PUBLIC AND ADMINISTRATIVE LAW REFORM COMMITTEE

DAMAGES IN ADMINISTRATIVE LAW

A WORKING PAPER

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1. The Public and Administrative Law Reform Committee is presently considering the question whether in some circumstances the remedy of damages should be available to those who suffer loss in consequence of unlawful administrative action. This Working Paper is being sent to all those who may be able to offer comment on this very difficult question. It is probably one of the most difficult problems ever to confront a law reform committee. The modern development of administrative law by the courts has produced a situation in which there are numerous grounds for attacking administrative decisions for unlawfulness, usually by means of an application for review under the Judicature Amendment Act 1972. In particular, the courts, following Anisminic v. Foreign Compensation Commission [1969] 2 AC 147, now apply a very wide concept of "jurisdictional error", as well as the less important doctrine of "error of law on the face of the record". They also apply a wide-ranging doctrine of abuse of discretion: see e.g. Padfield v. M. of F.A.F. [1968] AC 997.

2. To indicate the scope of our inquiry we should define "administrative action". By that expression we mean any action or decision taken by any tribunal or person by or under a statute empowering that tribunal or person to act or to decide a question, whether or not there is a duty to act judicially, or in accordance with fairness. This definition excludes the actions and decisions of purely domestic tribunals. That does not mean that the Committee wishes to exclude from the beginning any possibility of an award of damages against a domestic, i.e. non-statutory, tribunal. Obviously the impact of a decision by a domestic tribunal can be far-reaching upon individuals who may suffer loss as a result of such decisions which it may be felt that the law should not compel them to bear. It simply indicates our wish to concentrate, in the first place, upon the more significant part of the general problem before turning to the additional complications which arise when loss arising from acts or decisions of domestic tribunals is considered.

3. Application to Statutory Tribunals? Our definition highlights one important point. Parliament has set up numerous statutory tribunals. Their decisions touch on many aspects of our national life, and affect a great variety of economic, industrial, property and personal interests. It may be asked, at the outset, whether it is right to impose a liability in damages upon tribunals which have no funds of their own, and for which the Crown is not vicariously responsible. This issue involves asking further questions. If it is right to create a new liability in damages, should this be accompanied by a provision that damages should be paid out of the Consolidated Fund? Should there never be any personal liability on the members of a statutory tribunal? Or should there be such liability in exceptional cases, e.g. where malice or bias can be established? If so, what precisely is meant by "malice" or "bias" in this context? Would the fear of personal liability, even though remote, make it more difficult than at present to recruit people to serve as members of statutory tribunals? Would there be a tendency to timidity in decision-making? Upon none of these questions does the Committee at present have a clear view. But the Committee does not think that it would be justified in confining its consideration to statutory powers exercisable by administrators who are in no sense "tribunals", who hold no hearings and who are, for the most part, officers or employees of the Crown. The Committee nevertheless acknowledges that one possible view is that a newly created liability in damages for the consequences of unlawful administrative action should not be imposed on statutory tribunals, but only upon individuals who exercise statutory powers unlawfully and cause loss by so doing.

4. The Anisminic case establishes that the following amount to jurisdictional errors:

(a) The decision-maker lacks jurisdiction to enter on the inquiry in question;

(b) the decision may have been given in bad faith;

(c) there may have been a failure to comply with the requirements of natural justice before reaching the decision in question;

(d) the decision reached, i.e. the formal order, may be one which there was no power to make;

(e) The decision-maker may in good faith have, in Lord Reid's words, "misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some other question which was not remitted to it";

(f) the decision-maker may have refused to take into account something which he or it was required to take into account by the statute conferring the power;

(g) the decision-maker may have based its decision on some matter which, under the provisions conferring the power, he or it had no right to take into account, in short upon "irrelevant considerations".

This is Lord Reid's catalogue of jurisdictional errors. He said that he did not intend the list to be exhaustive. The list usefully indicates the variety of "jurisdictional" grounds of attack which, if sustained, will lead a court on review to pronounce a particular decison to be a nullity. In addition, unless a privative clause prevents the court from so doing, the court may quash a decision where an error of law appears on the face of the record, or where an abuse of discretion is proved.

