Damages in Administrative Law

DAMAGES IN ADMINISTRATIVE LAW

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Summary

Should the law provide a general right to damages for loss caused by unlawful or invalid administrative action? This important question appears to have been neglected by law reform agencies and other official bodies.

2. Administrative law evolved slowly and spasmodically in England until the rapid growth in the scope and vigour of judicial review of administrative action over the past twenty years. Since 1978 major procedural reforms have removed the weaknesses of the old procedures which restricted the effectiveness of judicial review; but the effects of the old procedures, with their emphasis upon controlling or invalidating administrative decisions by means of the prerogative orders, linger and particularly in the absence of any general remedy in damages for administrative misconduct.

3. Without such a general right to damages, claimants must bring their actions within the terms of existing heads of tortious liability, discussed in turn.

(i) Negligence. This may prove difficult to establish in many cases. Where discretionary administrative powers are involved, the courts have identified two levels of analysis: the policy/planning level, susceptible to judicial review and political sanctions only, and the operational level, at which liability for negligence may arise. (Anns v Merton London Borough Council [1978] AC 728, HL.)

(ii) Breach of statutory duty. The availability of this claim depends upon the interpretation by the court of the presumed intention of Parliament in the statute in question. Precedents are inconsistent and the basic principle has been judicially described as "a game of chance" and "a will o' the wisp".

(iii) Misfeasance by a public officer. It is settled that this requires proof of malice but it is unclear whether mere knowledge is equated with malice for this purpose.

(iv) "Action on the case". An attmept by the High Court of Australia to identify a general basis for the award of damages for loss resulting from the intentional acts of others (in Beaudesert Shire Council v Smith (1966) has been rejected by the House of Lords and not followed elsewhere.

(v) "Pure economic loss". Recent cases from Canada and Hong Kong show divergent approaches to the extent to which pure economic loss may be recoverable against the state.

(vi) The constitutional dimension. Exceptionally, some constitutions establish a basis for claims in damages against the state for wrongful administrative action: the Constitution of Cyprus is an example.

4. Conclusion. The basic question demands attention. The first report on it by a law reform agency, from New Zealand (1980), recommends a piecemeal approach, by a majority,

including provision in future statutes for compensation to be payable where it is considered appropriate. Difficult questions of policy and principle are raised by any search for a solution. However, the minority view in the New Zealand report, favouring a simple and general reform of the law to provide a remedy in damages for loss resulting from unlawful or invalid administrative acts, is surely preferable.

DAMAGES IN ADMINISTRATIVE LAW

In most Commonwealth countries a basic legal question of fundamental significance remains unresolved, as one of the less attractive legacies of the shared inheritance of the common law: should the law provide a general right to damages for loss or injury suffered by an individual as a consequence of invalid administrative action? Administrative law was, exceptionally, an area of late flowering in English law, its most formative period of growth falling, indeed, within the past two decades. In particular, the development of general principles for the judicial review of administrative action lagged behind the massive growth in governmental powers. When the courts slowly and spasmodically developed such principles in the twentieth century, the provision of compensation for loss was, for various reasons, neglected. The absence of a general common-law right to damages for unlawful administrative action is off-set in some cases by the possibility of claiming damages under an established head of tort liability, such as negligence or breach of statutory duty; but each of these has its own limitations and they do not together amount to a systematic approach, so that many cases are left without any prospect of satisfactory redress.

2. This is one of the most striking areas of common deficiency in the legal systems of the modern Commonwealth, and one which has received surprising little attention in public discussion. The first report by any official law reform agency on the subject was apparently published as late as 1980, in New Zealand, and is discussed later in this paper. In a few countries constitutional provision may offer some assistance to particular claimants, as in Cyprus. But in general this appears to be a question of outstanding importance, suitable for wider discussion with a view of identifying common problems and possible solutions.

The Evolution of Administrative Law

3. It is notorious that, for all its many virtues, the common law for most of its history failed to evolve a satisfactory approach to public law, in the form of an effective scheme of administrative law or an integrated pattern of judicial remedies for the control of administrative action. In English legal history many factors inhibited the systematic growth of public-law remedies to parallel those which were developed by the courts for private-law suits: the recognition of extensive royal prerogative powers, the exercise of which was long considered to be beyond judicial review; the common-law immunities of the Crown, including the general immunity from actions in contract and tort until the Crown Proceedings Act 1947; "Crown privilege" in the law of evidence, until its transformation into the modern law of "public interest immunity"; the establishment of the doctrine of "parliamentary supremacy". Of course, in the formative centuries in the evolution of the common law, there was little need for public-law remedies, for government agencies and their administrative powers were very limited; the pressure for judicial intervention grew from the late nineteenth century, with the flood of legislation creating new administrative bodies and powers.

