DAMAGES IN ADMINISTRATIVE LAW

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FOURTEENTH REPORT OF THE
PUBLIC AND ADMINISTRATIVE
LAW REFORM COMMITTEE

WELLINGTON
NEW ZEALAND

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1. The Problem

Should damages be payable to citizens who sustain losses by unlawful administrative action? We have been considering this broad question - of damages in administrative law - over the past two years. We have benefited from the responses to our Working Paper issued in August 1978. No report issued by any of the Commonwealth law reform agencies deals directly with the question.

We have carried out this study in the context of the massive increase, since the nineteenth century, of the powers of the State and of public authorities. The courts and the legislature have taken account of this growth by broadening and strengthening the grounds for the review of, and appeals against, administrative decisions. The 1968, 1972 and 1977 amendments to the Judicature Act 1908 and much specific legislation are part of that response, as are the significant court decisions to which we referred in our last report. Those responses are however, limited to correcting unlawful or wrong administrative action. They are not concerned with providing monetary compensation to those citizens who are affected by the action. We have no doubt that there is a need for such compensation in many cases. Indeed, as we shall point out, the law already makes such provision in a wide range of situations. But that law needs to be developed. How can this best be done? There are three broad possibilities:-

1. The courts might be left to develop the law; or

2. General legislation creating a right to damages for loss resulting from unlawful administrative action might be enacted; or

3. Specific statutes conferring powers on public authorities might, as appropriate, include a right to damages or compensation in respect of certain exercises of the powers.

We have decided in favour of a combination of the first and third approaches. That is to say, we have concluded that the courts should be left to develop the general law, but that in specific contexts a statutory right to damages or compensation should be created.

Some of us consider the report to be too emphatic in rejecting a statutorily based remedy in damages for losses suffered as a result of unlawful administrative acts or decisions. They regard the traditional tort concepts as inappropriate to deal with loss, frequently fortuitous and heavy, which results from governmental activities. They believe that it is equally inappropriate - as well as optimistic - to expect that a satisfactory principle of public liability will evolve from the common law based as it is on concepts of private liability. In their view what is required is a system which will achieve a more equitable distribution of the loss. Exceptional losses should not be borne by the individual on whom they have been inflicted by the government or governmental agency in pursuit of the public good. If the assumption is that the community benefits from this activity, then the conclusion must be that the community should bear the cost of it. Unlawful governmental action is to be perceived within this framework. Given the limitations of time and resources as well as human frailty, unlawful administrative acts and decisions are inevitable. The cost of these mistakes should not be borne by the individual who suffers them but by the community in whose name they are made. Consequently, the Committee members concerned would favour the enactment of a provision empowering the Court to award damages for loss suffered as a result of an unlawful administrative action for which no remedy is now available.

2. The Present Scope of Judicial Review

In modern New Zealand administrative law there are numerous grounds for attacking administrative decisions for unlawfulness, usually by means of an application for review under the Judicature Amendment Act 1972. The courts, following Anisminic v. Foreign Compensation Commission [1969] 2 A.C. 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. Minister of Food, Agriculture and Fisheries [1968] A.C. 997.

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

(a) a lack of jurisdiction to enter on the inquiry in question:

(b) giving the decision in bad faith:

(c) a failure to comply with the requirements of natural justice before reaching the decision in question:

(d) making a decision, i.e. the formal order, which there was no power to make:

(e) in good faith misconstruing the provisions giving the decision maker power to act so that he or it failed to deal with the question remitted to it and decided some other question which was not remitted to it:

(f) refusing to take into account something which a tribunal or official was required to take into account by the statute conferring the power:

(g) basing a decision on some matter which, under the provisions conferring the power, the decision maker had no right to tke into account, in short upon "irrelevant considerations".

This is Lord Reid's catalogue of jurisdictional errors [1969] 2 A.C. 147, 171. 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 decision to be a nullity. From all this it will be clear that there are many grounds upon which administrative action may be pronounced unlawful. That in turn emphasises the far-reaching significance of the problem. Should a person who has suffered from any of the various species of unlawful administrative action or inaction have the right to claim damages in respect of his loss?

3. <u>The Scope of our Inquiry</u>

To indicate the scope of the inquiry which we have undertaken, we should define "administrative action". By that expression we mean any action or decision taken by any tribunal or person (but not a court) by or under a statute empowering that tribunal or person to act or to decide a question. It is irrelevant for this purpose whether or not there is a duty to act judicially, or in accordance with fairness. Here and throughout our report "action" should be taken to include inaction. Our definition excludes the actions and decisions of purely domestic tribunals. Obviously the impact of a decision by a domestic (i.e. a non-statutory) tribunal can be far-reaching upon individuals who may suffer resulting loss which some may feel that the law should not compel them to bear. But we decided that it would be better to put on one side for the time being the additional complications which arise when loss arising from the acts or decisions of domestic tribunals is considered. In view of the re-constitution of the Supreme Court as the High Court, and of the Magistrates' Courts as District Courts, as from 1 April 1980, we have used the new nomenclature throughout our report.

4. The Special Problem concerning 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 sound policy to impose a liability in damages upon tribunals which have no funds of their own, and for which the Crown is not vicariously responsible. If it is answered that 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 Account? 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?

5. The Consequences of Invalidity

What are the consequences of a decision by the High 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 result is that the successful applicant becomes 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 High 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 special 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 decision is that the aggrieved person is granted the opportunity to obtain a lawful administrative decision. This does not necessarily mean that the original application or objection will be granted (or as the case may be, sustained). We have made this elementary point because it 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 18 of this Report.

6. <u>Legal Writing on the Subject</u>

The problem which confronted us has been the subject of some academic writing. We cannot review it in detail. We refer especially to:

1. Gould, "Damages as a Remedy in Administrative Law", (1972) 5 N.Z.U.L.R. 105;

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

3. Craig, "Negligence in the Exercise of a Statutory Power", (1978) 94 L.Q.R. 428.

4. H.W.R. Wade, <u>Administrative Law</u> (4th ed., 1977) Chap 20.

5. Ganz, "Compensation for Negligent Administrative Action", [1973] Public Law 84.

We have noted that the English Justice Report, Administration Under Law (1971) vigorously supports the conferment on the courts of a power to award damages.

7. The Gould Approach to Reform

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. In Farrington v. Thomson & Bridgland [1959] V.R. 286, 293 Smith J said that: "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". This is merely persuasive authority and has not so far been applied in New Zealand. Certainly, if this tort exists, its scope is unclear. Hence, for Gould: "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 with the particular problem which arises as to the liability of statutory tribunals for committing an administrative law error.

8. Mr Haughey's Approach

Mr Haughey 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), 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". (The English Law Commission has not so far been authorised to explore the question further.) After surveying the position in Australia, Canada, the United States, France and Denmark, Mr Haughey agrees with Mr Gould's approach.

9. Negligence in the exercise of Statutory Powers

Mr Craig first surveys the nineteenth century cases culminating in Geddis v. Proprietors of Bann Reservoir (1873) 3 App. Cas. 430, 455-456, where Lord Blackburn stated:

> "For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently."

We interpolate and emphasise that that famous proposition must be read in the light of the facts of that case. No issue as to an unlawful administrative decision, indeed no question of administrative law, concerned the House of Lords. A local Act of Parliament empowered the defendants to ensure a regular supply of water to mill owners whose works were situated on the banks of the River Bann. The House of Lords found that under the particular Act the defendants had power to cleanse a contributory river, but had been negligent in doing so, with the consequence that the plaintiff's supply was depleted.

