

MALADMINISTRATION AND THE LAW OF TORTS

The purpose in writing this article is to investigate the principles determining whether the making of a wrongful administrative decision may render its maker liable to an action in tort for the consequences of the decision.¹ A number of preliminary points need to be made about its scope. The article is concerned with the substantive issue of what administrative decision-making is tortious. It is not concerned with the larger question of the liability of public authorities in tort. It will be assumed, for example, in this article that the Crown is liable for its torts in the same manner as a private person, though that, even in the present day, is clearly too large an assumption. Nor is it possible to pursue here the difficult question of the desirability of attaching immunity from tortious liability to decision-makers themselves, letting the burden of the liability rest upon their masters in the form of government departments or other public bodies. Secondly, the article is concerned with the common law principles governing liability in tort. It is of course perfectly possible for statute expressly to create a tort and to render public bodies or decision-makers liable to that tort. Apart from examination of the principles of breach of statutory duty, however, there is no examination here of statutory torts of this kind. Nor is it possible to provide any detailed examination of the numerous statutory defences which may protect a public body or decision-maker, though the general principles underlying the defence to statutory authority are considered. Finally, the article is limited to liability in tort, though the total absence of reference to contractual liability in present day circumstances may perhaps seem artificial.

The concern of the article is with the liability in tort of persons who make decisions. It is not concerned with the liability of those who act ministerially in carrying out those decisions, though it is of course necessary to look at the question of liability of the decision-maker in relation to the acts of such persons in considering the doctrine of operational negligence. In general it is not necessary to examine the tortious liability of public bodies where this arises from something other than a decision. So, although defamation is a tort which has considerable importance in the public arena, it is excluded. For reasons which will be explained, however, liability for negligent statements under the *Hedley Byrne*² principle cannot be altogether ignored. Again, there is no need here to examine the liability of a public body under a strict liability tort such as *Rylands v Fletcher*³ in which liability though it may result from an initial decision is in no sense dependent upon the wrongfulness or invalidity of that decision. At the outset it should be stated that the

* Senior lecturer in law, University of Adelaide.

1 For general reference, see Aronson and Whitmore "Public Torts and Contracts" (1982); Harlow, "Compensation and Government Torts" (1982). See also Craig, "Negligence in the Exercise of a Statutory Power" (1978) 94 LQR 428; "Compensation in Public Law", (1980) 96 LQR 413; Harlow "Public and Private Law: Definition without Distinction", (1980) 43 MLR 241; Samuels "Public and Private Law: a Private Lawyer's Response", (1983) 46 MLR 558.

2 *Hedley Byrne & Co v Heller & Partners* [1964] AC 465.

3 (1868) LR 3 HL 330.

answer to the question posed in the paper must be sought within the existing principles of the law of torts. There is clearly no general principle of liability in tort for causing loss through the medium of an invalid administrative decision. Nor does such a principle seem likely to emerge in the future nor even to be desirable. The development of the law must therefore take the form of the adaptation of existing torts to deal with the problem of how far compensation should be awarded to those who suffer loss arising from faults occurring in the administrative decision-making process.

Trespass, Nuisance and the Defence of Statutory Authority

Trespass requires a positive act by the defendant causing directly an injurious interference with the plaintiff's person or property. It has always had an important role to play in restraining the excesses of public officials. So from early times it was available against a justice of the peace who caused the arrest of a person by wrongfully issuing a warrant, or against a sheriff who wrongfully distrained on the goods of a person, for example in the execution of a judgment. Trespass might also be available, in respect of the judicial decisions of justices of the peace, for example against one whose wrongful judgment had caused the imprisonment of the plaintiff. Underlying all the cases of liability in trespass through the making and enforcement of a wrongful order is the notion of excess of jurisdiction or power. If the order lay outside the power of the person making it, trespass would lie. If it was within his power but was tainted by bad faith or malice, trespass was not available but a remedy might be available in the form of an action on the case.⁴ This distinction between acts outside and those within jurisdiction applied to the judicial decisions of justices of the peace but at common law they enjoyed a considerable measure of protection in relation to their judicial decisions. The concept of a jurisdictional defect was very narrowly defined so that many judicial decisions which were clearly in present-day parlance abusive were nevertheless within jurisdiction and therefore only capable of allowing a remedy if malice was proved. There is something of a wilderness of decisions and some controversy concerning what lay within and what outside the jurisdiction of the justices' court for the purpose of determining whether an action of trespass was available. For present purposes it is only necessary to refer to the recent summation of the earlier cases by the House of Lords in *McC v Mullan*,⁵ a summation which forms part of the ratio decidendi of the case and must be regarded as authoritative. Provided the court has validly embarked upon a hearing of the case in question and where the order it has made, for example as to sentence, lies within its power, no other defect in its handling of the case, whether procedural or substantive, may be regarded as establishing an excess of jurisdiction thereby rendering the members of the court liable to an action in trespass. As Lord Templeman pointed out, defects such as failure to accord a fair trial, breach of natural

4 The liability at common law for a malicious judgment is supported by a number of old cases, for example, *Morgan v Hughes* (1788) 2 Term. Ref. 225 and by dicta of Diplock, J in the modern case of *O'Connor v Isaacs* [1956] 2 QB 288, at 310-312 but was pronounced to be obsolete by the House of Lords in *McC v Mullan* [1984] 2 All ER 908 and no longer available. The statements of the House were obiter on this point, no malice having been found on the part of the defendant in the case before it.

5 [1984] 3 All ER 908.

justice or error of law which would be generally described as jurisdictional by an administrative lawyer and would certainly render the judgment open to rectification by certiorari do not expose the justices to an action in tort.⁶

The common law immunity attaching to judicial decisions of justices of the peace, which is equivalent to that enjoyed by other members of inferior courts and is part of the general immunity enjoyed by judicial bodies continues to exist though now it is invariably either codified or extended by statute. A like immunity to that of judicial bodies has been applied to certain other bodies when exercising functions equivalent to those of a court⁷ but clearly will not extend to the vast range of decisions by decision-makers who are not courts nor are acting like a court; not is it to the point that the epithet — “judicial” or “quasi-judicial” might be a convenient description of the function they perform.⁸ Any protection their decisions may enjoy from the normal operation of the tort of trespass must exist by reference to some specific statutory provision within whose ambit they may show themselves to have acted. Nor does there seem to be any necessary reason for extending to them the protection of the very narrow concept of jurisdictional defect that applies to the decisions of justices of the peace. Granted also the very wide meaning of “jurisdictional defect” as it is applied to the decisions of administrators, that creates a considerable possibility of successful challenge of their decisions by trespass. The leading case of *Cooper v Wandsworth Board of Works*⁹ illustrates the use of trespass as a means of challenging an administrative decision. The defendant Board had ordered to be demolished a house during the course of its construction by the plaintiff builder on the ground that seven days’ notice of intention to build had not been given to the Board as required by statute. Demolition was specifically authorised in these circumstances by the Act. Nevertheless the Board was held liable in trespass since it was an essential precondition to the valid exercise of the power that natural justice should be observed and that the plaintiff should be heard. The decision has a number of points of interest. Since the Board acted within the literal terms of the Act, the court’s willingness to allow trespass meant that the Board’s decision was void. The principle is the same as that which allows trespass to lie against justices of the peace, though the defect which rendered the decision void, i.e. breach of natural justice, was not one which would have rendered void a judicial decision of a justice of the peace. Trespass here operated as a successful collateral challenge to the Board’s decision, and this seems perfectly acceptable since the normal process of judicial review would not have resurrected the demolished building. Finally, the members of the court

6 *Ibid.*, at p 929.

7 See, for example, *Dawkins v Lord Rokeby* (1873) LR 8 QB 225 (military court of enquiry); *Tampion v Anderson* [1913] VR 321 (body appointed to inquire into scientology). Malice removes the immunity here too — *Everett v Griffiths* [1921] 1 AC 631.

8 For a lucid statement of the difference between acting judicially and acting in a capacity that entitles one to judicial immunity, see the judgment of Fry, LJ in *Royal Aquarium etc Society v Parkinson* [1892] 1 QB 431, at p 440.

9 (1863) 14 CB (NS) 180; 143 ER 414. See also *Painter v Liverpool Corporation* (1836) 3 A & E 433 (conversion lay for wrongful distress carried out under void warrant issued by magistrate without hearing the plaintiff). As to the judicial nature of the power to issue warrants, see *Wilson v Colchester Justices* [1985] 2 All ER 97.

inclined to the view that the Board was acting judicially in making its decision in the sense that it should have given the plaintiff a hearing. This of course did not make applicable the doctrine of judicial immunity.

The tort of nuisance has also had an important part to play in remedying abuses of power by public authorities. It was common during the nineteenth century for Parliament to delegate the performance of public works to private companies acting under statutory duties or powers conferred upon them for that purpose. The nature of public works of this nature was such that there was a distinct possibility of the creation of a nuisance in the exercise of its powers by the statutory undertaker. The courts resolved the question of whether the statutory authority protected the undertaker from an action in nuisance by laying down the following principles. Where the creation of the nuisance was inevitable, as for example where the defendant had a statutory duty to perform the act in question, or where, if the defendant was acting under a power, the power could not be exercised in any other way than by creating a nuisance, the defendant was not liable.¹⁰ Where, however, the defendant in exercising a power had created a nuisance, he could not excuse himself by showing that he had acted within the literal terms of the power if the exercise of that power did not inevitably lead to the creation of a nuisance. This had two important consequences. First, where the power could be exercised in a number of ways, some of which would and some of which would not create a nuisance, the defendant must exercise the power in such a way as not to interfere with private rights.¹¹ It was not to the point that those exercises of the power which would involve the creation of a nuisance might have been in the eyes of the undertaker more efficient or less inconvenient. Secondly, the "inevitability" principle entailed that even if the power in question was a specific one, the undertaker was liable for any nuisances through its execution arising from his negligence. The statutory authority could not be interpreted to excuse an absence of due care in execution.¹² Further in deciding what was the standard of care to be required of the defendant in executing a specific power the House of Lords held that the defendant could not succeed by showing that he had adopted the most economical and efficient means of executing power if the effect of that was to create a nuisance. The defendant would have to show that the prevention of the nuisance was impracticable; that it was possible only by some extraordinary means or at the price of defeating the enterprise.¹³ It was therefore not a legitimate exercise of the discretion conferred on the statutory undertaker to seek to save money at the expense of interfering with private rights. The point may seem to be an obvious one in the case of statutory undertakers who are private persons but there is no doubt that it also applies to undertakers who are public bodies. The statutory undertaker, however, was not in quite the same position as the private person. The latter, if he could not by any practicable means

10 *R v Pease* (1832) 4 B and Ad 30; *Hammersmith Ry v Brand* (1869) LR 4 HL 171; aliter where liability in nuisance is preserved by the statute — *Rapier v London Tramways* [1893] 2 Ch 588.

