Town Planning and the Tort of Breach of Statutory Duty

by

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The remedies available to a litigant in the field of administrative law are confined to those provided by the statute creating the administrative tribunal, supplemented in some circumstances (e.g. where there has been a jurisdictional error, error on the face of the record or breach of natural justice) by the supervisory jurisdiction of the Supreme Court exercised through the prerogative writs and the powers of declaration and injunction. For the most part these are adequate remedies. However, they are required to be of general application and occasionally cases arise where these review remedies are quite inappropriate. When that situation occurs the plaintiff may very well find that the maxim which provides "where there is a right there is a remedy" is somewhat hollow-sounding. One of the primary reasons for this is the inability of the Courts to award damages to a plaintiff in lieu of or in addition to issuing a prerogative writ. In many cases these writs are sought in situations which exemplify a failure on the part of the tribunal concerned to observe the law and as often as not this failure amounts to a breach of statute. In the field of tort such a breach may in certain circumstances provide a plaintiff with a right to damages and it is proposed to examine in this paper, the possibility of a successful action being brought against a local body for such a breach in the context of the Town and Country Planning legislation.

The question as to when a breach of a statutory duty will give rise to the right to maintain a civil action is one which has been the subject of much debate, both in and out of the courts, over the last fifty years. There is disagreement amongst the commentators as to the

basic nature of the tort,[1] and the number of confusing and often irreconcilable decisions on the availability of this cause of action would indicate that judges too have had difficulty in determining when the action on the statute will lie.[2]

The fundamental issue is simply whether Parliament intended by the Act to give a right of action in tort.[3] The means of ascertaining that simple issue create the difficulty. The judge is required to search for an expression of Parliament's intention on a matter upon which, invariably, neither Parliament nor the draftsman have given any consideration at all. Much will depend therefore, on the attitude of the particular judge to a particular case and upon that judge's view of the requirements of public policy.

Rules of statutory interpretation do not afford much assistance in this enquiry, although decisions are usually expressed as being pursuant to those rules, the judges not wishing explicitly to declare that public policy has prevailed. Perhaps the only rule that is valid is that proposed by Lord Simonds in *Cutler* v. *Wandsworth Stadium Ltd.*[4] when he stated:

> . . . the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law in which it was enacted.

As a guide to ascertaining the often elusive intention of Parliament the judges have developed a number of presumptions or rules which assist in determining whether the action in tort is available. These are by no means rigid rules but are intended to be general indications only. In the ultimate, the decision will very largely depend on the judge's personal view of the merits of the claim and the effect recognition of a cause of action is likely to have.

Professor Street has noted[5] that many of the decided cases can, for the most part, be regarded as judicial decisions of policy, whether breaches of certain provisions should be compensated for in damages. In some areas it is easier for the courts to determine the intention of Parliament than it is in others. Thus where employer/employee relationships exist and the statute concerns itself with safety of workers, the courts have not been hesitant to allow an action on the statute.[6]

[1] See Thayer, "Public Wrong and Private Action" (1914) 27 Harv. L.R. 317; Morris, "The Role of Criminal Statutes in Negligence Actions" (1949) Col. L.R. 21; Glanville Williams, "The Effect of Penal Legislation in the Law of Tort" (1960) 23 M.L.R. 233; Fricke, "The Juridical Nature of the Action Upon the Statute" (1960) 76 L.Q.R. 240.

[2] See (for example) *Lochgelly Iron & Coal Co.* v. *McMullen* [1934] A.C. 1; c.f. *London Passenger Transport Board* v. *Upson* [1949] A.C. 155.

[3] *Street on Torts* (4th ed., 1968), 269.

[4] [1949] A.C. 398, 407.

[5] Op. cit., 269.

[6] Idem.

No quarrel can be found with this acceptance of a right to sue, and it is doubtful that its application in this field is ever likely to be challenged.