Mr Craig next surveys a series of decisions, including East Suffolk Rivers Catchment Board v. Kent [1941] A.C. 74 and Dorset Yacht Co. Ltd v. Home Office [1970] A.C. 1004, which culminated in Anns v. London Borough of Merton [1978] A.C. 728. In the Anns case Lord Wilberforce, with Lords Diplock, Simon of Glaisdale and Russell of Killowen concurring, first discussed the general principles of liability for negligence. His speech undoubtedly represents the modern approach to the duty of care problem. The first question is whether there was sufficient proximity between plaintiff and defendant such that, in the reasonable contemplation of the defendant, carelessness on his part may be likely to cause damage to the plaintiff. If that question is answered in the affirmative, a prima facie duty of care exists and it is necessary to go on to the second question, viz. are there any considerations which ought to limit or reduce the scope of that duty, or the class of persons to whom it is owed, or the type of damages recoverable?

10. Planning v. Operational Decisions: Anns case

On that second question Lord Wilberforce recognised a distinction between planning and operational decisions. The borough council was empowered to make by-laws to regulate the construction of buildings. The lessees of flats in a two-storey block of maisonettes claimed that cracks in walls and sloping doors had resulted, inter alia, from the negligence

of the council in approving, by one of its officers, foundations which were inadequate. Lord Wilberforce recognised that it would be easier to superimpose a common law duty of care on the council's duties and powers under the Public Health Act 1936 (U.K.) where there had been an operational rather than a policy-planning decision. A local authority's policy decision would encompass the following: what scale of resources should the local authority make available to carry out its duties and powers; how many inspectors should be appointed, and what types of inspections should be made? These matters could not be reassessed in the courts through the medium of a negligence action. By contrast, the operational level was concerned with the manner of carrying out any inspection decided upon, given the limits set by the policy decision. A duty of care could exist but the plaintiff would have to show that the action taken was not within the limits of a discretion bona fide exercised before he could rely on this duty. The council would also be liable if it could be shown not to have given proper consideration as to whether it should inspect or not: it would then be acting ultra vires. It is at this point that the case, which did not directly concern decisions of a tribunal which are ultra vires in administrative law, begins to have potential relevance to such decisions.

11. Negligence and Ultra Vires

In the United States, as Craig shows, the rationale behind a number of superior court decisions - complicated by the language of some specific immunities from suit contained in the federal Tort Claims Act 1946 and state legislation - is that a public body should not be liable when the alleged negligence can be established only by challenging the method of using scarce resources, or balancing thrift and efficiency, or when the damage complained of results from a risk consciously taken by that body to achieve a policy pursuant to a discretionary power given by a statute. But no American case seems to deal

with the problem which arises when an ultra vires and negligent decision is made on an application for, say, a licence, which is a problem which has directly confronted us. Nor, as we have seen, did the Anns case expressly deal with that problem, at the head of which is the question of the relevance of ultra vires to negligence. We agree with Craig when he says: "The mere fact that something is not a relevant consideration for the purpose of the ultra vires doctrine tells us nothing about whether taking that factor into account involved a failure to take reasonable care." In the end Craig sees great potential in the development of liability at the operational level in the tort of negligence. But such development, which will undoubtedly occur and which we illustrate in para 16 when dealing with the New Zealand cases on the liability of local authorities in negligence, has only marginal relevance to the question whether there should be liablity for an invalid decision unaccompanied by any physical act. On that problem the Court of Appeal's decision in Takaro Properties Ltd v. Rowling [1978] 2 N.Z.L.R. 314, to which we now turn, is the most pertinent Commonwealth authority so far.

12. The Takaro case

In the Takaro case the plaintiffs claimed damages in excess of $1.75 million based upon losses allegedly caused by an ultra vires decision of the defendant Minister of Finance, who had refused his consent under the Capital Issues (Overseas) Regulations 1965 to a proposal whereby a Japanese corporation would take up a substantial number of preference and ordinary shares in Takaro Properties Ltd. It had previously been held by the Court of Appeal (see [1975] 2 N.Z.L.R. 62) that the Minister's refusal to consent was void because he had acted outside the powers conferred on him by taking into account irrelevant considerations and acting to secure objects other than those contemplated in the legislation. One point was authoritatively established by the Court of Appeal's decision on the motion to strike out certain parts of the statement of

claim for damages, namely that a claim to damages based solely on the fact that the Minister had acted outside the scope of the powers conferred upon him by the 1965 Regulations was clearly untenable and could not possibly succeed.

13. But might such a claim alternatively succeed where the Minister was negligent in the exercise of his statutory power? On this question Woodhouse J. referred to the impossibility of reassessing the policy decision made by an official or a public authority. "The Courts may review the decision in order to decide whether it was properly made within the limits of the statutory discretion but for obvious reasons they may not substitute a kind of judicial evaluation of the relevant considerations for the evaluation to be made by the authority or official as contemplated by the relevant statute" ([1978] 2 N.Z.L.R. at 325). Woodhouse J. then referred with evident approval to Lord Wilberforce's distinction between policy and operational decisions, and held that "it is open to the plaintiffs at least to contend that the Minister in making his decision was acting in terms of a statutory duty and that the function he was performing at the time fell into the operational rather than a policy area "(ibid). His Honour suggested <u>obiter</u> that "there will certainly be cases where the issue of <u>ultra vires</u> itself will be decided on negligence without anything more" (at 327). In the end he concluded that it was impossible to determine the duty of care question one way or the other at the present stage of the proceedings. "The negligence cause of action may lie or it may not. The answer in my opinion can only be discovered at a trial" (at 328).

Richardson J. for his part had no hesitation in concluding that "decisions of the Minister under the regulations may well fall within the policy area in Lord Wilberforce's formulation" in <u>Anns.</u> But it was not easy to "determine in the abstract and without any findings of fact or any evidence as to the types of

application for which consent is sought under the regulations and the practice adopted in processing and determining them, exactly where in the policy - operational area spectrum the Minister's discretion in this case stands" ([1978] 2 N.Z.L.R. at 336.) So the company should not be deprived of its opportunity of proceeding to trial in the High Court on its allegation of negligence. Richmond P. broadly agreed with the reasons given by Woodhouse and Richardson JJ., stating: "The principles of the common law governing claims for damages founded on negligence in a context of the invalid exercise of statutory powers are clearly in a state of evolution" ([1978] 2 N.Z.L.R. at 318).

The Court of Appeal has clearly held that a merely invalid decision causing loss does not give rise to a cause of action: there is no liability unless the invalidity is accompanied by a recognised tort. But it is unclear whether it is negligence <u>per se</u> to reply on irrelevant considerations when making an administrative decision, or whether some additional pointer to negligence must be thrown up by the facts, e.g. that doubt had been raised by an adviser but the decision-maker had not taken the trouble to take legal advice on the extent of his powers. More generally, in the <u>Takaro</u> case the Court was dealing with an application to strike out a cause of action in negligence as disclosing no cause of action; its prononcements are expressed in terms of hypothetical factual possibilities; and it may be that on the question of legal liability for negligently giving an invalid decision, their Honour's judgments do not establish any principle of law capable of being applied in other cases. The final disposition of the <u>Takaro</u> judgment is likely to be still some distance away. We believe that we should not await that final disposition before finalising our report. In any event, to anticipate our conclusion in para 25, we are of the view that no sweeping legislative reform ought to be recommended. The <u>Takaro</u> litigation is part of the evolutionary process which we believe should continue without the constraint of general formulas superimposed by statute upon the common law.

14. The result of our analysis is that there are no English or Americal cases which specifically determine the liability of a decision-maker, when his decision is not accompanied by physical action, but is made upon an application to him. THat is the typical kind of case that has concerned us and of which different illustrative examples are offered in para 17. It must not be assumed, however, that the Crown, local authorities and other individuals exercising statutory powers enjoy a wide immunity in tort in New Zealand. The law already often shifts the loss from the person suffering it to the administrator or official who is proved to have caused it. The scope of the problem should not be wrongly exaggerated.

