

Summary

"Damages and Human Rights: A Changing Relationship Between Citizen and State?"

by Janet McLean

McLean considers prisoners' claims against the state for maltreatment or negligence, claims which at present can be made in both public and private law contexts in the UK and other common law jurisdictions, and the difficulties raised by the different standards and entitlements to damages in these various forums. She begins by tracing two dramatic shifts in the relationship between tort liability and the conception of the state in the common law in a broad contrast between the nineteenth and twentieth centuries. The introduction of vicarious liability and new conceptions of negligence transformed tort law in the private and in particular corporate context: employers could now be held liable for the conduct of their agents, and corporate bodies could also be held liable for negligence. These two developments however threatened the twin pillars of the nineteenth century view of tort liability of public officials: the moral blameworthiness of individuals and the moral rectitude of the state. Vicarious liability could not traditionally apply to the Crown, because officials acting unlawfully could not be considered to be acting within the authority of the Crown in doing so. But the new doctrine of vicarious liability undermined this view as the state's powers expanded. Following statutory reform to the doctrine of crown immunity and common law developments in tort law, the state has come to be seen as liable for the unlawful acts and omissions of its agents. Meanwhile, while tort liability for public officials has evolved in this piecemeal way, the European Convention on Human Rights is explicitly predicated on the notion of the state having direct legal obligations to its citizens. Citizens, including prisoners, can claim directly against the state as a matter of public law. As British judges administer the now incorporated Convention in the form of the Human Rights Act, however, the jurisprudence of damages is proving a source of disquiet. Human rights damages are discretionary both in provision and in amount; yet if prisoners choose to sue in tort, damages are provided as a matter of right and explicitly correlated to loss. McLean concludes by reflecting on the anomalies and underlying unresolved questions about the relationship between citizen and state, and between public and private law, raised by this diversity of potential claims by prisoners against the state.