4. Dicey, the centenary of whose famous work Law of the Constitution was justly celebrated in 1985, lauded the English constitutional system, in which he saw individual rights as being more effectively protected by the regular processes of the common law in the ordinary courts than by written constitutions elsewhere. In a careful comparison Dicey saw many similarities between the growth of English law and the emergence of the distinctive French system of droit administratif: the predominance of case-law as a vital source in both systems, influenced by the opinions of text-writers and with the capacity

for rapid evolution; the historical origin of jurisdiction in each country in the gradual separation of judicial from executive functions; the parallel between the emergence and survival of equity in England and droit administratif in France, as additional legal systems beneficially modifying the ordinary laws. Nevertheless Dicey thought droit administratif "rests upon ideas absolutely foreign to English law" - in essence, the ideas that special principles, within the jurisdiction of special courts, govern the relations between individuals and the state. Yet Dicey duly admired the French system for its own merits, for example, the skill in evolving new remedies; he noted, however, of the remedy in damages against the state:

> " .... the success with which administrative courts have extended the right of private persons to obtain damages from the State itself for illegal or injurious acts done by its servants, seems, as an English critic must think, to supply a new form of protection for the agents of the government when acting in obedience to orders. There can surely be little inducement to take proceedings against a subordinate .... if the person damaged can obtain compensation from the government ....".[1]

This seems a perverse argument with which to defend the English system which in most cases denies the person injured any such choice of defendant.

5. In England the maintenance of administrative standards was entrusted not to the courts but to other organs and procedures. The nineteenth-century reforms transformed a corrupt and inefficient bureaucracy into an efficient and uncorrupt public service commanding general confidence and backed by the doctrine of ministerial responsibility to Parliament. With the enormous growth in the activities and powers of government from the late nineteenth century, further protection for individual citizens in routine decision-making has been provided by several distinctive instruments established by legislation. The device of "public inquiries" before final decisions, extensively applied particularly in land use matters, accommodates a measure of popular participation and public fact-finding; the extensive apparatus of (administrative) tribunals of many kinds, whose jurisdiction penetrates most areas of life, provides for the disposal of far more disputes than the courts themselves deal with; as additional watch-dogs the "ombudsmen" - the Parliamentary Commissioner for Administration (first established in 1967), the Health Service Commissioners and the Commissioners for Local Administration - investigate individual complaints of injustice arising from maladministration.

6. However, no new machinery was introduced for the general legal control of administrative action. In some areas of administration statutes have provided for direct appeals to the courts from decisions by administrative authorities (including most tribunals). Otherwise it is the responsibility of the courts to investigate the existence and scope of lawful authority for administrative action, whenever it is challenged. To perform this task English lawyers and judges invoked the supervisory jurisdiction of the courts in the form of the prerogative orders (formerly writs), especially certiorari, prohibition and mandamus. The early growth of judicial review was consequently hampered by the procedural limitations attending these remedies, including the significant restriction that an application for a prerogative order could not be combined with an application for any other remedy, such as damages. Later, in the twentieth century, the primarily private-law remedies of declaration and injunction were also found to be available and advantageous in some cases where the validity of administrative action was questioned, and these remedies were free of the those procedural restrictions and could be combined with claims for damages.[2]

7. Growth in the application of these remedies in the English courts in respect of administration action was notoriously unsystematic, marked by hesitation and inconsistency in judicial decisions over many decades. The precise grounds upon which the courts might

intervene remained for long uncertain and unsystematised. The ultra vires doctrine was stretched to accommodate various elements held to be required for proper decision-making; the application of the rules of "natural justice" was extended to "quasi-judicial" decisions; and all kinds of decisions were subjected to the Wednesbury test of "reasonableness".[3] In the landmark case of the Brighton Chief Constable, Ridge v Baldwin[4], the House of Lords held that the old distinction between "administrative" and"quasi-judicial" decisions was otiose. The two decades which have followed have seen a steady expansion of the scope and vigour of judicial review of administrative action, with a welcome elucidation of the principles applied.

8. However, until 1978 the machinery of judicial review in England continued in an unsatisfactory state, which was authoritatively compared with the old "forms of action" in the unreformed law of civil procedure of more than a century earlier. This criticism was quoted by the Law Commission[5], which recommended far-reaching reforms which have now been substantially implemented in England, although it appears that the old, unreformed machinery is still applied in many Commonwealth states.