15. A Short Catalogue of Existing Liabilities

Tortious liability in respect of the acts or words of administrators and public authorities already has a wide reach. Someone exercising a statutory power may be held liable under one of several established torts. The first fourt headings in the list which follows are particular categories of the tort of negligence.

(a) Negligent act causing physical damage to property, even where the defendant has a substantial discretionary authority. See Dorset Yacht Co. v Home Office [1970] A.C. 1004 and Anns v. London Borough of Merton [1978] A.C. 728, as explained above.

(b) Negligent misrepresentation giving rise to physical property damage.

(c) Negligent act causing pure economic loss. See the 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 Q.B. 223 (negligent search by Registry clerk) for a more particular precedent falling within the present field of inquiry. Casey J.

has recently hald that the Caltex Oil case is "authority for the view that a liability for [pure economic] loss exists, but is limited to a situation when the wrongdoer can reasonably foresee that the person affected (as distinct from a general or indeterminate class of persons) will suffer loss as a consequence of his conduct": J & J.C. Abrams Ltd v.Ancliffe [1978] 2 N.Z.L.R. 429, but cf. also the observations of Cooke J. in Taupo Borough Council v. Birnie [1978] 2 N.Z.L.R. 397, 404.

(d) 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 N.Z.L.R. 403.

(e) 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 N.Z.U.L.R. 105, 115); intimidation; or inducement of breach of contract. See P.T.Y. Homes Ltd. v. Shand [1968] N.Z.L.R. 105 and Central Canada Potash Co. Ltd. v. Attorney-General for Saskatcheway (1975) 57 D.L.R. (3d) 7 (tort of intimidation linked with unlawful decision). The Saskatchewan Court of Appeal subsequently reversed the decision of Disbery J. (1977) 79 D.L.R. (3d) 203) on the basis that intimidation had not been established, but without affecting the principle.

(f) 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 through failure of natural justice); Blundell v. Attorney-General [1968] N.Z.L.R. 341 (false imprisonment); Carrington v. Attorney-General and Murray [1972] N.Z.L.R. 1106 (wrongful arrest and assault).

(g) Torts of wrongful interference with property, notably conversion. See F. E. Jackson & Co. Ltd v. Collector of Customs [1939] N.Z.L.R. 682, which was an action for possession of goods and for damages for their wrongful detention. The detention was necessarily wrongful if the Import Control Regulations 1938 were invalid, as they were held to be.

(h) 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] A.C. 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).

In an appropriate case a person exercising a statutory power could also be held liable in deceit, or injurious falsehood, or defamation.

16. The Existing Liability of Local Authorities

Many people no doubt feel that they should have a remedy in damages when a local authority's wrongful act or decision causes them financial loss. It is accordingly important to emphasise that the common law already allows compensation for loss occasioned by a tort committed in the discharge of a wide range of local body functions, and that the tendency is to expand the scope of that liability.

Under the heading of nuisance a local authority is liable for the creation of a private nuisance which is not necessarily or inevitably involved in the construction or maintenance of an authorized public work: Irvine & Co. Ltd v. Dunedin City

Corporation [1939] N.Z.L.R. 741. The Court of Appeal there construed the predecessors of the present ss.166 (compensation) and 168 (no nuisance) of the Municipal Corporations Act 1954. The onus of proving that the nuisance is in the necessary and inevitable category lies upon the party seeking to escape liability: see Manchester Corporation v. Farnsworth [1930] A.C. 171; Taupo Borough v. J. W. Birnie Ltd [1978] 2 N.Z.L.R. 397, affirming the decision of Haslam J., 11 June 1975; Powrie v. Nelson City Corporation [1976] 2 N.Z.L.R. 247. It used to be thought that in a private nuisance claim the nuisance must enamate from neighbouring land occupied by the defendant, but Mahon J. has recently held that this is not so: Clearlite Holdings Ltd. v. Auckland City Corporation [1976] 2 N.Z.L.R. 729. There the plaintiff recovered costs and monetary loss suffered when its factory floor was damaged as a result of a tunnel excavated under the factory.

Under the heading of negligence the Anns case, already discussed, affirmed that a local authority may be liable for negligence arising out of the administration of local bylaws; and that the time for filing a claim runs from the discovery of the damage, and not from the date of the original negligent act, so that the opportunity for pleading the expiry of a limitation period and thus securing an immunity is much reduced.

A local authority will also be liable under Hedley Byrne & Co. Ltd v. Heller & Partners Ltd. [1964] A.C. 465 if all the necessary ingredients (negligent advice; a special relationship; assumption of responsiblity; reliance; pecuniary loss) are established. Property owners in New Zealand often make casual inquiries about the nature and effect of a district scheme: the inquiry may be too casual to give rise to a special relationship. Thus in Care v. Papatoetoe City [1975] 1 N.Z. Recent Law (N.S.) 335 a casual planning inquiry did not attract liability for an allegedly negligent answer. But there will be liability if (in Lord Reid's words in Hedley Byrne) "the party seeking information or advice was trusting the other to

exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him." The effect of this, surely, is that the court is rightly entitled to distinguish between the advice given by a counter clerk and that given by the City's Town Planner. It may also distinguish between cases where a member of the public makes a perfectly general inquiry, and cases where he discloses his intention in some detail and otherwise makes it clear that he is going to rely on what he is told.

A local authority will be liable if its officers fail to take reasonable care to ensure that a building site is appropriate for a building to be erected thereon, when the plans are submitted to it for approval as an essential step towards obtaining a building permit: Gabolinscky v. Hamilton City Corporation [1975] 1 N.Z.L.R. 150. And it has been held that it is liable for any negligence in approving plans, and for failing to carry out a final inspection of the premises: Hope v. Manukau City Corporation [1976] N.Z. Current Law 762. Chilwell J. in that case, discussed by K.A. Palmer in [1976] N.Z.L.J. 541, followed Dutton v. Bognor Regis U.D.C. [1972] 1 Q.B. 373 in ruling that the Council had control over the building operations and was therefore bound to take care in carrying out its statutory functions. It is problematic whether the law thus enunciated must be taken to have been qualified by what the House of Lords said in Anns case. Another somewhat similar case arose in Johnson v. Mt Albert Borough [1977] 2 N.Z.L.R. 530 where Mahon J. held that a local authority which, knowing that a house is to be built on filled ground, issued a building permit without requiring foundations that will be adequate for such ground, or fails to ensure by inspection that adequate foundations are used, is liable to the owner if subsidence causes damage to it. (In the Court of Appeal, liability was apportioned between the builder and the council). Further, a local authority will probably incur liability in negligence for issuing statutory certificates without using reasonable care in so doing: cf. Rutherford v. Attorney-General [1976] 1 N.Z.L.R. 403.

On the other hand it seems that a failure to carry out town planning duties, while leading in the ordinary case to the grant of an injunction or perhaps mandamus, does not give rise to a right to damages against the Council: Attorney-General v. Birkenhead Borough Council [1968] N.Z.L.R. 383. In Duigan v. Thames Coronamdel District Council and Creasy [1979] N.Z. Recent Law 147 Mahon J. revoked a building permit as having been unlawfully issued by the Council in breach of its obligations under the Town and Country Planning Act 1953. No issue of damages arose.

We conclude that many local authority functions (duties and powers) under statute attract a parallel common law duty to use reasonable care when discharging them; and that the precise extent of their liability is unclear but evolving and expanding. We are of the view that it would be wrong to divert the course of the case law by enacting a new legislative principle which would provide a new starting point but undoubtedly some difficulties of interpretation as cases unforeseen by the draftsman arose for consideration. The authorities do not establish a universal duty of care for all local authority functions. The principal category so far uncovered by authority is the type of situation that arose in Takaro but transposed from the central government to the local government area. To anticipate the conclusion we reach in para. 25, we do not recommend the enactment of general remedial legislation to provide compensation for those who suffer loss through the negligent and invalid exercise of a statutory power by a Minister of the Crown or an officer of central government. It would be inconsistent to recommend the enactment of legislation to give a remedy in the case of negligent and invalid exercises of power by an officer of local government.