The difficult areas lie in those statutes which cannot be said to be concerned with preserving personal safety, i.e. the prevention of personal injury. There are of course a vast number of these. Breach of them may cause 'damage' in the wider sense of that word, i.e. to members of the public, and it is their rights to an action which present the greatest problem in determining whether an action was intended. The Town and Country Planning Act 1953 is within this area.

Before embarking upon a closer examination of that Act, it may be advantageous to consider the various rules the judges have developed to assist in determining this difficult question. They are considered in detail in all the major texts on Tort and this survey will be brief.[7]

The first relevant matter is said to be the state of the pre-existing law. If the common law affords a means of obtaining adequate compensation to persons aggrieved then the statute will not usually confer an additional cause of action.[8] If, however, the statute re-enacts a duty already subsisting at common law the plaintiff will generally be entitled to proceed either under the statute or at common law, subject to there being no other factors which would tend to negative that right.[9]

A plaintiff must also be able to establish that the Act did in fact create a private right. This will be easier to do where the duty breached is imposed for the benefit of a particular ascertainable class of persons of which the plaintiff is one. This is the principal rationalisation for the acceptance of industrial safety legislation[10] as supporting an action. However, this is a presumption only and the mere fact that the statute is shown to be directed at the public generally will not *per se* deprive a plaintiff of an action.[11] However, it will make it an exceedingly difficult task. The courts have been reluctant to allow actions to be brought where public duties are concerned. This is perhaps influenced by the impracticalities of the situation, for many cases allowing a remedy to the public at large might open the courts to increased litigation and thus a restrictive

[7] Fuller analysis may be found in Street, op. cit., Ch. 14; *Salmond on Torts* (15th ed. 1971), 318; Winfield, *Law of Torts* (8th ed., 1967), Ch. 8.

[8] *Phillips* v. *Britannia Hygenic Laundry Co. Ltd.* [1923] 2 K.B. 832, and see also Street, op. cit., 274 n5.

[9] *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1859) 6 C.B. N.S. 336, 356.

[10] E.g. Machinery Act 1950.

[11] As is shown by *Phillips* v. *Britannia Hygenic Laundry Co. Ltd.* [1923] 2 K.B. 832.

approach has been taken. Thus in *Phillips* v. *Britannia Hygenic Laundry Co. Ltd.* Atkin L.J. observed:[12]

> . . . the question is whether these regulations, viewed in the circumstances in which they were made and to which they relate, were intended to impose a duty which is a public duty only, or whether they were intended, in addition to the public duty, to impose a duty enforceable by an individual aggrieved.

This approach has wide judicial support[13] and was a deciding factor in the recent case of *Gardiner* v. *McManus*,[14] where Quilliam J. held that a breach of the Traffic Regulations 1956 did not confer a right upon the plaintiff, since the regulations imposed public duties directed towards no particular individual or class of persons. Thus something more than a mere breach of the statute must be established.

A third factor is whether the statute provides a specific remedy itself. If it does do so, then, prima facie, that is the only remedy. The court is entitled to consider the adequacy of the remedy and should it be of the opinion that it is insufficient it may well allow an action on the statute. This becomes a question of degree, coupled with elements of policy.

In addition to bringing his complaint within one of these categories, a plaintiff must of course, prove causation and damage (unless the breach is actionable *per se*) and must establish that the duty is mandatory. No element of discretion can be present, for discretion creates an element of decision in the bearer of the power which he cannot be compelled to exercise. If that is the case then there cannot be a breach of a duty because the 'duty' does not necessarily exist.[15] This does not of course prevent an action in negligence being sustained if, having elected to carry out the discretion conferred by the statute, the appropriate standard of care is not maintained.[16]

It must be emphasised that none of these matters are conclusive. In the many cases on the subject, different judges place more stress on some factors than do others. The fact situation in each case is of vital significance in the ultimate, and the over-riding feature is the intention (if any) that can be deduced from the particular statute, viewed as a whole.

