THE LIABILITY OF ADMINISTRATIVE AUTHORITIES

A research paper prepared by Mr E .J. Haughey, MA, LLM, BCom, Barrister of the Supreme Court of New Z ealand, for the Public and Administrative Law Reform Committee.

OCCASIONAL PAMPHLET NUMBER NINE

LEGAL RESEARCH FOUNDATION
SCHOOL OF LAW
AUCKLAND, NEW ZEALAND
1975

TABLE OF CONTENTS

INTRODUCTION

Mr E.J. Haughey, MA, LLM, BCom, formerly Crown Counsel and a Judge of the Maori Land Court, was commissioned to write a research paper for the Public and Administrative Law Reform Committee on the award of damages against administrative authorities for their acts and omissions. The paper has been completed and has been given preliminary consideration by the Committee.

The Legal Research Foundation, believing that Mr Haughey's paper should be made available to a wider audience, with the approval of the author and the Committee, has agreed to publish it as an occasional pamphlet. The Foundation thanks Mr Haughey and the Committee for the opportunity of publishing the results of his valuable research.

In paragraph 56 of his report Mr Haughey refers to the proposal in the United States for the abolition of sovereign immunity in actions for "specific relief" against the government. One of the members of the Administrative Conference, Professor Walter Gellhorn, very kindly arranged for the Committee to be advised of recent developments in respect of this matter and to be furnished with a large amount of very informative material relating to it. This material included a most valuable report on the subject by Professor Roger C. Cramton of the University of Michigan which deals at considerable length with the development of the doctrine of "sovereign immunity" in the United States. It touches, however, only briefly and incidentally on the remedy of damages in respect of administrative acts and omissions, which is, of course, the main theme of Mr Haughey's paper.

Early this year a Bill was introduced in the United States Senate to give effect to the proposal in question by abolishing the defence of sovereign immunity with respect to actions in Federal courts seeking relief other than money damages and stating a claim against a government agency or officer acting in an official capacity. It would seem that the Bill is still before Congress.

The Public and Administrative Law Reform Committee has indicated to the Foundation that the Committee would welcome comments on Mr Haughey's paper.

P.G. Hillyer, Q.C.
Chairman, Legal Research Foundation

September 1975

THE LIABILITY OF ADMINISTRATIVE AUTHORITIES

(Working paper by E. J. Haughey,
MA, LLM, B.Com, a Barrister &
Solicitor of the Supreme Court
of New Zealand)

I. INTRODUCTION

1. I have been asked to prepare a working paper on the question of damages against administrative authorities for their acts and omissions; and, in particular, to examine and report on the following matters:

(a) The extent to which an action at present lies for damages for wrongful acts and omissions of public officials and bodies, including the Crown;
(b) The position in selected countries e.g. the United Kingdom, Australia, Canada, U.S.A., France and Denmark;
(c) Proposals for reform in other common law jurisdictions;
(d) How far and in what circumstances remedies for controlling administrative acts and omissions should include the right to damages;
(e) The need to redefine for the purpose of public law any of the concepts of private law e.g. negligence, negligent misstatement, malice or fraud.

2. These matters are concerned with that important area of our legal system where two great primary fields of law, administrative law and the law of tort, meet and impinge on each other.[1] Remedies in English administrative law fall into two distinct groups. On the one hand there are the public (and "prerogative") remedies of certiorari, prohibition, mandamus and habeas corpus; and on the other, the private law remedies of damages, injunctions and declaratory judgments (see Bernard Schwarts and H. W. R. Wade, *Legal Control of Government* (1972) p. 216; and K. C. Wheare, *Maladministration and Its Remedies* (1973) p. 31). In the past the emphasis has been on the former group of remedies but the primary object of those remedies (except habeas corpus) was to "make the machinery of government work properly rather than to enforce private rights". Today this emphasis has shifted and the private law remedies have assumed a much greater importance. In 1949, in a celebrated statement, Lord Denning said:

> "Just as the pick and shovel is no longer suitable for the winning of coal so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up-to-date machinery, by declarations, injunctions, and actions for negligence." (*Freedom under the Law,* 126.)

3. It would appear that the defects which have hitherto existed in the law with regard to these matters have been largely due to the failure on the part of English lawyers and legal thinkers to appreciate the true nature and functions of administrative law and the part that it should play in the legal system. This in turn appears to have arisen at least in part from their neglect of the distinction between private law and public law (of which administrative law forms a most

important part). With respect to the nature of this distinction Sir T. E. Holland, one of the earliest of the modern English writers on analytical jurisprudence, said:

> "In private law the State is indeed present, but it is present only as arbiter of the rights and duties which exist between one of its subjects and another. In public law the State is not only arbiter, but is also one of the parties interested. The rights and duties with which it deals concern itself of the one part and its subjects of the other part . . . The conception of public, as opposed to private, law is due to the Romans, who say of it 'ad statum rei Romanae spectat', . . . and, as a matter of fact, include in it also the law of crime. With this extended meaning the phrase has been accepted, and is in daily use, in the legal speculation and practice of the continent of Europe, but unfortunately finds no equivalent in our insular terminology. An English lawyer, when he had been made to understand the idea, which to his foreign colleagues, is at once rudimentary and indispensible, would probably come to the conclusion that it covers the topics which are recognised in this country as 'Constitutional law', 'Ecclesiastical law', 'Revenue law', and 'Pleas of the Crown'. It is therefore somewhat remarkable that perhaps the most masterly summary of the nature of public law is to be found in the writings of an English Lord Chancellor."

Holland then cites a passage in Latin from Bacon's works in which that writer sets out the essential features of *ius publicum.* (*Jurisprudence* (12th ed. 1916) pp. 366-7).

4. It is only in comparatively recent years that administrative law has emerged as a recognised branch of English law. It seems that the first book to be published in England under the title, *Administrative Law,* was that written by Dr F. J. Port in 1929 (see preface to the first edition of Garner's Administrative Law, 1963). It was not until the fourth edition of Halsbury's Laws of England, now in the course of publication, that a title on this subject *eo nomine* has appeared in that work. For the purposes of the present edition of Halsbury administrative law is understood to mean "the law relating to the discharge of functions of a public nature in government and administration. It includes functions of public authorities and officers and of special tribunals, judicial review of the exercise of those functions, the civil liability and legal protection of those purporting to exercise them and aspects of the means whereby extra-judicial redress may be obtainable at the instance of persons aggrieved" (vol. 1, para 1).

II: THE EXTENT TO WHICH DAMAGES FOR ADMINISTRATIVE WRONG DOING ARE AT PRESENT AVAILABLE

5. Professor J. F. Garner, a leading English authority on administrative law, has summarised the present law relating to damages for the wrongful acts and omissions of administrative authorities in the following words:

> "The Courts may also be asked to review the acts of the administration by the ordinary process of litigation; the Crown, a local authority or a statutory corporation may sue or be sued for damages in breach of

contract, quasi-contract or tort, in accordance with normal common law principles, subject only to a few special rules . . . . . It may be possible to sue for damages on a breach of a statute where a duty has been imposed. Damages may also be recoverable in a case where a public officer does some act which to his knowledge amounts to an abuse of his office and he thereby causes damage to the plaintiff." (*Administrative Law* (4th ed. 1974) p. 186)

See also Halsbury, *Laws of England* (4th ed. 1973) Vol. 1, paras, 191 *et seq*; S. A. de Smith, *Judicial Review of Administrative Action* (3rd ed. 1973) pp. 20-22, 280-281, 295-297, and 473-478; H. W. R. Wade *Administrative Law* (2nd ed. 1967) pp. 44, 98-102, and 142-144; E. C. S. Wade and Godfrey Phillips, *Constitutional Law* (8th ed. 1970) pp. 678 *et seq;* Griffith and Street, *Principles of Administrative Law* (4th ed., 1967), Ch. VI: Law Commission Working Paper on "Remedies in Administrative Law", No. 40 of 1971; B. C. Gould, "Damages as a Remedy in Administrative Law" (1972) 5 N.Z.U. Law Review, 105-122; and Miss G. Ganz, "Compensation for Negligent Administrative Action", [1973] Public Law 84-99.[2]

6. It is of course a well known fact of legal history that at common law the Crown was under no direct liability of this nature. This is generally attributed in the main to the old maxim that the "King can do no wrong" (see Currie, *Crown and Subject* (1953) p.1). But in England this maxim was never "allowed to run riot". Ways and means were found to give effect to the famous principle enunciated by Bracton in the thirteenth century that the King is under God and the law, because it is the law that makes the King. The problem was really a procedural one: how to make the King answerable in his own courts. This was achieved in part by the institution of the remedy known as a petition of right. This remedy, which was nominally subject to the King's consent (which in practise was given by the Attorney-General's fiat) was however confined to claims in contract and claims to property and was not applicable to those sounding in tort. This anomaly in the law became very important in the nineteenth century when the courts developed the law of vicarious liability, and the Government became a large-scale employer. Justice was in fact done by rigorous adherence to the rule that the Crown's immunity was no defence to the servant personally. But the Government could not stand by and leave its officials to pay for unlawful trespasses and other tortious acts if committed on Government business. It therefore adopted the practice of conducting the defence and paying the damages wherever the official was acting in the course of employment and in such a situation that a private employer would have been liable (see Bernard Schwartz and H. W. R. Wade, *Legal Control of Government* (1972) p. 186).