9. As from 1978 the whole character of judicial review of administrative action in England and Wales was transformed by major procedural reforms. A new Order 53 of the Rules of the Supreme Court, reinforced by the Supreme Court Act 1981, largely implements the recommendation made by the Law Commission, with some differences. The basic reform introduced a new, unified procedure of "application for judicial review", a two-stage procedure in the Queen's Bench Division of the High Court, requiring the grant of leave to apply at the first stage. By such application all of the relevant remedies can be sought, in any combination - prerogative orders, declaration, injunction and damages. Interlocutory orders such as discovery are available in respect of all remedies and the requirement of locus standi, formerly defined differently for the different remedies, is now stated in a common phrase requiring an applicant to have "sufficient interest". The courts have seized the opportunity presented by this fresh start to rationalise further the process of judicial review. Such remedies as declaration and injunction continue to be available as private-law remedies by ordinary action in the Chancery Division, but the House of Lords has decided that that route is no longer open to enforce rights claimed under public law against a public authority : the Order 53 procedure is the exclusive remedy in such cases (save for a few exceptional cases which are yet to be fully defined)[6]. In the celebrated "G.C.H.Q." case the late Lord Diplock gave a magisterial classification of the grounds upon which the courts may intervene to control administrative action : "illegality", "unreasonableness" or "procedural impropriety".[7] In the same case the House of Lords held that even the exercise of royal prerogative powers is now within the reach of judicial review except in certain areas of government such as those affecting national security.

10. Some Commonwealth countries have adopted reforms of the relevant law, in some cases ante-dating the English changes : for example, the Judicial Review Procedure Act1971 of Ontario and the Judicature Amendment Act 1972 of New Zealand. In Australia the Administrative Decisions (Judicial Review) Act 1977 restated the grounds for judicial review. Many countries, however, retain the older unreformed procedure in local form.

Damages

11. The judicial remedies available are applied essentially to control administrative action that is improper or excessive : they are instrumental in character, not compensatory. These remedies serve to quash a decision, to compel or forbid the exercise of an administrative power, or to declare the legal position. Under Order 53 in England an application for any such order can now be combined with a claim for damages; however, this reformed procedure does not - could not - alter the rules of substantive law. It has

long been clear that the common law failed to develop any general principle to support the award of damages as compensation to any individual who may have suffered loss or injury through administrative action which may be shown to be unlawful.

12. This gap in the law has been considered on various occasions. When the English Law Commission first reported on Administrative Law in 1969, it posed, as one of the key questions for further study (by a proposed Royal Commission, which was never established), the question how far remedies for judicial review of administrative action should include a right to damages.[8] When the Law Commission returned to the subject, in its Report on Remedies in Administrative Law (1976), it expressly refrained from comment on the substantive law which determines liability for damages, as falling outside the scope of that Report on procedure, although the Commission noted that its Working Paper No. 40, which preceded the Report, attracted "a substantial body of opinion among the commentators" that "a separate inquiry was desirable into the question of damages as a remedy for illegal administrative action".[9] The Commission also cited the view expressed by Lord Wilberforce in his dissenting speech in Hoffmann-La Roche and Co. v Secretary of State for Trade and Industry :

> "...When the court says that an act of administration is voidable or void but not ab initio this is simply a reflection of a conclusion, already reached on unexpressed grounds, that the court is not willing in casu to give compensation or other redress to the person who establishes the nullity. Underlying the use of the phrase in the present case, and I suspect underlying most of the reasoning in the Court of Appeal, is an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action. It is this which requires examination rather than some supposed visible quality of the order itself. In more developed legal systems this particular difficulty does not arise. Such systems give indemnity to persons injured by illegal acts of the administration. Consequently, where the prospective loss which may be caused by an order is pecuniary, there is no need to suspend the impugned administrative act: it can take effect (in our language an injunction can be given) and at the end of the day the subject can, if necessary, be compensated. On the other hand, if the prospective loss is not pecuniary (in our language, 'irreparable') the act may be suspended pending decision - in our language, interim enforcement may be refused. There is clearly an important principle here which has not been elucidated by English law, or even brought into the open."[10]

In that case the House of Lords upheld an interim injunction granted to the Secretary of State, restraining pharmaceutical companies from charging prices exceeding those specified in a statutory order the validity of which had been challenged by the companies in pending litigation, without requiring the Secretary of State to give any undertaking to make good any consequent loss of profits if the order was subsequently invalidated. Lord Wilberforce would have refused the injunction without a scheme, as approved by the judge at first instance, to protect the respective pecuniary interests of the companies and the Secretary of State.

13. In the absence of a general common-law right to claim damages for ultra vires administrative action, a claim for damages can be made only where it can be based upon some other, recognised head of liability. Claims in tort are most likely to arise and to be framed in negligence, breach of statutory duty or abuse of public office.

Negligence

14. More than a century ago the House of Lords decided that damages could be awarded against a public authority for loss caused by negligence in the performance of statutory functions where the action taken is shown to have been ultra vires. In Mersey Docks and Harbour Board v Gibbs a cargo owner sued for loss caused when a ship grounded in the port, which had not been properly dredged of mud. The House of Lords affirmed that a common-law duty of care was properly imposed on the Dock authorities in the exercise of their statutory powers.[11] The courts have refrained from imposing a general duty of care upon administrative authorities to act lawfully - had they done so the scope of negligence would have been virtually coterminous with that of ultra vires. However, in fact special difficulties may arise in establishing that administrative agencies owe the necessary duty of care towards a particular individual - and perhaps even more difficulties in proving a breach of such a duty.