Turning to a consideration of the exercise of statutory powers vested in local bodies by virtue of the Town and Country Planning

[12] Ibid., 842.
[13] See *Rochester (Bishop)* v. *Bridges* (1831) 1 B. & Ad. 847; *Pasmore* v. *Oswaldtwistle Urban Council* [1898] A.C. 387; *J. Bollinger* v. *Costa Brava Wine Co.* [1960] Ch. 262; *Sephton* v. *Lancashire River Board* [1962] 1 W.L.R. 623.
[14] [1971] N.Z.L.R. 475.
[15] Street, op. cit., 273.
[16] *Fisher* v. *Ruislip-Northwood Urban District Council and Middlesex County Council* [1945] K.B. 584.

Act 1953, an endeavour will be made to apply these principles to this legislation with a view to formulating an opinion as to the likely outcome of an action on the statute in this context.

The principal purpose of this legislation appears to be the control of the development of land, and responsibility for planning is vested in the local authorities of particular areas. Parliament has seen fit in this legislation to curb the rights of the landowner to do as he will with his land within the bounds of the common law, in the interests of the public at large. As part of this policy it has accordingly provided that it shall be illegal to develop land in certain ways without the consent of the local authority. Provision is made for the compilation of planning schemes and for the formal process of obtaining dispensations and consents to departures from such schemes. The local councils are entrusted with very wide powers to decide issues on the merits although certain procedural duties are cast upon them by the legislation concerned. An Appeal Board is created to which parties concerned have rights of appeal where dissatisfied with a decision of the Council, and, as indicated earlier herein, the Supreme Court may exercise its discretionary powers of supervision over both Council and Appeal Board where necessary.

The local bodies are thus possessed of a very important power by virtue of this Act. Decisions reached by them may concern issues of substantial economic involvement and it would be reasonable to expect that the courts would demand strict compliance with duties imposed upon them in such circumstances. If they are to have the right to dictate to the landowner the manner in which he may or may not develop his property in a way which may be detrimental to their neighbours, then strict compliance with the Act would seem a logical requirement. The real question however, is whether the courts would regard it as enough to justify an action in tort for damages where non-compliance can be proved.

Under certain sections the councils have power to determine issues in a discretionary manner. Examples are sections 28C, 35, 38 and 38A, where, in applications made under them, councils "may allow or refuse" same. These powers are clearly discretionary and, it is submitted, do not impose any mandatory duty upon the Council concerned sufficient to support any action for breach of the statute. These are matters on the merits, left to the council to determine, and provided they do so in accordance with the Act and principles of natural justice, which have been held to apply in this context,[17] they cannot be susceptible to challenge other than on appeal pursuant to

[17] *Denton and Others* v. *Auckland City and Another* [1969] N.Z.L.R. 256, 259.

the Act. Only if there has been a jurisdictional error or an error of law on the face of the record will the supervisory powers of the court be invoked and even then only as a court of review, not as a court of appeal.[18] It is therefore submitted that complaints of this nature may justifiably be put to one side as being incapable of supporting an action on the statute.

The mandatory duties which the local authorities have appear to be procedural in nature. They are, however, very important procedural duties since they are the basis of the council's jurisdiction to determine the issue on the merits. The Act gives very extensive powers of objection to the public at large, much wider, apparently, than those granted in the comparative legislation in England and Australia.[19] If the public are given these rights by Parliament then it is the duty of the Council to see that they are observed since any breach may have very far reaching effects for individual persons.[20] The Council is required to cause notice of applications to be advertised, to cause copies of same to be served upon persons particularly affected and to grant objectors the right to be heard. Failure to do so would, it is submitted, amount to a jurisdictional error on the authority of *Anisminic* v. *Foreign Compensation Commission*[21] and would make the defaulting council amenable to *certiorari* and any of the other writs which might be found to be appropriate. This was in fact the conclusion Roper J. reached recently in *Godber* v. *Wellington City*[22] where the advertisement published was held to have been so defective that the public could not have known what property the application referred to, and hence the council had not complied with the Regulations and thus never had jurisdiction. Prohibition and certiorari were issued.