17. <u>Illustrative Examples</u>

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 probably 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 has been "unlawfully imported" (which would bring it into the category of "forfeited goods": s.270(g)). The importer loses the use of 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 <u>Hedley Byrne</u> 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. There has been

an innocently unlawful exercise of statutory power. Can he sue? Probably yes, if the valuer's misinterpretation of the law can be regarded as negligent. 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 planning permission in the form of a specified departure from his local authority and applied 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 a 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 High 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. 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:-

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 High 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) to be confined to the loss attributable to the extra delay between the first and second decisions (ii) to extend to the $10,000 loss of income, or (iii) to be confined 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 Act 1975, inserted by 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?

18. 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 any new liability created by reforming a statute, there would be no scope for exemplary damages based on Lord Devlin's category in Rookes v. Barnard of "oppressive, arbitrary or unconstitutional actions by the servants of the Government". 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 probablities 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 unlawful decision did not cause his loss, and in any event his own ommission to apply again was the proximate cause of his loss.

We could recommend that compensation be payable simply because an unlawful 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 we 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 the 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 we are of the firm opinion that it would be unjustifiable. We also thinks that, if there were a new action for damages in respect of unlawful administrative decisions, the ordinary principles of causation, remoteness of damage and mitigation would have to apply, as in an action for a tort.

19. Develop "Misfeasance in a Public Office"?

We do not see the solution to our problem, advocated by Gould and Haughey, as holding out any promise for the creation of a broad new type of liability. Any development by the courts of a wide-ranging remedy under the label "misfeasance in a public office" is likely to 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 Messrs Gould and Haughey. Probably, if the tort exists at all, "malice", in some sense of that always slippery word, is a necessary ingredient in a course of action: Smith v. East Elloe R.D.C. [1956] A.C. 736; David v. Abdul Cader [1963] 1 W.L.R. 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.

20. Reform Possibilities

In our Working Paper we tentatively set out various ways in which the law might be reformed, and invited comment.

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 High Court could investigate the question of unlawfulness - without in any way being bound by the Ombudsman's opinion - and assess the amount of damages. A new remedy in damages might be accompanied by a rule requiring the plaintiff to exhause all other practicable legal remedies against all other persons before resorting to the new remedy.

B. *Ad hoc* provisions might be 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. An Administrative Law Damages Act might be enacted. 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, we proposed, 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 <u>bona fide</u> exercise of the power; or

(ii) exercises that power, knowing that the power exercised does not extend to authorising him to do the 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 <u>bona fide</u> 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."

21. <u>The response to our Working Paper</u>

We sent our Working Paper to a wide variety of organisations and persons, and particularly invited comment on our three different tentative reform proposals. The most detailed replies came from local authorities in the form of comments prepared by their legal advisers.

The general view of those legal advisers was that the law should be left to be developed by through the courts, and that a statutory extension of liability is neither necessary nor desirable. They believed that in principle decisions made in good faith, albeit erroneously, should not give rise to an action for damages. In the particular case of legally erroneous planning decisions by local authorities attention was drawn to the existence of rights to appeal to the Planning Tribunal and the availability in certain circumstances of judicial review by the High Court. We were reminded that the Planning Tribunal has jurisdiction to award costs, and this was seen by some respondents as sufficient, when coupled with the reversal of a local authority's erroneous decision, to compensate the person aggrieved by the error. One respondent equated the loss suffered by an individual at the hands of a local authority, through legal error, with an opportunity lost through mere administrative delay or error, and said that both types of loss were ordinary business risks which should not attract a right to compensate when they materialise.

Some more specific arguments were advanced against the provision of a new liability. It was said that there is no significant cause for dissatisfaction, with the present law, and that other areas of law reform deserve a higher priority. It was argued that local authorities often had to make policy decisions, and the proper remedy for dissatisfaction with the nature of those decisions was on the occasion of local body elections. The practical difficulties attendant upon a statutory reform of the law are so great they outweight the desirability of that reform. It is either difficult or impossible to achieve a proper balance between the competing interests of public administration and the individual. Should damages be paid from the assets of those responsible, or from the general funds of the decision-maker in question? There would be a tendency to timidity in decision-making if damages could be claimed against a local authority for decisions which turned out to

be unlawful. A prudent council would inevitably seek to insure itself against claims which would inevitably be large claims on occasions, but might well find it impossible or extremely expensive to obtain insurance against this class of risk. Without the protection of insurance there would be an even greater tendency to "look over one's shoulder". Reference was made to the immunity of a Judge of the High Court from claims for damages for making a jurisdictional error. It was asked whether in terms of public policy there was any valid reason for distinguishing between the erroneous decisions of a local authority council of the Planning Tribunal on the one hand, and the erroneous decisions of a High Court Judge on the other.

One respondent summed up his views in this way: "It seems to us that no change to the law is required. Where malice is proved, a remedy presently exists. Where powers are exercised in good faith, no liability should fall upon the decision maker. It might be otherwise if there were not other remedies available to an aggrieved citizen ..." This was a reference to the power of judicial review contained in the Judicature Amendment Act 1972.

A.R. Turner S.M., chairman of the No. 1 Division of the Planning Tribunal, summarised his view as being that "the remedy for a wrong administrative decision made in good faith should not be in damages against the decision-maker but by way of appeal to another body." That comment was made in the context of decisions against which there is a right of appeal, and loses its force when no right of appeal exists. There are many statutory powers where there is no right of appeal, and none is likely to be provided in the forseeable future, e.g. decisions of the Overseas Investment Commission under the Overseas Investment Act 1973.

Two other chairmen of statutory tribunals were good enough to furnish us with comments. Both said that they would have been reluctant to accept appointment in the absence of an immunity provision in their empowering Act, and that their personal assets should not be at risk in consequence of the decisions which they or their tribunals gave, unless bad faith was involved. One of them raised the pertinent question of the liability of other members of a tribunal for decisions on questions of law reached by the chairman of the tribunal. He echoed a point already noted by asking: "If quasi-judicial tribunals are to be liable should not liability also extend to Magistrates and Judges on the same grounds?"

Our Working Paper was distributed by the New Zealand Law Society to District Law Societies but we did not receive any comments from them.

22. Our Reconsidered Views.

We have decided not to recommend any of the three tentative proposals outlined in our Working Paper.

There was no enthusiasm expressed for any proposal involving an extension of the Ombudsman's powers. Upon reflection we consider that an investigation by the Ombudsman, and a certificate by him that in his opinion an unlawful administrative act or decision had been done or given, should not in principle be a condition precedent to any court proceedings. Basically, the functions of an Ombudsman are persuasive and recommendatory, and it would be undesirable if he were to be in any way associated with the granting of coercive remedies by a court. If such a procedure were a condition precedent to the recoverability of damages, there would be some undesirable delay before an action could be commenced. As to exhausting other remedies first, such a

rule or requirement might be difficult to draft and would certainly add considerable complexity to the administration of the law, and introduce the possiblity of a highly technical defence being successful. Moreover, it is by no means clear to us that legal remedies that do not include monetary compensation ought to be required to be exhausted before a damages action is commenced.