7. There was, however, increasing dissatisfaction with this system of enforcing tortious claims against the Crown and from time to time there were protests from the Bench and in the press against the Crown's technical legal immunity in respect of this matter. In 1921 the Lord Chancellor appointed a committee which in 1927 presented a draft Bill proposing to abolish the petition of right and make the Crown freely suable in tort (Cmd 2842 [1927]); but the report of this Committee was pigeon-holed. In 1946 in *Adams* v. *Naylor* [1946] A.C. 543 the House of Lords condemned the existing practice in those

situations where in the absence of the defendant being "nominated" by the Crown the plaintiff could never have sued him as a servant of the Crown and the proceedings were accordingly obviously fictitious. Shortly afterwards the Court of Appeal dismissed a case (*Royster* v. *Cavey* [1947] K.B. 204) on the grounds that it had no jurisdiction over a suit, against a nominal or fictitious defendant. This, together with outcries against the large number of accidents involving Government vehicles during the war of 1939-45 and fears (which were in fact unfounded) that the nationalisation programme of the post-war Labour Government would increase the immunities enjoyed by the Crown led to the Lord Chancellor introducing in the House of Lords in February 1947 a Government sponsored Crown Proceedings Bill based on the draft Bill of 1927. Up to this time any measure of this nature had been resisted on the argument that juries would award extravagant damages against the Crown; but in any event by 1947 juries had disappeared in England from most civil actions. The Bill, which became law on 31 July 1947, and came into operation on 1 January 1948 abolished the petition of right and made the Crown suable in tort (see Street, *Government Liability* (1953) pp. 5-6).

8. Prior to the passing of the foregoing Act there had been a considerable divergence between the law in New Zealand and that of England, with regard to the liability of the Crown in tort. The immunity of the Crown in tort at common law had, of course, been inherited in New Zealand but various statutory inroads of a far reaching nature had been made on that immunity although many of the special procedural advantages enjoyed by the Crown still remained. (See Currie, *Crown and Subject* pp. 2-5; and D. P. Neazor *Crown Liability in Tort* (1967) pp. 1 *et seq* [an unpublished thesis submitted by Mr Neazor for the degree of Master of Laws]). About the end of the 1920's certain proposals together with the draft of a Bill, for further widening the Crown's liability in tort had been made by an Auckland lawyer, the late Mr R. L. Ziman, but no legislative effect was ever given to these proposals (N.Z.L.J. Vol. 5, 62 (1929) and Vol. 9, 248 (1933); and the whole matter lapsed. In 1947 however the question was raised in Parliament of introducing legislation similar to the contemporary English measure; and this was in fact done by the enactment of the Crown Proceedings Act in 1950 (see Neazor, *op. cit.* pp. 13-19).

9. The central feature of this Act is that the Crown is to be "subject to all those liabilities in tort" to which it would be subject "if it were a private person of full age and capacity" (see s.6(1) and cf. s.3(2)(b)). There is however a saving as to prerogative and statutory powers particularly in relation to defence and the armed forces.

10. The Crown is made vicariously liable in respect of torts committed by its servants or agents (s.6(1) (a)); and it is *directly* liable in respect of:–

(i) any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer (s.6(1)(b)); and
(ii) any breach of the duties attaching at common law to the ownership, occupation, possession, or control of property (s.6(1)(c)).

11. Where the Crown is bound by a statutory duty which is binding also upon

persons other than the Crown and its officers, then, subject to the provisions of the Act, the Crown shall in respect of a failure to comply with that duty, be subject to all those liabilities in tort (if any) to which it would be subject if it were a private person of full age and capacity (s.6(2)). The purpose of this provision is to ensure, firstly, that the Crown shall only be liable for breaches of statutory duty which bind the Crown and, secondly, that the Crown shall not be liable for breaches of statutory duties which bind the Crown but do not at the same time bind private persons. (See Barnes, "The Crown Proceedings Act 1947" in 26 Can. Bar Rev. (1948) 387). It is not designed to create a new department of tort by turning constitutional and administrative law into a system of duties owed to individuals (see Glanville Williams, *Crown Proceedings* (1948) 48; and cf. Neazor *op. cit.* 31-32).

12. Where any functions are conferred or imposed upon an officer of the Crown as such either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown (s.6(3)). It appears that this provision was intended to overcome the effects of such decisions as *Stanbury* v. *Exeter Corporation* (1906) 2 K.B. 838 (wrongful seizure of sheep by sanitary inspector); *Enever* v. *The King* (1906) 3 C.L.R. 969 (arrest by a police constable); and *Baume* v. *The Commonwealth* (1906) 4 C.L.R. 97 (collector of customs passing entries). In these cases no vicarious liability arose because the servant's right to form an independent judgment excluded the operation of the maxim *respondeat superior* (see Neazor, p. 33 and pp. 40-41).

13. The Crown is entitled to the benefit of any enactment which negatives or limits the amount of liability of any department or officer of the Crown in respect of any tort committed by that department or officer (s.6(4)); and is exempted from liability in respect of any thing done or omitted by any person while discharging or purporting to discharge any responsibilities of a judicial nature or in connection with the execution of judicial process.

14. Restrictions are placed on the application of the general provisions contained in s.6 in relation to industrial property (s.7); in relation to death or disablement of members of the New Zealand Armed Forces (s.9 as later enacted); and in relation to the various matters specified in S.35.

15. Recently Schwartz and Wade expressed the following views on the operation of the English legislation on this subject:

> "The liability of the British government to ordinary civil actions might be said to be one of the major *non-problems* in our area. [emphasis added] So far as it can practicably be done, the State has been put into the position of an ordinary litigant. This was done formally by the Crown Proceedings Act 1947; but long before that date it was admitted that the Crown should accept ordinary civil liability, and there was an efficient administrative system for bringing disputed cases before the Courts and for avoiding injustice. The Act of 1947 brought the law into conformity with the practice. It would be too much to expect that it should be word

perfect. But it has operated very smoothly for a quarter of a century; and in an area where one might expect to find numerous exceptions, it is remarkably comprehensive." (*Legal Control of Government* (1972) p. 185)

These remarks would appear to be equally applicable to the operation of the corresponding legislation in New Zealand.

16. The Crown Proceedings Act does nothing to take away the personal liability of a servant, officer, or agent of the Crown for his own torts (see Currie, p. 85; Neazor, pp. 103 *et seq;* and Schwartz and Wade p. 189). In a well-known passage Dicey described this liability in the following terms:

> "Every official from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment or to *the payment of damages* [emphasis added] for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military governor, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person. (*Law of the Constitution* (9th ed.) pp. 193-4)

17. With regard to the circumstances in which the Government should stand behind an officer who has become involved in personal liability in respect of administrative action Mr Currie said:

> "The Crown is usually bound to indemnify its agent for tortious acts done under authority. There being no legal obligation, the extent of this duty has not been defined by the courts. It is conceived that it refers to a subordinate carrying out instructions which he might fairly regard as proper ones, and to a superior acting in a way that might legitimately receive the government's approval although declared by the courts to be actionable. An analogy suggests itself with such activities as have from time to time been covered by an Act of Indemnity. The moral obligation can hardly extend to cases where the servant has involved the Crown by personal negligence in the course of his employment, or by doing authorised acts in a forbidden manner." (*op. cit.* p. 86)

It is noteworthy that in America there has been a marked tendency in recent times to eliminate altogether any personal liability in law on the part of public officials (see Bernard Schwartz, *An Introduction To American Administrative Law* (1958) p. 209; and para. 52 hereof).