As has already been made clear, it is essential to consider the particular legislation as a whole when attempting to determine whether a right of action in tort is intended. The express intent of Parliament is not set out and an examination must be conducted using the rules and presumptions previously discussed.

An examination of the pre-existing law is of little assistance in this context. The Act has not protected or re-enacted in legislative form any common law right. Rather it has taken one away, viz., the right

[18] *Rex* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 K.B. 338.
[19] See Robinson, *Law of Town and Country Planning* (2nd ed., 1968), 192; *Attorney-General* v. *Birkenhead Borough & Others* [1968] N.Z.L.R. 383.
[20] For example, they effect rights to compensation under s.38A.
[21] [1969] 2 A.C. 147.
[22] [1971] N.Z.L.R. 184.

to do as one wishes with one's own land.[23] There simply is no comparable duty at common law. A landowner had certain remedies against persons using land in a manner which might, for example, constitute a nuisance but the Act has not interfered with these. They are still available, but lie not against a Council approving a certain use but against the person embarking upon such use, if a right capable of protection at law is being infringed.

The second consideration is whether the statute can be construed as creating a private right in the plaintiff. It is submitted that this is the very vital consideration in the majority of cases. Essentially this follows because a plaintiff must be able to establish some tangible interest or *locus standi* in order to succeed. Where a statute is construed as conferring public rights only, not directed to any particular class or individual, it is very much harder for a plaintiff to establish that Parliament intended that he should have a right to sue. The approach of the Courts is that the Attorney General as *parens patriae* is the appropriate person to ensure observance of the law on behalf of the public when it is not being observed by a public body with a duty to enforce it.

What, then, are the nature of the rights created by the Town and Country Planning Act 1953? In *Attorney-General and Another* v. *Birkenhead Borough Council and Another*[24] Richmond J. had to consider this very question. He concluded that the Act was more in the nature of imposing public duties than private rights, and that a breach of the Act did not give rise to an action in tort for damages. His Honour was much influenced by the observations made in respect of the comparative English legislation. In *Buxton* v. *Minister of Housing*[25] Salmon J. (as he then was) had noted that:

> The scheme of the legislation . . . is to restrict development for the benefit of the public at large and not to confer new rights on any individual members of the public, whether they live close to or far from the proposed development.

and this statement was referred to in *Gregory* v. *London Borough of Camden.*[26] Similar observations had been made in earlier cases. In *Attorney-General* v. *Bastow*[27] Devlin J. (as he then was) stated:

> . . . (these provisions) enable the local authorities to exercise powers over the use of land. . . . [T]hat provision is plainly made with the object of conferring a right upon the public because Parliament considers that the public is entitled not to have land used in ways which may be considered to be unhealthy or offensive . . . .

[23] *Bradford Corporation* v. *Pickles* [1895] A.C. 587.
[24] [1968] N.Z.L.R. 383.
[25] [1961] 1 Q.B. 278, 283.
[26] [1966] 1 W.L.R. 899.
[27] [1957] 1 Q.B. 514, 519.

Lord Goddard C.J. adopted the same approach in *Attorney-General* v. *Smith and Others*.[28]

One of the factors which influenced Richmond J. in the *Birkenhead Borough* case[29] was the effect recognition of this cause of action could have. He considered it would produce "an astonishing result if all persons claiming to be affected . . . could bring an action for damages against anyone . . . who (in this particular case) commenced a use which detracted from amenities."

This may be true, but it is, in the writer's respectful submission, a most inadequate means of dismissing consideration of the issue. The very fact that the New Zealand Act gives wider *rights* of objection to the public than does the English equivalent, a fact expressly recognised by the learned judge, is in itself a distinguishing feature setting our legislation apart from the English Act. Members of the public in New Zealand have greater rights to protect. However, Richmond J. was unimpressed by Counsel's submission that "those entitled to object" were a class and consequently dismissed the claim for damages. The Attorney-General as *parens patriae* was granted a declaration to the effect that the land was being used contrary to the planning scheme, though it is submitted this would be poor consolation to the plaintiff who His Honour had found suffered special damage herself.