5. It must be remembered what are the consequences of a decision by the Supreme Court quashing an unlawful exercise of "statutory power" (a term which is broadly defined in s.2 of the Judicature Amendment Act 1972 and which includes a "statutory power of decision"). In broad terms the successful applicant is now entitled to a fresh exercise of the statutory power by the power-holder. The original application, appeal or objection which he lodged has not been validly disposed of, but the application, appeal or objection itself will remain in existence. He now becomes

entitled to a lawful disposal of the original proceeding. The Supreme Court may give him particular assistance by directing under s.4(5) of the 1972 Act (as amended in 1977) that the power-holder should "reconsider and determine, either generally or in respect of any specified matters, the whole or any part of the matter to which the application relates", adding, if it thinks fit, its reasons for so doing and such directions as it thinks just. Thus the primary remedy for an unlawful administrative action is that the aggrieved person is granted the opportunity to obtain a lawful administrative action. This elementary point assumes significance when the question is asked: how much loss has been caused by the unlawful administrative action? We shall return to the question of causation in para. 12.

6. The problem confronting the Committee has been the subject of some academic writing. We cannot review it in detail. This Working Paper is likely to achieve its intended object better if it is short and avoids a detailed analysis of the cases which bear upon the present law. Those wishing to pursue the problem in greater depth before offering comment to the Committee are invited to peruse:

"Gould, "Damages as a Remedy in Administrative Law", 5 NZULR 105;

and Haughey, "The Liability of Administrative Authorities" Occasional Paper No. 9, Legal Research Foundation, Auckland (1975).

7. Mr Gould's conclusions can be summarised as follows. If a plaintiff can show that a public body's actions, stripped of their legal authority, fall within the scope of one of the ordinary private law actions, the way to an award of damages is clear. Thus in Cooper v. Wandsworth Board of Works (1863) 14 C .B. (N.S.) 180 the defendant had statutory authority to pull down houses in certain circumstances. But it failed to proceed in accordance with natural justice. The plaintiff's right to damages for trespass was upheld. Recent developments in the law of torts suggest that the liability of public authorities for a negligent performance of their powers and duties is being extended. On the other hand, although an action for breach of statutory duty is well established, it will afford a remedy

in damages only in very restricted fact situations. There is high authority that damages may be awarded if the exercise of a public power is deliberately wrongful or malicious, and some less clear authority that there is a tort of misfeasance in a public office: "if a public officer does an act which to his knowledge amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person". Farrington v. Thomson & Bridgland [1959] VR 286, 293, per Smith J. Certainly, if this tort exists, its scope is unclear. Hence: "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". Mr Gould thus looks to the creative powers of the courts, developing already existing precedents, for the solution of the problem whether, and if so when, damages should be awarded for unlawful administrative action. He does not deal in particular with the problem as to the liability of statutory tribunals for committing an administrative law error, with resultant loss to a would-be plaintiff.

8. Mr Haughey, in his Occupational Pamphlet, offers a survey of the extent to which damages for administrative wrongdoing are at present available. Then he discusses the working of the Crown Proceedings Act 1950, s.6(1)(a) of which makes the Crown vicariously liable in respect of torts committed by its servants or agents. He notes that the English Law Commission in 1971 (Law Com. 40, para. 148) thought: "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". After surveying the position in Australia, Canada, the United States, France and Denmark, Mr Haughey agrees with Mr Gould's approach.

9. Develop "Misfeasance in a Public Office"? What may be called the Gould-Haughey approach tentatively seems to the Committee to be far too

sanguine. Any development of a wide-ranging remedy under the label "misfeasance in a public office" would be very slow. Very few cases of this sort reach the courts. It is even arguable that no such tort exists, as distinct from the established tort of abuse of judicial procedure by, for example, a court bailiff or Registrar. It is quite unclear what a "public office" is, and any workable definition of that concept would require legislative intervention, but no such intervention is recommended by Gould or Haughey. Probably, if the tort exists at all, "malice", in some sense of that always slippery word, is a necessary ingredient in the cause of action: Smith v. East Elloe R.D.C. [1956] AC 736; David v. Abdul Cader [1963] 1 WLR 834; Roncarelli v. Duplessis (1959) 16 D.L.R. (2d) 689; Farrington v. Thomson and Bridgland [1959] V.R. 286. If malice in any of its possible senses is a necessary ingredient, a person suffering loss would not be able to recover damages to compensate for loss suffered in consequence of a decision later quashed because of a misconstruction in good faith of statutory powers; or for loss suffered in consequence of the majority of decisions void for innocently failing to comply with the requirements of natural justice. Further, liability of this sort would not touch statutory tribunals, as it seems a misuse of language to speak of a statutory tribunal holding "public office" in the same way in which a Collector of Customs or a Minister of Finance does.

10. Tortious liability in respect of the acts of administrators and public authorities already has a wide reach, quite independently of the kind of liability discussed in the last paragraph. There is no barrier against holding anyone exercising a statutory power liable in one of several established torts:-

(a) negligent acts causing physical damage to property, even where defendant has a substantial discretionary authority; e.g. Dorset Yacht Co v. Home Office [1970] AC 1004
See also Anns v. Merton London Borough Council [1977] 2 WLR 1024 (H.L.)