18. The Crown Proceedings Act also did not affect the position of those administrative authorities which were not Crown servants or agents (or "instrumentalities of the Crown"). Administrative authorities of this nature have never enjoyed the immunity of the Crown in tort and have always been liable (subject to any special statutory provision or special rules affecting them) for their own wrongful acts and for those of their servants and agents committed in the course of their employment in the same way as a private individual or company (see *Mersey Docks and Harbour Board* v. *Gibbs* (1866) L.R. 1 H.L. 93). In many border-line cases however it has been difficult to draw the dividing line between

the two types of administrative authority; and there is a large amount of case law on the subject (see Currie, *op. cit.,* Ch. V and Benjafield and Whitmore *Principles of Australian Administrative Law* Ch. X.) For instances in which an award of damages has been made against administrative bodies in New Zealand, see D. E. Paterson, *An Introduction to Administrative Law in New Zealand* (1967) p. 198.

III: THE COMPARATIVE POSITION IN OTHER COUNTRIES

A. United Kingdom

19. The general position with regard to the tortious liability of administrative authorities in the United Kingdom has already been dealt with above.

20. In England the Law Commission, which was established under the Law Commissions Act 1965, has to some extent at least been concerned with the various matters which arise for consideration in this present paper. In May 1969 they made a submission to the Lord Chancellor recommending that a broad inquiry be made into administrative law by a Royal Commission or a Committee of comparable status (Law Com. No. 20). Preparatory to this submission they prepared and circulated an explanatory working paper in which they referred to a seminar on Administrative Law which had been held at All Souls College, Oxford in December 1966 (Law Com. 13, also published as Appendix A in the submission to the Lord Chancellor). With regard to this seminar the Commission said:

> "Its intention was to bring together a number of lawyers and administrators in a critical examination of the present study of [Administrative Law]. In the light of the views expressed at that seminar and of subsequent studies, it has appeared to the Commission that administrative law has strong claims for inclusion in some form in a future programme of the Commission as a subject for examination with a view to reform. The purpose of this working paper is to refer shortly to some of the criticisms of administrative law in this country which have been brought to the attention of the Commission at the All Souls Seminar and otherwise, and to consider what aspects of administrative law might be appropriate for inclusion in a future law reform programme." (Law Com. 13, para. 2).

21. The Commission then went on to mention that one of the four main lines of criticism of English administrative law which had been brought to their attention was:

> " . . . the opinion . . . that whilst the existence of administrative law as a separate topic has come to be recognised, we still lack a sufficiently developed and coherent body of legal principles in this field. Views on this matter vary considerably. It has been suggested that we need a body of law which, inter alia, makes the remedy for damages more widely available where administrative acts are found to be unlawful, and which recognises in the fields of contract and tort that the administration as a party is different from a private party and, as in a number of other countries, provides special rules of public law accordingly. It has also been suggested that there is a need to re-define for the purposes of public law many of

the concepts of private law, e.g., negligence, including misstatement, malice, fraud etc." (Ibid., para. 8).

22. In their submission to the Lord Chancellor the Commission referred to a number of questions dealing with different aspects of a possible inquiry into administrative law. These questions included the two questions set out hereunder:

> "(C) How far should remedies controlling administrative acts or omissions include the right to damages?
>
> (D) How far, if at all, should special principles govern . . . the tortious liability of the administration?" (Law Com. No. 20 para. 3).

The Lord Chancellor however decided that the time was not ripe for a full scale inquiry of this nature. Instead, he requested the Commission to review the existing remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure. This limited investigation, on "Remedies in Administrative Law", formed the subject matter of the Commission's working paper No. 40 of 1971.

23. The Commission doubted if their terms of reference strictly covered the question whether damages should be awarded for administrative acts or omissions which, although wrongful, did not fall within the category of wrongs remediable by an award of damages against a private person and where there was no right to an award of damages for a breach of statutory duty. They did however in the last section of their paper (paras. 145-151) refer to this problem, because they thought that it was not really satisfactory to attempt to reform the judicial remedies without giving some consideration to it (para. 5).

24. With regard to the present law relating to damages in administrative law they summarised the position as follows:

> "The existing law is that if an administrative authority commits a tort or breach of contract it is as liable to an action for damages as a private individual is. Thus, an action for breach of statutory *duty* against a public authority will lie in the same circumstances as it would against the citizen, i.e., when it can be shown that the statute is intended to confer a right of action on individuals. No action will lie for the mere failure to exercise a discretionary *power,* even though the damage suffered is injury to the person or property. On the other hand there is some suggestion that where an administrative authority with discretionary powers acts maliciously to an individual's loss (including economic loss) it may be liable to pay damages. The scope of this 'administrative' tort is as uncertain as its existence. Will it be committed whenever an administrative authority wrongly exercises its discretion to the loss of an individual, e.g. by acting for extraneous purposes or taking into account irrelevant factors in reaching a decision? There is Canadian authority for liability in such situations; in the leading case [*Roncarelli* v. *Duplessis* [1959] 16 D.L.R. (2d) 689] the plaintiff recovered damages from the Prime Minister of Quebec Province for persuading the Liquor Commission to cancel his licence to sell liquor. This act was done without legal authority on the part of the defendant, and for the ulterior purpose of punishing the plaintiff, a Jehovah's Witness, for acting as bailsman for a large number of

members of the sect when they were charged with the violation of various by-laws." (para. 146)

25. It was considered by the Commission that although the present state of the law was in some doubt, that did not appear to them to be the main argument for looking at the question of damages together with their proposals for the reform of the judicial remedies. It was rather that it might be thought impossible satisfactorily to solve some of the problems posed by the reform of the judicial remedies without having regard to the question whether damages should be available or not e.g. the short time limit which it was in the public interest to impose for challenging the validity of administration action.

26. The Commission however then went on to point out that there were also "much broader grounds" for looking at the circumstances in which the citizen has a right to damages against the administration. They said:

> "It is arguable that no system of remedies can afford justice to the individual who has suffered loss as a result of an administrative decision adverse to him unless it makes provision for the recovery of damages (see the Report by 'Justice', *Administration under Law* (1971), paras. 62, 73-5).[3] We have already expressed the view that this problem must be looked at as one aspect of the inquiry into administrative law which we envisage would be undertaken by a Royal Commission or by a committee of comparable status. But we do not think that our terms of reference allow us to look at this very important and difficult topic at this stage. We, therefore, do not go beyond raising the question whether the reforms we have proposed with regard to the form and procedure of existing remedies can be satisfactorily implemented with regard to the question when damages should be available as a remedy against the administration. We should welcome views on this question." (para. 148).

27. I am unaware of any further progress which may have been made by the Commission with regard to this matter. I am also unaware of any other proposals, whether in the United Kingdom or any other common law jurisdiction, for dealing with the reform of the law on this matter.

28. In a recent case however in the House of Lords Lord Wilberforce made the following *obiter* observations on the subject of damages in respect of administrative liability:

> "Underlying the use of the phrase [sc. 'void ab initio'] in the present case, and I suspect underlying most of the reasoning in the Court of Appeal, is an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action. It is this which requires examination rather than some supposed visible quality of the order itself.
>
> In more developed legal systems this particular difficulty does not arise. Such systems give indemnity to persons injured by illegal acts of the administration. Consequently where the prospective loss which may be caused by an order is pecuniary, there is no need to suspend the impugned administrative act; it can take effect (in our language an injunction can be given) and at the end of the day the subject can, if necessary, be compensated. On the other hand, if the prospective loss is not pecun-

iary (in our language 'irreparable') the act may be suspended pending decision – in our language, interim enforcement may be refused.

There is clearly an important principle here which has not been elucidated by English law, or even brought into the open. But there are traces of it in some [statutory] areas . . . These are examples of at least a partial recognition in our law that the subject requires protection against action taken against him or his property under administrative orders which may turn out to be invalid. How far this principle goes need not, and cannot be decided in the present case." *Hoffman-La Roche* v. *Secretary of State for Trade and Industry* [1974] 2 All E.R. 1128, 1148-9.

B. **Australia**

29. In Australia, the Crown in right of the Commonwealth and in right of each of the States has been made liable to action in tort both by Commonwealth legislation and by State legislation. (See Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed. 1971) p. 276; and P. W. Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (1971) p. 8. The principal provisions of the relevant statutes, which vary in detail from jurisdiction to jurisdiction, are set out in the Appendix to Professor Hogg's book.

30. By the Commonwealth of Australia Constitution Act 1900 it was provided that the legislature of Australia "may make laws conferring rights to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power". Part IX of the Judiciary Act 1908 gave a right to sue the Commonwealth both in contract and tort without petition of right. It was provided that in any suit to which the Commonwealth or a State was a party "the right of the parties shall as nearly as possible be the same . . . as in a suit between subject and subject".