It is true that the action for breach of statutory duty against the Council failed by reason of the very technical approach adopted to the wording of section 38A, viz.: no "application" had in fact been filed therefore the Council could not have breached the Act. But this means that by having misdirected itself on the question whether a use was a detraction from amenities or not, the Council avoided liability and deprived the plaintiff of her right to object. The declaration granted would have enabled the Council to take certain steps under sections 36 or 37, but the Court did not consider the plaintiff could obtain any other relief.

This "public duty" consideration was held conclusive by the Full Court in *Miller & Croak Pty. Ltd.* v. *Auburn Municipal Council*.[30] A unanimous court held, on a demurrer, that no action for damages lay against a council for a breach of a local planning scheme ordinance. The court held[31]

> . . . that whatever duties and powers are imposed upon or given to a local council by the planning ordinance are imposed and given for the benefit of the public generally and not for the benefit of individuals or particular classes of individuals, and that negligent performance of those

[28] [1958] 2 Q.B. 173.
[29] [1968] N.Z.L.R. 383.
[30] [1960] S.R. (NSW) 398.
[31] Ibid., 400.

> duties or a negligent exercise of those powers an action for damages will not lie at the suit of an individual thereby affected. . . . [T]he ordinance is the legislative expression of the town and country planning scheme . . . intended to be carried out for the benefit of the public at large and not for the benefit of an individual or limited class of individuals.

Although this case does not appear to have been cited in the *Birkenhead Borough* case, it is obvious that the judge in that case was inclined to this view. In the writer's opinion it is equally applicable in this country.

The final consideration is whether the Act itself provides a remedy. This is a factor which also weighed heavily in the *Birkenhead Borough* case. The Act does, it must be conceded, provide a fairly elaborate and comprehensive enforcement procedure for breaches of the Act *by persons other than the Council.* It is these emphasised words that are relevant. It is an offence for persons to fail to comply with the district schemes and, as was pointed out by Richmond J. in the *Birkenhead Borough* case, such a breach could be visited with monetary penalty, injunction and/or removal of the offending building. No objection is taken to this. It is quite correct. But there are no provisions or remedies provided which will rectify breaches by the Councils themselves. It is all very well for the council to have the power to cause a building to be removed; however, what concerns a plaintiff is that by the time he becomes aware that the Act has been breached in a manner vital to his own interest, the building may be half or fully completed. Agreed, such a plaintiff, who could prove special damage, could institute proceedings for a breach of the Act —see *Pahiatua Borough Council* v. *Sinclair and Another*,[32] *Lionel Lawrence Ltd.* v. *Waitemata County Council*[33] and the *Birkenhead Borough case*—but to force the Council to take such a step as to cause removal of the building is an entirely different matter. Such a remedy may not even lie. Mandamus might be available but as soon as the plaintiff seeks a prerogative remedy he embarks on the sea of discretion and there might be many compelling factors, amongst them greater hardship to the defendant owner, which would cause the Court to refuse the remedy sought. Poor consolation in a case where special damage has been established!

It is submitted that greater consideration should have been given by the court to the adequacy of the remedy prescribed by the Act or at common law. It must be remembered that these rules are not conclusive; if the remedy available is inadequate in all the circumstances, then the Court may justifiably ignore the presumption and allow an action for a breach of the statute. The decisions in *Reffell* v.

[32] [1964] N.Z.L.R. 499.
[33] [1965] N.Z.L.R. 415.

Surrey County Council[34] and *Groves* v. *Wimborne*[35] are ample authority for that proposition.

Of course it might be argued that a breach of the Act by the Council would be an offence by it against section 107 of the Crimes Act 1961. This argument was put in *Pease* v. *Eltham Borough*,[36] but McGregor J. did not feel disposed to give it much weight, although he held that he was not required to consider it.

