempted to draft legislation to give effect to the Government's proposals, but will be happy to co-operate with the Parliamentary Counsel in the preparation of legislation.

CHAIRMAN: E. J. Edwards

MEMBER : B. W. Rowland

MEMBER : C. le B. Langoulant

24th August 1972.