31. In New South Wales there is a long standing provision (now contained in the Claims Against the Government and Crown Suits Act 1912) under which "any person having or deeming himself to have any just claim or demand whatsoever" was authorised to bring his claim before the court by way of petition. On any such petition the rights of the parties were to be "as nearly as possible the same . . . as in an ordinary case between subject and subject".

32. The litigation which has arisen in respect of these legislative provisions of the Commonwealth and of New South Wales has produced a body of case law which throws considerable light on various problems involved in the exposition and development of the law relating to tortious liability of administrative authorities (see Neazor, *op. cit.*, Ch. II; Hogg, *op. cit.*, Ch. 4; and Benjafield and Whitmore, *op. cit.*, Ch. XI).

33. Under these particular provisions one area of difficulty which has been eliminated has been the issue of whether the Government is subjected by the statute to direct liability or only to vicarious liability for the torts of its servants. In fact the Australian courts have held that the Crown can be liable in both respects for their wrongful acts or omissions (Neazor, p. 40).

34. One exception to this general rule can arise however, where a servant is

designated by statute to perform a particular duty and in so doing to form an independent judgment. In such a case there can be no direct liability because the servant and not the State is charged with responsibility; and there is no vicarious responsibility because the servant's right to form an independent judgment excludes the operation of the maxim, *respondeat superior.* In these cases the servant is doing his job in his own way: *Enever* v. *The King* (1906) 3 C.L.R. 969 (arrest by a police constable); and *Baume* v. *The Commonwealth* (1906) 4 C.L.R. 97 (collector of customs passing entries); cf. *Stanbury* v. *Exeter Corporation* [1905] 2 K.B. 838 (defendant Corporation, who had appointed a sanitary inspector, could not be sued for his tort in seizing sheep, when delegated legislation imposed the duty upon him directly); and *Fisher* v. *Oldham Corporation* [1930] 2 K.B. 364 (wrongful arrest by a police officer appointed by the Corporation's Watch Committee). It would appear that s.6(3) of the present New Zealand Act was primarily designed to overcome the effect of decisions of this nature (Neazor, p. 33).

35. With regard to the general rule itself the Privy Council held in *Farnell* v. *Bowman* (1887) 12 App. Cas. 643 that the New South Wales legislation extended the right to make claims against the Government to claims in tort, including claims for damages for a tort committed "by the Government by its servants"; see also *Baume's* case (in so far as it dealt with matters other than those placed by the statute on the shoulders of the officer personally, but attributable to or imposed on the Commonwealth or the Department generally); *Field* v. *Nott* (1939) 62 C.L.R. 660, 670; and *Zachariassen* v. *The Commonwealth* (1917) 23 C.L.R. 166; but cf. *Parker* v. *The Commonwealth* (1965) 112 C.L.R. 295, 301 (an action based on negligence arising out of the sinking of H.M.A.S. "Voyager" in 1964) where Windeyer J. appears to have deviated from the "dual approach" (Neazor, pp. 41 *et seq.*).

36. Taken at their face value, statutory provisions such as those just referred to give the Courts considerable room for creative activity in determining and fashioning the Government's liability in tort (see Neazor pp. 44 *et seq.).* In these Australian provisions the only qualification which might require the finding of a private analogue before an action can succeed against the Crown is the phrase "as nearly as possible . . . as in a suit between subject and subject". In this situation a Court would appear to have open to it a choice of three courses of action viz.:

(a) To apply a strict requirement of a private analogue before accepting that a claim lies against the State;

(b) To require only that the plaintiff be able to set up as a basis of his claim one of the recognised causes of action in tort, whether or not the circumstances giving rise to the claim can be duplicated between private persons. This course leaves the Court a good deal of flexibility particularly in actions based on negligence;

(c) To attempt to create a Government tort liability, perhaps on a basis of recompense for harm done. (Neazor, p. 44).

37. In Australia the High Court has adopted the middle course and has established as its approach the testing of the Government's liability by reference to the recognised causes of action as they apply between private parties so that

to succeed against the Crown, the litigant must present his case on the basis of such a cause of action. This, however, is not a requirement that a complete private law analogue must be demonstrated before an action will be against the State. If this were the case there would be no action in respect of wrongful customs' seizures or unauthorised acts done in the course of administration of regulatory legislation. Such actions have in fact been admitted by the High Court. (Neazor, p. 45)

38. In *James* v. *The Commonwealth* (1938-39) 62 C.L.R. 339 Dixon J. (as he then was)affirmed the private law cause of action approach when exploring the effect of the invalidity of legislation on claims in tort against the Government. See also *McClintock* v. *The Commonwealth* (1947) 75 C.L.R. 1, 19, and *Asiatic Steam Navigation Co.* v. *The Commonwealth* (1956) 96 C.L.R. 397, 416-7 (an action in respect of improper navigation of a Commonwealth ship, not a warship). (Neazor, pp. 45-48)

39. This approach will not, however, provide a remedy in every case of detriment caused by the Crown's operations, even with the removal of the effect of the distinction between direct and vicarious liability. Lacunae have been demonstrated in Australia in respect of actions for both breach of duty and negligence. Distinctions have been made between statutory provisions which regulate matters as between the Commonwealth and its officers and those which regulate functions as between the Crown and subject; see *Zachariassen* v. *The Commonwealth* (1917) 24 C.L.R. 166. In the case of provisions of the former class an individual could not base an action against the servant, but he could base one directly against the Commonwealth on provisions of the latter class. A similar distinction arises between an officer's responsibility to the Government as his employer for the manner in which he performs his duties and his responsibility to every person who might be thereby affected; see *Field* v. *Nott* (1939) 62 C.L.R. 660, 669 (legal aid officer employed by the Government); *Carpenter's Investment Trading Co.* v. *Commonwealth* (1952) 69 W.N. (N.S.W.) 175 noted in (1952) 26 A.L.J. 320 (no duty owed to plaintiff by servants of Commissioner of Taxation); *Revesz* v. *The Commonwealth* (1951) 51 S.R. (N.S.W.) 63 (Minister of Customs and his departmental officers not liable for delay in issuing licences for importation of goods); and *Wool Sliping and Scouring Co.* v. *Central Wool Committee* (1920) 28 C.L.R. 51 (no right of action maintainable in respect of an omission by defendant committee to perform an act the obligation to perform which had been laid upon it by certain war regulations). (Neazor, pp. 48-50).

40. Although the facts of a case can be fitted within the framework of a cause of action available between private persons the right to bring an action in tort against the State may be denied for reasons of social policy in respect of some peculiarly governmental actions. In particular a distinction has been made between state activities which are analogous to profit earning private corporations and those in respect of which no such analogy can be drawn. See *Davison* v. *Walker* (1901) 1 S.R. (N.S.W.) 196 (no liability in respect of nuisance from a prison); *Enever* v. *The King* (1906) 3 C.L.R. 969, 988; *Field* v. *Nott* (1939) 62 C.L.R. 660, 673; *Gibson* v. *Young* (1900) 21 N.S.W. R. 7 (injury to prisoner caused through negligence of gaol officials); and *Shaw Savill & Albion Co.* v.

The Commonwealth (1940) 66 C.L.R. 344; but cf. *Evans* v. *Finn* (1904) 4 S.R. (N.S.W.) 297 (Government liable in respect of bullets flying from rifle range to physical danger of nearby residents); *Quinn* v. *Hill* [1957] V.R. 439, 447-452; *Hall* v. *Whatmore* [1961] V.R. 225, 234; and *Administration of Papua & New Guinea* v. *Leahy* (1960-61) 105 C.L.R. 6. (Neazor, pp. 50-64).

C. **Canada**

41. Canada has been slow to abolish completely the common law rule that the Crown was not liable in tort despite the fact that limitations on the right of action against the Crown, both in the right of the Dominion and in the right of the provinces, and, where such right existed, the prescribed procedure, had been commented on and criticsed by the legal profession in that country for many years; see D. Park Jamieson, "Proceedings by and against the Crown in Canada" (1948) 26 Can. Bar Rev. 373-386.

42. Under the Canadian Petition of Right Act 1927 (which replaced legislation first passed in 1875) the Crown was suable in a separate Court, the Court of Exchequer, on petition of right but so far as liability in tort was concerned this was confined to negligence (see *Palmer* v. *The King* [1952] 1 D.L.R. 259); and until it was abolished by the Exchequer Act 1938 there was also a limitation that any such liability was restricted to negligence "upon any public work". In 1953 a Crown Liability Act was passed by the Dominion legislature under which the Crown in right of Canada is made liable for damages in tort on much the same lines as those of the Crown Proceedings Acts in England and New Zealand.