15. The Australian case of Dunlop v Woollahra Municipal Council is instructive.[12] Dunlop contracted conditionally to sell property to a development company which, however, rescinded the contract when the Council refused planning permission for a proposed building. The Council then passed two resolutions as building restrictions to control building on the site but in previous proceedings Dunlop had obtained judicial declarations that these resolutions were invalid and void : one was inconsistent with the applicable planning law; the other was invalid because Dunlop had been given no notice or opportunity to make representations. Dunlop sustained losses as a result of the invalid resolutions, partly because of changes in the property market, including interest paid on an overdraft and rates and taxes on the property. In this action Dunlop alleged, inter alia, that the Council had acted in breach of its duty to take care because in passing the resolutions it had failed to seek proper legal advice. At first instance Yeldham, J. doubted whether such a duty of care was established by the precedents but in any event he was satisfied that no breach of it had been proved : the resolutions had in fact been passed at the instance of the Council's solicitors. The Judicial Committee of the Privy Council, on appeal, noted that the question in issue in the previous proceedings had been finely balanced and agreed with the important finding by Yeldham, J., that the failure to give Dunlop an adequate hearing could not in itself amount to a breach of a duty of care. The Privy Council also upheld the rejection of Dunlop's claim under two other heads of alleged liability, to be discussed below, so that the Council was held to have committed no actionable wrong and Dunlop was left without any recompense for his losses.

16. In applying the rules of negligence to administrative action, the courts have held that the exercise of discretionary powers involves a level of decision-making which does not necessarily give rise to duties of care owed directly to individuals who may be affected. In making such decision a public authority may rather owe a general duty to the community as a whole, enforceable primarily by political sanctions and especially by Parliament. Such matters have been characterised as decisions of general policy; they are, of course, susceptible to judicial review on the application of a party who can demonstrate a "sufficient interest" in the matter. The implementation of such policy decisions in specific cases will involve a particular exercise of administrative powers at a second, "operational" level, at which a duty of care may well arise in respect of the individuals who will be directly affected. Losses caused by a failure to take proper care at the operational level may result in the award of damages.

17. In 1878 the House of Lords held that statutory authority could not provide a defence to a claim in negligence where the exercise of statutory power to construct a reservoir and direct river water caused flooding of the plaintiff's land:

> "... 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. ... if by a reasonable exercise of the powers... the damage could be prevented it is... 'negligence' not to make with reasonable exercise of their powers."[13]

In East Suffolk Rivers Catchment Board v Kent the Board had exercised statutory powers to repair a river wall in such a way that the plaintiff's land had remained flooded for longer than it would have been if the Board had exercised reasonable care. The House of Lords held that the Board had a power, but no duty, to mend the walls; it could have lawfully refrained from acting and the only duty it owed in repairing the wall was to avoid causing "fresh" damage; it was not liable for failing to cure existing damage, caused by natural flooding, expeditiously.[14]

18. In Home Office v Dorset Yacht Club youths undergoing Borstal training escaped from custody and damaged a yacht. A claim was brought in negligence, alleging careless supervision by the officers. The House of Lords accepted that public policy required the emphasis in subordinate legislation upon training through cooperation in open institutions; for such decisions the Minister is responsible, primarily to Parliament, and the courts can intervene only in terms of ultra vires, not for negligence. The reservoir case (above) was distinguished : that concerned a private Act which authorised works merely affecting the property of others. The Borstal system is very different, with wider implications for trainees and the whole nation. The courts have no criteria by which to assess the balance of conflicting interests; the law of negligence cannot be applied to such decisions, but it will apply to the conduct of the particular officers in charge of the inmates (in effect, at the "operational" level).[15]

19. The locus classicus for this doctrine is now the celebrated decision of the House of Lords in Anns v Merton London Borough Council, where it was held that the local authority would be liable for negligence at the operational level in respect of the foundations of a new building.[16] The decision was applied in Dennis v Charnwood Borough Council to negligence by a local authority in approving plans for a building without considering the adequacy of the proposed foundations.[17] Anns was further considered in Fellowes v Rother District Council, where Goff,J., as he then was, summarised the principles as follows:

> "Where a plaintiff claims damages for negligence at common law against a public body or official purporting to act in pursuance of a power conferred by statute or other legislation, he can only succeed if he can show (1) that the act complained of was not within the limits of a discretion bona fide exercised under the relevant power, (2) that having regard to all the circumstances, including the legislation creating the relevant power, there was sufficient proximity to create a duty of care on the defendant to avoid damage to the plaintiff of the type complained of , and no ground for negativing (or reducing or limiting) such duty of care, (3) that it was reasonably foreseeable by the defendant, or by those for whom he was vicariously responsible, that the act complained of was likely to cause damage of the type in fact suffered by the plaintiff by reason of such act."[18]