The Courts appear to be adopting a very benevolent approach to errors and omissions of a procedural type in administrative law, and this is a factor which will if continued make it very difficult to establish this right of action. For example, in *Munnich* v. *Goldstone Rural District Council*[37] Lord Denning voiced the opinion that only substantial compliance with the provisions of the Town and Country Planning Act was required.[38] A similar approach was adopted in *Wilson Rothery Ltd.* v. *Mt Wellington Borough*[39] and the former case was cited with approval in *Godber* v. *Wellington City*.[40] Yet these procedural matters affect the exercise of rights by the public and it seems quite incongruous to adopt a policy of benevolence towards their breach. This attitude will, it is submitted, create further obstacles in the path of a litigant who seeks to establish an action for breach of statutory duty.

Conclusions

It is submitted that the attitude of the courts to this legislation as exemplified in case law to date, is that the Act creates public rights only which are to be protected by the Attorney-General on behalf of the public. Much stress has been laid on his powers to bring relator actions and upon the powers of the Appeal Board to review decisions under section 42(5) where new information comes to hand (a provision which Roper J. did not consider sufficient to prevent certiorari in the *Godber* case). Perhaps this attitude springs from unexpressed recognition by the judiciary that most people will make enquiries at an early stage on matters which might affect them, or will seek legal advice when it becomes apparent that the Council has failed in its duties. The Courts seem to have adopted the attitude that the pre-

[34] [1964] 1 W.L.R. 358.
[35] [1898] 2 Q.B. 402.
[36] [1962] N.Z.L.R. 437.
[37] [1966] 1 W.L.R. 427.
[38] Regulation 4 of the Town and Country Planning Regulations 1960 endorses that approach in New Zealand.
[39] [1967] N.Z.L.R. 116.
[40] [1971] N.Z.L.R. 184.

rogative writs are adequate remedies since in most cases the plaintiff will be more concerned to have the Council prevented from doing or permitting some act to be done, or to oblige the council to observe the law. In many cases this will be true.

But, it is submitted that these writs have two patent inadequacies. First, they are discretionary and as such cannot be said to be a sufficient guarantee of protection of the rights vested by law in persons particularly affected by a breach of this Act. Secondly and most importantly, they are useful only where prompt action is taken, for delay may mean that their effective value is lost. All too often, the Courts are faced with a situation where the grant of a remedy will effect an injustice upon the defendant or a third party. Cases like *Kennedy* v. *Auckland City*[41] in which many breaches of city ordinances were established, but most were dismissed under the *de minimis* head, primarily because the Court was powerless to grant an alternative remedy which would not involve removal of the building; and *Attorney General and Robb* v. *Mt Roskill Borough*[42] where dispensations under a scheme were held ultra vires, yet no remedy followed for much the same considerations, exemplify this and show the total inadequacies of these writs as suitable remedies. This would indicate that it is time the Courts were empowered to award damages in lieu in appropriate cases, although it seems that the Public and Administrative Law Reform Committee is not yet convinced that this reform is necessary.[43]

In conclusion, it is submitted that the courts are unlikely to recognise the action on the statute as an indirect means of obtaining this remedy in the context considered, regrettable though this may be. Unless something is soon done to alleviate the obvious injustices which may occur and which the cases demonstrate have already occurred, the maxim that introduced this paper could very well become "where there is a right there might be a remedy", and that would make a mockery of the law.

[41] [1966] 2 N.Z.T.C.P. 297, noted in 5 T.P.Q. (1966) 6.
[42] [1971] N.Z.L.R. 1030, noted in [1971] N.Z.L.J. 488 and 25 T.P.Q. (1971) 17.
[43] See the Committee's fourth report presented to the Minister of Justice in January 1971, in particular at p. 15 discussing an additional remedy. Refer also Northey "An Additional Remedy in Administrative Law." [1970] N.Z.L.J. 202.