Introduction

In the United Kingdom, as in perhaps all mature legal systems, compensation for victims of misfortune comes from a number of different sources. The following may be regarded as the most important:

- Social security
- Private insurance
- Tort law
- A surprisingly wide variety of other compensation funds and schemes

The last-mentioned—the focus of this paper—are created because of perceived gaps of cover in, or shortfalls in the compensation offered by, the other three sources.¹ Each of the three suffers from its own specific limitations—affecting either the scope of cover provided or the amount of compensation paid.

Social security provides only a minimum level of support and compensation payments are targeted on needs, rather than losses. In general, only pecuniary rather than non-pecuniary needs are addressed. The benefits provided may be means-tested.

The major limitation of private insurance, by contrast, is that it is voluntary, so the coverage it provides is incomplete. (In some contexts—for example, in respect of motor vehicles—third-party liability insurance is compulsory, but this is to ensure the effectiveness of the remedies granted by tort law, so the insurance here is not an independent source of compensation.) In practice, there are limits on what first party (or loss) insurance will cover,

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¹ In English, one tends to refer to a ‘compensation scheme’ rather than a ‘compensation fund’. Compensation schemes need not make use of a specific fund or have distinct management of its own assets: cf workmen’s compensation (1897–1948), based on private insurance; in other contexts, contributions to the compensation fund may be paid out of the general operating budget of a government department.
especially because of the moral hazard problems that arise if insurance benefits are too attractive. For example, the benefits payable under income protection insurance in the event of unfitness to work will not replace the insured’s full lost income for the remaining part of his or her working life, but will likely be limited to a specified percentage of pre-disability earnings.

In considering the scope of the compensation provided in the United Kingdom by the law of tort, it should be noted in the first place that the system is predominantly fault-based. In comparison with other European countries, there is very little strict liability. Fault-based liability applies even in respect of road traffic accidents. In respect of work-related injuries and illnesses, there is no workers’ compensation. The erstwhile system was abolished in 1948 on the theory that occupational injuries and illnesses should not be distinguished categorically from those arising in other contexts; instead, all should be brought within a universal social security system. This increased the importance of the remedy provided by tort law, and that importance increased as the real value of social security benefits diminished over time. From the final years of the nineteenth century until very recently, the courts interpreted statutory health and safety requirements as laying down strict duties whose contravention was actionable in damages without the need to prove fault. But in 2013 this strict liability was abolished by statute and the injured worker must now prove fault in order to succeed in an employers’ liability claim.

It is worth adding that the scope of tortious State and public authority liability is also very limited in the United Kingdom. In general, there is no liability in damages for supervisory or investigative failures as the courts have ruled consistently that the responsible authority owes no duty of care even to foreseeable victims—as highlighted in recent cases about negligent police investigations and delayed responses to 999 emergency calls. Further, English law recognises no principle of equality in the distribution of public burdens (égalité devant les charges publiques) whereby the State may be required to pay compensation to those injured by its lawful activities.

Compensation schemes: a chronology

To give a flavour of the range of special compensation schemes recognised now or in the past in English law, it may be useful to provide a chronological survey. In fact, such schemes have a long—perhaps, surprisingly long—history, dating back at least as far as the Riot Act of 1714.

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3 Lewis (fn 2), para 109 ff.
4 Enterprise and Regulatory Reform Act 2013, s 69.
5 See generally Ken Oliphant (ed), Public Authority Liability in Comparative Perspective (2016).
8 The Act is the source of the familiar phrase, ‘to read the Riot Act’: an official would read aloud a text prescribed in the statute, requiring the dispersal of any group of 12 or more persons who were ‘unlawfully, riotously, and tumultuously assembled together’. The text read: ‘Our sovereign lord the King chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King.’
This statute, a response to the public disorder caused by the accession of George I, Elector of Hannover, to the British throne on the death of Queen Ann, put an obligation on the local community—the ‘hundred’—to compensate for damage caused to buildings in the course of a riot. Though this compensation provision gathered little attention from modern writers, it was again put in the spotlight in the aftermath of riots in London and Birmingham in 2011, following which the scope of the entitlements under the Act, and the burden of the liability, were litigated to the Supreme Court.\(^9\) Even before judgment, Parliament passed the Riot Compensation Act 2016 to clarify the law.\(^{10}\)

Other significant landmarks in the development of compensation rights in the UK include the following:

- The Workmen’s Compensation Act 1897, establishing the system of workers’ compensation that survived until 1948.
- The introduction of compulsory motor liability insurance in the Road Traffic Act 1930, ensuring the effectiveness of tort remedies against negligent motorists.
- The creation of the Motor Insurers’ Bureau in 1946, providing compensation for victims of uninsured drivers, and later for hit-and-run victims.
- The creation of the welfare state in 1948, absorbing workmen’s compensation—and at the same time expanding the previously limited scope for employers’ liability claims in tort.\(^{11}\)
- The creation of the Criminal Injuries Compensation Scheme (CICS) in 1964.
- The Vaccine Damage Act 1979; and in the same year the first of the various schemes offering compensation to the victims of asbestos (the Pneumoconiosis etc (Workers’ Compensation) Act 1979).
- In 1988, the establishment of the first of the various schemes offering compensation to the victims of contaminated blood (this dealing with HIV; later schemes deal with Hepatitis C).