The Anns distinction between policy and operational levels of functions in relation to liability in negligence has been applied by the Supreme Court of Canada which had indeed itself drawn a similar distinction between "administrative" and "business" powers.[19]

20. Yet the precise distinction between the two levels of "policy" or "planning" or "operation" remains an elusive one in many situations, so that a commentator has suggested that the allocation of a particular decision mainly reflects the court's perception of the justiciability of the question raised:

"When a court feels that the allegation of negligence is unsuited to judicial resolution it will apply the label planning decision to express that conclusion."[20]

Breach of statutory duty

21. Another way of seeking damages against a public authority is by a claim for breach of statutory duty, but the precise scope of this tort is still somewhat uncertain. Its application depends on the interpretation by the court of the intention of Parliament in the statute in question. For example, the courts have varied in their reactions to the effect of an alternative remedy provided by the statute. In 1898 the House of Lord held that where the Act provides a remedy - there in the form of a right of appeal to the Minister - the right to sue for damages was by implication excluded (for failure to provide a public sewer).[21] Yet in a later case damages were awarded against a local authority for breach of duty to supply clean water even though the statute in question provided for a penalty which was, however, held not to be an exclusive remedy.[22] The principles, as set out by the House of Lords in 1949[23] were summarised in 1969 as follows:

(i) The question is one of the interpretation of the statute in the light of the previous law.
(ii) Does it exist for the benefit of the public at large or of a category of persons to which the plaintiff belongs?
(iii) If the former, and a specific remedy is provided for its enforcement (e.g. criminal proceedings), no action for breach of statutory duty lies.
(iv) If the latter, then - (a) if no specific remedy is provided there is a right of action for breach of statutory duty, (b) even if there is a specific remedy, there may be a concurrent right of action, especially if the specific remedy is not effective to ensure that the duty is performed."[24]

This summary received judicial approval in an unusual case where it was the Crown which sought to recover damages for loss alleged to have resulted from an inaccurate although "conclusive" certificate issued by a registrar of land charges. Fisher, J., held that the registrar could be liable for breach of statutory duty and that the local council could be vicariously liable for the negligence of its employee, the clerk who searched the register; however, the action failed because the Crown had suffered no damage in terms of the legal effect of the Act.[24]

22. Yet the attempt to define principles in this area of the law conceals the fact that there is no consistency between the cases where the action has been allowed and those where it has been refused. In 1978 Lord Denning, M,.R., termed these the "pro-cases" and the "contra-cases" respectively, and commented:

"... it has left the courts with a guess-work puzzle. The dividing line between the pro-cases and the contra-cases is so blurred and so ill-defined that you might as well toss a coin to decide it. I decline to indulge in such a game of chance."[25]

23. Several modern cases in England have arisen under the Housing (Homeless Persons) Act 1977, which imposes a "housing duty" at various levels upon local ("housing") authorities towards persons whom the authority is satisfied are "homeless" according to prescribed criteria. The statute is silent as to remedies. The Court of Appeal held in several cases that a civil action for damages was available. Lord Denning, M.R., held:

"...this is a statute which is passed for the protection of private persons, in their capacity as private persons. It is not passed for the benefit of the public at large. In such a case it is well settled that, if a public authority fails to perform its statutory duty, the person or persons concerned can bring a civil action for damages or an injunction"[26]

In such cases the relationship between proceedings for judicial review and the action for damages was often canvassed. With the recognition by the House of Lords in O'Reilly v Mackman that the new Order 53 establishes an exclusive remedy[27], a decision by the House of Lords delivered on the same day analysed the position under the Housing (Homeless Persons) Act and applied to the action for breach of statutory duty principles rather similar to those already established in Anns to actions in negligence: Lord Bridge, with whom other members of the House agreed, identified a dichotomy between the "decision-making" functions of a public authority, in public law, which are subject to control by way of judicial review only, and the "executive functions" which implement the decision and the exercise of which gives rise to rights and obligations in private law enforceable by actions for injunctions and damages.[28]

24. The English approach to this form of liability has by no means been favoured throughout the Commonwealth. In the leading Canadian decision, Saskatchewan Wheat Pool v Government of Canada[29], the Supreme Court of Canada rejected the view that there is a nominate tort of breach of statutory duty, holding that liability for such breach must be brought under the law of negligence. Evidence of such breach, causing damage, may be evidence of negligence. Dickson, J. (as he then was), vigorously rejected the English doctrine that the court should give effect to the (usually unstated) intention of Parliament in this regard:

"The pretence of seeking what has been called a 'will o' the wisp', a non-existent intention of Parliament to create a civil cause of action, has been harshly criticised. It is capricious and arbitrary, ' judicial legislation' at its very worst."

