of intoxication (as Lord Hutton acknowledged at paragraph [40]). For it must not be forgotten that the effect of the diminished responsibility defence is not to acquit the defendant but to convict him of the lesser offence of manslaughter, for which the judge has discretionary sentencing powers.

Although not explicitly acknowledged in the House of Lords, a trend in recent decisions of the House concerning homicide is slowly emerging. In the same way that the decision in *Smith* [2001] 1 A.C. 146 resulted in a liberalisation of the defence of provocation, so too *Dietschmann* has expanded the operation of the defence of diminished responsibility, so that it is now available even though the defendant might not have killed had he been sober. Is it reading too much into these decisions to conclude that the judiciary are seeking to preserve some judicial control over sentencing for homicide? I think not.

GRAHAM VIRGO

CIVIL LIABILITY FOR ABUSE OF THE CRIMINAL PROCESS: DOWNSTREAM OF *THREE RIVERS*

IF the criminal justice system malfunctions and causes someone damage, when can the victim sue the person responsible?

To this question, the traditional answer is "almost never". If the malfunction consists of imprisoning someone who was innocent, or prosecuting them without due cause, there is no civil liability except for acts done in bad faith; liability for merely negligent behaviour is excluded, on grounds of public policy. Where the malfunction consists of failing to catch a criminal who celebrates his continued freedom by causing further damage—or in releasing one with similar effect—the same is true *a fortiori*, because the case is further complicated by issues of causation and *novus actus interveniens*. Thus in *Hill* v. *Chief Constable of West Yorkshire* [1989] A.C. 53 the House of Lords ruled that the Yorkshire police, however negligent, were not liable for their failure to catch the Yorkshire Ripper. Nor was the Home Secretary liable for negligently failing to execute a deportation order against a dangerous criminal—a failure castigated as "utterly lamentable" by a judge when later sentencing him for a further string of terrible offences (*K.* v. *Secretary of State for the Home Office* [2002] EWCA Civ 775).

As result of *Akenzua* v. *Secretary of State for the Home Department* [2002] EWCA Civ 1470, [2003] 1 W.L.R. 741, liability may now be easier to establish than has traditionally been thought.

According to the claimant, the facts were these. One Denton, a Jamaican gangster with a string of murders to his name, arrived in England where he tried unsuccessfully to claim asylum. When his application failed he should have been deported—but the Home Office and the Metropolitan Police did a deal with him under which he was informally allowed to stay, on terms that he acted as a police informer. In pursuance of this arrangement, the Home Office temporarily "lost" his deportation papers, and the police turned a myopic if not blind eye to his criminal activities (including an alleged rape). This cosy arrangement came to a dramatic end when Denton committed a horrendous sexual murder. Outraged, the victim's personal representatives sued the Home Office and the police for damages. They did not base their claim on negligence (when it would certainly have failed) but relied instead upon misuse of public office—a very ancient tort, recently overhauled and recommissioned by the House of Lords in *Three Rivers District Council* v. *Governor and Company of the Bank of England (No. 3)* [2002] 2 W.L.R. 1220. Their claim was initially struck out as disclosing no cause of action—but the Court of Appeal reinstated it, ruling that on these alleged facts the claimants had an arguable case.

For 300 years the common law has accepted that, in principle, tortious liability exists for the abusive use of an official power that causes someone damage—but the details were in doubt. Then in *Three Rivers*, the House of Lords was asked to explain in detail what a group of depositors would have to show to hold the Bank of England liable under this principle for failing properly to supervise BCCI, a bank in the collapse of which they had lost their money. Against this background, the House laid down the law as follows. First, liability for misuse of office potentially applies both to acts done in the abusive exercise of official powers, and abusive failures to exercise them. Second, it applies not only where the defendant was actuated by the express aim of causing harm, but also sometimes where the resulting harm was not intended. Third, the defendant is so liable for unintended harm where he both (i) knew his behaviour was improper, or was at least reckless as to whether it might be, and (ii) knew it would cause harm, or was reckless as to whether it might do so. Fourthly and most importantly, liability for unintended harm resulting from misuse of office does not depend on the existence of any kind of "proximity" or "special relationship" between the official and the person harmed. As Lord Steyn put it, "There is no reason why such an action cannot be brought by a particular class of persons, such as

depositors at a bank, even if their precise identities were not known to the bank".

Given this, the decision of the Court of Appeal in *Akenzua* hardly comes as a surprise. The main difference between *Three Rivers* and the current case was the nature of the damage—physical injury and death rather than economic loss—but on principle this ought to reinforce the claim, not undermine it. Building on Lord Steyn's reference to "a particular class of persons" quoted above, the defendant tried to argue that liability for misuse of office was limited to those victims who were readily identifiable at the time the allegedly improper act took place. This argument the Court of Appeal rejected. Lord Steyn's reference to a class of persons was, it said, "expansive rather than restrictive". The defendant's argument, if correct, would reintroduce the "proximity" requirement that the House of Lords had expressly rejected.

That the defendant is potentially liable for misuse of office if he was reckless—and, moreover, reckless in the sense that he foresaw the risk of harm to people generally, and not the risk of harm to some identified person—has great practical significance.

By recklessness, the House of Lords in *Three Rivers* said it meant subjective recklessness; that the defendant actually foresaw the risk of harm. This is of course significantly harder for the claimant to show than negligence. However, it is enormously easier for a claimant to establish than intention. It is only because of this that claimants like Akenzua can sue with possible success. Thus the decision that recklessness suffices makes this area of the law much more favourable to claimants—and, of course, correspondingly less favourable to defendants.

Obviously this does not mean that a defendant is liable merely because he foresaw a risk of harm. A person is only reckless where the risk he took was one that it was unreasonable in the circumstances for him to take—which is why recklessness is sometimes called "advertent negligence". But if this gives some protection for defendants sued for misuse of office, it is a protection with a sting in its tail. In order to show they were not reckless, official defendants will now sometimes find themselves obliged to justify in court decisions where they had to weigh a choice of evils. And it was partly to protect officials in the criminal justice system from the need to justify such decisions that, in the past, the courts usually ruled that they are immune from being sued in negligence.

J.R. SPENCER