11 *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193.

12 *Manchester Corporation v Farnworth* [1930] AC 171.

13 *Ibid*, per Viscount Sumner at p 201. See also *Rudd v Hornsby* (1975) 31 LGRA 120; *York Bros Trading Co v Commissioner of Main Roads* [1983] 1 NSWLR 391.

remove the nuisance, clearly had to desist from the activity that produced it.¹⁴ The statutory undertaker would not have to do that since the grant of legislative power clearly showed an intention that it should be exercised.

Negligence and Statutory Discretions

The nuisance cases might seem to establish that in general the existence of a statutory authority will not be interpreted by implication to excuse negligence in carrying out that authority and that statutory discretions must be exercised with due regard to private rights. The temptation might clearly exist to conclude that public bodies in the exercise of their public functions were subject to the same principles of the law of torts as private persons and bodies and that in particular no difference existed in relation to the application to them of Lord Atkin's neighbour principle. There was, however, an obstacle to that view in the form of the House of Lords decision in *East Suffolk Rivers Catchment Board v Kent*,¹⁵ which held a statutory body not liable in negligence for failing to exercise its powers in relation to the repair of sea-walls in such a way as to alleviate flooding. Not until the judgment of Lord Diplock in *Home Office v Dorset Yacht*¹⁶ however was there any clear recognition that the application of the principles of negligence to public bodies exercising statutory powers might require special treatment. The principle which he sought to lay down in that judgment is that public bodies in the exercise of their statutory functions are subject to a very considerable degree of immunity from liability under "normal" principles of negligence, and that that immunity applies to a decision taken or action performed under a statutory power provided it is within the limits of the statutory discretion as being bona fide and properly exercised. Recourse to the tortious action as a remedy for improper exercise of the power was therefore only available where under public law principles the decision or action was ultra vires the person or body in which the power resided. The principle as stated by Lord Diplock received neither express concurrence in nor dissent from any of the other members of the House of Lords. Nevertheless a later House of Lords, in which Lord Diplock was present, confirmed in *Anns v London Borough of Merton*¹⁷ that the ultra vires principle was the determining criterion in deciding whether liability in tort existed for the negligent exercise of public powers. The leading judgment of Lord Wilberforce expanded the principles laid down by Lord Diplock in three important ways: (i) despite the immunity that would attach to the making of an intra vires decision, a common law duty of care might exist both at the decision-making level and at the level of implementation of that decision. At the former level, the duty was at least to give due consideration to whether or not and how to exercise the power; (ii) a distinction was to be drawn between the discretionary part of the exercise of the power and its operational part, negligence in the latter being unprotected by the immunity. That distinction tended to coincide with but was not coextensive with, the distinction between the making of the decision and the implementation of it; (iii) merely establishing the invalidity of a decision to take certain

14 *Rapier v London Tramways* [1893] 2 Ch 588.

15 [1941] AC 74.

16 [1970] AC 1004; [1970] 2 All ER 294.

17 [1978] AC 728; [1977] 2 All ER 492.

action under principles of ultra vires was insufficient by itself to render the public body liable in the absence of proof of negligence accompanying or producing that decision. These principles certainly now represent English law. They have been applied in Australia, though the High Court has recently refused to accept certain parts of the *Anns* decision.¹⁸ They have been accepted in other Commonwealth jurisdictions.¹⁹ It is of interest to note here that what may be referred to as the "discretionary immunity" doctrine was introduced into American law many years earlier but largely it seems through a sidewind. The Federal Torts Claims Act of 1952 in introducing for the first time a right to sue the United States government in tort expressly reserved from that capacity acts or omissions to act which are within the "discretionary function or duty" of any federal agency or employee [28 U.S.C. s 2680]. The American decisions as to what falls within the immunity are now at a much more developed stage than those of the United Kingdom and Commonwealth and some reference to them is essential at certain parts of the article.

This article will now examine a number of interrelated facets of the principle of discretionary immunity established by *Dorset Yacht* and *Anns*. These are the justification and extent of the immunity, the doctrine of operational negligence, the non-feasance problem, the relevance of the invalidity of the decision, and the applicability of ordinary principles of negligence to the particular question of liability for the misuse of powers.

Justification and Extent of the Immunity

Not a great deal is said by Lord Diplock and nothing at all by Lord Wilberforce as to the justification of the immunity. This is not very satisfactory since virtually at a stroke the public law doctrine of ultra vires has invaded the torts world. Some writers have objected altogether to this development on the ground that private law principles of tort are perfectly capable of responding effectively to the problem.²⁰ At the very least the justification of the immunity should be understood in order to decide upon its extent. In *Dorset Yacht*, however, Lord Diplock merely said that the function of reviewing intra vires discretionary decisions through the medium of an action in tort for negligence was an inappropriate one for a court. Negligence was available where the decision was ultra vires the defendant so that he lost the protection of the statutory authority.²¹ This argument is spelled out in somewhat greater detail in the American cases and authorities. There the doctrine is generally explained upon the basis that in exercising its powers the public

18 In *Sutherland Shire Council v Heyman* (1985) 59 ALJR 564. Australian cases accepting the *Anns* principles are *Dunlop v Woollahra MC (No 2)* (1981) 33 ALR 621; *Wollongong Shire Council v Fregnan* [1982] 1 NSWLR 244; *Minister of Environmental Planning v San Sebastian* [1983] 2 NSWLR 268; *Clarke v Gisborne SC* [1984] VR 971; *Burgchard v Holroyd* [1984] 2 NSWLR 164; *Carosella v Ginos* (1981) 27 SASR 515.

19 For example, *Canadian-Barratt v District of North Vancouver* [1980] 2 SCR 418; *Toews v Mackenzie* (1980) 114 DRL (3d) 577; *Malat v Bjornson* (1980) 114 DLR (3d) 612; *Ordog v District of Mission* (1980) 110 DLR (3d) 718; *Kamloops v Neilsen* [1984] 2 SCR 2; *New Zealand-Mount Albert BC v Johnson* [1979] 2 NZLR 234; *Young v Tomlinson* [1979] 2 NZLR 441; *Harris v Demolition Contractors* [1979] 2 NZLR 166; *Stiller v Porirua CC* [1983] NZLR 628.

20 See especially Harlow, "Public and Private Law: Definition without Distinction", (1980) 43 MLR 241.

21 [1970] 2 All ER 294, at pp 332-333.

body may be resolving complex issues of policy in a certain way; that by attaching a lower priority to one interest than to another when balancing interests and by thereby "damaging" that lower interest, it is not acting improperly because it is in the nature of the power that it should be required to do that very thing. The argument is reinforced by pointing out that the public body exercising the function is almost inevitably an elective body or one deriving its powers from such a body and that if decisions have to be taken in which the interests of various sections of the community are weighed in the balance, the result being benefit to some and disadvantage to others, it is preferable that those decisions should be taken by elective bodies and not in effect by courts.²² This argument is compelling. The court is simply not constituted in such a way as to evaluate in terms of its being right or wrong the type of policy decision that the public decision-maker has to perform, particularly where the decision is one that is taken at a high executive level. It may exercise control over the decision-maker through the process of judicial review but that process normally stops well short of substituting the opinion of the court for that of the decision-maker as to what decision should have been made. Acceptance of this argument also points the way to acceptably controlling the extent of the minority. The less "political" the decision, and the more akin it is to the type of decision taken by private decision-makers and being of a sort normally subject to scrutiny under court process, the less justifiable will it be to accord immunity to the decision. Finally in relation to justification, brief mention should be made of an argument based upon, in the convenient American phrase, the "chill factor" effect upon administrative officials of allowing judicial control of their decisions through the medium of a tort action for damages, the idea being that such control will produce excessive caution and reluctance to act.²³ This argument it is suggested amounts to very little. For one thing, where the immunity exists, the chill factor is inherently incapable of being demonstrated. For another, it works both ways — what may discourage the timid may deter the reckless and overbold. Administrative decisions may in any case have to be defended by officials under the judicial review procedure. The chill factor seems on the whole a weak argument and Lord Wilberforce was dismissive of an argument based on it in *Ann*, though that was in relation to the question whether tort liability should be imposed outside the immunity, rather than to whether the immunity should exist.²⁴

When we consider the extent of the immunity, its width is at first sight impressive. Public bodies, whether they are part of the Crown, or are independent statutory bodies or local authorities, are organs with enormous tort-producing potential. Such bodies will inevitably be exercising their function under a complex of powers and duties which most commonly derive from statute although they may have other sources. Potentially, therefore, the discretionary immunity has a wide range. Nor does it have any clear or absolute limitations. It would seem to apply across the board to acts of omission and commission. No distinction is to be drawn according to whether the type of power is one which envisages the infliction or potential infliction upon the public or a

22 See Davis, "Administrative Law Text" 3rd edn at p 476.

23 See Jaffe, "Judicial Control of Administrative Action" pp 244-247.

24 [1977] 2 ALL ER 492, at p 501. See to the same effect, the judgment of Lord Salmon at p 511.

section of it of damage as a necessary evil, and the type which exists essentially for the protection of the public or a section of it. The decision to keep an open prison may therefore be just as immune as the decision not to execute some work of public safety. The *Dorset Yacht* case is support for the first point, *Anns* for the latter. Both *Dorset Yacht* and *Anns* were examples of "novel fact" situations. The duty of care of the keepers of a Government prison to persons outside the prison had never previously been considered by the High Court in England. The duty of care in relation to the need to actively exercise public powers in the interest of public safety had come under the consideration of the House of Lords in the *East Suffolk* case but had been regarded as merely requiring a more or less simple application of the non-feasance rule. The discretionary immunity is, however, not limited to situations where there is no private law analogy for the imposition of a duty of care. Of this point, the leading American decision in *Dalehite v US*,²⁵ the first case to be decided under the Federal Torts Claims Act, 1952 provides a convenient example. The case concerned an action of negligence against the U.S. Government in relation to its manufacture, packaging and labelling of a certain fertiliser which was required for the purpose of relieving a famine problem in post-war Europe. The fertiliser contained a known explosive and exploded after being loaded on to a ship causing widespread loss of life and damage. Clearly in this situation there could be no question about the existence of a notional or prima facie duty of care. The duty of care of a manufacturer of products towards the consumer of the product is one of the clearest examples of such a duty. The only question could be whether the manufacture in this case fell within the immunity applying to the exercise of discretionary public powers. In finding that it did, the United States Supreme Court propounded the distinction that has become well known between planning and operational decisions and concluded that the alleged acts of negligence in the instant case were all decisions taken at the planning level.