Misfeasance by a public officer

25. The tort of abuse of office has been established since the House of Lords decision in the celebrated case of the returning officer, Ashby v White, in 1703[30]. This was one of the grounds presented by the claimant in Dunlop v Woollahra but the Privy Council upheld the dismissal of the claim, tersely approving the conclusion of Yeldham, J., at first instance that the relevant authorities establish that

"in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is capable of amounting to such 'misfeasance' as is a necessary element in this tort."

The precedents, however, are again contradictory as to whether knowledge in itself imports sufficient "malice" for this purpose. In a leading case from Quebec, Roncarelli v Duplessis[31], the defendant, Premier of Quebec, directed the independent Liquor Commission to cancel the licence which the plaintiff had held for over thirty years. (The plaintiff had regularly assisted fellow Jehovah's Witnesses before the courts on minor charges.) The defendant was held liable for "gross abuse of legal power" under the Quebec Civil Code, Article 1053:

"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another..."

Applying Quebec civil law, Rand, J., compared English law, citing Ashby v White to show that the defendant had also acted "maliciously", broadly defined as "acting for a reason and purpose knowingly foreign to the administration....".

26. In the Supreme Court of Western Samoa Mahon, J. recently reached a similar decision - and awarded exemplary damages for misfeasance - where the (former) Prime Minister influenced the independent Public Service Commission to stop the appointment of the plaintiff, a naturalised citizen, to a senior post. The Minister was motivated not by ill-will but by his wish to advance indigenous citizens, but this ulterior motive was held to be "malice" for the purpose of this action.[31A]

"Action on the case" : An Australian initiative spurned

27. A bold attempt by the High Court of Australia in1966 to identify a new basis for the award of damages against administrative authorities would have rendered otiose many of the rules which clutter and restrict the scope of existing common-law remedies, but unfortunately it has not proved fruitful. In Beaudeser Shire Council v Smith[32] the Council damaged the plaintiff's well by the unlicensed, and therefore unlawful, extraction of gravel from a river bed. On the basis of eight English precedents, the High Court held the Council liable, recognising a novel innominate tort of broad scope in these words:

> "... the authorities cited do justify a proposition that, independently of trespass, negligence or nuisance but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other."

In Kitano v The Commonwealth, however, the High Court endorsed the view of Mason. J. that "unlawful" here is to be given a restricted meaning : an act done in breach of a statutory duty, where the statute gives no express of implied remedy in damages, is not necessarily "unlawful" within this principle. A plaintiff "must show something over and above what would ground liability for breach of statutory duty if the action were available"[33].

In Dunlop v Woollahra, insofar as the plaintiff framed his action in trespass on the case, invoking Beaudesert, his claim failed : the Privy Council upheld the decision at first instance that the precedents establish a clear distinction between invalidity and unlawfulness - the fact that the Council's resolutions had been held invalid was insufficient to bring them within the Beaudesert doctrine. A few months later the House of Lords, noting that that doctrine was of uncertain scope and that Beaudesert had not been applied in Australia or any other jurisdiction, declared that it forms no part of English law.[34] This reaction has been lamented by a commentator who compared the Beaudesert principle to the American "prima facie tort" doctrine.[35]

"Pure economic loss"

28. Recent attempts to extend the scope of available remedies against government agencies to include damages for "pure economic loss" have met mixed reasons in the courts. Two comparable cases related to the exercise of statutory powers to regulate financial institutions. In Canada investors in trust companies sued the Crown for breach of statutory duty and negligence in the exercise of regulatory powers under the Trust Companies Act.[36] In Hong Kong depositors in a deposit-taking company sued the Commissioner for Deposit-Taking Companies for negligence (only) in the Commissioner's failure to exercise the duty of care which, it was alleged, he owed the plaintiffs at common law by reason of his statutory powers.[37] In each case the respective Statement of

Claim was struck out as disclosing no reasonable cause of action and an appeal was brought to the appropriate Court of Appeal. In Canada the Federal Court of Appeal set aside the striking-out order, allowing the action to proceed; the Court of Appeal of Hong Kong, however, upheld the striking-out order there. Each Court of Appeal found guidance in the celebrated passage in Anns where Lord Wilberforce explained the two stages in establishing a duty of care : first, a sufficient relation of proximity must be shown; then, it must be considered whether "there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise...".[38]

29. On such issues, including the particular question whether the Crown could be liable for "purely economic loss", the Court of Appeal in Canada considered that it was not plain and obvious that the plaintiffs did not have a cause of action, so that their action should proceed. In Hong Kong, however, the Court of Appeal in 1986 declined to follow that decision. One member of the court held that the claim failed the initial proximity test because the depositor had not relied upon any knowledge or skill in relation to tangible or physical property. Two members of the court considered that the proximity test was satisfied but held that this was nevertheless not the sort of damage for which compensation should be ordered against the Crown, for the legislation did not guarantee depositors against losses caused as much by their own misjudgments as by administrative default. In the words of Fuad,J.A.,:

> "... a statutory authority cannot be held liable in negligence for economic loss suffered by another as a result of the failure of a third party to meet his contractual obligations in a financial or commercial transaction, even if it can be shown that the authority has failed to perform statutory functions whose objects are to prevent or mitigate that type of loss. This, it seems to me, would be to impose a limitation or 'control mechanism' upon common law principles governing liability for negligence in the public law context which can be readily understood and applied, and which would not lead to a capricious result."