43. Since then most of the provinces of Canada have passed similar legislation but up till the end of 1967 (and I have not been able to ascertain the position since then) the rule that the Crown was not liable in tort still applied in the provinces of British Columbia, Newfoundland and Prince Edward Island.

44. There are several important cases which have come before the Canadian courts on the question of the liability of administrative authorities for damages for administrative wrongdoing which are of notable significance for other jurisdictions. Although *Roncarelli* v. *Duplessis* (1959) 16 D.L.R. (2d) 689 (referred to elsewhere in this paper) was decided in the civil law jurisdiction of Quebec, it is in effect the leading authority on the right to damages where such an authority wrongly exercises its jurisdiction to the loss of an individual (see para. 146 of Law Com. No. 40 set out in paragraph 24 hereof; and cf. a note by E. C. S. Wade in (1951) 29 Can. Bar Rev. 665).

45. In *Windsor Motors* v. *District of Powell River* (1969) 4 D.L.R. (3d) 155 the plaintiff company was given a licence by a licence inspector to set up a used car business which was later found to be invalid because it contravened a zoning by-law. The company was awarded damages for the financial loss it suffered under the *Hedley Byrne* principle. This case was distinguished in *Welbridge Holdings* v. *Metropolitan Corporation of Greater Winnipeg* [1971] 22 D.L.R. (3d) 470, where the plaintiff claimed damages because of having to abandon building an apartment block when a zoning by-law of the Corporation on which it had relied was declared invalid for a procedural defect. In rejecting the

claim the Court held that the *Hedley Byrne* case did not, nor would any underlying principle which animated it, reach the case of a legislative body or other statutory tribunal with quasi-judicial functions, which in good faith exercise of its powers, promulgates an enactment or makes a decision which turns out to be invalid because of anterior procedural defects.

D. **The United States**

46. In the United States the law with regard to the liability in tort of the State has proceeded along different lines from those in the United Kingdom and New Zealand and the protection afforded the citizen in that country is not as comprehensive as that available in these latter countries. (See Schwartz, *An Introduction to American Administrative Law* (1958) Ch. IX: Schwartz & Wade, *Legal Control of Government* (1972) pp. 193-201; Street, *Government Liability* (1953) pp. 7-13 *et seq;* and 55-56; and Neazor, *op. cit.* Ch. III (comprehensive discussion of the relevant case law) and Chapter IV (personal liability of public officers).

47. It is pointed out by Schwartz and Wade (as well as by Street) that one of the mysteries of legal evolution was the retention by the United States for so long of the doctrine of Sovereign immunity, that is, the doctrine that government may not be sued without its consent. As interpreted in America this principle was applied to all governments, from the federal government down to the smallest units of state and local government. In 1946, however, the Federal Tort Claims Act was enacted by Congress. Under this Act "The United States shall be liable, respecting . . . tort claims in the same manner and to the same extent as a private individual under like circumstances". This is basically similar to the Crown Proceedings Acts in England and New Zealand but unlike those enactments the American statute goes far in the direction of nullifying its equation of the State with the ordinary litigant by the many exceptions contained in it.

48. These exceptions are of the following kinds. First, there are exemptions for specific administrative functions or agencies, as well as for all claims arising in foreign countries. Secondly, the Act excepts specific torts, by providing that there is to be no liability for what are broadly described as intentional torts e.g. assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. Thirdly, there are broad exceptions for:

(i) Acts or omissions of federal officers exercising due care in carrying out statutes or regulations, whether they be valid or not; and for

(ii) Acts of discretion by government employees in the performance of their duties, whether or not the discretion is abused.

49. The third exception has the effect of exempting the government from responsibility in most cases in which the act causing damage is not committed by a negligent public officer, for it is only in the rare case that the officer has not acted in the execution of a statute or regulation or in the exercise of his discretionary powers. If discretionary powers are involved, recovery against the government cannot be had even though the act causing the damage was done negligently.

50. It is this principle which was the basis of the decision in *Dalehite* v. *United States* 346 U.S. 13 (1953), a test case arising from the Texas City disaster in 1947. In that case a large cargo of ammonium nitrate fertiliser exploded on board a ship docked at Texas City. The result was a gutting of the entire dock area; more than 560 persons were killed, and some 3,000 injured; the property damage ran into hundreds of millions of dollars. The fertiliser itself had been manufactured in plants owned by the federal Government as its order and to its specifications. It was being shipped to Europe at the Government's direction under the Marshall Plan. Over 300 suits were brought against the United States under the Tort Claims Act, based on negligent handling of the fertiliser by the Government.

51. The lower court had found negligence in the production, transportation, and storage of the fertiliser. But the Supreme Court held, by four to three, that this did not make the Government liable since discretionary authority was involved. The exception in the statute applies whenever the act causing damage involves the discretion of the administrator to act according to this judgment of the best course. And it precludes actions for abuse of discretionary authority whether or not negligence is alleged to have been involved.

52. The dimensions of the disaster involved in *Dalehite* emphasise the limited scope of American law in this area. The unsatisfactory situation is underscored by the trend toward immunity for individual officers that has occurred during the present century. The common law rule of strict personal liability of public officers has been replaced in the American system by an ever-broadening rule of immunity. The central principle today is that officers are immune from liability for torts resulting from the exercise of discretionary functions (Davis, *Administrative Law Treatise,* 1970 Supplement, 26.01 (1971)). The consequence is that, in a case like *Dalehite,* where discretionary authority is involved, neither the Government nor the negligent officials may be held liable. The only means of redress in such a case is through the exercise by Congress ~~for~~ its authority to enact private legislation to compensate for governmentally caused losses (see Gellhorn and Lauer, "Congressional Settlement of Tort Claims against the United States", 55 Columbia Law Review 1 (1955)).

53. It has been urged that something in the nature of a discretionary function exemption for Governmental tort liability is essential (Davis, *op. cit.,* 25.13):

> "In the exercise of some types of discretionary function, then, Government units clearly should be immune from liability for damages on account of negligence, fault, mistakes, or abuse of discretion". (3 Davis, *Administrative Law Treatise,* 25.13).

It is, however, difficult to understand the basis for such a contention. There is no comparable exception for discretionary functions in English or French law, nor is any need for it felt. Government may possess discretionary authority to perform or not to perform functions; but that should not immunize it from liability where the functions are performed negligently in circumstances where a private person could be liable (*United Air Lines* v. *Wiener* 335 F. 2d. 379, 393 (9th Cir. 1964)). Otherwise the result is, as Justice Jackson put it, that

> "the ancient and discredited doctrine that 'the King can do no wrong' has not been uprooted, it has been amended to read, 'the King can do only

little wrongs' " (dissenting, in *Dalehite,* 346 U.S. at 60)

Or, as some have put it, the Federal Tort Claims Act is too high-sounding a title; the more accurate one would be Federal Negligent Operation of Government Government Motor Vehicles Act (see Gellhorn and Lauer, *op. cit.* note 39 above, 1325, 1326).

54. It is of interest to note that in later cases the Federal Supreme Court without expressly overruling *Dalehite* have endeavoured to circumvent the effect of their decision in that case (see the extensive discussion of these cases by Neazor at pp. 71 *et seq* and in particular his tabulated analysis at pp. 88-90 of the various underlying reasons for the Court's decisions therein). In one of these cases, *Indian Towing Co. Inc.* v. *U.S.* (1955) 350 U.S. 61, the facts were similar to those which occurred in a New Zealand case some years ago. In that case a vessel was wrecked on the Taranaki coast allegedly because of a failure by the Marine Department to keep a coastal light burning. In the American case the action was based on allegations of negligence on the part of Coast Guard officers in allowing a navigation light to be extinguished as a result of which a vessel was stranded with consequent damage to the cargo. In these circumstances the Supreme Court held the Government liable. In the New Zealand case liability for the loss of the vessel was accepted (without court action) by the Marine Department on the advice of the Crown Law Office.

55. In America sovereign immunity has been invoked by the federal courts to ban actions which do not seek money damages. In particular, it is often relied upon in cases seeking injunctive or mandatory relief against federal officials; see e.g. *Dugan* v. *Rank* 372 U.S. 609 (1963), in which the court dismissed an action against local officials of the United States Bureau of Reclamation to enjoin them from diverting water to which the plaintiffs had a beneficial right on the ground that the suit was in fact one against the United States without its consent. In such cases a private individual who asserts that a government officer is wrongfully interfering with his legal rights is unable to secure a judicial determination on the merits of his claim (cf. Davis, "Sovereign Immunity Must Go", 22 Administrative Law Review 383, 394 (1970)).