A number of conclusions may be derived from a study of the *Dalehite* decision. The first is that the question of whether a duty of care exists and whether the discretionary immunity operates are two separate questions and are not to be confused. This is made apparent in America by the provision of the Federal Torts Claim Act 1952 itself which apart from establishing the discretionary immunity for governmental acts requires also that the behaviour in question constitute a tort under the provisions of the local law.²⁶ Where, as in the *Dalehite* case itself, the duty is an obvious one, the only question is whether immunity applies to it. Where a novel duty-fact situation presents itself to the court, it seems that the question whether the situation is one that attracts a duty of care in the tort of negligence is logically prior to the question of whether, despite the fact that it does, immunity applies. The first question must be resolved on the basis of the two-tier approach suggested by Lord Wilberforce in the *Anns* case.²⁷ Until recently it had been generally thought that that question would be part of the second tier, i.e. that concerned with the question whether, despite the fact that there is

25 346 US 15; 97 L Ed 1427.

26 28 USC s 1346(b).

27 [1977] 2 All ER 492, at p 498.

foreseeability of harm to the plaintiff, there are other considerations which "negative, reduce or limit" the scope of the duty. Recent Australian High Court authority, however, has been to the effect that the "proximity" question which the first tier of *Anns* relates to is not concerned solely with the issue of foreseeability of harm, but that at least some of those other considerations which rule out a duty of care are relevant at that stage.²⁸ This raises questions, as yet unanswerable, as to whether the two-tier approach has in effect become a three-tier one, or even a one-tier, and what considerations are left over from the final tier. One consideration that the final tier seems likely to embrace is that of the second question posed above, i.e. whether the discretionary immunity applies to the case. The second point to be derived from *Dalehite* is the considerable potential the immunity has for invading areas in which hitherto the tort of negligence has been thought to hold sway. *Dalehite* even at the time it was decided was a controversial decision in terms of its application of the law to the facts — it would almost certainly have been differently decided if the approach of the Supreme Court in the later *Indian Towing*²⁹ case had been applied. Nevertheless the justification for the decision in *Dalehite* clearly lay in the extreme urgency of the requirement to provide food for Europe, a legitimate governmental preoccupation at the highest level. More mundane considerations might influence a Government manufacturer in the exercise of its discretion. It might for example reach a decision to cut costs in the manufacture of its product at the risk of increased danger to the consumer. Why should this not be a legitimate exercise of its discretion, assuming there is no statutory provision which excludes cost-saving as irrelevant? The well-known dictum of Lord du Parc LJ, in the Court of Appeal in the *East Suffolk* case to the effect that the public body is often required to place the claims of efficiency below that of thrift³⁰ was quoted with approval in *Anns* and may seem directly applicable. Yet the private manufacturer must take precisely similar decisions as to the extent to which he can afford to save costs at the expense of the safety of his product, yet his decision is clearly open to the scrutiny of the courts and remediable by the means of an action in tort if he gets the decision wrong. A state of the law which appeared to countenance the possibility that Government manufacturers were in effect entitled to produce less safe products than private manufacturers would not be in any way desirable. With respect to the legitimacy of cost-saving in relation to decisions made by public bodies the fate of the nuisance cases deserves some enquiry. Those cases excluding as they do the relevance of considerations of cost-saving by the defendant in deciding whether liability in nuisance exists when the nuisance in question is created in the exercise of a statutory power have survived *Dorset Yacht* and *Anns*. A good recent example is *York Bros Trading Co v Commissioner of Main Roads*.³¹ The defendant highway authority had constructed a bridge across a public navigable river and in so doing had substantially interfered with the navigational rights of the plaintiffs. The authority defended the plaintiffs' action in public nuisance by pleading its statutory

28 See for example the judgments of Deane, J and Gibbs, CJ in *Coffey v Jaensch* (1984) 54 ALR 417 and to similar effect in *Sutherland SC v Heyman*, supra, n 18.

29 *Indian Towing Co v US* 350 US 61; 100 L Ed 48.

30 [1939] 4 All ER 174, at p 184.

31 [1983] 1 NSWLR 391.

power, but was held liable on the ground that it was practicable to construct a bridge which did not interfere with navigation, even though that sort of bridge was vastly more expensive. It might be tempting to conclude from this that economy is not now a factor which excuses a decision to exercise a power in such a way as to interfere with private rights whether that interference takes the form of a nuisance or simply falls within the general ambit of the tort of negligence. The nuisance cases, however, survive not because of any such general principle, but because of a reason deriving from the judgment of Lord Diplock in the *Dorset Yacht* case and receiving confirmation from a recent English decision.³² This is that the type of power in question under which the nuisance might be created is one conferred on a statutory undertaker who being a private person or body cannot rely on any sort of public interest defence in the same way as a public statutory body. This explanation looks inadequate in a case like the *York Bros* case where the defendant was not a private undertaker but the public highway authority.

Granted that the nuisance cases represent a partial though theoretically debatable derogation from the immunity principle, is it possible to lay down any more general restrictions upon that principle? It seems clear that there are two important restrictions. The first is that the mere fact that a public body is acting under and exercising a statutory power does not automatically call the immunity into play — the power may be irrelevant to liability in negligence. This has received confirmation in the judgments of the High Court in *Sutherland Shire Council v Heyman*,³³ particularly those of Mason J and Brennan J. The second restriction is the doctrine of operational negligence.

(a) *Irrelevance of the statutory power to negligence liability*

Suppose that a statute empowers a local authority to “acquire, own, occupy, use, maintain and repair” premises, that acting under such a power a local authority is in occupation of a building and that an invitee in that building is injured through an alleged breach of the duty of care which an occupier of premises owes to his invitees on those premises. There seems no reason at all why any rule should be applied other than the normal rules concerning the liability of occupiers towards invitees. It seems apparent that the authority should not be allowed to justify any deviation from the normally required standards of repair of the building in question by reference to its public powers. Those powers here seem to be quite irrelevant. The irrelevance of the fact that the authority is acting under a statutory power to the question of liability in negligence in such a case was recognised quite early in the development of the tort of negligence by Lord Greene MR in his masterly judgment in *Fisher v Ruislip-Northwood UDC*.³⁴ The plaintiff was injured when the car he was driving collided with an unlighted air-raid shelter which had been erected in the highway by the defendants acting under a statutory power conferred by the Civil Defence Act 1939. Street lighting was prohibited at the time of the collision, but other forms of lighting were permitted.

32 [1970] 2 All ER 294, at p 331; *Fellowes v Rother DC* [1983] 1 All ER 513, at p 518.

33. *Supra*, n 18.

34 [1945] KB 584. See, for a similar case, approved by the High Court in the *Heyman* case, *Birch v Central W County DC* (1969) 119 CLR 652.

Finding the defendants liable, Lord Greene did so on the basis that they were to be judged by the normal principles of negligence as they applied to persons who erected dangerous structures in the public highway. The statutory authority merely made lawful the original erection of the shelter. The decision may be compared with *Sheppard v Glossop Corporation*.³⁵ In that case, the plaintiff was injured in a fall which he alleged would not have occurred had the defendants exercised their statutory power of lighting the highway. The defendants had placed a lighting system in the highway but for reasons of economy had caused it to be switched off after 9 p.m. when the accident occurred. Holding the defendants not liable the Court of Appeal did so on the ground that it was a legitimate exercise of the defendants' discretion as to whether to light the highway to decide to withdraw it for certain periods on grounds of economy. The difference between this case and the *Fisher* case is that in the latter the statute while empowering the erection of the structure could not be interpreted as conferring upon the authority a discretion whether or not to observe the normal precautions to be taken to prevent its being a danger; in the *Sheppard* case the power was interpreted to confer a discretion as to whether it should be exercised in such a way as to remove such dangers. The statutory power must therefore be interpreted as one which invited the making of a policy decision. If it does not do so, its existence is irrelevant to the question of liability. It may be observed that although the Court of Appeal placed some emphasis upon the fact that in *Sheppard* the defendants had not created the danger, the case was not decided on the ground that it was one of non-feasance. It is no doubt the case, however, that a statutory power is more likely to be interpreted as one which may be legitimately exercised in such a way as to ignore obvious dangers where the relationship it creates between plaintiff and defendant is one in which no common law duty of care is already recognised. Conversely where in the course of exercising a power the defendant has entered into a relationship with the plaintiff to which a recognised common law duty applies, for example, occupier/invitee or manufacturer/consumer the power is far less likely to be interpreted as conferring discretion to depart from the normal requirements of that relationship though of course it could so do.

It follows from the principles laid down in *Sheppard* that if the defendant's conduct had fallen outside the limits of the statutory discretion, the power would not have conferred protection on it. If, for example, the defendant had taken a bona fide decision to light and then through negligence had failed to carry it out, it would have been held liable. This is stated quite explicitly in the judgment of two members of the Court of Appeal.³⁶

Those statements, though impossible to reconcile with the later decision of the House of Lords in the *East Suffolk* case, are vindicated by the decision in *Anns*. They are, however, contrary to the tenor of some of the judgments of the High Court in *Sutherland Shire Council v Heyman*.³⁷

35 [1921] 3 KB 132.

36 Per Scrutton, LJ at p 146; per Atkin, LJ at p 150.

37 This question is discussed at pp 76-78 of this article.

(b) *The doctrine of operational negligence*

The essential features of the concept of operational negligence are no doubt widely understood. The decision as to whether and how the power is to be exercised involves a discretionary or "planning" element. The carrying out of the decision is generally operational in nature. Negligence in the course of implementation of a decision is at least *prima facie* operational and the public body will not escape liability for that negligence on the basis of its immunity from having its decisions questioned in an action of negligence. It should be noted immediately that the taking of decision/implementation of decision antithesis as just set out is simplistic. As Lord Wilberforce himself pointed out in *Anns* the implementation of a decision to inspect though "heavily operational" may have a discretionary element in its exercise, discretionary "as to the time and manner of inspection and the techniques to be used". Conversely, however, the decision-making power of the public body, though "heavily discretionary" in its nature may have an element of the operational. In the numerous American decisions under the 1952 Act there is clear testimony to the fact that discretionary immunity is not to be equated with decision-making immunity.