The constitutional dimension

30. In most Commonwealth countries the common law applies subject to the provisions of the Constitution as the supreme law. Constitutional provisions may be relevant to the question of the award of damages for invalid administrative acts. For example, the Constitution of Cyprus, provides, in Article 172 :

> "The Republic shall be liable for any wrongful act or omission causing damage committed in the exercise or purported exercise of the duties of officers or authorities of the Republic..."

Article 146 gives the Supreme Court exclusive jurisdiction to adjudicate finally on any complaint that any administrative act or decision is unlawful or in excess or abuse of power; in such a case the Supreme Court may declare the decision or act null and void. The Article then provides, in paragraph 6 :

> "Any person aggrieved by any decision or act declared to be void under... this Article... shall be entitled, if his claim is not met to his satisfaction by the organ, authority or person concerned, to institute legal proceedings in a court for the recovery of damages or for being granted other remedy and to recover just and equitable damages to be assessed by the court..."

The Supreme Court has held that these provisions give a constitutional right to compensation from the state, although it is enforceable only after a judgment of the

Supreme Court under Article 146 annulling the administrative act in question. A public officer incurred unnecessary expenses in pursuing higher studies to acquire qualifications which, by a wrongful amendment of the scheme of service, were required for promotion; by legal action he successfully challenged the amendment, which was annulled, and his promotion was then reconsidered. In a further action the Supreme Court held that he was entitled to press his claim for damages in respect of the expenses incurred, despite the subsequent correction of the administration action.[39]

Conclusion

31. Should the law provide a general remedy in damages for loss or injury caused by invalid administrative action? The foregoing summary of the existing law shows how limited and unsystematic that law is, and these weaknesses remain even with the adoption of reformed procedures for judicial reviews in various Commonwealth jurisdictions. The absence of a general right to damages, except in those few states like Cyprus where constitutional provisions may apply, leaves a serious gap in the law to the prejudice of individuals who suffer loss caused by unlawful or excessive administrative action. Dunlop v Woollahra[40] is an example of a case where compensation should have been recoverable, but was not available on the basis of the present law.

> The English Law Commission posed the problem in 1967: "How far should remedies controlling administrative acts or omissions include the right to damages?"[41]

It has not yet had an opportunity to offer an answer to the question. The first official report on the matter in the Commonwealth came from the Public and Administrative Law Reform Committee of New Zealand in 1980, in its final Report on Damages in Administrative Law[42]. That Committee concluded that there are many situations where damages should be available for improper administrative action and considers three broad possibilities:

(i) leaving the courts to develop the law;

(ii) new legislation establishing a right to damages generally for loss caused by unlawful administrative action; or

(iii) specific provision for damages or compensation to be included in specific statutes in respect of particular administrative powers.

A minority of the Committee favoured the second, simple solution; the majority recommended that the matter should be left to the judges, under the first option, with some statutory developments under the third heading. The provision of compensation should be considered in the drafting of new statutes; principles of liability could be adjusted to the character of the power involved and recovery of damages need not necessarily be by way of an action in tort. Guidelines for the consideration of new powers were put forward, for example, the degree of risk that innocent persons might suffer loss through bona fide administrative decisions, the likely weight of such losses and the potential for amelioration by means of judicial review; statutory provisions would not usually be required where a common-law remedy is available.

32. The New Zealand Committee emphasised the importance of general policy consideration in this area, taking town planning as an example for detailed scrutiny: here individuals may suffer possibly serious economic loss as a result of the pursuit of the public interest by a public authority. The Committee recommended that the existing provisions for compensation in the legislation should be expanded - compensation to be provided from either central or local government funds according to whether the relevant decision benefitted national or local interests.

33. On the basic question there is an inevitable clash of interests. Yet it is surely preferable that the community as a whole, rather than individuals who happen to be affected, should bear the losses sustained directly as a result of invalid administration acts. The existing law has created a tangle of routes by which compensation may be sought, but each of these has unpredictable elements and together they do not provide a comprehensive or integrated pattern of remedies. The solution preferred by the New Zealand Committee would continue this patchwork and add to it a further variety of legislative provisions - and would, moreover, require, for consistency, a review of all existing statutory powers. Yet there is an understandable and authoritative reluctance to accept that public funds should be burdened with compensating for all losses which result from administrative acts - as demonstrated by the "economic loss" case from Hong Kong, cited above. A commentator has suggested that reform of English law could be based upon two general principles, perhaps in combination: "compensation for invalidity" - appropriate for losses arising from modern regulatory legislation - and "a risk theory" to provide a mechanism for operating a value judgement to determine which "interests in society should be protected against either lawful or unlawful interference by government".[43] He cites the Land Compensation Act 1973 in England as containing this idea: it provides compensation for the depreciation of land values through physical factors, such as pollution caused by the use of public works such as highways.