Further analysis of these schemes is provided below as and where appropriate.

**Characteristics of compensation schemes**

Perhaps the most distinctive characteristic of compensation schemes is that they are context-specific. They are restricted in scope by reference to the cause of the injury or damage, the type of injury or damage suffered, and/or by the occasion of its occurrence.

- **By cause of injury:** criminal injuries, vaccine injuries, blood transfusions, oil pollution, banking/insurance/pensions fund failure, etc. Sometimes the scheme can be narrowly

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\(^9\) Mitsui Sumitomo Insurance Co (Europe) Ltd v Mayor’s Office for Policing and Crime [2016] UKSC 18 (applying section 2 of the Riot (Damages) Act 1886)


\(^{11}\) Especially through the abolition of the defence of common employment: Law Reform (Personal Injuries) Act 1948, s 1.
limited to a specific agent, as in the case of asbestos, Thalidomide, and foot and mouth disease (FMD).

- **By type of injury**, for example Hepatitis C or HIV infection (from blood transfusion, etc), pneumocomiosis (etc) or mesothelioma (from workplace exposure), or the slaughter of livestock (because of FMD)
- **By occasion of occurrence**, as in the case of work accidents and occupational diseases

It may be noted that these different factors may be applied in combination (eg *type of injury plus cause* or *type of injury plus occasion*).

Other typical (though perhaps not universal) characteristics include:

- Entitlement to compensation is on a no-fault basis, though (as with criminal injuries and compensation for accidents caused by uninsured or untraced motorists) compensation may be for injury caused by *someone’s* fault, while it may be the case that the recognition of the right to compensation was motivated, at least in part, by a desire to head off civil claims for damages based on fault on the part of the State (as has been suggested in respect of criminal injuries compensation)
- Streamlined procedures (quick, cheap, making use of administrative tribunals rather than courts)
- Compensation is paid out of a distinct compensation *fund*, not from general taxation revenues

**Points of distinction between compensation schemes**

A number of points of distinction may be observed as between different compensation schemes. Regarding the compensation to be paid, is it to cover the victim’s losses in full or only partially? If the latter, is the compensation a fixed amount or subject to a cap? Another set of differences relates to the effect of the scheme on entitlements in tort law or under social security. Does the scheme excludes those alternative claims or can they be combined? If the latter, are the recoveries from different sources set off or accumulated, and/or is the scheme subrogated to the victim’s rights against the ‘responsible’ party? Lastly, regarding funding, is the financing for the scheme to come from those whose activities cause or create the risk of the injuries covered by the scheme, or their insurers, is it to come from potential victims, or is the taxpayer to foot the bill? Almost all permutations of these variables are to be found amongst the special compensation schemes to be found in the United Kingdom today, as the more detailed analysis below will show, though it is hard to discern any particular pattern in or logic behind them.
The main compensation schemes in the United Kingdom by thematic cluster

Asbestos-related disease

Compensation for asbestos-related disease comes from a variety of different sources, including social security (industrial injuries disablement benefit) and tort law (employers’ liability/EL claims). There are also three separate compensation funds or the benefit of asbestos victims, while the Financial Services Compensation Scheme (FSCS) offers relief for employers and insurers who face an undue payment burden.\(^{12}\)

Additionally, there are dedicated trust funds for asbestos victims—notably, that set up for those who brought claims against the former asbestos producer, Turner and Newall, and related companies (now part of Federal-Mogul).\(^{13}\) However, I shall not consider these further in the present paper.

(1) Dust-related diseases

The Pneumoconiosis etc (Workers’ Compensation) Act 1979 establishes a compensation scheme providing lump sum payments to sufferers of certain dust-related industrial diseases, subject to various conditions. The awards are for victims of occupational exposure to asbestos who cannot or have not taken civil action because their former employer has stopped trading.

The asbestos-related\(^{14}\) diseases included under the Act are:

- Pneumoconiosis (including asbestosis), referring to a variety of diseases of the respiratory tract owing to the inhalation and retention of dust particles
- Diffuse mesothelioma: a cancer of the lining of the lungs or abdomen associated almost exclusively with asbestos
- Bilateral diffuse pleural thickening (benign thickening of the lining of the lungs) (not to be confused with (less serious) pleural plaques)
- Lung cancer (primary carcinoma of the lung) if accompanied by asbestosis or bilateral diffuse pleural thickening

Awards vary according to age and degree of disablement (as assessed by a medical advisor on a percentage scale) and currently range from £3,051 for 10% disablement in a sufferer aged 77 or more to £86,607 for 100% disablement in a sufferer aged 37 or less.\(^{15}\) The total compensation payable by this scheme in 2010, the last year for which I have been able to find a figure, was £37,611,000.\(^{16}\)

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13 The T&N UK Asbestos Trust and The EL Trust: see https://tandnasbestos.org.uk.