Proposal B in our Working Paper (see para. 20, supra) is also not recommended in the form in which it was expressed in the Working Paper. We do not think that it would be practicable to insert ad hoc damages provisions in future statutes only. To be consistent, we would have to make a series of recommendations in relation to many existing statutory powers. It would be very much a matter of subjective opinion whether the risk of unlawful behaviour by a named official was "high". Again, the "seriousness" of a loss is relative to the financial standing of the loser. Some of our recommendations would probably be acceptable to Government and others unacceptable on policy grounds. The end result of the process would probably be that in a few cases there would be a special liability in damages, and in the case of all other statutory powers no liability (apart from the possiblity of invoking the existing common law remedies). This prospect we regard as unacceptable. If there is to be liability in one case and not another this should depend not on expediency but on principle, consistently applied. We ourselves have been unable to formulate a readily intelligible principle that would justify the imposition of liability in the case of the unlawful exercise of one statutory power, and its non-imposition in the case of other statutory powers broadly similar in nature and effect.

23. Our Recommended Statute - by - Statute Approach

We are, however, in favour of a slightly different procedure. We recommend that whenever a new statute confers powers that, if exercised unlawfully will cause economic loss, consideration should be given to the inclusion of a provision relating to compensation for losses flowing from any unlawful decisions given by the donee(s) of the power. We recommend that the Government should, bv Cabinet minute, impose the responsibility for this consideration on the Government Department initiating such legislation, on the office of Parliamentary Counsel, and on our Committee. If we decided to recommend the inclusion of a compensation provision, we would transmit our recommendation both to the department responsible for the legislation and to the Minister of Justice. The compensation would not necessarily be recoverable as damages in a tort action. The principles on which liability should be determined could be tailor-made to the nature of the power exercised. In the case of a power being reposed in a Tribunal, its members would never be personally liable to pay the damages awarded. We would propose that new statutes be examined with the aid of the following guidelines for the committee and others concerned:

(a) how great is the risk that innocent persons will suffer loss as the result of legally erroneous decisions taken in good faith;

(b) when loss is suffered, will it be typically heavy or typically trivial. Relevant to this consideration is the availability of review, including the quashing of the decision by the High Court and the existence or non-existence of a right of appeal. Prompt exercise of the right of review or appeal will in many cases reduce the losses caused by the unlawful decision.

(c) whether the common law already provides an adequate remedy? In such a case, it is unlikely that we would recommend the imposition of a statutory liability.

(d) whether the imposition of liability in the particular instance is seen as analogous to circumstances where liability already exists.

We envisage that in appropriate cases there would be limitations on the recoverability of compensation, including a ceiling on the amount awarded. If compensation was provided for the legislation would also indicate the fund from which it would be payable.

In order to indicate how our recommendation, if adopted, would operate, we have chosen the field of town planning as an illustration of legislation where the imposition of liability would be recommended. Planning is an area where in the public interest restrictions are placed on an individual's use of land. The public benefit, but the individual often suffers economic loss. The Town and Country Planning Act 1977 already provides for compensation in certain limited circumstances. We believe that provision should be expanded so that an individual who suffers loss arising from unlawful action under that Act can be compensated from funds provided either by central or local government according to whether the country as a whole or a locality benefited from the planning decision.

24. <u>Why we do not recommend a new constricted statutory liability</u>

We now return to Proposal C in our Working Paper (see para. 20 <u>ante</u>). We agree with the general tenor of the comments that we received. One respondent said that "these bare bones of a remedy which are left in Proposal C seem hardly to

justify all the fuss". We are obliged to agree. What was tentatively proposed would, if enacted, result in a very narrow liability. Probably the provision we suggested does no more than restate existing law, with the only benefit being the slender one that there would be a clearer starting point for lawyers than the present decisions and dicta in the area of liability for malicious or knowingly wrongful decisions. Allegations of bad faith or dishonesty or malice are made so rarely that it scarcely seems worth while to attempt a restatement of the existing decisions in statutory language. Proposal C would leave untouched the far more significant area of unlawful administrative decisions reached with or without negligence, but certainly in good faith and without any "malice" (in any of its possible connotations). Proposal C is accordingly not recommended.

25. Why we do not recommend a broad new liability

After anxious consideration, we have decided that we cannot at present recommend the enactment of a broad new liability to pay damages for loss suffered in consequence of unlawful administrative acts or decisions. We recognise, too, that there is no identifiable class of plaintiffs to whom we could have sent our Working Paper, and that the comments we received were chiefly from local authorities who have perhaps more to lose than any other group if such a new liability were introduced. Nevertheless we are persuaded that in this problematic area, where public and private law intersect, we must proceed cautiously, and that it is our duty to balance the competing interests involved. Our reasons for declining to recommend a broadly worded new liability for losses resulting from unlawful administrative decisions are the following:-

1. As we have pointed out, the law already provides a pecuniary remedy for many kinds of unlawful acts. In particular, whenever an act amounts to a tort in the absence of statutory authority, the unlawfulness of any decision to perform that act will destroy the authority, and leave the defendant, whoever he be, liable for damages in tort in the ordinary way.

2. The expanding tort of negligence already provides a remedy over a broad area of local body action and decision-making.

3. Any new remedy would be generally worded, but would fall to be applied by the courts to a bewildering variety of fact situations, so much so that we cannot be confident that the remedy would not create as much injustice to defendants as it remedied for plaintiffs.

4. Judge-made law is likely to be better law in this area than statute law. Other cases besides Takaro are known to be pending, so it should not be very long before the shape of the common law can be more clearly discerned.

5. If and in so far as a new Administrative Law Damages Act were to attach liability to decisions that were invalid, but reached without negligence, that would reverse the law as stated in Takaro and the Australian and Canadian cases there in referred to. And, quite apart from the fact that the courts have set themselves against liability for invalidity without negligence, we believe that to impose liability for mere invalidity would incorrectly balance the competing interests. Very large amounts would often be involved. Moreover, for any administrative law error, however trivial, damages would be claimable: there would be no distinction between gross and very minor jurisdictional errors. As the requirements of natural justice have been judicially made increasingly rigorous, some jurisdictional errors can be very minor. The controversial growth of a separate duty to act with

procedural fairness makes this point even more significant. There would also be two very real dangers. The first is that the judges would tend to reverse their tendency over the last decade to widen the grounds of judicial review of administrative action, and would become distinctly more hesitant to quash decisions in borderline cases where it would be seen that instead of this merely leading to a correct decision, as at present, it would lead in all likelihood to a claim for damages against a conscientious but mistaken administrator. The second is that there would be an imperceptible but significant tendency for officials to delay making any decisions before legal advice was obtained, more reference than at present occurs to superiors (if any) in the hierarchy; and, more generally, a lessening of speed and administrative efficiency. Each of these points can be caricatured and then dismissed. But we believe that when they are considered cumulatively, the case for introducing a radical reform is not made out. We should add tht there has been no noticeable clamour for any such reform; but also that that has not been among the more influential of the considerations that have moved us for, by the nature of the case, there is no pressure group to press for reform. We should have thought, however, that the District Law Societies would have been vigilant in pressing instances of injustice upon us, should the incidence of such injustice been high in their opinion. They have, in fact, refrained from all comment on our Working Paper.

6. Any radical new remedy would in practical operation achieve much less than the public would be likely to expect, because of the peculiar difficulty of proving that the unlawful administrative act caused the loss complained of (see para. 18 above). Thus it would be of limited efficiency unless we were prepared also to reverse the onus of proof or to abolish the need to prove causation. We have already said that neither of these drastic steps can be contemplated.

We do recognise that other legal systems, including some in Europe, provide remedies in respect of the abuse of power by instrumentalities of the State. We plan to return to the questions discussed in this paper at a later date when we will have gained experience in relation to draft legislation as outlined in paragraph 23, and we shall also have benefited from further development of the law here and elsewhere.