(b) the economic torts, e.g. conspiracy (the true explanation of Wood v.

Blair and the Helmsley R.D.C. The Times, 3, 4 and 5 July 1957, pace Gould in [1972] 5 NZULR 105, 115) intimidation, or inducement of breach of contract.
See P.T.Y. Homes Ltd v. Shand [1968] NZLR 105;
Central Canada Potash Co Ltd v. Attorney-General for Saskatchewan (1975) 57 D.L.R. (3d) 7. (tort of intimidation linked with unlawful decision).

(c) the intentional torts, viz. trespass, false imprisonment, assault. See Cooper v. Wandsworth Board of Works (1863) 14 C.B. (N.S.) 180 (damages for trespass: trespass through failure of natural justice); Blundell v. Attorney-General [1968] NZLR 341 (false imprisonment) Carrington v. Attorney-General and Murray [1972] NZLR 1106 (wrongful arrest and assault).

(d) torts of wrongful interference with property, notably conversion.

(e) breach of statutory duty, provided that the duty is imposed on the defendant, and that the statute is construed as conferring a private right of action (in accordance with the confusing cases on that question: see principally Cutler v. Wandsworth Stadium Ltd [1949] AC 398) and provided also that the relevant statute binds the Crown when the Crown or a Crown servant is defendant: see Downs v. Williams (1971) 126 C.L.R. 61, elaborately discussed by the N.S.W. Law Reform Commission in Report on Proceedings By and Against the Crown L.R.C. 24 (1975).

(f) negligent misrepresentation giving rise to physical property damage.

(g) negligent act causing pure economic loss
See cases culminating in Caltex Oil v. "Willemstad" (1976) 11 A.L.R. 226 for the general nature of this species of the tort and Ministry of Housing v. Sharp [1970] 2 QB 223 (negligent search by Registry clerk) for a more particular precedent falling within the present field of inquiry.

(h) negligent misrepresentation where there is a special relationship, an assumption of responsibility and reliance by the plaintiff to his financial detriment, i.e. Hedley Byrne liability
See, e.g. Rutherford v. Attorney-General [1976] 1 NZLR 403.

(i) the torts of deceit and injurious falsehood.

(j) the tort of defamation.

11. Illustrative Examples The following are examples of situations where a citizen suffers loss but the person exercising a statutory power has done so in good faith and has made an innocent mistake:-

A. Let us assume that a Customs officer exercises his power under s.275 of the Customs Act 1966 to "seize any forfeited goods or any goods which he has reasonable and probable cause for suspecting to be forfeited". He does in fact suspect, but is later held by a court not to have had reasonable and probable cause for suspecting, that a motor-vehicle had been "unlawfully imported" (which would bring it into the category of "forfeited goods": s.270(g)). The importer loses the use of his motor-vehicle but is vindicated in the later condemnation proceedings. He is entitled to damages for conversion: indeed the right to bring such an action is expressly envisaged by s.281 of the Act. The Crown sued in the name of the Attorney-General, would be vicariously liable for the Customs officer's tort. Many other examples could be given of similar cases in which the law is already perfectly satisfactory.

B. Assume that the Valuer-General makes a special valuation of land under the Valuation of Land Act 1951. It later turns out that the value has been erroneously under-assessed, because the valuer actually doing the task has inadvertently failed to comply with the statutory provisions determining how the valuation should be approached. He has misinterpreted "land value". The owner of the land does not rely on the valuation. (If he did, he might well have an action under the Hedley Byrne principle for loss sustained by

selling in reliance on a negligent under-value.) Rather, he suffers loss because he had previously contracted to sell at whatever value was placed on the land by the Valuer-General. No breach of contract or tort has been committed; there has merely been an innocently unlawful exercise of statutory power. Can he sue? Probably not, even if the valuer's misinterpretation of the law was regarded as negligent, because there is no precedent for holding that a duty of care exists: the situation would be analogous to that in Takaro Properties Ltd v. Rowling [1976] 2 NZLR 657, which is proceeding on appeal and about which we prefer to offer no specific comment. If the misinterpretation was not negligent, there is certainly no liability under the present law but, of course, the landowner's loss is just the same whether he can or cannot establish negligence. Should a remedy be created?