14 The Act also covers other types of pneumoconiosis such as silicosis and kaolinosis, as well as byssinosis, a reactive airways disease of cotton, flax and hemp workers.


Only people who receive Industrial Injuries Disablement Benefit (IIDB) are eligible to receive a payment under the 1979 Act. IIDB is a non-contributory social security benefit paid to employees who become disabled through an accident at work or as a result of one of some 70 specified occupational diseases. The general minimum degree of disablement required is 14% (payable as 20%). For diffuse mesothelioma and asbestos-related lung cancer, disablement is stipulated to be 100%. There is a maximum payment of (currently) £168 per week, equating to an annual total of £8,736. IIDB may be combined with other social security benefits, such as Constant Attendance Allowance (maximum £134.40 per week), Exceptionally Severe Disablement Allowance (£67.20 per week) and either an Unemployability Supplement (£103.85 per week) or a Reduced Earnings Allowance (maximum £67.20 per week).17 So the total annual amount paid could be up to £24,619.40 (£473.45 per week).

(2) 2008 Mesothelioma Scheme

A separate scheme applies to those who suffer mesothelioma from non-occupational exposure to asbestos.18 It provides lump sums for:

- those exposed to asbestos from a relative (e.g. from their overalls)
- environmentally (e.g. living near a factory using asbestos)
- the self-employed
- those who can’t trace specific exposure to asbestos, but there is nothing to suggest that they were not exposed to asbestos in the UK.

The aim was to ensure faster compensation payments, including up-front financial support within six weeks.19 The cost of the compensation is met through compensation recovery whereby payments (under this scheme and under the 1979 scheme) are recovered by the State if a civil claim for compensation is subsequently successful.20 Payments under the 2008 scheme are intended to correspond to what can be afforded out of the projected compensation recovery amounts, and are supposed to increase as those funds allow.21

Current rates of compensation vary from £13,295 (for those aged 77 or over at the date of diagnosis) to £85,580 (for those aged 37 or under).22 The total amount of compensation paid under the scheme in 2010 was £8,006,000.23

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19 Child Maintenance and Other Payments Act 2008: Explanatory Notes, para 10 (referring to the Secretary of State’s announcement of proposals in March 2007).
23 Department of Work and Pensions (fn 16), 4
(3) Diffuse Mesothelioma Payment Scheme

This further scheme was introduced by the Mesothelioma Act 2014 and established by the Diffuse Mesothelioma Payment Scheme Regulations 2014, SI 2014/916, following a Department of Work and Pensions consultation of 2010. (As regards the Department’s rejection of a wider employer’s liability fund, see below.)

The scheme is intended to deal with the problem that employees negligently exposed by their employer to asbestos, who contract diffuse mesothelioma decades after the exposure, are often in practice unable to recover compensation: by virtue of the passage of time no solvent employer remains to be sued, and the employee is often unable to trace any insurer who was providing EL insurance to their employer at the material time.

The scheme makes payments to eligible people with diffuse mesothelioma and eligible dependants of people who have died from diffuse mesothelioma before making an application to the scheme. People will be eligible for a scheme payment if they were first diagnosed with diffuse mesothelioma on or after 25th July 2012 (which was the date when Government responded to the consultation and made its intentions clear) as a result of negligent exposure to asbestos at work in the United Kingdom. The scheme is only open to people who have not brought an action against a relevant employer or employer’s EL insurer because they are unable to do so. In addition, in order to be eligible to claim from the scheme, applicants must not have received damages or a specified payment in respect of diffuse mesothelioma and must not be eligible to receive a specified payment from another source.

The scheme is funded by a levy on insurance companies that are currently active in the EL insurance market. The amount of the levy to be paid by each insurer is determined by reference to each insurer’s market share in a recent 12-month period.

The scheme provided for by the Act does not allow for payments to be made to persons with long-tail industrial diseases other than diffuse mesothelioma. The Government stated that it considers this condition to be unique, in particular because of its near universal fatality, the speed of death following diagnosis and its causation arising exclusively from exposure to asbestos.