In commencing the discussion of operational negligence, we start with a problem arising from Lord Wilberforce's judgment in *Anns*.

The problem arises because of the following passage from his judgment.³⁸ "It is for this reason that the law . . . requires to be understood and applied with the recognition that . . . there may be room, once one is outside the area of legitimate discretion or policy, for a duty of care at common law. It is irrelevant to the existence of this duty of care whether what is created by the statute is a duty or a power: the duty may exist in either case. The difference between the two lies in this, that, in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of the power." This passage, which clearly is dealing with operational negligence is capable of leading to two conclusions both of which are, it is suggested misconceived. The first is that operational negligence is *ultra vires* the person or body in whom the power is vested. The second, more insidious misconception is that operational negligence is actionable *because* it is *ultra vires* that person or body. Both of these misconceptions may be illustrated by a simple case. Suppose that a statute empowers a local authority to render assistance to its residents in various emergency situations requiring relief. Suppose that in one such case it has sent out a team of its employees by car to render that relief and on the way through the negligence of the driver, the car hits and injures a pedestrian. It is difficult to see that there is any sort of *ultra vires* act whatsoever here. The authority itself has acted *intra vires* in the exercise of its discretion and the driver is acting in the course of his employment. What Lord Wilberforce meant by saying that the act of negligence must lie outside the ambit of the power was surely that that negligent act was one which was not entitled to the immunity which any act which was a non-negligent implementation of the discretion enjoys. For his act to be outside the ambit of the power, the defendant must have moved outside the area of legitimate choice which the discretion confers into an area where he has no choice

38 [1977] 2 All ER 492, at p 503.

but to act carefully. If, nevertheless, we accept that, ultra vires being a not altogether exactly defined principle, the act of the driver may properly be described as being ultra vires the authority, this is clearly not the reason for holding it liable. The authority is liable because its employee has caused injury by driving negligently in the course of his employment, and because statutory authority is no defence when a negligent act is invoked by the plaintiff. The second misconception is perhaps more insidious where the court is dealing with operational negligence which raises difficulties with the notional duty apart from the discretionary immunity problem, for example, a difficulty concerning the non-feasance rule. Suppose that in the factual case just considered, the negligent driving of the employee has caused the relief party to arrive late and further "damage" i.e. "non-relief" has been suffered in consequence. To categorise the negligence here as ultra vires the authority does not assist in solving the question of its liability. Whether there is liability depends upon whether the court gives a positive answer to the question of whether a duty of care arises in the exercise of the statutory power to render the required relief. It is suggested therefore that Lord Wilberforce in the passage in question was not calling into play for any purpose the technicalities of the doctrine of ultra vires in relation to operational negligence. There are indeed some expressions of judicial opinion which support this conclusion.³⁹

The question must now be considered what negligence is operational. The word itself appears to imply something that is mechanical in nature, that is ministerial rather than discretionary. It has already been stated that it is too simple to draw any absolute line between the making of the decision itself and its implementation and that the former may have operational elements just as the latter clearly may have discretionary. On the manner in which the distinction may operate, some reference is necessary to the American case law which predates our own by some two decades. The American experience is especially instructive in showing the limits within which a court may justifiably classify a part of the decision-making function as operational, though on this difficult question their case law shows some divergences. The present American position was reached by the initial recognition that even mechanical acts of implementation of a decision involved some element of choice and therefore of discretion. ("It would be difficult to conceive of any official act, no matter how directly ministerial that did not admit of some discretion in the manner of its performance, even if it involved only the driving of a nail.")⁴⁰ To exclude from review every decision taken in the course of exercising the statutory discretion would reduce operational negligence to the area of unconscious or unthinking acts or omissions. In *Smith v US*⁴¹ the court pointed out that "it is not a sufficient defence for the Government merely to point out that some decision-making power was exercised by the official whose act was in question". Two consequences followed from the willingness of the American courts to scrutinise from the point of view of the law of negligence the actual decision-making power vested in the Federal Government and its

39 For example, per Woodhouse, J in *Takaro Properties v Rowling* expressed doubt about the necessity for an ultra vires act [1978] 2 NSLR 314, at p 326. See also Mason, J in *Sutherland Shire Council v Heyman* 59 ALJR 564, at p 578.

40 *Ham v Los Angeles County* (1920), 46 Cal App 148, at p 162.

41 375 F 2d 343.

officials. The first is that it was necessary to draw a line between those aspects of the decision which are of a "planning" or "policy" nature and those which are "operational". The second is that in relation to those parts of the decision that are operational the court if it allows a negligence claim is not merely reviewing the decision but also substituting its own decision for that of the decision-maker. That somewhat revolutionary position will impress administrative lawyers in this country.

In relation to the first point, no hard and fast rule can be laid down as to the determination of what is planning and what is operational in the decision, but a number of guidelines may be indicated. The basic distinction between the initial decision to exercise a power, which is very likely to be classified as a planning decision, and the later implementation of that decision which will very often be operational appears from the *Indian Towing* case.⁴² In that case, the Supreme Court held that, though the decision to build and operate a lighthouse was immune, once that decision had been taken the Government was liable for its failure to keep the lighthouse in good working order since that was operational negligence. So also will decisions taken in the course of implementation of that decision tend to be classified as operational. In *U.S. v Gavagan*⁴³ the government was held liable for erroneous decisions made by those in charge of a rescue attempt during the course of that attempt. "The discretionary nature of the decision to undertake the rescue at the outset or the discretionary right to abandon . . . does not alter the duty . . . during the time the operation went on." The same distinction appears in those frequent cases in which day-to-day decisions in the application of some overall policy direction have been classified as operational.⁴⁴ As to what is a policy decision, the *Indian Towing* case rejected a distinction for which some support existed in the earlier *Dalehite* case between activity which was essentially governmental in nature and other activity which was not, for example, commercial or trading activity. There is therefore no automatic exemption for typical exercises of the governmental function. Nevertheless the distinction is to some extent apparent in the case law. There has for example been a universal unwillingness to examine the decision whether or not to institute criminal or civil proceedings on behalf of the State against a person, that function being a typical governmental one.⁴⁵ Again there is some evidence in the American case of the classification of functions approach now somewhat discredited in administrative law, one common result being to attach immunity to what is classified as a legislative or quasi-legislative act. Certain State decisions, for example, have accorded immunity to the making of regulations fixing traffic-light intervals on the basis that this is a legislative function.⁴⁶ However this approach has come under criticism, with justification it appears, from other cases on

42 250 US 61; 100 L Ed 48; followed in *Rayonier v US* 352 US 315, 1 L Ed 2d 48.
43 280 F 2d 319.

44 *Aretz v US* 503 F Supp 260 (decision to upgrade safety classification of illuminants); *Piggott v US* 451 F 2d 574 (test-firing of rocket); *Downs v US* 522 F 2d 990 (FBI's handling of hijacking of airplane); *Liuzzo v US* 508 F Supp 923 (implementation of FBI policy of recruitment of criminal informants).

45 *Smith v US* 375 F 2d 343; *Hoston v Silbert* 514 F Supp 1239; *Imbler v Pachtman* 424 US 409. Cf *Raymer v US* 482 F Supp 432 (actionable failure by mine inspector to enforce safety conditions in mine); *Barron v US* 473 F Supp 1077 (actionable failure by government to enforce safety standards on its contractor).

46 *Urow v Dist of Columbia* 316 F 2d 351.

the ground that no automatic immunity should apply even if "legislative" was the correct classification.⁴⁷ Clearly the more the decision involves a resolution of conflicting interests, the more likely it is to be a "policy" one and entitled to immunity. So in cases concerning actions for negligent approval of the construction of a road or bridge, the court has dismissed the action on the basis that even on the assumption that the safety of persons using the road or the bridge was a relevant consideration, it was only one of a number of relevant factors and therefore the decision was a policy one and not subject to review.⁴⁸ Not all decisions where a resolution of competing interests needs to be made are, however, immune. In the well-known case of *Johnson v State of California*⁴⁹ the court held that "the decision of a parole officer as to what warnings to give to foster parents [concerning the homicidal tendencies of their foster-child] does not constitute a basic policy decision that the Government Code needs to insulate from liability". In *White v US*⁵⁰ the court found that the application of the policy that mental patients should be allowed the maximum freedom warranted by their condition to an individual case was not one of policy but operational in nature (in deciding the question of liability to a mental patient who had committed suicide in the hospital grounds). It seems to follow a fortiori that where the discretion that exists is merely to decide the most appropriate means to achieve a desired end, the decision will be an operational one. That will particularly be so where the decision is one of the sort which the courts in the course of their handling of everyday litigation are accustomed to evaluate, a point which was also recognised by the *Johnson* case. Yet on this matter the American decisions are by no means uniform. Where the decision involves the exercise of the professional judgment involved in medical diagnosis, a number of cases have held this to be operational in nature;⁵¹ some have gone the other way.⁵² In relation to matters of design, *Medley v US*⁵³ found the defendant liable for the defective design of a dumper-truck; *Mayer v US*⁵⁴ held the defendant's decision to use an aircraft with an allegedly negligently-designed ejector seat to be within the planning exception. There are similar cases of seemingly inconsistent decisions in relation to drug approval⁵⁵ and to weather-forecasting.⁵⁶ Conflicts of this sort arise from a divergence in approach between those courts which interpret the express exemption for discretionary decisions in the Federal Tort Claims Act, 1952 literally and those which are prepared to read into it

47 For example, *Weiss v Fote* 7 NY 2d 579 in which the court said that if the interval fixed was shown to have been determined without due care or that no reasonable official could have adopted it, a remedy in negligence would be available.

48 *Mahler v US* 306 F 2d 713; *Re. Silver Bridge* 381 F Suppl 931.

49 69 Cal 2d 782.

50 317 F 2d 13.

51 *Fair v US* 234 2d 288; *Supchak v US* 365 F 2d 844; *White v US* 317 F 2d 13.

52 *Blitz v Boog* 328 F 2d 596; *Fahey v US* 153 F Supp 878. For an attempt to rationalise the medical cases, see *Hendry v US* 418 F 2d 774.

53 480 F Supp 1005.

54 302 F Supp 1235.

55 So the power to approve a drug for public use was immune — *Gray v US* 445 F Supp 337; not, however, the decision whether a vaccine complied with specific technical criteria — *Griffin v US* 500 F 2d 1059.