C. A developer requires a specified departure from his local authority and applies accordingly. The application is rejected. Having been advised that the local authority has not decided his application by reference to the statutory criteria for granting specified departures, he lays out capital expenditure on designs and specifications for a high-rise block of apartments (not a permitted use in the industrial zone of the city where he proposes to build) and appeals to the Planning Tribunal which, however, acts in technical breach of natural justice by not giving proper notice to an objector who, under the Town and Country Planning Act 1977, was entitled to appear and be heard on the appeal. The Planning Tribunal allows the appeal, as predicted. Subsequently, the developer commits himself to the outlay of further capital expenditure in building costs but is then faced with a Supreme Court decision quashing the Tribunal's decision on the objector's application. Next, the matter returns to the Tribunal and the developer now obtains an unimpeachable order allowing his appeal and thus, at last, the necessary planning permission. The cost of delay from all causes can be quantified as $10,000 in terms of higher building costs, and postponement of the chance to earn income from the apartments.

This example highlights the problems which arise. The questions requiring answer are:

1. Should an action lie against the local authority for the loss occasioned by the error of law that it made when it refused the specified departure application?

2. If so, did that refusal cause any more than the costs and expenses of appeal to the Tribunal, or should the local authority be liable for part of the overall economic loss caused by the two mistakes?

3. Was the developer justified in acting on the Tribunal's decision, without waiting to see whether Supreme Court proceedings would ensue? Would the answer be different if the developer knew of the Tribunal's jurisdictional error?

4. Should an action lie against the Tribunal in any event?

5. If so, are the damages properly confined to (i) the loss attributable to the extra delay between the first and second Tribunal decisions, or do they (ii) extend to the $10,000 loss of income or to (iii) that portion of the $10,000 loss for which the Tribunal was alone responsible?

6. If there is liability, should Parliament declare it to be a liability in tort, thus creating a new tort and attracting tortious principles governing the measure of damages, mitigation of damages, and remoteness of damage? Precedents for the creation of a new statutory tort are s.28 of the Wanganui Computer Centre Act 1976 and s.119B(3) of the Commerce Amendment Act 1976. Or should it be a statutory liability to compensate for loss suffered; but not a tort? And if so, on what principles should compensation be assessed?

12. Causation Some discussions of liability in damages for administrative wrongdoing overlook this question. An exception is the English Justice report, para. 75: "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". In the case of illegal administrative acts this is straightforward. In the case of void administrative decisions, complications arise. Assume that X applies to a Minister for a statutory consent. Committing any of the Anisminic jurisdictional errors, the Minister declines to grant it. The court quashes the Minister's decision. That does not entail a consent. If X now renews his application and obtains the consent, his damages are probably confined to the consequences of not having his consent (say) 6 months earlier: such damages are likely to be small. Assuming that malice is not an ingredient in the new liability, there would be no scope for exemplary damages based on Lord Devlin's category in Rookes v. Barnard of "arbitrary, oppressive or unconstitutional acts by Government servants". If X renews his application, which is then declined without jurisdictional error, it is difficult to see that he or others similarly placed could often prove on the balance of probabilities that but for the first refusal he would not have suffered economic loss, in which case the illegal decision has not caused the loss which he has incurred. If the applicant does not renew his application, a double problem of causation arises: the illegal decision did not cause his loss, and in any event his own omission to apply again was the proximate cause of his loss.

The Committee could recommend that compensation be payable simply because an illegal decision had been given. But that would have to be compensation simply for the expenses associated with an application that was wrongly dealt with. Or it could recommend the sweeping aside of all inquiry into causation, so that an applicant who needed a licence or consent before embarking on a construction programme could recover pre-application capital expenditure plus loss of anticipated profits that he would have received had the licence or consent application been successful. The latter solution would be so out of line with ordinary common law conceptions that

the Committee provisionally thinks that it would be unjustifiable. The Committee also tentatively thinks that in any new action for damages for illegal administrative decisions the ordinary principles of causation, remoteness of damage and mitigation should apply, as in an action for tort.

13. Immunities The Committee is aware that variously worded specific immunities have been enacted. No full list has been compiled, but we may mention s.29 of the Crimes Act 1961, which gives an immunity to those acting under an invalid warrant or process; s.124 of the Mental Health Act 1969, which gives an immunity from civil or criminal liability to those acting pursuant to the Act in respect of their jurisdictional errors or mistakes, "unless the person has acted in bad faith or without reasonable care"; and s.39 of the Police Act 1958, under which a police constable is immune from liability for any irregularity in any process which he has executed. Such immunities characteristically prevent liability that would otherwise arise in tort, typically in negligence or conversion. The Committee thinks that it should proceed to prepare an exhaustive list of these immunities, and then to consider them one by one, asking whether their continued existence is justifiable. In performing that task it would be careful to invite comment from the Departments concerned. It seems clear that many immunities would be readily justifiable on policy grounds. These immunities are not the effective stumbling block in the way of a citizen who is hurt by unlawful administrative action. Rather it is the absence of a cause of action whereby the citizen can recover for loss suffered by him as a result of unlawful administrative action, which is not a tort in itself and not accompanied by some other tort. The Committee would nevertheless welcome having its attention drawn to specific immunities which may be thought to be over-wide or productive of injustice.