Payments under the scheme are in the form of a single, once and for all, lump sum. The amount of the lump sum was initially intended to be 80% of an average civil claim for mesothelioma, but the amount was increased to 100% of average civil claims for new diagnoses on or after 10 February 2015 under new compensation rules brought in on that date. This resulted in an increase of up to £54,000 a person. Payments now range from

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24 See http://mesoscheme.org.uk/.
26 Mesothelioma Bill [HL] Explanatory Notes
28 Ibid, para 15.
29 Ibid, para 17.
30 reg 19(2).
31 DWP Press Release, 10.02.2015 (‘Mesothelioma sufferers’ compensation boosted by extra £54,000’).
£87,061 (for those aged 90 and over at the time of diagnosis) to £271,120 (for those aged 40 and under).\(^{32}\)

(4) Contribution for Mesothelioma Claims

Additional compensation in respect of mesothelioma may be paid by the Financial Services Compensation Scheme (FSCS), but this is distinctive in that it makes payments to employers and their insurers rather than to the victims of the disease. It does so in cases where the employer (or insurer) cannot enforce its contribution (ie recourse) rights against other responsible persons on being found liable to pay damages in a tort mesothelioma claim.\(^{33}\) The same problem arises as for victims: the long latency period may mean that other responsible persons have ceased to trade or cannot be identified. This was the case, for example, in *Barker v Corus (UK) plc*,\(^{34}\) where insolvent employers were responsible for 83% of total asbestos exposure. The House of Lords in that case ruled that each employer’s liability should be proportionate to their contribution to the overall exposure, meaning that the defendant employer paid only 17% of full damages.\(^{35}\) This left the victim undercompensated, and Parliament legislated almost immediately to ensure that liability in mesothelioma cases would be ‘joint and several’ (ie solidary or *in solidum*).\(^{36}\) This relieves the victim of the risk of the insolvency (etc) of a former employer or the latter’s insurer. So, in *Sienkiewicz v Greif (UK) Ltd* (2011), where the defendant was responsible for only 15% of the exposure to asbestos, and 85% was environmental exposure, the claimant nevertheless recovered 100% damages.

As a quid pro quo, where an employer is unable to recover contribution or indemnity from other responsibility parties, the shortfall on recovery is to be made good out of the financial services compensation fund which (inter alia) guarantees payments in the event of an insurer’s insolvency.\(^{37}\)

Healthcare provision (vaccines and blood)

English law places significantly less reliance on compensation funds in the area of healthcare provision than French law.\(^{38}\) The two particular categories in which specific compensation rights are granted are vaccine damage and infection from contaminated blood.

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\(^{33}\) See further Oliphant, ‘Changing Landscape’ (n XX) para 63 ff.

\(^{34}\) [2006] UKHL 20, [2006] 2 AC 572.


\(^{36}\) Compensation Act 2006, s 3.


\(^{38}\) Simon Taylor, Medical Accident Liability and Redress in English and French Law (Cambridge University Press 2015) 64.
(1) Vaccine damage

A separate compensation scheme for vaccine damage was introduced by statute in 1979. The rationale was that vaccine injury is the very occasional price that society pays for the benefit of defeating disease through national vaccination programmes. The compensation entitlement maintains public trust in the system and encourages participation in it. (Vaccination is not compulsory.)

The scheme pays a fixed sum of £120,000, but the compensation entitlement is limited to cases of severe (ie 60% or greater) disablement resulting from vaccination against specified diseases. Despite criticism of the scheme in Parliament, there are no current plans to reform it.

(2) Infection with Hepatitis C or HIV by NHS blood

During the late 1970s and early 1980s more than 1,200 people with haemophilia were infected with HIV through their clotting factor treatment and around 100 people with other conditions were infected with HIV through treatment with NHS-supplied blood products or blood transfusions. A large proportion of the victims were also infected with Hepatitis C. This continued until heat treatment of blood products was introduced in 1985 and a screening test for blood donations was developed and introduced in 1991.

This healthcare disaster led in 1988 to the Government’s establishment of the first of a number of charitable trusts and not-for-profit companies which now provide compensation to victims out of funds provided on an ex gratia basis by Government. To early 2016, over £390 million has been paid (since 1988); the projected expenditure over the lifetime of the scheme is a further £570 million, with an extra £125 million earmarked for the introduction of reforms announced earlier this year.

For HIV, there are two charitable trust funds established and funded by government:

- Macfarlane Trust, established in 1987 (for haemophiliacs infected with HIV as a result of contaminated NHS blood products) (its work is now complemented by that of a not-for-profit company MFET Ltd, established in 2010)
- Eileen Trust, established in 1993 (for non-haemophiliacs infected with HIV through blood transfusion or tissue transfer)

These charities initially paid beneficiaries lump sums of £20,000, to which a further £60,500 was later added by way of out-of-court settlement of claims brought by haemophiliac HIV victims; this further payment was subsequently extended to others infected with HIV through NHS-supplied infected blood. In 2009, an annual payment (currently £14,749) was

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40 See HC Deb 24 March 2015 vol 594 col 441WH.
42 http://www.macfarlane.org.uk/
43 Department of Health (supra), ch 1.
introduced. There are also discretionary bereavement payments for dependants on low incomes.