56 Cf. *Ingham v E Airlines* 373 F 2d 227 (failure by air traffic controller to warn of weather change not immune) with *Bartie v US* 216 F Supp 10 (failure by weather-forecaster to warn of hurricane immune).

qualifications. An important point that the case law establishes is that where the making of a policy decision is relied on by the defendant, he must show that his discretion was consciously exercised. It is not enough to show that the result could have been arrived at as the result of a legitimate planning or policy decision. The *Johnson* case is authority for this point as is the United States Court of Appeals decision in *Driscoll v US*.⁵⁷ In the latter case the plaintiff alleged negligence in the design of an airforce base in respect of the failure to provide traffic warning signs and controlled crosswalks for pedestrians. Rejecting the Government's claim to immunity, the court found that the pleadings did not disclose that the decision was made at the planning level. Also it was one which the judicial process was "demonstrably capable of evaluating". The decision-maker is therefore not to be excused by mere forgetfulness or indolence. Further, in order to establish his claim to immunity he must plead the facts upon which he relies to show the conscious exercise of a judgment by himself requiring some sort of policy evaluation.⁵⁸ The burden on this issue is on the defendant. Recent authority shows however, that this approach is not being adopted in Australia. In *Sasin v Commonwealth*,⁵⁹ the plaintiff alleged negligence against the Commonwealth in that being in a position to regulate safety standards within the aviation industry, and in this case in relation to equipment used in aircraft in Australia, its servant, the Director-General of Aviation approved the use of a particular safety-belt in Australian planes which he knew to be of defective design, the result being that the plaintiff, a pilot, was more seriously injured on failure of the belt in a plane crash than he would have been had a proper safety belt been installed. Finding that the defendant owed the plaintiff a prima facie duty of care under the first part of the two-tier test in *Anns*, Hodgson J nevertheless held that the case fell within a qualification at the second stage of the test on the ground that the approval of the belt fell within the limits of a discretion bona fide exercised by the Director-General. He considered that the relevant Act and Regulations thereunder allowed the Director-General to take into consideration matters other than safety such as those concerned with the "regularity and efficiency" of air navigation. What is lacking in the case as reported is any indication that the Director-General weighed any of these factors in the balance against safety. If safety alone had been the only factor considered by the Director-General, his decision seemed to raise a justiciable issue of the sort a court seems to be perfectly capable of deciding for itself. The same approach whereby the matter is resolved in favour of the decision-maker without his being required to defend his exercise of the discretion as raising policy issues which the court cannot determine may be seen in the judgments of the New South Wales Court of Appeal in *Minister for Environmental Planning v San Sebastian*⁶⁰ and in that of Gibbs CJ in *Sutherland Shire Council v Heyman*.⁶¹

The Anglo-Commonwealth authority on what is operational negligence cannot compete in abundance with the American. Quite a number of cases like *Anns* itself are cases where the court has merely had to decide

57 525 F 2d 136.

58 *Driscoll* case; *Medley v US* 480 F Supp 1005; *Piggott v US* 451 F 2d 574.

59 (1983-4) 52 ALR 299.

60 [1983] 2 NSWLR 268.

61 *Supra*, n 18.

whether a cause of action exists and therefore did not have to reach a decision on the facts.⁶² The distinction *Anns* draws between the policy and operational aspects of the decision has been accepted and now clearly represents the law. Falling within the discretionary immunity have been held decisions not to light a public highway because of economy reasons;⁶³ to clear only major roads of snow because of manpower shortages;⁶⁴ to inspect public roads for potholes only at 14 day intervals, again because resources only permitted this amount of inspection;⁶⁵ to release a dangerous prisoner on a temporary pass.⁶⁶ Falling into the operational negligence category are the numerous decisions concerning the exercise of the statutory powers of local authorities with respect to the approval of building foundations. Whether the relevant negligence has been that of the local authority's inspector in failing to inspect properly, or of the authority itself in the circumstances surrounding the giving of approval, no real problem has existed concerning the application of the concept of operational negligence.⁶⁷ A number of cases to be considered⁶⁸ in connection with liability for negligent statements have found operational negligence to exist in relation to such matters as the giving of planning approval and the issue of certificates. In *Bird v Pearce*⁶⁹ the defendant highway authority was held liable in negligence for causing the obliteration of existing road signs and the failure to replace them thereby causing an accident. Such negligence clearly is operational in the absence of any valid policy explanation for the decision. The New South Wales *San Sebastian*⁷⁰ case raised a rather more difficult problem. The defendant Council had published a plan indicating its future policy for the development of a certain part of Sydney, one of the purposes being to attract property developers to that area. The result of the publication of the proposal was that a number of developers including the plaintiffs acted on the plan and acquired land in that part of Sydney. The Council had become aware at some stage after publication that its plan might not be feasible because of the difficulty of transporting the workforce. Eventually the plan was dropped for this reason. The N.S.W. Court of Appeal dismissed the plaintiff's claim in relation to an allegation of negligence by reason of a failure to warn

62 *Fellows v Rother DC* [1983] 1 All ER 513; *Takaro Properties v Rowling* [1978] 2 NZLR 62; *Taranaki Catchment Board v R & D Roach* [1983] NZLR 64.

63 *Sheppard v Glossop Corporation* [1921] 3 KB 132.

64 *Haydon v Kent CC* [1978] QB 343.

65 *Barratt District of North Vancouver* (1978) 89 DLR (3d) 473.

66 *Toews v Mackenzie* (1980) 109 DLR (3d) 473; cf however *Vicar of Writtle v Essex CC* (1979) 77 LGR 656 — failure by social worker to communicate arsonist tendencies of juvenile criminal to those in charge was not because this was in the boy's best interests but because the risk was thought to be insufficiently great. The defendants were held vicariously liable for the negligence of the social worker when the boy escaped and burned down a church.

67 Negligence by inspector — *Dutton v Bognor Regis UDC* [1972] 1 QB 373; *Acecrest v WS Hattrell* [1983] 1 All ER 17; *Peabody v Sir Lindsay Parkinson* [1984] 3 All ER 529; *Mount Albert BC v Johnson* [1979] 2 NZLR 234; *Young v Tomlinson* [1979] 2 NZLR 441; *Harris v Demolition Contractors* [1979] 2 NZLR 166; *Stiller v Porirua CC* [1983] NZLR 628; *Ordog v District of Mission* (1980) 110 DLR (3d) 718. Negligence by local authority — *Dennis v Charnwood BC* [1982] 3 All ER 486; *Wollongong SC v Fregnan* [1982] 1 NSWLR 244; *Carosella v Ginos* (1981) 27 SASR 515; *Clarke v Gisborne* [1984] VR 971; *City of Kamloops v Nielson* [1984] 2 SCR 2.

68 At pp 83-86.

69 (1979) 77 LGR 753.

70 *Supra*, n 60.

developers of the possibility of a change of policy at a time when the Council was considering the matter and before the plaintiff had acquired the land that he bought on the strength of the plan. The decision whether to warn of the change was a policy one and within the immunity attaching to that sort of decision. No doubt there might be policy factors to be weighed in deciding whether to announce publicly a change of policy of this sort but it is not clear that the Council took these into account nor even that it consciously exercised its discretion on the matter of a warning in any way.

The non-feasance problem

The nature of the problem may be stated simply enough. At common law there is no liability in tort for a mere failure to act (the primary non-feasance rule). The various seeming exceptions to this rule turn out on examination to be not exceptions at all but cases where the defendant has committed some positive act which imposes upon him a duty of care to take other positive action. *East Suffolk Rivers Catchment Board v Kent*⁷¹ appeared to establish a rule in relation to statutory powers which was a logical development from the primary non-feasance rule. Since the defendant had no duty to act at all, his only duty when acting was not carelessly to cause the plaintiff damage as a result of that action. He had no duty of care to improve the position of the plaintiff by, for example, exercising the power in such a way as to remedy damage which had some other cause (the secondary non-feasance rule). So in the *East Suffolk* case itself the defendant was not liable for the further damage to the plaintiffs' land through flooding which would have been prevented had the defendant exercised its statutory power to repair the sea wall with proper care.

Both rules clearly apply in the tort of negligence. They have a prima facie application to the case of the person in whom is vested a statutory power, the exercise of a power being permissive rather than obligatory. Yet in *Anns* both rules received considerable modification in so far as they related to statutory powers. Lord Wilberforce's judgment holds that a duty of care may arise in the decision-maker at least to give due consideration to the exercise of the power. Also, when a decision has been taken to act, a duty of care might arise to act carefully and breach of that duty will expose the defendant to liability not only for fresh damage that it causes but also for failing to avert damage or to alleviate damage that has already occurred.⁷² Whether that secondary non-feasance is actionable as negligence will depend upon whether it may be regarded as operational negligence under the principles just considered. It may be noted in the case of the statutory power there is a tertium quid case between primary and secondary non-feasance. This is the case where the defendant has taken a decision to exercise the power but has taken no steps to implement that decision. In principle it is submitted that the tertium quid case should be judged as a case of secondary non-feasance. Once a decision has been taken to act, the fact that the defendant might have legitimately decided not to act should not be used to excuse him for his inaction. If the inaction is negligent, he should be liable. If that

⁷¹ *Supra*, n 15.

⁷² Lord Salmon in his separate judgment expressed doubt whether a breach of the duty to give consideration to the exercise of the power could give rise to a cause of action for damages — [1977] 2 All ER 492, at p 507.

were not so the law would be drawing an unsatisfactory distinction between the active though negligent defendant and the supine defendant, imposing liability upon the former who may seem the more meritorious of the two.

