When things go wrong in public and private sector relationships:
a meeting on compensation
Partnership & Security Project, Centre for History and Economics

Monday 25 September 2006 Saltmarsh Rooms, King’s College, Cambridge

Report by Melissa Lane

The meeting was organised to explore the hypothesis that compensation is an increasingly important area in the actual relation between both private and public sector bodies, and in the conceptual relation between clients/consumers and citizen. As the two relationships evolve, the comparison between consumer and citizen becomes more salient. Exploring changing conceptions and practices as to what states and private bodies owe citizens in compensation when things go wrong is an underexplored way of tracking changes in those relationships themselves. The meeting examined aspects of these relationships from legal, historical, and philosophical perspectives.

Paper authors and titles
Claire Grant, Law, Birkbeck: ‘Law and Security: Punishment and Compensation’
Julia Moses, History, Cambridge: ‘Accidents at work, security and compensation in industrializing Europe. The cases of Britain, Germany and Italy, 1870-1925’
Daniel Squires, Barrister, Matrix Chambers: ‘“Compensation Culture” and the impossible distinction between state acts and omissions’

Discussants
Melissa Lane, History, Cambridge [of Moses]
Janet McLean, Law, University of Dundee [of Squires]
Antje du Bois-Pedain, Law, Cambridge [of Bou-Habib and Grant]

Also in attendance
Richard Toye, History, Homerton College [for the afternoon session]

All papers were circulated in advance to all participants, who were all present throughout the meeting, with the exception of Claire Grant, who due to a sudden death in her family was unable to attend on the day. However, her paper had been circulated and was presented for discussion by the commentator. Another participant scheduled to attend, Hyman Gross (Law, Corpus Christi College), was also unable to come due to delay in a hospital appointment that morning.

Summary of main points of discussion

Introduction

Melissa Lane opened the meeting by laying out the matrix of topics explored in the papers: compensation from private individuals or firms, but under state requirements
(Moses); compensation from private individuals or state for crime (Grant); compensation from state for deliberate violations of equality (Bou-Habib) or for negligence (Squires).

She laid out two divergent definitions of compensation -- whether it is understood as sufficient to nullify a harm, or not; whether it must be tied to violation of rights, or not -- while noting that the topic has been dramatically understudied in political theory and relatively so in criminal law, while being central to tort and contract, and problematic in administrative law. The disciplinary diversity of the meeting was planned to shed light on these discrepancies.

Session I. Daniel Squires, Barrister, Matrix Chambers: ‘‘Compensation Culture’’ and the impossible distinction between state acts and omissions’

Introducing his paper, Squires explained that its topic – the negligence liability of public bodies – has been an exceptionally vexed area of British law, with cases going up and down to and from the High Court. (He explained that negligence must be accompanied by a duty of care in order to establish liability.) He diagnosed the difficulty as relating to what the state should be responsible for, and what individuals should be responsible for; other issues include how public authority employees respond to issues of liability; concern on the part of courts about interference with politics; and concern by courts with a fear of ‘compensation culture’. However, he argued that the specific route chosen in several decisions to steer a path through these issues – that of drawing a distinction between acts and omissions, consonant with broad tort doctrine – actually fails to apply to public bodies. The main difficulty is that the state’s role in shaping the environment of action is so pervasive that it is meaningless to try to imagine counterfactuals by which people could be held responsible for their actions in its absence.

Janet McLean commented on Squires’ paper from the standpoint of administrative law, in which disputes are not conceived as bilateral between citizen and state, and in which the remedies of private law (such as monetary compensation) have not traditionally been available. However, in administrative law also, the pressures of compensation culture are mounting, as a new contractarian relationship between individual and state develops allowing (if not requiring) damages, but which raises difficulties of how to ensure that the focus remains on preventing public wrongs. Considering Squires’ paper, she raised the question of who decides what the relevant individual – state relationship is in a given case, and whether the court or the claimant can decide whether the remedies provided should be public or private law. (She also raised the problem of determining which bodies count as public.) An example of the problems is Napier vs Scottish Ministers, in which a prisoner claimed in tort that the prison service had failed to take reasonable care of his health; the result of his success was that some 300 other similarly situated inmates made similar claims, resulting in £85 million in settlements, which would have been enough to build a new prison and so end the violation instead of providing individual compensation.