For Hepatitis C victims, compensation came a little later and was initially unfavourable in comparison with that to victims of HIV. The main source is the Skipton Fund, a company established in 2004. This compensates for infection with Hepatitis C through treatment with NHS blood or blood products prior to September 1991. It pays lump sums of £20,000 plus (in severe cases) £25,000, but until 2011 it did not make annual payments (now £14,749) and provided no support to dependants. A Government review in 2010 highlighted discrepancies in the treatment of HIV and Hepatitis C and led to reforms, including the provision of further, targeted support for Skipton Fund beneficiaries and their dependants via a new fund managed by the Caxton Foundation, established in 2011. Annual payments were also introduced for Hepatitis C victims and the amounts paid were equalised.

The Department of Health initiated a further review of the schemes in early 2016. It criticised the outdated and confusing funding structure, based on five separate entities and requiring some victims to deal with more than one fund. It also criticised differences in payments and policies, as well as the lack of individualised assessment of beneficiaries. Its proposal was for a unified scheme run by a single body under which the existing flat-rate annual payments would be replaced by differential payment levels assigned following individualised assessment. The maximum annual payment would be fixed perpetually at £15,000 and not increased in line with inflation. The proposal is opposed by victims’ groups, who fear that most will be left worse off financially and in a position of uncertainty because of the unpredictability of individualised assessment.

Motor vehicle accidents (uninsured and untraced drivers)

The Motor Insurers’ Bureau was established by the insurance industry in 1946 in response to Ministry of Transport pressure. (Cynics suggest it was designed to forestall legislative intervention.) The agreement reached with the Ministry requires insurers to contribute, pro rata to the amount of their motor business, to a fund from which compensation is paid to victims of uninsured drivers. Compensation was extended to victims of untraced (‘hit and run’) drivers in 1968.

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44 www.skiptonfund.org.
45 Department of Health, ‘Review of the support available to individuals infected with Hepatitis C and/or HIV by NHS supplied blood transfusions or blood products and their dependants’ (2010). The review followed the rejection of Lord Archer of Sandwell’s call to pay Irish levels of compensation: see Written Ministerial Statement, Department of Health ‘Support for those affected by contaminated blood’ Thursday 14 October 2010, Anne Milton. See also Department of Health, Government response to Lord Archer’s Independent report on NHS supplied contaminated blood and blood products, 20 May 2009.
46 www.caxtonfoundation.org.uk
48 See haemophilia.org.uk
In 2014, the MIB settled 44,276 claims and paid compensation totalling £280.6 million. The cost of the scheme has reduced significantly in recent years: in 2015 the levy on members was £244m against a collection high of £417m in 2008.

The MIB actively pursues recovery of indemnity from the uninsured driver.

Criminal Injuries Compensation

The Criminal Injuries Compensation Scheme (CICS) provides compensation in respect of personal injury which is directly attributable to being a direct victim of a crime of violence. The scheme was established 1964, initially on a non-statutory basis; payments were ex gratia. The Scheme was given statutory foundations in 1988. It meets the obligation imposed by Directive 2004/80/EC relating to compensation to crime victims.

The rationale for the Scheme is sympathy for the innocent victim of crime. Government has consistently rejected the view that the compensation discharges a liability of the State. The Pearson Commission (in its report on Civil Liability and Compensation for Personal Injury) concluded that ‘compensation for criminal injury is morally justified as in some measure salving the nation’s conscience at its inability to preserve law and order’.

The Fund is financed from general taxation. Its finances are allocated by the Ministry of Justice.

Compensation was initially awarded at the full level of damages in tort but a statutory tariff was introduced 1996. Thereafter, the compensation recovered under the CICS has been calculated differently from that available by way of damages in tort law, and the tariff award no longer based on the personalised assessment undertaken in tort cases. The maximum award tariff award is £250,000. This can be supplemented by a contribution towards loss of earnings after the first 28 weeks of loss and other special expenses. The overall maximum is £500,000.
Calls for more extensive compensation entitlements for victims of terrorism after the 7/7 bombings in London in 2005 were rejected by Government, which reiterated that CIC is akin to charity rather than the discharge of a liability. However, in 2012, entitlement under the scheme was extended to British citizens and EU (etc) nationals resident in the UK who are victims of specific acts terrorism abroad. These include the Brussels airport attack of April 2016 and the Paris attacks of November 2015. The same payment entitlements are recognised as under the regular scheme and they are subject to the same maximum of £500,000.

The Scheme received 32,595 new applications in 2014-15. It made compensation awards totalling £176.6 million.

Financial services

(1) Financial Services Compensation Scheme (FSCS)

The FCSC was set up under the Financial Services and Markets Act 2000, becoming operational on 1 December 2001. It is the United Kingdom’s compensation scheme of last resort for customers of financial services firms authorised by the Financial Conduct Authority (FCA) or the Prudential Regulation Authority (PRA). The FSCS may pay compensation to customers of authorised financial services firms that fail. This will generally be because they have stopped trading and are unable to pay protected claims against them or likely to be ‘in default’. The aim is to preserve consumer confidence in the banking system and financial services sector generally. A sceptical opposing is view that the existence of a compensation scheme might mean that alternative options that might be more advantageous to investors, such as a rescue of the collapsed firm, are not explored.