27. The French Conseil D'Etat

One of those other legal systems in the French. In some circumstances French Law, as developed from general principles underlying the constitutionnel documents, provides a remedy in damages to the individual affected by state action whether the state is at fault or not. The principle of equality as applied to the sharing of public burdens has been vividly expressed by Duguit in "Traite de Droit Constitutionnel" (3rd ed., page 469) in these terms:

> "The activity of the state is carried on in the interest of the entire community; the burdens that it entails should not weigh more heavily on some than on others. If then state action results individual damage to particular citizens, the state should make redress, whether or not there be a fault committed by the public officers concerned. The state is, in some way, an insurer of what is often called social risk "('risque social')"...

28. Proceedings against the Crown

In our Working Paper, we stated that we had decided to re-examine the language and effect of s.6 of the Crown Proceedings Act 1950 and we posed some questions about subsections (1), (3) and (5) in particular.

We stated that we would welcome comment from anyone who had encountered technical difficulties when seeking to have the Crown held directly or vicariously liable in tort. No comments were received on this part of the Working Paper and

this possibly shows that in practice section 6 does not produce any injustice or serve to deny remedies on technical grounds where remedies ought to be available. We have nevertheless reviewed s.6 generally and we recommend some amendments to its language. The effect of our recommendations, if adopted, will be of only small practical importance. We have benefited from the extensive discussion in Mr D. P. Neazor's unpublished thesis, Crown Liability in Tort in New Zealand (V.U.W., 1967) chapter 4 of Professor Peter Hogg's work, Liability of the Crown (Law Book Co. Ltd., 1971) and the New South Wales Law Reform Commission's Report on Proceedings By and Against the Crown (L.R.C. 24, 1975). We think it unnecessary to survey the history of petitions of right, or to survey the various Australian state statutory provisions which differ markedly from the Crown Proceedings Act 1947 (U.K.), which was largely copied in New Zealand when the Crown Proceedings Act 1950 was enacted. The 1950 Act very substantially simplified the law and in some respects improved the position of the litigant seeking a tortious remedy against the Crown. But there are some gaps which it is now timely to fill, and there are some problems of interpretation which should be resolved by legislation. Our recommendations are in some respect similar to the conclusions reached by the Law Reform Commission of British Columbia in its Report on Civil Rights: Part I Legal Position of the Crown (1972).

28. Under s.3(2) of the 1950 Act any person may enforce any claim or demand against the Crown in respect of, inter alia:

> "(b) Any wrong or injury for which the Crown is liable in tort under this Act or under any other Act which is binding on the Crown."

Glanville Williams has aptly commented:

> "There is no section of the Act stating generally that the Crown shall be liable in tort. Instead the general principle [sc. of immunity] is left but very wide exceptions are carved out of it": Crown Proceedings (1948), 28.

Section 6 states the circumstances in which the Crown is "liable in tort under this Act." It provides:

(1) Subject to the provisions of this Act and any other Act, the Crown shall be subject to all those liabilities in tort to which, if it were private person of full age and capacity, it would be subject -

(a) In respect of torts committed by its servants or agents;

(b) In respect of any breach of those duties which a person owes to his servants or agents at common law by reason of being their employer;

and

(c) In respect of any breach of the duties attaching at common law to the ownership, occupation, possession, or control of property:

Provided that no proceedings shall lie against the Crown by virtue of paragraph (a) of this subsection in respect of any act or omission of a servant or agent of the Crown unless the act or omission would apart from the provisions of this Act have given rise to a cause of action in tort against the servant or agent of his estate.

(2) 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 this 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 so subject if it were a private person of full age and capacity.

(3) 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.

(4) Any enactment which negatives or limits the amount of the liability of any Government Department or officer of the Crown in respect of any tort committed by that Department or officer shall, in the case of proceedings against the Crown under this section in respect of a tort committed by that Department or officer, apply in relation to the Crown as it would have applied in relation to that Department or officer if the proceedings against the Crown had been proceedings against the Department or officer.

(5) 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.

29. Attention is first directed to the three paragraphs (a) (b) and (c) of s.6(1). Section s6(1)(a) imposes a vicarious liability in respect of torts committed by the Crown's servants or agents. A definition of "servant" was introduced by the Crown Proceedings Amendment Act 1958: the word <u>means</u> "any servant of Her Majesty, and accordingly (but without prejudice to the generality of the foregoing provision) <u>includes</u> a Minister of the Crown, and a member of the New Zealand armed forces; but does not include the Governor General, or any Judge, District Judge, Justice of the Peace, or other judicial officer." This definition reproduced the existing definition of "Officer" which "<u>includes</u> any servant of His Majesty..." and proceeds

with the same specific inclusions and exclusions. Section 6(1)(a) thus simply means that where a private employer would be vicariously liable for the torts committed by his employee or agent or independent contractor (for "agent", in relation to the Crown is defined by s.2 as including an independent contractor employed by the Crown) the Crown shall also be liable. The effect of s.6(1)(b) is that the Crown shall be directly liable for any breach of an employer's duty to his employees or agents at common law, in circumstances where a private employer would be so liable. Breach of an employer's duties in regard to the provision of a safe system of work etc. is of course much less significant since the enactment of the Accident Compensation Act 1972. The effect of s.6(1)(c) is that the Crown is directly liable in respect of any breach of an occupier's duties attaching at common law, those duties having been partially superseded, in respect of lawful visitors (but not trespassers) by the Occupier's Liability Act 1962, an Act which binds the Crown, and which since 1 April 1974 is applicable only to property damage. Whether s.6(1)(c) embraces liability under the principle in Rylands v. Fletcher is obscure.

It is inescapable that under s.6(1) the Crown is liable in tort only if the tort falls within either (a) or (b) or (c). So far as vicarious liability is concerned, probably the whole field is covered (for a possible exception, see para. 30) because the orthodox rationale of this kind of liability, occasionally questioned but approved by the House of Lords in Staveley Iron and Chemcial Co. v. Jones [1956] A.C. 627, is that the tort is not based on the employer's breach of any duty that he owed, but on the employee's tort which is imputed to him. So far as direct liability is concerned, however, paras. (b) and (c) state only the leading instances of such liability. Any other direct liability is impliedly excluded. There is thus a gap which cannot be defended. The Crown should be liable in tort in all circumstances where a private person would be either directly or vicariously liable. The draftsmanship of the 1950 Act did not give full

effect to this principle. There are very few illustrations of the gap in liability, but it is clearly recognised by authority, notably Hall v. Whatmore [1961] V.R. 225 per Hudson J at 228-9.

To take an example of that kind of duty, assume that the Crown has brought a huge installation into existence and has negligently totally omitted to take some prudent step. It may, for example, have failed to instal devices to prevent a hydro-electric power station's reservoir from bursting and flooding adjacent farmers' lands. A plaintiff suing in negligence may be unable to point to any tort committed by a "servant or agent" in order to fix the Crown with vicarious liability: he will be unable, should the Crown take the point, to sue the Crown in tort for the breach of the Crown's direct obligations, unless he can convince the Court that the case falls under para. (c), which in the example given is dubious.
Or suppose that the Crown fails to take adequate steps to prevent maximum security prisoners from escaping from a penal institution, a situation reminiscent of Home Office v. Dorset Yacht Co. [1970] A.C. 1004. Assume that they escape and cause property damage. No failure to exercise reasonable care on the part of a Crown servant may be able to be proved. The Crown's liability is given dubious, even assuming that the plaintiff successfully overcomes the hurdles set by Ann's case (para. 10 supra). And there would definitely be no direct Crown liability for failure to prevent the carelessness of non-servants, as was imposed on a private defendant in Brooke v. Bool [1928] 2 K.B. 578. The problem would be overcome by deleting paras. (a) (b) and (c) altogether, s.6(1) would then cover all instances of direct and vicarious liability, with no implied exceptions. We so recommend. There is no counterpart to paras. (a) (b) and (c), with their implicit exhaustiveness, in several other Commonwealth jurisdictions. Thus there are no similar limiting provisions in The Claims against the Government and Crown Suits Act 1912 (N.S.W.).