In discussion, Squires was pressed as to whether the implication of his paper is that the principles governing negligence liability of public and private bodies should be the same,
or different. It was suggested that the real work is done in determining whether or not a duty of care is owed, rather than in the act/omission distinction; but the issue of responsibility and where it should be located between state and individual then becomes paramount. There is danger in analogizing citizen-state relations too closely to contractual relationships as lawyers understand them, because citizens can’t make certain choices about whether to avail themselves of state protection or to hypothecate tax, and because state services are necessarily imperfect because assigned limited resources. The danger of sue-able duties of care is that they would distort resources dramatically. The question was raised whether this is what is meant by those who raise anxieties about ‘compensation culture’, or whether they are more focused on the erosion of individuals’ taking responsibility for themselves, as the language of the court decisions emphasizes. Is there a concern about failure of democracy, or about failure of trust, which is driving the rise of public authority negligence cases and the courts’ concerns about them?

Julia Moses, History, Cambridge: ‘Accidents at work, security and compensation in industrializing Europe. The cases of Britain, Germany and Italy, 1870-1925’

Julia Moses emphasized the ‘ambiguous’ relationship between state and society around workmen’s compensation at the turn of the twentieth century: different European states mandated the provision of such compensation in different ways, but they did not provide it directly themselves; nevertheless their involvement raised expectations of public assurance which they did not fully meet, and also indicated (especially in the case of Italy) concern for changing international standards of best practice. Germany and Italy mandated employers’ insurance, whereas Britain mandated employers’ compensation but not the method by which this was to be provided. In all three countries, she argued, changing understandings of the nature of work led to new understandings of the ‘nexus of causation’ of accidents at work, which made it possible for the workmen’s compensation laws to become politically and legally thinkable. Yet there was also concern that the link between compensation and work should be maintained, with anxiety about lump-sum payments, for example, which seemed to break that link.

In her comments, Melissa Lane noted how well the paper followed on from the discussion of Squires’ paper, highlighting the same issue of personal responsibility as problematic for compensation that he did, and showing how that issue was defanged as a difficulty for workers’ compensation regimes by changing understandings of risk and of the nature of the workplace and work relationship itself. The issue of individual fault receded as a new understanding – drawing on new forms of expert knowledge -- of the nature of different kinds of work as statistically likely to generate accidents emerged. Yet it also shows how the very first regimes of European state-mandated compensation already provoked concern with what Squires calls ‘compensation culture’ – in Moses’ vivid portrait of the concern with ‘pension addicts’ which arose in Italy and Germany. Moses stresses differences between prevention and compensation (p.16): prevention deals with large numbers, while compensation increasingly became ‘much more personal and interventionist’, an ‘individualised form of security…that should be legally guaranteed’. The idea of a legal guarantee for compensation is an important one and again resonates
with the anxiety of the judges described by Squires in handing out a blank cheque for such guarantees. Strikingly, while in the period and countries that Moses describes, ‘[c]ompensation took into account individuals’ salaries and family situations’ (p.16), in current US law for example workers’ compensation statutes ‘provide uniform payments to workers injured on the job’ to which their personal economic circumstances are ‘irrelevant’ (a point made in Kenneth R. Feinberg’s report on the 9/11 compensation fund, which he advocates should be replaced for any future disaster by a model closer to workmen’s compensation: *What is Life Worth? The Unprecedented Effort to Compensate the Victims of 9/11*, PublicAffairs, 2005, p.185). The choice between uniform standards of compensation and individualised tort-based models is relevant in a range of areas today.

In discussion, it was observed that, by excluding all tort claims except for gross negligence, the schemes discussed by Moses served to protect employers as much as, or more than, employees (the same point is made in Feinberg’s account of the origin of the 9/11 compensation fund, which was set up to give individuals some compensation while making it difficult or impossible for them to bring tort claims against the airlines). Moses pointed out that the shift from suing one’s fellow worker, to suing the enterprise, was itself a major conceptual shift involving a new conception of the nature of an enterprise in the common law. In contrast, in the civil law, as Antje du Bois-Pedain observed, the master-servant paradigm had long enabled workers to make claims versus employers, either in parallel or shadow actions to criminal prosecutions for gross negligence. Moses’ point that various wars had stimulated the development of new expectations of citizen-state relationship was highlighted: the social insurance laws were fuelled in part by a concern for economic development, which came to be seen as requiring the state to limit freedom of (employment) contract, in order to regularise risk within the private sector. Paul Bou-Habib raised the provocative question of whether compensation changes its meaning when blame is excluded, a point which was explored by Janet McLean’s mention of the New Zealand Personal Injury Compensation scheme, which has made exactly this exclusion, but which has sometimes resorted to exemplary damages in order to punish rather than merely compensate.