The FSCS claims to have protected more than 4.5m consumers since 2001 and paid out more than £26bn in compensation. In 2015/16, it paid out £272m in compensation to consumers as a result of 32,000 claims. The scheme is funded by levies on firms subject to regulation in the financial services sector.

The scheme has three different components:
• Bank deposits are guaranteed up to £75,000 (or £1 million in the case of temporary large deposits, eg the proceeds of sale of one’s home or a compensation lump sum).63
• Protection against insurance company failures, with 100% protection for entitlements under compulsory motor or employers’ liability insurance, or under professional indemnity insurance; otherwise 90%.
• Protection in respect of other financial services, eg £50,000 for investments or for home financing (mortgages)

(2) Pension Protection Fund (PPF)64
The PPF provides financial protection for those whose pension funds fail or who are the victims of fraud. The main fund provides compensation to members of eligible defined benefit pension schemes, where the employer became insolvent on or after 6 April 2005, and there were insufficient assets in the pension scheme to cover the Pension Protection Fund level of compensation. It is supplemented by the Financial Assistance Scheme, offering relief to pension scheme members where their scheme started to wind-up between 1 January 1997 and 5 April 2005, and the Fraud Compensation Fund65 which pays compensation—paid for through a separate levy on all pension schemes—to members of work-based pension schemes of all types whose employers become insolvent and their schemes have lost out financially because of dishonesty. Between 1 April 2015 and 31 March 2016, the fund paid £616 million to pension scheme members.66

Agriculture
The Animal Health Act 1981 states that the Secretary of State for Agriculture may cause to be slaughtered any animal affected with foot and mouth disease or another specified disease or suspected of being affected, and any other animal that appears to have been exposed to the infection. The Act requires farmers of slaughtered animals to be paid compensation in the value of the animal prior to infection or slaughter (or, in the case of diseases other than foot and mouth, in an amount specified by order of the Secretary of State). Compensation is also to be paid in respect of infected material such as straw destroyed during a cull.67 The aim is to encourage farmers’ participation in slaughter programmes so as to protect agricultural business in general, while relieving those who bear the cost for the general benefit.

64 http://www.pensionprotectionfund.org.uk/.
65 Established as the Fraud Compensation Board by the Pensions Act 1995, ss 78 to 86, repealed with effect from 1 September 2005 but substantially re-enacted in ss 182 to 189 of the Pensions Act 2004, with further regulation by Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) Regulations 2005, SI 2005/2151 and Occupational Pension Schemes (Fraud Compensation Payments and Miscellaneous Amendments) Regulations 2010, SI 2010/483
Following a major outbreak of foot and mouth disease in 2001, £1,158 million was paid in compensation in respect of the slaughter of over 4.2 million animals; the average payment to the farmers affected was around £125,000; the highest payment was over £4 million.68

In the same outbreak, a separate, voluntary Livestock Welfare (Disposal) Scheme was introduced for animals who were not directly affected by foot and mouth disease but could not be moved to alternative accommodation or pasture nor sent to market because of movement restrictions and could therefore have been at risk of suffering because of overcrowding. The scheme made payments to farmers £205 million for the slaughter of two million animals.69

**Rejected Compensation Scheme Proposals**

Notwithstanding the introduction of the various compensation schemes described above, the United Kingdom has proved reluctant to follow the example of other countries in introducing no-fault compensation schemes of wider scope.

**A New Zealand-style accident compensation scheme**

Though the well-known Accident Compensation Scheme introduced in New Zealand in 197470 itself drew inspiration from the work of British academic Terence Ison, specifically his 1967 book *The Forensic Lottery*, and had only recently been established at the time of the British Royal Commission into Compensation for Personal Injury chaired in the 1970s by Lord Pearson, Pearson interpreted narrowly its terms of reference so as to preclude it from making a recommendation for or against the adoption of a New Zealand-style scheme in the UK, and the matter has never been close to the legislative agenda again. It may in any case be that Pearson’s own sympathies were with the existing UK approach based on a mix of tort law and social security, and that he was personally dubious about the abolition of tort effected in New Zealand.

**Motor no-fault**

A state-administered no-fault compensation scheme for road accidents was first given notable advocacy by two scholars, Elliott and Street, in 1968.71 In 1978, the Pearson Commission repeated their call72 and was echoed in its turn by the Civil Justice Review in 1988,73 but no reform materialised. In 1991, there was a further proposal from the Lord Chancellor’s Department (LCD), limited to small claims of £2,500 or less.74 The LCD believed

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69 Ibid, para 4.22 ff. See further http://footandmouth.fera.defra.gov.uk/secure/fmdscience/lwds.cfm
70 For a useful overview, see Stephen Todd, ‘Forty Years of Accident Compensation in New Zealand’(2011) 28 Thomas M Cooley Law Review 189.
that the range of road accident victims eligible for compensation would be wider than under the tort system, and that disputes over liability for minor injuries would be greatly reduced. The scheme was to be funded and operated by the insurance industry. Again, the proposal was never adopted.