34. The complexity of the issues likely to be raised by a piecemeal approach to reform in this area should not be allowed to discourage the reformer - although it might perhaps give encouragement to those, like the minority on the New Zealand Committee, who recommend a simpler and more general solution, for which the precedent to the Cyprus constitutional provisions discussed above might be invoked. Certainly the basic question posed at the outset of this paper should not be ignored. The words of a leading American authority may be quoted in support:

> "A system of administrative law which fails to provide the citizen with an action in damages to make him whole ... is actually but a skeletorised system. If individuals are to be protected adequately, an action for damages is the necessary complement of the action for review, which results only in the setting aside of improper administrative action."[44]

This was quoted in an earlier comparative review of the subject in New Zealand:

> "Without a remedy of this nature being also available a formal pronouncement by a court that an administrative act is illegal or otherwise invalid frequently represents no more than a mere Pyrrhic victory for an aggrieved citizen."[45]

35. It is suggested that it would be consistent with fundamental principles of democratic government, and an appropriate fulfilment of the procedural reforms so far accomplished in some Commonwealth jurisdictions -and perhaps anticipated in others - to give an affirmative answer to the basic question : the law should be amended to provide a general remedy in damages for losses which result from unlawful or invalid administrative acts.

FOOTNOTES

1. Dicey, op. cit., 9th ed., 1948, p. 404

2. As in Vine v National Dock Labour Board [1957] AC 488.

3. Associated Provincial Picture Houses Ltd v Wednesbury Corportaion [1948] 1 KB 223

4. [1964] AC 40.

5. S.A. de Smith, quoted in Law Commission, Report on Remedies in Administrative Law, 1976, Comnd. 6407, para. 32.

6. O'Reilly v Mackman [1983] 2 AC 237.

7. Council of Civil Service Unions v Minister for the Civil Service [1985] LRC (Const) 948, [1984] AC 374.

8. Law Com. No. 20, Cmnd 4059.

9. Para 9.

10. [1975] AC 295 at pp. 358-59.

11. (1866) LR 1 HL 93.

12. [1982] AC 158.

13. Geddis v Bann Reservoir Proprietors (1878) 3 App Cas 430

14. [1941] AC 74.

15. [1970] AC 1004.

16. [1978] AC 728.

17. [1983] QB 409.

18. [1983] 1 All ER 513 at p. 522.

19. Barratt v District of North Vancouver [1980] 2 SCR 418; Welbridge Holdings Ltd v Metropolitan Corporation of Greater Winnipeg [1971] SCR 957.

20. P.P. Craig, Administrative Law (1983), p. 535.

21. Pasmore v Oswaldtwistle Urban District Council [1898] AC 387.

22. Read v Croydon Corporation [1938] 4 All Er 631.

23. Cutler v Wandsworth Stadium [1949] AC 398.

24. Ministry of Housing and Local Government v Sharp [1970] 2 QB 223.

25. Ex Parte Island Records Ltd [1978] 3 All ER 824 at p. 829.

26. De Falco v Crawley Borough Council [1980]1 All ER 913 at p. 920
See also Thornton v Kirklees Metropolitan Borough Council [1979] QB 626, CA

27. See foonote 6 above.

28. Cocks v Thanet District Council [1983] AC 286.

29. (1983) 143 DLR (3d) 9.at p.17

30. 2 Ld. Raym. 938, 3 Ld. Raym. 320.

31. (1959) 16 DLR (2d) 689

31A. Vermeulen v Attorney-General [1986] LRC (Const) 786

32. (1966) 120 CLR 145.

33. (1973) 129 CLR 151 at p. 175.

34. Lonrho Ltd v Shell Petroleum Co Ltd [1981] 2 All ER 456 at p.463.

35. Harlow, Compensation and government torts (1982), pp. 66-67.

36. Baird v Queen in right of Canada (1983) 148 DLR (3d) 1.

37. Yuen Kun Yeu and Others v Attorney-General [1986] LRC (Comm) 300.

38. [1978] AC 728 at pp 751-2.

39. Frangoulides v The Republic (1982) 1 CLR 462. See also Hapeshis and others v The Republic (1979) 3 CLR 550.

40. See footnote 12 above.

41. Working Paper No. 13, repeated in Law Com. No. 20 (1969).

42. 14th Report.

43. P.P. Craig, Administrative law (1983), pp. 550-54. See also the same author's "Compensation in Public Law" (1980) 96 LQR 413, 435.

44. B. Schwartz, Introduction to American Adminstrative Law (1958), p.207.

45. E.J. Haughey, The Liability of Administrative Authorities (1975).