30. The Crown as "Particular Employer"

We have said that almost the whole area of vicarious liability is covered by s.6(1)(a). An arguable exception arises in the case of a tort of an employee "borrowed" by to the Crown, which then becomes his "particular employer". There is some scope for a particular employer to be held liable for the borrowed employee's torts at common law (see Century Insurance Co. v. N.I. Transport Board [1942] A.C. 509), but s.6(1)(a) might be construed to mean that the Crown's vicarious liability is confined to servants of which it is the "general employer". In the United Kingdom liability is restricted to the acts, neglects or defaults of officers appointed by the Crown and paid out of the Consolidated Fund or other public funds: s.2(6) of the Crown Proceedings Act 1947 (U.K.). That subsection was not reproduced in our 1950 Act and the problem seems not to have arisen in litigation in New Zealand (for Canada see Farthing v. The King [1948] 1 D.L.R. 385). Our recommendation in para. 29 will, if adopted, preclude the problem from arising. As a result of deleting paras. (a), (b) and (c) the Crown will be liable or not liable exactly as would be a private "particular employer" at common law.

31. Vicarious Immunity

Attention is next directed to the proviso to s.6(1). At first sight this may merely seem to reinforce the rationale of vicarious liability, namely that if the servant or agent of the Crown has committed no tort, there is no tort to be imputed to the master. In truth it goes somewhat further because the servant or agent may enjoy a personal statutory immunity, e.g. that of the serviceman who obeys the lawful command of a superior officer for the suppression of a riot: see Crimes Act 1961, s.47. A private employer has no defence based on the

personal immunity enjoyed by his employee: Harvey v. O'Dell [1958] 2 Q.B. 78 (where the action was statute-barred). In principle, our aim being to equate the position of the Crown with that of a private employer, the general common law should also apply to the Crown, but the proviso negates its application. We accordingly recommend that the proviso to s.6(1) also be repealed.

32. Who is a "Crown servant"

The definition of "servant" added in 1958 did nothing to elucidate the question: who are Crown servants? The most troublesome aspect of this question concerns the status of policemen. It has been held that although a constable is not "servant" of the Crown, the Crown is nevertheless liable for his tortious acts by the operation of s.6(3), which refers to "officers": Osgood v. Attorney-General (1972) 13 M.C.D. 400. Thus s.6(3) operates independently of s.6(1). This view is in our opinion correct and preferable to the statement in Power v. The King [1929] N.Z.L.R. 267 that "In New Zealand all police officers are servants of the Crown": cf. also Ellis v. Frape [1954] N.Z.L.R. 341. (These authorities are usefully discussed by H.A. Cull in (1976) 8 V.U.W.L.R. 148). We recommend the retention of s.6(3). The abbreviation of s.6(1), which we have recommended in para. 29 cannot on this view of the law, affect the Crown's vicarious liability for the torts of policemen as "officers of the Crown" committed in the course of performance or purported performance of their functions, and such liability is desirable and frequently imposed. Another aspect of this question is the relationship between the Crown and public corporations. There are numeous cases concerning whether particular corporations are "servants" of the Crown. We do not recommend any alteration of the course of the common law in this difficult area. Thus, if on

the tests applied by the courts, a particular incorporated body is held to be a Crown servant or agent, and it commits a tort which carrying out its functions, it will involve the Crown in vicarious liability. If it is not a Crown servant or agent, it alone will be the tortfeasor and subject to both direct liability and vicarious liability for the torts of its own employees. Our recommended abbreviation of s.6(1) will not affect the legal analysis one way of the other.

33. We have not so far dealt with a general argument which might theoretically be raised against the imposition of liability under the opening words of s.6(1) which will, if our previous recommendations are adopted, be all that remains of the present s.6(1). This is the argument that many of the activities of government which occasionally cause injustified damage to individuals have no analogy in the private sector. The "private person of full age and capacity" does "not keep an army, a police force, a post office, courts, goals ...; nor does he issue licences patents and trade marks, or inspect factories, or collect taxes and customs duties" (Hogg, op. cit. 77). The argument would proceed that there is no Crown liability where the activity in the course of which the tort is committed is a peculiarly governmental activity, with no private analogy. But the argument has always been expressly or impliedly rejected in Australia (see e.g. Parker v. Commonwealth (1965) 112 C.L.R. 295; Ramsay v. Pigram (1968) 118 C.L.R. 271 (police); James v. Commonwealth (1939) 62 C.L.R. 339). Even in the United States, where the Federal Torts Claims Act 1946 seems to encourage the argument by providing that "the United States shall be liable ... in the same manner and to the same extent as a private individual under like circumstances", Hogg's conclusion is that "the private analogy argument now seems to have been quietly forgotten." (p.79). We agree with Neazor's arguments (at pp. 36A-38) that there is textual support for the view that the legislature did not intend that the existence of a private analogue should be a

condition precedent to Crown liability in tort. The argument has, in any event, never been advanced in New Zealand, so far as we are aware. In these circumstances we believe that no alteration to the opening words of s.6(1) is needed, and that there is no need to provide specifically that there shall be liability where the tort arises out of functions only by the Crown.

34. The Action for Breach of Statutory Duty : Section 6(2)

Section 6(2) confines the availability of an action for damages for breach of statutory duty of circumstances where the duty in question is "binding also upon persons other than the Crown". We recommend the deletion of this limitation. Various arguments have been adduced to support the limitation: see Neazor, op. cit., 31. Foremost among them is "the undesirability of leaving to the Courts for determination the question of policy as to the areas in which the State should be subject to tort actions. This would be the position if it was left to the Courts to determine as a matter of construction whether the statute created only a duty to the public or gave a remedy to private persons" (Neazor, op. cit., 31-32). But, granted that the action for breach of statutory duty does necessarily result in some flexibility and uncertainty, we see no reason why the Crown should stand in a favoured position. And, as Neazor shows, s.6(2) is probably of less importance in New Zealand than in the United Kingdom. The first requirement of this tort is a duty, but in New Zealand, as opposed to the United Kingdom, the usual practice is to charge the Minister with "the administration of this Act" which is different from a specific duty of precise content; or to impose "functions" which seem to have the character of powers rather than duties. Should the Minister's function be defined in terms of duty, as in s.3 of the Hospitals Act 1957, we see no reason why this should not give rise to a possible action for breach of statutory duty at the suit of a plaintiff who can overcome the hurdle of convincing the Court that the intention of the Legislature was to provide a civil remedy in damages as a result of the Minister's breach of duty (if, of course, a breach can be established).

35. Section 6(3)

Section 6(3) should be preserved as it stands. It removes a defence instead of continuing one. We have already noted in para. 30 that in some situations it has an operation independent of s.6(1).

36. Section 6(4)

It will be remembered that the effect of s.6(4) is to enable the Crown to take advantage of any enactment which "negatives or limits the amount of the liability of any Government Department or officer of the Crown...." Now the effect of an enactment of this kind will depend upon the precise wording employed by the draftsman. If the words chosen by him on their true interpretation negate the tort, there is no problem.

The Crown's liability is vicarious; if no tort has been committed, there can be no liability and s.6(4) is not needed for the Crown's protection. It is only if the words of immunity chosen by the draftsman leave the tort in existence but nevertheless, confer an immunity from proceedings that s.6(4) can have any practical operation: if the immunity is conferred on a particular office, it would be anomalous if, by the procedural device of naming the Crown as an additional defendant, that immunity could be sidestepped. Section 6(4) precludes this result. We have not compiled a list of examples of the second type of immunity, but our impression is that they would be very few in number; in fact we cannot point to a clear practical example. If so, s.6(4) for the reasons given above is of small practical significance. Consider, for example, s.129(1) of the Health Act 1956 which provides that "a person who does any act in pursuance or intended pursuance of any of the provisions of this Act shall not be under civil or criminal liability... unless he has acted in bad faith or without reasonable care". This would appear to mean that the actor can be liable only in deceit or negligence and that if he

acts pursuant to the Act he does not commit and tort of, say, conversion. (Cf. to the same effect, but this time expressly including the Crown as such in the immunity, s.124 of the Mental Health Act 1969).