**No-fault compensation for medical injuries**

A report of a public inquiry into a healthcare scandal in Bristol recommended in 2001 the abolition of the law of clinical negligence and its replacement with no-fault compensation.\(^{75}\) A particular advantage of such a scheme, said the report, was to encourage the open reporting of adverse events and near misses.

However, the Chief Medical Officer, in a follow-up report of 2003,\(^{76}\) stated that a general no-fault scheme for medical injuries would be too expensive, and recommended instead a (much) narrower scheme for birth injuries resulting in severe neurological impairment. Even this more limited suggestion was not taken up by Government, which instead enacted a ‘NHS Redress’ scheme of dubious utility, which is more a semi-formalised mechanism for settling low-to-medium value tort claims than a distinct compensation scheme. Though enacted,\(^{77}\) the Scheme has not yet been implemented in England (though it was introduced in Wales).\(^{78}\)

**An employers’ liability insurance bureau (ELIB)**

It has been suggested from time to time that there should be an equivalent to the Motor Insurers’ Bureau (MIB) in the context of compulsory employers’ liability insurance.\(^{79}\) The creation of an ELIB has been strongly urged by unions and other groups, but consistently rejected by government. In 2012, it reiterated that it considered that the running costs would be disproportionate to benefits. Government, however, recognised that mesothelioma was a ‘unique case’, which led to the creation of the Diffuse Mesothelioma Payment Scheme 2014 (above).\(^{80}\)

**Injuries associated with product-related development risks**

In response to a European Commission’s Green Paper on Liability for Defective Products, the UK Government announced in January 2014 that it has no plans to introduce a special compensation scheme for the victims of defective products in cases where the development risks defence applies. It noted that it would be difficult to assess the likely demand on such a fund.\(^{81}\)

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76 Chief Medical Officer, ‘Making Amends: a consultation paper setting out proposals for reforming the approach to clinical negligence in the NHS’ (2003).
77 NHS Redress Act 2006.
78 National Health Service (Concerns, Complaints and Redress Arrangements) (Wales) Regulations 2011, SI 2011/704.
Possibilities for the future?

Notwithstanding the failed initiatives just mentioned, it would be too soon to write off the scope for further innovation in the UK in the creation of new compensation schemes. A number of possibilities may be considered.

A compensation fund for uninsurable natural disasters

A Belgium Law of 12 July 1976 addresses the issue of compensation of damage caused to private property by natural disasters.\textsuperscript{82} According to art 1 of the Law, specified heads of direct material damage to private personal property or land is to be compensated under specified legal conditions. The damage must occur on Belgian land and be caused by specified natural phenomena. Entitlement extends only to damage that was not and could not be insured against. The Fund thus operates as a primary fund and embodies the idea of national solidarity towards the victims of natural disasters.

The UK is exposed to the broadly same risk of natural disaster as its Continental neighbours, and its insurance market also experiences difficulty with the provision of cover in particular contexts (eg homes built on flood plains). But it prefers to address these issues through ad hoc solutions. For example, following flooding in 2013–14, Government announced a package of different forms of support for those affected, including grants to homeowners and businesses to fund flood resilience or resistance measures in respect of flooded property; relief against business rates (taxes) for flooded properties; council tax discounts for flooded homes; and a business support scheme for businesses losing trade as a result of the flooding. The measures were designed to complement existing insurance cover (eg by covering the amount of any excess in the insurance policy) and their benefit can be denied to those who failed to insure themselves.\textsuperscript{83}

The problem of obtaining insurance cover in flood-affected areas has been addressed by cooperative action between Government and insurers, initially under a Statement of Principles dating from 2000.\textsuperscript{84} Under the Principles, insurers had a commitment to continue the cover of their existing customers, but this was intended only as a temporary measure as new insurers could decide to whom they offered flood insurance. Consequently, under a new initiative taken with Government blessing, insurers established a new joint reinsurance fund, Flood Re, in respect of flood damage claims.\textsuperscript{85} Flood Re became operational on 1 April 2016 and it is estimated that it will assist 350,000 households in the UK at risk of flooding.

According to the website: ‘Flood Re takes the flood risk element of home insurance from an insurer in return for a premium based on the property’s council tax band. In addition, we would charge the insurer an excess on the flood part of the policy of £250. Because Flood Re’s

\textsuperscript{82} See XXX, in this volume.
\textsuperscript{83} Department for Communities and Local Government, ‘Flood Support Schemes: Guidance Note’ (updated December 2014).
\textsuperscript{84} ‘Flood Insurance Statement of Principles’ (2000).
\textsuperscript{85} http://www.floodre.co.uk/.
activities are subsidised by a levy on insurers of £180m, the premium we charge insurers is below the rates insurers would normally charge on properties at the highest risk of flooding.