56. The American Bar Association and the Administrative Conference have proposed an amendment to the Administrative Procedure Act which would abolish sovereign immunity in actions for specific relief in the federal courts. The proposal provides that:

> "An action in a court in the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party."

It appears that legislation to give effect to this proposal has been introduced but I am unaware if it has in fact been passed.

57. In recent years there have been "dramatic developments" in the various states. In a survey of American law a decade ago it was stated

> "that the doctrine of sovereign immunity has never been expressly

repudiated by an American Court" (Schwartz, *An Introduction to American Administrative Law,* 227 (2nd ed. 1962)).

Such a statement would now be very far from accurate. One of the most striking developments in recent American law has been the abolition by judicial decision of the immunity of state governments from tort liability, the case of *Muskopf* v. *Corning Hospital* 359 P. 2d 457 (Cal. 1961), decided by the highest court in California in 1961 representing a "landmark" in this respect. This court held flatly that "the rule of governmental immunity from tort liability . . . must be discarded as mistaken and unjust". Sovereign immunity in tort "is an anachronism, without rational basis, and has existed only by force of inertia" (*ibid.* at 458, 460). Since this decision the courts of almost half the states have disavowed, in whole or part, the doctrine of governmental immunity for torts (see Davis, *op. cit.* "Sovereign Immunity Must Go", 22 Administrative Law Review, 383, 385 (1970)). Such action by an increasing number of American courts

> "accomplishes the nearest approach we have available to a just and common-sense solution of a great problem which has festered in the courts for many years" (*Williams* v. *Detroit*, 111 N.W. 2d. 1, 25 (Mich. 1961)).

However even before this judicial development of the law a number of states had already provided by statute for some form of governmental liability in tort (see Street, p.13).

E. France

58. In France there exists a well known system of administrative law which is administered by special administrative courts. These courts are not part of the ordinary judicial machinery of the country but form an integral part of the administrative system itself. There is now an extensive literature in English dealing with the French system of administrative law (see e.g. Hamson, *Executive Discretion and Judicial Control* (1954); Wheare, *Maladministration and its Remedies* (1973) 36-43; Bernard Schwartz, *French Administrative Law and the Common Law World* (1954); L. W. Brown and J. F. Garner, *French Administrative Law* (1967); Street, *Government Liability* (1953) 15-19, and 56-80; Schwartz and Wade, *Legal Control of Government* (1972), 323-324; Dicey, *An Introduction to the Study of the Law of Constitution* (10th ed. by E. C. S. Wade, 1965), Ch. XII and App. 1 (which contains an excellent summary of the French system of *droit administratif* by Professor P. M. Gaudemet of the University of Nancy); and D. C. Rowat (ed.), *The Ombudsman* (2nd ed. 1968) 217-225); but only a brief account of it can be given here.

59. The centrepiece of the French system is the *Conseil d'Etat*, which also plays the part of general adviser to the Government. In the *Conseil d'Etat*, the *Section du Contentieux* works as the highest administrative court. Originally it had a general competence over all administrative decisions but since 1953 the local administrative courts (*Tribunaux Administratifs*) have in effect become the courts of first instance and the *Section du Contentieux* is now essentially a court of appeal. The jurisdiction entrusted to these courts covers

> "all litigation between public authorities and third parties, or between public authorities themselves, concerning the execution, non-execution or bad execution of public services". (See Wheare, *op. cit.* 43)

60. Characteristic features of this system are: the ordinary citizen has an easy access to the courts; the proceedings are juridical and associate wide powers of investigation with the rule of contradictory (*contradictoire*) defence; and relief either results in quashing an administrative decision *(recours pour exces de pouvoir*) or provides financial compensation for damage received through illegal or arbitrary action (*recours de plein contentieux*) (see Mme Nicole Questiaux (who is herself a member of the *Conseil d'Etat*) in Rowat (ed), *op. cit.* 218).

61. With regard to this latter remedy this writer says:

> "In the 'recours de plein contentieux' the contender . . . can ask in particular for compensation for the damage caused through any fault of the administration. The administration may be obliged to take material action — to pay a pension, evacuate a property, correct irregular local elections, etc. It is regarded to be at fault not only when illegal action has been taken; tardiness, inefficiency or negligence can cause sufficient harm for compensation as allowed. This is the way of appeal open to the civil servant who has unduly lost his office, to the patient who has suffered from mismanagement in the public hospitals, to the citizen who has suffered an accident or damage from any public construction, etc. It would be impossible to make out an exhaustive list of the situations in which such compensation might be allowed. The administrative courts were for a time criticized as being too strictly economical of public funds in dealing with these complaints; but this tendency has been completely reversed in the last five years or so, and very large sums are paid out to provide adequate compensation for the most varied damages." (*op. cit.* 221-222) (See aslo Professor Gaudemet in Dicey, *op. cit.* at pp. 490-491)

62. It is of interest to note that unlike the ordinary civil courts in France the Administrative Courts are not bound by any code (or fettered by any doctrine of binding judicial precedent) and the law applied by them has been built up entirely on a case law basis by the *Conseil d'Etat* acting on its own initiative. In this respect the development of French administrative law has been likened to the process whereby the *communis consuetudo regni* was elaborated into the common law of England (see Hamson, *op. cit.* 127).

63. Although in recent years many present day English commentators (unlike Dicey) have lavished extensive praise on French administrative law most of them have not been prepared to go so far as to recommend its adoption in England. In particular Schwartz and Wade say:

> "One consequence of these gyrations [in British administrative law] was to arouse interest in the French system of special administrative courts headed by the Conseil d'Etat and served by a special bar . . . French administrative law began to be studied, and its admirers stressed its advantages. Their enthusiasm has even touched the political world, and it is not unusual to hear public figures saying 'we need a proper system of administrative law like the French Conseil d'Etat'. But it is very doubtful whether such remarks are founded on an accurate knowledge of the limitations of droit administratif or of the capabilities of administrative law as it exists today in Britain . . . The Conseil d'Etat has developed some remarkably broad-minded principles of compensation, and it has devised

valuable doctrines for government contracts. But the most obvious advantage of the French system is that it is much more specialized, so that both the judges and their commissaires, as well as the advocates, are highly skilled lawyers. The subject therefore has much more solidity and consistency than in Britain. But against this must be set the disadvantage of its being cut off from the main stream of the law." (*op. cit.* 323-324)

64. With regard to this particular disadvantage Schwartz and Wade go on to point out that there is real constitutional importance in the protection of the citizen against the government by the ordinary judges in the traditional way; and that it would be lamentable confession of failure if they proved unable to apply the law with the same consistency as in other subjects such as criminal law, land law, and the company law (cf. Hamson, *op. cit.* 5-6, and 50-52 and Street, *op. cit.* 80).

65. Another objection to the French system is that it has produced an extraordinarily complicated law of conflicts so that cases arise in which French lawyers have great difficulty in telling whether it is the civil or the administrative courts which are competent to deal with the claim in question (see Schwartz and Wade, *op. cit.* 324; Wheare *op. cit.* 39-40; Hamson, *op. cit.* 86-88).

66. One argument which is frequently advanced in favour of a specialised administrative court such as the *Conseil d'Etat* is that administrative cases should be decided by a mixed tribunal of lawyers and administrators; but on closer examination this argument loses much of its superficial attractiveness. The process of applying the law to acts of government requires knowledge of law, not knowledge of administration. Administrative experience is of little help in determining whether a fair hearing ought to be given before a chief constable is dismissed, whether a preclusive clause should protect an excess of jurisdiction, or whether there is error of law on the face of a tribunal's decision. It is a misapprehension to suggest that such questions should be decided with the help of administrators on the basis that it is the business of administrative courts to review decisions of policy and administrative errors generally. Administrative law, in Britain and France alike, is concerned with legality. It is the practical application of the rule of law; and it is for the law and those learned in it to determine where the legal limits lie (see Schwartz and Wade, *op. cit.* 324).

F. Denmark

67. Although France is the outstanding example, in British eyes, of a country where remedies in respect of administrative matters are sought through a system of separate and specialised courts there are other countries on the continent of Europe where somewhat similar systems of administrative law prevail. In Switzerland, in West Germany (both in the federal government and the *länder*), and to a less extent in Belgium a strong legal control is exercised over the country's administration through special administrative courts. In Italy the *Consiglio di Stato* is regarded as a pale reflection of the French *Conseil d'Etat*; and in Holland there is the *Raad van Staate*, but wide areas of central administrative activity are excluded from its control and, even where it has jurisdiction, its powers of inquisition are inadequate (see Wheare, *op. cit.* 43).