We are aware that the McRuer Report (vol.5, no.3, pp.2203, 2110-2111) recommended against a provision almost identical with our s.6(4) which is found in Canada's Uniform Crown Proceedings Act and in Ontario legislation, but the Royal Commission did not investigate the wisdom and desirability of specific immunities on a statute-by-statute basis, as we propose to do (see paras. 39, 40 below). After we ourselves have completed that task we may decide that some immunities are either (1) indefensible and should be abolished; or (2) socially desirable and should be retained. Until we are in a position to make that kind of decision, our review is that the Crown should in the meantime retain any immunity which it has by virtue of s.6(4), especially as Parliamentary Counsel may possibly have drafted what appears as a personal immunity with s.6(4) in mind, and with the intention of benefiting the Crown, not merely the individual officer.

We are unaware of any provision which confers a benefit on a "Government Department" which is not, unless the statute expressly so declares, a juristic person.

Thus our recommendation is that s.6(4) be retained for the time being. *This is consistent with our recommendation* that the proviso to s.6(1) (a) be repealed. The reason is that, were that proviso to be retained, the result would be that a personal immunity of a Crown employee, enacted wholly for his benefit, could be taken advantage of by the Crown, although at common law an employer does not enjoy any such vicarious immunity.

37. Section 6(5)

The judges of the High Court and Court of Appeal are absolutely immune from liability for anything they may say or do in the exercise of their functions: see e.g. Nakhla v. McCarthy [1978] 1 N.Z.L.R. 291. Judges, Magistrates and other judicial officers are not "officers" or "servants" within the definitions of s.2 of the Crown Proceedings Acts. Thus the precise scope of the first limb of s.6(5) which confers an immunity for acts done or omitted by any "person" discharging responsibilities "of a judicial nature" is unclear. Perhaps it was inserted ex abundanti cautela? Perhaps it is designed to protect the Crown against a potential liability for acts done by the members of administrative tribunals who are not "judicial officers" but who discharge responsibilities "of a judicial nature". Whatever the answer, we see no policy reason to open the door to a novel type of vicarious liability on the Crown, perhaps based on an allegation of negligent appointment. So we recommend the retention of the first limb of s.6(5) as being sound in principle, whether or not it is otiose. As to the second limb, we recommend its deletion. That is, the words "or any responsibilities which he has in connection with the execution of judicial process" should be repealed. They confer a general immunity from vicarious liability for the torts of bailiffs, Court registrars and the police when carrying out certain statutory functions. A large number of quite different functions can be characterised as "connected with the execution of judicial process". There are already many specific immunities or limitations of liability in this area (see the Police Act 1958. s.60; the Crimes Act 1961, ss.26-30 and s.32; and the Summary Proceedings Act 1957, s.3(1)(d) (which makes the Crimes Act provisions relating to matters of justification or excuse applicable in respect of summary proceedings and indictable offences dealt with summarily). These immunities are specific; they should continue to be prescribed by particular Acts if they are worthy of retention. If those particular Acts are so worded as to

negate tortious liability altogether for excesses of power, so be it. The Crown will not be vicariously liable. But if they are so worded as to confer only a personal immunity from tortious liability, while not negating the tort itself, then the Crown should be vicariously liable if all other requirements are met. The position should not be further complicated by a generally worded immunity which takes no account of the problems and desirable policy relating to one form of execution but not to another.

38. Specific Immunities and their Justification

We have already touched in passing on the existence of specific statutory immunities. Since we are proposing that the courts be left to develop the law relating to negligent unlawful administrative action (para. 25) it follows that we have had to give consideration to whether the numerous specific immunities scattered throughout the statute book are justified. Obviously, depending on their wording, they create barriers to the development of the common law. These immunities were drafted for particular statutes over many years; it is hard to discern a clear pattern; their wording often varies when one would think that the circumstances are broadly similar and that the wording ought to be the same.

Many enactments adopt or incorporate the limited immunity conferred on Commissions of Inquiry under s.3 of the Commissions of Inquiry Act 1908. This provides: "So long as any member of any such Commission acts bona fide in the discharge of his duties, no action shall lie against him for anything he may report or say in the course of the inquiry". Some enactments confer express immunities on the members of other tribunals in terms such that an immunity is enjoyed only if a member has acted in good faith. Then again, some provisions expressly protect an office holder from personal liability but possibly leave the statutory agency itself, if it is a legal entity, without immunity, while others exclude all proceedings against anyone. In a few immunity provisions there is a requirement of reasonableness.

39. We have not been able to undertake comprehensive research into the whole range of immunities in the statute book. We have, however, gone far enough to feel confident that some of the immunities conferred are probably unjustified. At this stage all we can do is to recommend that provisions conferring immunities in individual statutes should be examined and justified on appropriate occasions by Departments or Governmental agencies responsible for existing and proposed legislation, by Parliamentary Counsel and by us. That is to say, the best technique seems to be a case-by-case examination, which harmonises with our proposal for considering, statute by statute, the desirability of creating special statutory monetary remedies for loss caused by unlawful administrative action (para. 23).

40. This examination of the justification or lack of justification for a particular immunity will accordingly be regarded by us as a continuing responsibility to be progressively discharged, in what we trust will be a close cooperative relationship with Government Departments. In doing so we now state one definite conclusion at which we have arrived. There is a deeply imbedded judicial immunity, which is reinforced by s.6(5) of the Crown Proceedings Act 1950. We accept that there is some analogy between judicial officers and those exercising judicial functions as members of a statutory tribunal, and that broadly-worded immunity sections for members of a statutory tribunal, provided that they act in good faith, are socially justifiable. The reasons are so obvious that they scarcely need to be stated. They relate to recruitment, the possibility of timidity in discharging the Tribunal's functions, the fact that a disgruntled applicant before a Tribunal should not be able to take revenge by commencing proceedings which may have nuisance value if no possibility of success; and to the dignity of the Tribunal. It follows that in practice we shall be chiefly concerned to examine critically existing or proposed immunities for those who take decisions under statutory powers but who are not members of statutory tribunals.

We shall also examine very carefully any immunities conferred on statutory tribunals where the immunity is not dependent on good faith. We shall also keep in mind the sometimes desirable technique of creating a special compensation fund to which someone suffering loss by reason of an official's improper exercise of power may have recourse, as an alternative to bringing action against the official. An example is provided by the compensation fund set up by the Land Transfer Act 1952.

41. Summary

The Committee has carefully examined the law governing damages in the field of administrative law. Though it confidently expects the judiciary to expand the scope of common law remedies, some legislative action is called for. We have recommended that Government should, by Cabinet minute, impose on the responsible Department, Parliamentary Counsel and this Committee responsibility for considering the inclusion of statutory liability in new legislation conferring powers which if exercised unlawfully will cause loss (see para. 23).

We have also recommended that amendments be made to the Crown Proceedings Act 1950, s.6. We recommend that s.6(1) be amended to read:

> Subject to the provisions of this Act and any other Act, the Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject.

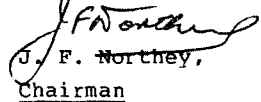
(See paras. 29 and 31).

We recommend that the latter portion of s.6(5) be deleted so that it would then read:

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.

(See para. 37).

for the Committee,



J. F. Northey,
Chairman

May 1980

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