Aronson and Whitmore have criticised the *Anns* conclusion regarding both primary and secondary non-feasance.⁷³ They support the *East Suffolk* finding that causation between negligence of the defendant and damage in the form of continued flooding did not exist. They justify this by reference to the fact that the defendant had a mere power to act and in consequence had no duty to give help. The defendant when acting admittedly had a duty to take care not to inflict further damage upon the plaintiffs. But to conclude that when acting it must exercise its powers in such a way as to confer a benefit in this form of relief of flooding upon the plaintiffs was to convert a statutory power into a duty. In answer to these arguments, it is of course a trite conclusion that the only way in which causal connection could have been established between the negligent action of the defendants and the prolongation of the flooding was by recognition of a duty to alleviate the flooding. As the case of breach of statutory duty confirms, once a duty to take positive action is established then any damage that the taking of that action would have prevented is caused by the failure to take such action. Everything, therefore, depends upon whether the law is willing to impose a duty of care in the situation where a statutory power rather than duty is conferred upon the defendant.⁷⁴ In contending that such a duty does not exist, Aronson and Whitmore appear to place much weight upon the fact that a person in whom a statutory power exists cannot be under a positive duty to act. This excludes in its turn a positive duty to take care to improve matters when acting as opposed to making them worse. This reasoning, which lies at the heart of the *East Suffolk* decision, is capable of being answered if a duty of care is found to be capable of existing at the time the defendant is considering the exercise of the power. At this point it is suggested that there is a fundamental difference between the private person who has a "power" to help, and the person in whom is vested a statutory power. The latter cannot arbitrarily decide not to act. He must give due consideration to the exercise of the power, a duty which exists under public law principles and is enforceable by public law remedies. This is so quite apart from the question of whether a private law duty of care exists, but it tends to support the conclusion that the law is not acting contrary to principle in imposing that private law duty. If a duty of care is recognised at the decision-making stage, even though that duty is only to give due consideration to acting rather than to act, it must be accepted that two conclusions seem to follow. First, the plaintiff admittedly will in many cases find it hard to establish causal connection between a breach of the duty in question and the damage he has suffered because even though he can show that certain ways of exercising the power would have prevented the damage, the court will not presume to exercise the discretion itself and substitute its own decision for that of the decision-maker. Nevertheless, the American cases show that certain decisions taken under discretionary powers are classified as operational, the effect of that being that in such cases the

73 Loc cit, pp 96, 104-107.

74 For confirmation that the determining question is whether there is a duty, see Hart and Honore, "Causation in the Law", 2nd edn, p 140.

court is entitled to reach a conclusion as to what decision should have been made by the defendant on the facts before him. This method of reviewing decisions through the medium of an action for negligence is not possible if at the stage of making a decision whether to take positive action under a power there can be no duty of care. Secondly, and perhaps even more important, if it is accepted that a duty of care may exist at the stage of deciding whether or not to exercise the power, no theoretical problem can exist in imposing a duty of care at the stage when the decision has been taken to act. The *East Suffolk* reasoning, which has logical force, that, if there is no duty to act at all, there is no duty when acting except not to make matters worse, is answered if it is accepted that the defendant has a positive duty to give due consideration to the exercise of his powers. That is only a qualified duty, but it is a positive duty nonetheless.

If the primary non-feasance rule remains in force in relation to statutory powers except to the extent that it is necessary for the power holder to give consideration to the exercise of the power, success in any action of tort for failure to perform that duty seems unlikely. The American cases have established no major infraction upon the primary non-feasance rule. Two New York decisions are of interest. In *Riss v City of New York*⁷⁵ the plaintiff alleged a failure by the City to afford her police protection on her request, that failure having been followed by the injury in the manner she apprehended. The plaintiff had a very good case for seeking police protection but her request had been turned down for the reason that to meet requests from the public of this sort would overstrain police resources. The majority decision in the New York Court of Appeal went against the plaintiff on the ground that the case was a simple one of non-feasance. The dissenting judgment of Keating J is of interest. He found there to be no conscious exercise of the discretion whether to give the protection in the particular case. The defendant had merely repeated a formula not exercised a discretion.⁷⁶ An earlier New York case, *Schuster v City of New York*⁷⁷ had held that the City was liable for its failure to afford police protection to a police informer. This case was distinguished in *Riss* for the unconvincing reason that the City owed the informer a reciprocal duty of protection. *Kwong v R*,⁷⁸ a Canadian case, suggests that the primary non-feasance rule will continue to be applied in the same mechanical way, despite the judgment in *Anns*. In *Kwong*, the plaintiff was the owner of a converted natural gas furnace installed in his house. He had left open the door to the blower compartment, and this had caused the suction of carbon monoxide fumes into the house thereby killing him. The relevant safety code in force in Alberta required that new natural gas furnaces should have a warning against leaving the blower door open, but this provision did not apply to converted gas furnaces. The basis of the plaintiff's claim was that the Alberta Gas Protection Branch should have realised this risk and have advised the Minister to pass new safety regulations to deal with the matter. The plaintiff's action failed. Part of the reason for that failure

75 22 NY 2d 579.

76 *Veach v City of Phoenix* 102 Ariz 195 is in line with Keating, J's dissenting judgment. The decision whether to supply water for purposes of fire-fighting was one which must not be exercised arbitrarily but "fairly and reasonably".

77 180 NYS 2d 265.

78 (1978) 96 DLR (3d) 214.

was that if any breach of duty by the Branch was established it was not one at the operating level amounting to misfeasance. The failure was a case of genuine non-feasance. This seems unsatisfactory for a number of reasons. The mere fact that the defendant did nothing should not establish a case of genuine non-feasance if we accept Lord Wilberforce's requirement of giving due consideration to the exercise of the power. The cogitative processes of the Gas Protection Branch do not appear from the judgment. There is no evidence that they consciously applied their mind to the problem and the likelihood is that it did not occur to them since on the evidence they simply did nothing about it. For a safety agency that seems unacceptable behaviour. Another point is that a safety agency would not be expected to take into account conflicting policy factors which might outweigh the need for safety in a particular situation. The question it had to decide was a justiciable one and one upon which a court should feel entitled to reach its own conclusion.

Apart from the statements of Lord Wilberforce in *Anns*, there is a considerable amount of authority to the effect that in relation to statutory powers the secondary non-feasance rule is defunct. Once the decision has been taken to exercise the power, the defendant may come under a duty of care to various persons in his exercise of the power and is not allowed to shelter behind the argument of non-feasance. The American case law is quite uniform on this point, following the decision of the U.S. Supreme Court in the *Indian Towing* case. Nor, although this factor was present in the *Indian Towing* case and in *U.S. v Gavagan*, is it necessary to show that the plaintiff has been induced to place reliance on due exercise of the power by the defendant by reason of his previous exercise of the power.⁷⁹ The numerous foundations cases are authority that once the local authority has decided to exercise its powers to ensure that buildings comply with by-laws or with the owner's plans and specifications, then the authority is under a duty to act carefully. Most of the cases have concerned negligent positive action on the part of the defendant, for example negligent inspection, or negligence in connection with the approval of plans. Yet in principle there is no reason to distinguish the case where the defendant has taken no action to implement a decision taken to exercise a power, the *tertium quid* case mentioned earlier. Once a decision has been taken to exercise the power, then a duty of care should arise to implement that decision. There is American and Canadian authority in support of this. In *Runkel v City of New York*⁸⁰ a city officer had ordered the immediate demolition or repair of an unsafe building but did nothing more to enforce the order and fifty days later the building collapsed and injured the plaintiffs. The city was held liable in negligence. In *Malat v Bjornson*⁸¹ the Department of Highways adopted a new 30 inch high median barrier for use on freeways. After that decision was taken any regional highway engineer had power to replace the existing 18 inch high barrier with the new barrier in his district. The defendant's engineer had decided in May of 1974 to instal the new strip but had taken no action to implement his decision by October 1974 when an accident occurred which the new strip would have prevented. Holding the defendants liable, the court did so on

79 Prosser "Law of Torts", 4th edition, p 347.

80 282 App Div 173.

81 (1980) 114 DLR (3d) 612.

the basis that once the initial decision to instal the new strip had been taken the Department had a duty of care to do so expeditiously. No attempt was made by the Department to explain the delay in terms of planning or policy. On these facts the court could conclude it was simple neglect. In *Kamloops v Neilsen*⁸² a building inspector had after inspecting a building in the course of construction placed a stop work order on the building. That order was never lifted but building continued to the defendant Council's knowledge. The Council at no time took any action; the completed house was sold to one of its aldermen who sold it to the plaintiff who complained of defects in it caused by the foundations. The Council was held liable in negligence. Its legal position was that it was under a duty of care to act to ensure that the foundations complied with its own bylaws but had a discretion as to how to comply with that duty. Its failure even to consider prosecution or obtaining an injunction was well outside the limits of the exercise of that discretion even though it might have been legitimate to decide on economic grounds not to act. The case is therefore an interesting example of discretionary considerations continuing to apply at the operational level, and of inactivity being construed as actionable operational negligence. The *San Sebastian* case provides additional confirmation that an omission to act may constitute operational negligence. All three members of the New South Wales Court of Appeal in that case seemed prepared to assume that a positive duty to warn would have arisen but for the discretionary nature of the decision involved.

Both the general principles laid down by *Anns*, and their application to the case of local authority powers over new buildings have now been called into question by the recent High Court decision in *Sutherland Shire Council v Heyman*.⁸³ The plaintiff sued the defendant Council in negligence for allowing the building of a house, which the plaintiff later acquired, on defective foundations, the result being that the plaintiff had to incur expenditure of some \$8,000 in order to repair the house. The Council had issued a building permit to the original owner of the house allowing the house to be built in accordance with his submitted plans and specifications. The foundations actually laid by the builder did not comply with those plans and this was found to be the cause of the defects in the house. The Council had exercised its statutory power to provide for inspection of such houses by its inspectors at various stages of the building work. On the finding of fact finally accepted by the High Court, only one inspection was made by a council inspector. That inspector inspected the frame of the house which he approved but it was uncertain whether he had inspected the foundations, though had he done so all the members of the High Court agreed that he ought to have discovered their defectiveness. There was, however, a difference in approach among the members of the High Court as to the evaluation of these facts. The "majority" (Mason, Brennan and Deane, JJ) took the view that a case of negligence against the Council had been established through the negligence of its inspector who either had failed altogether to inspect the foundations or had inspected them without due care. The "minority" (Gibbs CJ, and Wilson J) took the view that the mere failure to inspect the foundations was not necessarily negligent and that the plaintiff must show that it was.

82 [1984] 2 SCR 2.

83 *Supra*, n 18.