68. The countries of Scandinavia provide an interesting contrast among themselves. In Sweden and Finland the administration is to a very large extent immune from control by the ordinary courts and is subject to administrative courts. In this respect Sweden, and Finland even more so, resembles France. In Denmark (and Norway) however the ordinary courts exercise review over administrative activity (*op. cit.* 43-44).

69. In Denmark a party aggrieved by a final administrative decision may sue in the ordinary courts for its annulment or modification. If monetarily injured he may seek to recover damages from the state. An official who has abused his powers may be prosecuted before those courts which have power to pass upon the propriety of disciplinary sanctions including removal from office (see Walter Gellhorn, *Ombudsmen and Others* (1967) 60).

70. Although I have not been able to obtain any detailed information as to the precise nature and extent of the remedy for damages in administrative matters in Denmark it appears that administrative law in that country, as in the "jurisprudence" (i.e. the case law) of the *Conseil d'Etat*, is taken in a fairly broad sense. It includes not only rules laid down in acts or statutory instruments, but also unwritten law, including flexible standards like the important French doctrine of *detournement de pouvoir* (i.e. where the public authority has respected the external legal formalities but has used the power granted to it to serve a purpose outside the scope of the power – Hamson, *op. cit.* 164). In fact, over the last forty years the attitude of the Danish courts towards a number of fundamental principles of administrative law have been indirectly influenced by the underlying "jurisprudence" of the *Conseil d'Etat* (see Miss I. M. Pedersen in Rowat, *op. cit.* 231).

71. It is of interest to recall that in 1955 Denmark adopted (though with considerable modifications) the Swedish institution of Ombudsman (which had also been established in Finland in 1919), and that it was on the Danish model that the institution in New Zealand was based when it was set up in 1962. Since then Ombudsmen have been appointed in a number of other countries. Even France, despite its much cherished system of administrative law, found it expedient in 1973 to make an appointment of this nature under the title of *Mediateur.*

IV: HOW FAR AND IN WHAT CIRCUMSTANCES SHOULD DAMAGES BE AVAILABLE FOR ADMINISTRATIVE WRONGDOING

72. It is arguable that no system of remedies can afford justice to the individual who has suffered loss as a result of the administrative decision adverse to him unless it makes provision for the recovery of damages. (See para. 148 of Law Com. No. 40 of 1971 cited in para. 26 hereof). As Professor Schwartz points out:

> "A system of administrative law which fails to provide the citizen with an action in damages to make him whole . . . is actually but a skeletorized system. If individuals are to be protected adequately, an action for damages is the necessary complement of the action for review, which

results only in the setting aside of improper administration action." (An *Introduction to American Administrative Law* (1958), 207).

Without a remedy of this nature being also available a formal pronouncement by a court that an administrative act is illegal or otherwise invalid frequently represents no more than a mere Pyrrhic victory for an aggrieved citizen.

73. The question whether such a remedy should in fact be available is of course essentially a matter of policy for determination by the Legislature.[4] But frequently difficult matters of technical detail are involved in formulating the exact scope of the liability which should be imposed on administrative authorities. A leading American authority has expressed his views on this matter as follows:

> "The conventional answer [to whether and when the state should be liable] has been that a Governmental unit should be liable whenever a private party would be liable in the same circumstances. This answer may be sound as far as it goes, but it does not go far enough to reach the most difficult problems. A large portion of the functions of Governmental units have no private counterpart. Private parties do not draft men, administer prisons, conduct international relations on behalf of the general public, zone other people's property, enact statutes or ordinances, adjudicate cases, issue administrative orders and regulations that may have the force of law, regulate economic life, or authoritatively determine policies that may be binding upon courts.
>
> The task . . . that is easy to plan is to make governmental units liable in tort whenever a private party would be liable in the same circumstances. The task . . . that is especially difficult is to work out a satisfactory system of liability and immunity with respect to functions that have no private counterpart . . . which are vaguely governmental." (Davis, *Administrative Law Treatise* (1958), Vol. 3, p. 501 cited by Neazor at p. viii).

See also paras, 37-39 hereof, as to "the middle course" adopted by the Australian courts in moulding private law concepts of tort to meet administrative law situations.

74. One incidental argument, based on policy considerations, against exposing the state to liability to compensate individuals detrimentally affected by state action is "the simple one based on economic practicability i.e. that the cost might be too great" (see Neazor at pp. vii – ix, citing Jaffe in 70 Harvard Law Review 895, 900.) As Mr Neazor points out the answer to this [to which is related the need to work out better rules in respect of governmental acts] is that a governmental unit is an excellent loss spreader and that by subjecting the State to liability the loss is spread from the individual over the whole community. (See paragraph 61 hereof as to the wide liability now imposed on the administration in France by the *Conseil d'Etat*.) Even those who agree with this answer do not, however, generally suggest that every individual detriment should be compensated, and accept that in some situations (perhaps in all but where an individual suffers exceptional loss exceeding that of his fellow citizens) the loss must lie where it falls.

75. The following questions have been formulated by Mr Neazor as a basis for examining the subjection of the Crown (or state) to liability to compensate

citizens viz:

1. Should the state compensate at all the individual detrimentally affected by state action?
2. What detriments should the state compensate? These harms can generally be grouped as those in respect of corporeal property, of personal injury (which is now excluded in New Zealand by the Accident Compensation Act 1972), of liberty and reputation, and those of an economic nature.
3. What is to be the essence of the right to compensation? Is it to be compensation, as for instance under Part III of the Public Works Act 1928, or damages for wrong doing, as is the case under the Crown Proceedings Act 1950?
4. What statutory device is to be used if the action for tort solution is chosen (and what tribunal is best suited to adjudicate on disputed cases)? The principal possibilities, alone or in combination appear to be:
   (a) To subject the state to claims which it should "in equity and good conscience" meet, and leave it to the courts to work out a governmental claims or torts law (see Gellhorn and Schenck referred to in Davis, *op. cit.* 502);
   (b) To subject the state to liability for the torts of its servants, with or without limitation in respect of the servant's acts in a "purely governmental" capacity, and to direct liability in respect of every enterprise by the state so long as the claim can be brought within the framework of the ordinary causes of action in tort available between private persons (including corporations);
   (c) To subject the state to liability to pay damages whenever a servant's *ultra vires* act causes individual loss;
   (d) To subject the state to absolute liability for decisions of the type thought not to be properly subject to judicial scrutiny (see Jaffe, 70 Harvard L.R. 900);
   (e) To allow government agencies themselves to determine liability and compensation (see Jaffe, *ibid.* 900);
   (f) To provide that where the functioning of the administrative machine inflicts on an individual exceptional loss exceeding that of his fellow citizens the State should be liable to compensate that individual even in the absence of fault, and leave it to the ordinary courts to develop this administrative liability (see Street, pp. 78-80). The concept of tort liability of an official should be retained only for the determination of whether the public authority could recover a contribution from him.
   (g) To identify specific areas of discretion e.g. the exercise of licensing powers, the execution of any enactment, the performance of any public duty, the inspection of property etc. and establish by statute a rule of liability or non-liability (see California Law Revision Commission referred to by Jaffe, 77 Harvard L.R. 238).

76. With regard to the general question of administrative liability Miss G.

Ganz, a senior lecturer in law at the University of Southampton in an article entitled "Compensation for Negligent Administration" (1973 Public Law 84-99) says:

> "From the examination of the courts' attitude to liability in tort by public authorities it can be seen that they may absolve such bodies from fault liability by declining to sit in judgment on exercise of their discretion or by refusing to award damages against those who are honestly performing their decision-making functions. Fault liability is an unsatisfactory instrument for allocating losses in the area because it involves the courts substituting their judgment for that of the administrative body. However, the withdrawal of the courts in such cases has let the loss lie where it falls which is not necessarily the most equitable solution. It is not self-evident that those who sustain personal injuries as a result of gas escaping from a fractured main without any one's fault should have to bear the loss because gas and water are necessities of modern life provided for the common good. (*Dunne* v. *North Western Gas Board* [1964] 2 Q.B. 806). Nor does it follow that where risks are taken in the course of an enlightened penal policy those whose persons or property are injured should have to suffer for the common good. Again those who are innocently misled by official information suffer as much as those who are misled by negligence but they have no redress in the courts in the absence of statutory provisions imposing strict liability (*Ministry of Housing and Local Government* v. *Sharp* [1970] 2 Q.B. 223, where only Lord Denning M.R. held that breach of the statutory duty gave rise to strict liability) . . . The courts are right when they refuse to become involved in questions of penal policy or to tell a public authority with limited financial resources how to strike the balance 'between ~~civil~~ claims of efficiency and thrift'. (*East Suffolk River Catchment Board* v. *Kent* [1939] 4 All E.R. 174, 184A (du Parq L.J.). These are questions of policy and resource allocation which should be decided by the administrative authority to whom discretion has been delegated but it does not follow that the individual should bear the loss suffered as a result of such action." (pp. 97-8)

77. Miss Ganz then goes on to mention (at pp. 98-99) that in France the *Conseil d'Etat* had evolved a doctrine for public authorities based on "the risk", but that in England such a liability would have to be imposed by the legislature. The adoption in England of this principle of liability was strongly advocated by Professor Street in *Government Liability* at pp. 78-80. Although he was very much opposed to any adoption of French administrative law as a whole as to England Street was a firm supporter of the principle that administrative liability should be based on risk rather than on fault.