14. Crown Torts There is another approach which the Committee thinks it should adopt, although conscious that it does not go to the heart of the problem. The operation of the Crown Proceedings Act 1950 has caused little difficulty and given rise to no complaint of which we are aware. We think, nevertheless, that we should re-examine the language and effect of s.6, and

would welcome comment from those who have encountered technical difficulties when seeking to have the Crown held directly or vicariously liable in tort.

(a) Section 6(1) limits Crown liability to "those liabilities in tort, to which, if it were a private person of full age and capacity, it would be subject..." Does this invite the argument that there can be no liability if there is no precise analogue, i.e. if there is no counterpart in the private sector to the Crown activity in question? Decisions of the High Court of Australia are uniformly against such a limiting construction.

(b) Is the wording of s.6(3) sufficiently clear? The problem here relates to the vicarious liability of the Crown for those officers of the Crown who exercise independent statutory functions. Should the Crown always be liable? If not, what are the exceptional cases? In examining this question, the Committee will of course bear in mind the scope of the Crown's practice to indemnify public servants who are sued in relation to some loss arising from the performance of their duties.

(c) Section 6(5) provides that:

> "No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process."

Is the first limb of this too wide? Is the second limb too wide?

15. Reform Possibilities If the Committee were finally to come to the opinion that it should recommend to the Minister that the law should be changed, there are several forms that the recommendation might take.

A. The Ombudsman's present jurisdiction to recommend, in appropriate cases, that an ex gratia sum be paid to compensate for some item of maladministration might be given express statutory recognition. Or legislation might go further and enact that, upon the Ombudsman's certificate that a citizen has been the victim, in his opinion, of an unlawful administrative act, the Supreme Court could investigate the question of unlawfulness - without in any way being bound by the Ombudsman's opinion - and assess the amount of damages. If there is to be a new remedy in damages, this might be accompanied by a rule requiring the plaintiff to exhaust all other practicable legal remedies against all other persons before resorting to the new remedy.

B. A second possibility is that there should be no far-reaching new liability, but ad hoc provisions inserted in particular statutes where experience has shown that the risk of unlawful behaviour by officials is high, and serious loss is likely to eventuate if the risk materialises.

C. A third possibility is the enactment of an Administrative Law Damages Act. The central provision of such an Act (which would no doubt have to be subject to the specific exemptions conferred by any other Act) might be along the following lines:-

"Any person who being a person who may exercise a statutory power:

(i) exercises that power with the intention of causing harm or loss to any other person, other than harm or loss resulting or that may result from a bona fide exercise of the power; or

(ii) exercises that power, knowing that the power exercised does not extend to authorising him to act or make the decision which he in fact does or makes; or

(iii) fails to exercise his power with the intention of causing harm or loss, other than harm or loss resulting or that may result from a bona fide refusal to exercise the power; or

(iv) exercises the power maliciously

> shall be liable in damages to any person suffering harm or loss thereby caused, to the same extent as if his act or decision were a tort independently of this section."

The Committee will particularly welcome comment on these three possibilities. The chief implication of the third possibility is that in balancing the interests of the Crown and public officials and the taxpayer against the interests of the aggrieved citizen who has not merely suffered an unlawful administrative act (which he can at some expense rectify) but has also suffered consequential economic loss, the balance comes down in favour of liability - without proof of negligence - in any of the situations envisaged in (i) to (iv) above. On the other hand there would be no liability in damages simply because a decision was made in perfect good faith which later turned out to be void because of any of the many possible adminstrative law errors that may have been committed. Is the absence of liability here acceptable? If there were liability, would it be correct to say that hundreds of potential defendants, including present and retired public servants and Ministers of the Crown, and possibly even the members of statutory tribunals, as well as the Crown itself, will be potentially liable to legal proceedings where in the past no one has thought to sue them? If there were liability, then just a few claims each year would be very costly for the Consolidated Account. In the present Takaro claim for damages, for instance, the total claim is for an amount in excess of $1.5 million. The widening liability might also have repercussions upon the despatch of Government business. It could be argued that this will be inhibited if officials fear damages actions in respect of their acts and decisions, even if they personally do not have to foot the bill. There may be a tendency to timidity in decision-making: it may become necessary to "look over one's shoulder" to a greater and undesirable extent.