This difference led to a difference in approach to the formulation of the legal result of the case though all concurred in finding the Council not liable. The majority decided that its conclusion that the failure to inspect or to inspect properly by the inspector did not conclude the matter. It must also be shown that he was under a duty of care in relation to both failures. All three members of the majority found that no such duty of care existed, expressly differing in their conclusion on this matter from the conclusion on the same point of *Anns*. All three members relied to a considerable extent for that conclusion on the non-feasance rule. Since the Council had exercised its discretion in relation to the inspection of the houses under construction and since in this case the inspector had actually arrived on the site, the non-feasance in question was clearly secondary non-feasance. The judgments of the majority therefore go a considerable way towards restoring the secondary non-feasance rule as established by the *East Suffolk* case. Although the judgments are not altogether explicit on this point, it seems clear that that rule is being applied both to the case of failure to inspect at all (the "tertium quid" case) and failure to inspect properly, though it would have been sufficient for the purposes of the decision to have found that no duty of care existed in relation to one or the other situation. The minority judgments in *Heyman* proceed on an entirely different basis. Gibbs CJ, with whom Wilson J agreed although he had reservations about the formulation of the *Anns* two-tier test for deciding questions of duty of care in negligence, accepted the *Anns* conclusion that a duty of care arose, once a decision to inspect had been made, to implement that decision by inspecting and by inspecting properly. He disagreed, however, with the conclusion of the majority that the failure to inspect at all by the inspector was necessarily negligent. That meant that the action must fail, since the plaintiff was unable to show whether the case was one of non-inspection or negligent inspection.⁸⁴

Among the majority members of the High Court, the reasoning underlying the refusal to accept the existence of a duty of care was not uniform. Mason J thought that the general rule that the public authority which is "under no statutory obligation to exercise a power comes under no common law duty of care to do so" was only capable of being displaced where there had been a reliance upon the exercise of the power by the plaintiff. That reliance could be a specific one, i.e. induced by the previous conduct of the defendant, but it could be in the nature of a general public reliance on the exercise of the power in question by the authority. Considerable weight was placed on American authority but as was pointed out above, reliance is not necessary in order to establish

84 Gibbs, CJ investigated the question of possible negligence both by the Council itself and by the inspector on the assumption that the inspector did not inspect the foundations at all. He found no such negligence established. The Council's system of inspection might have revealed a weakness in that an inspector sent out at the stage when the framework was complete would be unable to determine whether any previous inspection of the foundations had been made. Nevertheless there was no evidence to show that the Council had failed to give proper consideration to the "methodology" of inspection. Nor was there any evidence to show that the failure by the inspector to inspect only the framework was through anything other than a bona fide exercise of his discretion. Both findings are open to criticism that it should be for the defendant to adduce evidence upon which he relies to show the bona fide exercise of a discretion as to the setting up or implementation of a system under which an inspection is not made.

liability for the non-exercise of the power under the American case law. In Mason J's view, there could be no question of either a specific or general reliance on the exercise of the power to inspect on the facts of the case before him. Brennan J delivered a judgment to similar effect, although he gave to the notion of reliance a less liberal interpretation than Mason J. "I would not doubt that a public authority which adopts a practice of so exercising its powers that it induces a plaintiff reasonably to expect that it will exercise them in the future, is liable to the plaintiff for a subsequent omission to exercise its powers." He does not mention general reliance. Deane J expressed criticism of the two-tier approach to the duty of care question in *Anns*, or at least of that interpretation of it which regards the first part of the enquiry as being engaged only in deciding whether on the facts there is foreseeability of harm, leaving entirely to the second stage the question whether there were factors which negated or qualified any prima facie duty established at the first stage. Proximity was a relationship embracing considerations other than foreseeability, at least that was so where the case was not merely one relating to physical injury to the plaintiff or his property caused by the defendant's positive act. In a case such as the present one concerning liability for economic loss caused by an omission or failure to act, there must be more than mere foreseeability of such loss to establish a prima facie duty of care on the part of the defendant. It was here impossible to observe in the legislative scheme "a general purpose of protecting owners of premises from sustaining economic loss by reason of defects in the buildings". There was also in the case an absence of "physical, circumstantial or causal proximity". These considerations led Deane J to reach a contrary conclusion to that of *Anns* on the question of the duty of care of local authorities in relation to the supervision of buildings that were being built in their district. But Deane J is less general than Mason J and Brennan J in his conclusion on non-feasance. That factor weighed heavily but not in isolation. By way of brief response to the majority position in *Heyman*, with which he does not agree, the writer would make the following points. In response to Brennan J, it is unsatisfactory to equate the position of a person or body in whom there reposes a public power with that of a private person who merely has no duty to act, thereby concluding that the same non-feasance rule applies to both. In response to Mason J, it seems unsatisfactory and limiting to base liability for the failure to exercise a statutory powers exclusively on the notion of reliance. In response to Deane J, it would not seem to be difficult to discern as part of the legislative purpose in conferring powers on local authorities concerning the construction of houses the protection of persons who have to live in those houses.

Ultra Vires Decisions and Negligence

A common feature of the *Anns* and *Dorset Yacht* judgments is their recognition that the defendant who forfeits the discretionary immunity by reaching an ultra vires decision may in appropriate circumstances be sued in negligence. This is not in itself new in principle. It has already been shown how an ultra vires decision constitutes no defence to trespass in circumstances in which a properly taken decision would have been. The effect of an ultra vires decision in the case of negligence is the same as in the case of trespass. The ultra vires nature of the decision merely removed the bar to the coming into existence of the cause of action that

the doctrine of discretionary immunity presents. It is still necessary to show the constituent requirements of the tort of negligence have been satisfied, and this is accepted by Lord Wilberforce in *Anns*. What is interesting and seemingly novel about negligence being used as a method of attracting ultra vires decisions is the prospect of the relevant negligence being established by reference to the making of the improper decision. It seems safe to say that administrative decisions have not been subject to this form of attack before now. Yet there is no obvious reason why this sort of remedy should not be available. The conduct of the decision-maker who exercises his discretion for an improper purpose or who takes into account an irrelevant reason may be negligent. There seems no reason why negligence should not lie against him if this is so.

Perhaps not surprisingly, our law has still to produce a case in which this sort of challenge to an administrative decision has been successful. On this matter also, the American cases afford no assistance. The case law there firmly establishes that once the decision has been classified as being in the planning or policy area, it does not matter that the actual decision is reached abusively and is therefore subject to judicial review.⁸⁵ This approach has been reached by a literal approach to the Federal Torts Claim Act 1952 provision, a marked contrast to the approach to operational negligence. The law on this matter, nevertheless, has not stood quite still since *Anns*. Two New Zealand cases have recognised the possibility of the cause of action for what may be described negligent ultra vires action by refusing to strike out causes of action in which it was alleged. In *Takaro Properties v Rowling*⁸⁶ a Minister had refused his consent to a proposal whereby a Japanese corporation would refinance Takaro Properties by taking up shares in that company. That refusal was later set aside as being invalidly made and ultra vires on the ground that the defendant had been motivated by an improper purpose. The New Zealand Court of Appeal refused to strike out a claim based on negligence in relation to loss caused by the decision. In *Taranaki Catchment Board v R & D Roach*⁸⁷ the court again refused to strike out a cause of action alleging negligence by the Board in failing to exercise its power of enforcement of a water-right granted to a local council, the result being damage to a lessee of the land to which the right pertained. In *Takaro* Richardson J emphasised, that despite the court's allowing the action to proceed, it might still fail for reasons of policy associated with the application of the second branch of the *Anns* two-tier approach.⁸⁸ Woodhouse J ventured into the difficult question of considerable interest to administrative lawyers whether the unreasonableness of a decision might suffice to invalidate it and at the same time establish negligence for the purpose of bringing the action. If that is so, it seems there are two tests of unreasonableness, one for establishing the invalidity of the decision and the other for the purposes of the common law action. Woodhouse J accepted that this might be the position⁸⁹ relying on remarks made by Lord Reid in the *Dorset Yacht*⁹⁰ case and by Professor

85 *Myers v United States Postal Service* 527 F 2d 1252 (breach of natural justice); *Reminga v US* 631 F 2d 449 (exercise of power for irrelevant reasons).

86 [1978] 2 NZLR 314.

87 [1983] NZLR 641.

88 [1978] 2 NZLR 314, at p 334.

89 *Ibid* at p 327.

90 [1970] AC 1004, at p 1031; [1970] 2 All ER 294, at p 301.

Wade in the 4th edition of his "Administrative Law".⁹¹ *Dunlop v Woollahra MC (No.2)*⁹² was again a case where the invalidity of the decision had previously been judicially determined. On both decisions, which the plaintiff alleged had caused him financial loss (ie the decision to fix a building line and to regulate the number of storeys the plaintiff was allowed to build) the defendants had sought the advice of their solicitor before taking them. This simple fact was found to be enough to defeat the plaintiff's allegation of negligence and therefore his action.

The Canadian decisions form something of a separate enclave on this matter following the Supreme Court decision in *Wellbridge Holdings Ltd v Greater Winnipeg*.⁹³ The court in that case drew a distinction between the so-called legislative or quasi-judicial functions of the municipality on the one hand and its so-called administrative or ministerial functions on the other. Invalidity of a decision reached when acting in the former capacity could not be made the subject of a challenge through the medium of a private action in tort. Invalidity of the latter type of decision could on the other hand be used as the basis of a claim in tort. In the *Wellbridge* case itself it was held that loss suffered by the plaintiff through buying land on the strength of an amended zoning by-law which was invalidly enacted and therefore void could not be recovered in an action for negligence because in amending the by-law the defendant was acting in both a legislative and quasi-judicial capacity. The *Wellbridge* approach has been consistently followed in later Canadian decisions, for example, *J.R.S. v Maple Ridge*⁹⁴ (Council resolution levying impost fees on developer legislative); *Bowen v City of Edmonton*⁹⁵ (zoning of lots, following *Wellbridge* legislative and quasi-judicial) and *Berryland Canning v Queen*⁹⁶ (passing of regulations legislative). These Canadian decisions proceed upon an outmoded administrative law approach under which the function is pre-classified and then the court decides the consequences that are to follow on the basis of that classification. The fallacy of that approach has been demonstrated in relation to the natural justice hearing rule by the judgment of Lord Reid in *Ridge v Baldwin*⁹⁷ which demonstrates that the nature of the power to be exercised determines whether there is a right to be heard, not the classification of the function of the decision-maker as judicial or quasi-judicial. Even if we adopt a classification approach and accept that the function of the Municipality in enacting the by-law might legitimately be classified as quasi-judicial because of the statutory requirement of holding a hearing on a rezoning application, it is not clear why that sort of function should automatically be exempt from tortious challenge. It is easier to accept this sort of immunity in the case of the exercise of a legislative function which is generally immune from judicial review than in the case of the "quasi-judicial" decision which in general is subject to it. There seems to be little reason for elevating the quasi-judicial decision above other discretionary decisions in relation to the availability of a challenge through an action in tort.

91 Wade, "Administrative Law", 4th edition, at pp 628-629.

92 (1981) 33 ALR 621.

93 (1970) 22 DLR (3d) 470.

94 (1981) 122 DLR (3d) 398.

95 (1977) 80 DLR (3d) 501.