78. A different viewpoint from this is expressed by Mr B. C. Gould, a New Zealander, who is a Fellow of Worcester College, Oxford, in an article entitled "Damages as a Remedy in Administrative Law" which appeared in the N.Z. Universities Law Review for 1972 at pp. 105-122 an in which he reviewed the existing case law on the subject. He concluded his article with the following passage:

> " . . . it is clear that there is little point in establishing a readily available

and comprehensive means of attacking the legality of the actions and decisions of public bodies if at the end of the day the plaintiff is to be left uncompensated. There are fortunately encouraging signs that the liability of public bodies to compensate people aggrieved by their actions and decisions is being increasingly recognised and developed. Their liability for negligent actions and misstatements will of course expand with that of the private defendant. The tort of breach of statutory duty will continue to provide a cause of action in the limited fact situations to which it is appropriate. The major requirement now is to establish the tort of misfeasance in a public office in our law, so that the private citizen will not suffer as a result of the peculiar capacity of public bodies to inflict upon him damage which may not necessarily fall within the confines of one of the more established torts. The materials, in the form of precedents in our case-law are there; all that is needed now is their development in order to fill a substantial gap in our administrative law."

79. It is this approach to the subject which appears to me to offer the most promising prospects for the development of a comprehensive and satisfactory body of rules and principles relating to the recovery of damages for administrative wrongdoing. (See also Hogg, *Liability of the Crown,* p. 235 for a rather similar viewpoint.)

V. IS THERE A NEED TO REDEFINE FOR PURPOSES OF PUBLIC LAW CERTAIN PRIVATE LAW CONCEPTS?

80. It also appears to me that little would be gained by any attempt to redefine by statute for the purposes of the public law such concepts of private law as negligence, negligent misstatement, malice or fraud. The application of these concepts in the field of public law is not a mere matter of definition but the result of an enlargement by the ordinary processes of juristic development of the underlying principles of liability involved in these concepts and the extension of those principles to new situations arising in the field of public law.

81. This is clearly the case with regard to negligence and negligent misstatements. See e.g. *Hedley Byrne & Co.* v. *Heller* [1964] A.C. 465 (negligence covers economic loss caused by negligent misstatement); *Dorset Yacht Co.* v. *Home Office* [1970] A.C. 1004 (administrative authority concerned liable in negligence for damage done by boys escaping from Borstal); *Ministry of Housing and Local Government* v. *Sharp* [1970] 2 W.L.R. 802 (liability for negligent misstatement extended to an official certificate of search which negligently failed to disclose an encumbrance); and *Dutton* v. *Bognor Regis U.D.C.* [1972] 2 W.L.R. 299 (liability imposed on a local authority for the negligence of their building inspector in approving under a by-law the foundations of the plaintiff's house which was built on a rubbish-tip). But there are signs that a similar expansion of the law is taking place even in such a new area of administrative wrongdoing as "misfeasance in a public office"; see e.g. *Smith* v. *East Elloe R.D.C.* [1956] A.C. 736 (possible remedy for damages if fraud or bad faith had been shown); *David* v. *Abdul Cader* [1963] 1 W.L.R. 834 (malicious exercise of statutory power; *Roncarelli* v. *Duplessis* (1959) 16 D.L.R. (2d) 689 (see paras. 24 and

44 hereof – malicious exercise of statutory authority); *Farrington* v. *Thomson and Bridgland* [1959] V.R. 286 (bar closed in exercise of powers which defendants knew that they did not have); and *Wood* v. *Blair and Helmsley R.D.C.* [1957] Adm. L.R. 243, reported more fully in *The Times,* 3, 4 and 5 July 1957 (notices forbidding sale of plaintiff's milk subsequently held invalid – recovery of damages for resultant loss). Mr Gould has suggested that this last case is

> "clear authority for the proposition that a plaintiff can recover damages, even in the absence of malice or bad faith, if he has suffered damage through an ultra vires action."

In this connection it is important to remember that the term "misfeasance" means merely the improper performance of some lawful act.

VI. CONCLUSION

82. In my opinion the greatest caution should be observed with regard to any suggestions for the reform or clarification of this branch of the law by legislative means. In particular I think it would be desirable to wait and see what steps the Law Commission in England takes in respect of this matter. Although New Zealand has a long history of originating measures of law reform in so many branches of the law this has not been true of the law of torts. In this field, apart from the former Crown Suits legislation, we have generally been content to follow England;[5] and even here that legislation was ultimately to be replaced by the English legislation relating to Crown proceedings. One measure of procedural reform would be to ensure that as far as possible all actions for damages against the administrative authorities in which a point of public law is involved should be channelled into the Administrative Division of the Supreme Court for hearing (cf. para. 149 of the Law Com. No. 20).

FOOTNOTES

1. In Winfield's *The Province of the Law of Tort,* published in 1931, no reference whatever is made to the tortious aspects of administrative law although this book was specifically devoted to the nature and scope of the law of tort and to the relationship of that branch of the law to other parts of the legal system.

2. In the course of his Introduction to the 10th edition (1965) to Dicey's *Law of the Constitution* Professor E. C. S. Wade makes the following comment (at p. cxxiv):

> "If in the exercise of its discretion it can be shown that [an administrative] authority has acted in excess of its powers, the act can be declared invalid. This does not necessarily, or indeed usually, involve a claim for damages."

It is doubtful, however, if the statement contained in the second sentence is completely consistent with the import of the authorities which have just been cited.

3. These paragraphs read as follows:

> "62. The remedies which the court can grant must be . . . appropriate. The question which any prospective litigant rightly asks is: 'If I succeed, how will I benefit?' In administrative matters the present answer which English law gives to this question is most unsatisfactory. The usual remedy is to quash or set aside the offending decision, but to give no compensation for any loss which that decision may have caused. This principle of 'back to square one' understandably has little appeal to the aggrieved citizen, who may somewhat cynically suppose that all that in substance will happen is that the administrative authority will be given a second opportunity to arrive at the same decision without on the second occasion offending against the procedural rules.

There is therefore an urgent need to extend and rationalise the remedies which the court can grant."

"73. In addition to making the appropriate order in relation to the decision complained of, the court should have power to award damages. In general, English law does not presently consider that the citizen has any right to compensation if he is adversely affected by an administrative decision which does not infringe his proprietary rights. The Committee consider that such a right should be recognised, so that any person who is particularly and materially affected by an administrative decision and who succeeds in his cause of action should be entitled to recover from the authority damages for any loss which he suffers. Provided this right is plainly recognised, then quantification of damage can be according to well-established principles."

"74. This new right to damages is of considerable importance because it will provide a new answer to the question: 'If I succeed, how will I benefit?' The answer will be: 'The error of the decision will be corrected and any damage done by that error will be compensated'."

"75. It is not envisaged that the court would normally make a single final order. Thus, for example, where remission for reconsideration was the appropriate order, the authority would have to file its revised decision in the court and proceedings would not come to an end until it was clear that the revised decision was free from objection. Moreover, in such a case it would normally not be appropriate to assess damages until the terms of the revised and unobjectionable decision were known, because only then would it be possible to know what damage the plaintiff would not have suffered had that decision been given in the first place. This also illustrates a limitation of importance on the right to recover damages. It would be wrong to suppose that damages will be awarded in every case in which the plaintiff succeeds in his action. The only damages recoverable will be such harm as would not have been suffered had the correct decision or correct procedures been followed in the first place. Conversely, the court may award damages in cases where the correct procedures have not been followed, but where the decision itself is allowed to stand."

4. This is subject, however, to the view expressed in paragraph 79 hereof.

5. It is true that the Accident Compensation legislation has effected a revolutionary change in the law in New Zealand relating to civil liability but this change has been brought about by the substitution of an administrative scheme for a large segment of the law of tort. It does not represent any internal development of that branch of the law itself.

PRINTED AND BOUND AT THE UNIVERSITY OF AUCKLAND BINDERY