Bou-Habib argued that the appropriate conception of equality for assessing security profiling is ex-ante, set by those risks which all those affected would accept in advance. On the basis of certain factual assumptions, he argued that a policy of ethnic profiling at airports could meet this standard, so long as it was accompanied by compensation which would make people ex ante even more likely to accept it. In contrast, ex post egalitarianism could not hope to use compensation in a meaningful way, since the worst-off who die due to heightened security risks could not be compensated.

In her commentary, Antje du Bois-Pedain spoke from the perspective of a lawyer whose concern was that discrimination on the basis of race, nationality, or similar criteria should not be allowed whatever the circumstances. She adduced a House of Lords case about
the UK policy of screening (only) people of apparent Roma origin at Prague airport, in which the Lords rejected it as discriminatory even though they acknowledged that those questioned on the basis of the policy were statistically more likely to offend. In discussion, the crucial role of statistics in this paper and their interpretation in this paper as in Moses’ paper was highlighted: the question is how to interpret such statistics and their putative link to individual character. The ‘nexus of causation’ in the case of ethnic profiling links descriptive characteristics which people (largely) can’t change, through a public communicative act, to social expectations of individuals on the basis of group statistics. It was asked whether the policy of profiling was actually wrong, in which case it might not be compensable; or if it is not wrong, why should compensation be offered? Harking back to Janet McLean’s point in the first session, it was observed that the idea that governments can do wrong so long as they compensate is potentially dangerous: the point of a right is not to indicate the price of compensation but to tell the government not to violate it.

Claire Grant, Law, Birkbeck: ‘Law and Security: Punishment and Compensation’

Presenting the paper in Claire’s unforeseen absence, Antje du Bois-Pedain outlined the Benthamite analysis which it provides. Bentham’s focus not on moral wrongs, but on how best to protect the maximum number against the harm caused by crime, led to a new view of why crimes are wrong and what to do about them: for example, state-guaranteed compensation could diminish the fear of crime even if it did not diminish the actual incidence or severity of crime. In this sense, perhaps the New Zealand scheme is the ultimate Benthamism. Grant raises compensation in place of punishment as Bentham’s idyll, which strikingly says very little about prevention; in this sense, Bentham would be instituting a purely tort-based system, based on individuals making amends to each other or the state stepping in to do so, without any broader focus on the public interest.

Is the idea that compensation can largely offset lack of protection really sound? Here the issue of whether compensation can actually nullify certain harms arises again (compensation for rape and murder, as opposed to property crimes, being especially problematic), and also whether compensation will deter as much as punishment in a society of unequal wealth, and lacking the expressive function of the latter aspect of the criminal law. (Switzerland set road traffic violation fines proportionate to an offender’s income, in an attempt to deal with this sort of problem.) Du Bois-Pedain also highlighted the extent to which an assumed divide between natural and personal causation structures the discussion of these matters in political theory. Yet strikingly, states have been far more successful in eradicating and controlling disease than they have crime.

Concluding discussion
Melissa Lane opened the discussion by drawing out a number of themes that had emerged during the day: whether compensation is inherently related either to fault/blame/wrongdoing, or to harm or injury; whether it is damage-mending or damage-obliterating (using Julia Moses’ excursus into the etymology of the word); whether
changes in compensation regimes drive, or reflect, changes in relationships between the
individual and the state, and between the private and the public (her view was that they
primarily reflect these, but through path-dependence also shape them); the significance of
assumptions about the nexus of causation and about the fungibility and valuation (as
“equal”) of goods and bads; whether compensation is primarily a legal or a political
matter, and a matter of public or private law; and the fundamental question of what we
want from compensation schemes, whether more deterrence and protection, less
interference with liberty, more economic efficiency, or some other good such as security.
ends-substituting compensation (which treats the recipient as a passive consumer) and
means-substituting compensation (which treats the recipient as an agent with specific
ongoing projects) was posited as relevant, though again the state’s right to presumptively
determine one’s projects was challenged. Can one can compensate too much, and how to
should one treat long term losses which also raise opportunities (a loss which is also a
chance: as in the case of refugees from Nazi persecution who ended up far wealthier in
North America than they would have been likely to become otherwise)? Finally, the
need for a theory of when the state should be compensating, and why, was raised, a need
which this meeting had not been designed to meet, but the outlines of which it had
succeeded in elucidating.