_A compensation fund for technological disasters_

A Belgium Law of 13 November 2011 provides a model for the creation of a compensation scheme for bodily injury and pain and suffering resulting from a technological accident. Where the accident has a tortious cause, the scheme is subsidiary in character and seeks reimbursement from the tortfeasor for sums paid out by way of compensation to the victims. Where no such recourse is possible, the fund becomes a primary fund and offers the victims compensation as a matter of social solidarity.

Again, in the UK there is likely to be a preference for ad hoc responses to particular incidents in which the tort remedy proves inadequate, rather than the enactment of a general statutory framework.

_Insurance for the vicissitudes of life_

The possible model here is the form of personal accident insurance known as the _garantie contre les accidents de la vie_ offered in French markets since 2000. In the UK, Patrick Atiyah has even gone so far as to argue that ‘[t]he action for damages for personal injuries should simply be abolished, and first-party insurance should be left to the free market.’ I doubt that many would share his enthusiasm for the _abolition_ of the tort remedy, but I think that it would be desirable to encourage the growth of vicissitudes of life insurance as a _complement_ to other sources of support. However, we should not be blind to its limitations. In particular, moral hazard problems prevent insurers offering full compensation for all the losses for which one would be entitled to damages in tort—notably, damages for loss of future earnings. In serious injury cases, the victim may lose decades of remunerative employment, but no first-party insurance I know of will compensate for all that lost income. In fact, the French policies I have consulted seem to limit compensation to a maximum of Euro 1 million—not a negligible sum, but well below the future economic loss component of the largest personal injury damages awards.

_Targeted intervention by statute or ex gratia compensation to ensure equality in distribution of public burdens_

Perhaps the most realistic hope for the UK is for a more coherent approach to intervention by the creation of compensation schemes, whether on a statutory or ex gratia basis. One guiding principle that no doubt underpins many interventions to date, but has been insufficiently enunciated, is the need to ensure equality in distribution of public burdens: _égalité devant les charges publiques_. It is striking that the official Treasury guidance for creating an ex gratia compensation scheme makes no (even implicit) reference to such principle. Under the rules of public finance, establishing an ex gratia public compensation

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87 See XXX, this volume.
scheme requires advance Treasury approval. But the only guidance provided on the establishment of compensation schemes seems to envisage them as a response to maladministration or service failure, and does not address compensation to ensure the fair distribution of public burdens. I would therefore propose that the public finance rules be amended so as to allow for the creation of compensation schemes where a benefit to society at large has a cost to particular persons, and compensation to such persons is justified by the need to ensure public participation in a general programme of risk reduction or simply by the desire to express solidarity to victims of disaster.

Conclusion

As the above discussion shows, the United Kingdom’s approach to compensation schemes is ad hoc and unprincipled. The basis for singling out specific groups for special compensation is rarely enunciated and may simply not exist. The provisions of different schemes, including the benefits they offer, differ considerably—again, without any obvious justification.

Numerous anomalies exist. For example, funds guaranteeing tort compensation rights are accepted in some areas but not others. The Motor Insurance Bureau guarantees tort compensation rights for those injured by the negligence of uninsured and untraced drivers, and the 2014 Diffuse Mesothelioma Payment Scheme guarantees the rights of those exposed to asbestos during the course of employment who are unable to recover compensation for their erstwhile employers because the latter is insolvent and uninsured or cannot be traced. But, at the same time as accepting the desirability of guaranteeing tort compensation to the victims of mesothelioma, Government has rejected the idea of an Employers’ Liability Insurance Bureau for the protection of all employees suffering financially because their employer failed to comply with the obligation to insure.

Where compensation schemes are created, there is a suspicion in many cases that the main motivation was to forestall liability claims against the State for its supervisory failures, as with criminal injuries compensation (bearing in mind the courts’ denial of any police duty of care in investigating or preventing crime). The special compensation arrangements for vaccination damage and for infection with Hepatitis C or HIV from blood or blood products are perhaps other examples.

Government also seems to be more ready to embrace funds to protect general business interests, such as through financial services compensation and pensions protection, or the provision of compensation for the slaughter of diseased animals, than to compensate for personal injury. Social solidarity seems not, or only rarely, to be a reason for the creation of such schemes.

It seems therefore that there is an urgent need to re-assess the basis on which compensation schemes are created outside the tort and social security systems. As stated above, a key

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89 HM Treasury, Managing Public Money (2013, revised 2015) para 2.3.4
guiding principle could be the need to ensure the fair and equal distribution of public burdens, which should be accepted into English law so as to provide a more principled basis for the creation of new compensation schemes, whether statutory or ex gratia, in the future.