96 (1974) 44 DLR (3d) 568.

97 [1964] AC 40.

The final point to notice about the challenge of an administrative decision by means of an action for negligence alleging its invalidity is that it raises in critical form the problem of causation. It is one thing to declare the decision invalid. It is quite another to decide how it should have been decided, because that involves the substitution of the court's decision for that of the administration. The American cases show judicial willingness to do this where the decision is operational in nature, having no planning element. Where an abusive decision rather than an operationally negligent decision is the ground of challenge, the American cases give no guidance. Nor has this difficulty yet been faced by a court applying *Anns* principles, though the refusal to strike out the cause of action in *Takaro* is of some significance.

Operation of the general principles of negligence

Anns made it clear that the plaintiff suing in the tort of negligence for loss caused by an administrative decision must comply with the general requirements of the tort. He must, therefore, show a notional duty of care situation, a duty on the facts of the case, breach of that duty, and damage to himself which is not too remote a consequence of that breach. In some cases the plaintiff has failed because of mere failure to satisfy those requirements. *Dunlop v Woolahra MC (No.2)* has already been noticed. In *Toews v McKenzie*⁹⁸ on the assumption (which the court negated) that the defendant acted wrongfully in allowing a dangerous prisoner outside the prison, the damage was found to be too remote since it was caused by the prisoner's negligent driving of a motor-car, which was not one of the risks that needed to be borne in mind when deciding on his release. Causation, as already mentioned, will present the plaintiff with a problem in those cases where he is alleging the invalidity of the decision as the basis of his cause of action. Another considerable difficulty is with the type of interest that may be protected by the law of torts against the administrative wrong. Some part of this difficulty appears to be coextensive with the difficulty concerning the nature of relevant damage that arises in negligence cases generally, for example the problem that relates to the recovery of purely pecuniary loss. In the *San Sebastian*⁹⁹ case the New South Wales Court of Appeal thought that that problem must be solved in relation to "administrative" negligence by applying the test laid down by the High Court in the *Caltex Oil*¹⁰⁰ case, viz, put briefly, that the defendant must know or have the means of knowledge of the plaintiff as a particular person likely to suffer the loss and not merely as a member of a class so likely. The Court of Appeal's decision on the substantive issue of liability meant that there was no need to apply this test to the facts. If purely pecuniary loss is recoverable, it may in many cases be vast. Of that the *San Sebastian* case, the *Takaro* case and *Meates v A-G*¹⁰¹ are examples. Against that, the defendant is likely to be a governmental body capable of absorbing the loss. An even more open question is whether infringement of the various types of interest which enable a person to establish locus standi for the purpose of seeking an administrative law remedy would constitute

98 (1980) 109 DLR (3d) 473.

99 *Supra*, n 60.

100 *Caltex Oil (Australia) v The Dredge Willemstad* (1977) 51 ALJR 270; (1976) 136 CLR 529.

101 [1983] NZLR 308.

actual damage for the purposes of the tort of negligence. Many of these interests are not "tort-protected", for example, an amenity such as a view from one's home, or a licence to carry out a certain activity. Infringement of such an interest may have economic consequences, for example the fall in the value of the house if the view is interfered with, or the loss of livelihood dependent upon the holding of the licence. It may, however, be difficult to show pecuniary loss or its likelihood, for example, where the licence confers the ability to carry out a recreational activity. One possible approach is for the court to allow the action in negligence where the plaintiff is complaining of the interference with a right rather than with a mere licence or expectation. In the well known case of *Ashby v White*¹⁰² substantial damages were awarded to the plaintiff for interference with his right to vote. Holt CJ, giving judgment said: "Every injury imports a damage, though it does not cost the party one farthing". It is still not clear whether this refers to the presumption of actual damage that the court will draw in appropriate cases or the fact that in a tort actionable per se, damages are at large. *Freeman v Shoalhaven SC*¹⁰³ is a modern example of the infringement of the plaintiff's statutory and public right giving rise to a remedy in tort. The case also indicates one way of meeting the causation problem. In that case the defendant council had approved a development application under which a building was to be sited parallel to the northern boundary of certain land at a distance of 2.275 metres. The Council's town planner, acting pursuant to his delegated authority to approve minor variations, approved a variation of the condition under which the building was to be as far as possible towards the northern boundary. This variation was found to be outside the authority of the town planner as being more than minor. Nor was action taken under it secured by a later invalid approval of a development application before the council. The plaintiffs, whose view from their land was detrimentally affected by the completed building, were held to be entitled to damages in negligence against the Council who through allowing the building in breach of condition had deprived the plaintiffs of their statutory entitlement to notice, to object and to have their objections considered to any modification. In assessing damages for that tort, the court recognised that the plaintiffs were always exposed to the risk of "losing the benefit of their view, whether wholly or partially, by reason of [permitted] reasonable and proper development" on adjoining land. Nevertheless, applying the principle that as against a wrongdoer a person is entitled to compensation for the loss of mere chances, the court awarded damages based on the contingency as it related to loss of value of the land and loss of amenity.

Establishing vicarious liability for the negligence of an employee of a public body may present two theoretical difficulties to the plaintiff which are relevant here, the ultra vires tort problem and the independent discretion rule. Since *James v Commonwealth*¹⁰⁴ the problem created by the ultra vires tort (ie a tort committed in the course of an activity that is beyond the powers of the person committing it) does not appear to present a real problem in Australia. In *James* the plaintiff sued the Commonwealth alleging its vicarious liability for the seizure of the

102 (1704) 1 Bro Parl Cas 61; reversing (1703) Lord Raym 938.

103 [1980] 2 NSWLR 826,

104 (1939) 62 CLR 339.

plaintiff's consignments of dried fruit by officers of the Commonwealth Dried Fruit Board who were purporting to act under a Commonwealth statute which had already been declared to be unconstitutional. The High Court held the defendant vicariously liable for the action of the officers. The fact that they had no actual authority to act as they did was not important since they were exercising de facto an authority which arose from the position in which the defendant had placed them. It is still not clear, however, whether there is vicarious liability when the employee has consciously acted beyond his powers. In that case, however, it seems that the matter should be tested not according to whether the action was ultra vires the employer but according to whether or not the employee was acting in the course of his employment. The plaintiff may experience greater difficulty in establishing vicarious liability with the independent discretion rule. This rule establishes that where a common law or statutory discretion is conferred on the official himself and not on the department of which he forms a part, the latter cannot be vicariously liable for wrongs that he commits in the exercise of that discretion. The rule applies, for example to the exercise of powers of arrest of a police officer¹⁰⁵ and of powers of seizure of a customs official.¹⁰⁶ But its present-day justification is difficult to comprehend, since it appears to rest upon the now outmoded "control" theory of vicarious liability. Its application to police officers has in most jurisdictions been removed by statute. In relation to statutory powers, generally, the rule will only operate where the statute itself confers a power on the official, not where the exercise of a departmental discretion is delegated to someone within the department. Still less does the rule apply where the person in question is not exercising a statutory discretion but merely exercising independently professional skill or judgment in the course of his employment.¹⁰⁷

Application of Particular Aspects of Negligence

(i) Negligent Statements

Though a clear distinction exists between the making of an administrative decision and the communication of that decision to the relevant persons, liability for negligent misstatement under *Hedley Byrne v Heller* is relevant to the subject matter of this paper for two main reasons. In the first place a negligent communication of the decision may constitute operational negligence. Secondly, liability for negligent misstatement may provide an analogy for other situations in which a similar but distinguishable type of liability is sought to be established. This will require some further explanation. Three important main features of liability under the *Hedley Byrne* principle need to be mentioned. In the first place it is now clear since the decision of the High Court in *L Shaddock v Paramatta City Council*¹⁰⁸ that the principle applies to the giving of information or advice by public bodies and is not limited to the case of persons who supply such information or advice in the exercise of a business or professional skill. All the members

¹⁰⁵ *Enever v R* (1906) 3 CLR 969.

¹⁰⁶ *Baume v Commonwealth* (1906) 4 CLR 105.

¹⁰⁷ *Ramsay v Larsen* (1964) 111 CLR 16 (schoolteacher); *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 (hospital surgeon). N.B. That the rule does not apply to the Crown in South Australia — s 10(2) Crown Proceedings Act, 1972-75.

¹⁰⁸. (1981) 55 ALJR 713.

of the High Court concurred in this result though two of the judgments place greater emphasis than the others upon the special position of the council in this decision as a public storer of exclusive information,¹⁰⁹ creating some doubt as to how far the full logic of the *Hedley Byrne* principle is still placed under qualification by the Privy Council's decision in *Mutual Life and Citizens Assurances v Evatt*.¹¹⁰ Secondly, liability under the *Hedley Byrne* principle is typically associated with liability for *misstatement*. The judgments in the *Shaddock* case with their frequent references to liability for the giving of information or advice seem to confirm this position since even in relation to advice it will be necessary to show that the defendant rested his advice upon some erroneous and negligently-made assumption. It is difficult to incorporate within the notion of misstatement, statements of future intention and promises. Yet both may it seems incur liability under *Hedley Byrne*. The *San Sebastian* case clearly proceeds on the basis that a statement of future intention may be actionable at least in circumstances where the plaintiff is led to believe that a factual basis exists on which that intention rests, and that factual basis is incorrect. The case also establishes that in such circumstances a duty of care may arise to warn the plaintiff of any change in intention.¹¹¹ The New Zealand Court of Appeal in *Meates v Attorney-General*¹¹² has gone even further in holding that the plaintiff was entitled to succeed under the *Hedley Byrne* principle for loss which he had suffered through acting upon a governmental non-contractual promise of financial support which was not forthcoming. The third important feature of the *Hedley Byrne* principle is that it undoubtedly may impose liability where the plaintiff's loss is purely economic.

One very common administrative function is the giving of a consent by some controlling body in the form of planning permission, the grant of licences, the giving of building approvals and so forth. Liability for negligence in the exercise of that function is in principle distinguishable from liability under *Hedley Byrne*. The duty of care arises here from the defendant's position of control rather than from his making of a statement. The two are, however, often very closely connected and it is apparent that *Hedley Byrne* liability has furnished an analogy for imposing liability in this case and has provided a justification for allowing the recovery of purely economic loss of the plaintiff. Where, for example, the consent in question is conferred through the making of a statement, and where the plaintiff is complaining of acting to his loss upon that consent because of misstatements contained therein, the analogy with *Hedley Byrne* is virtually complete. In *Rutherford v A-G*,¹¹³ for example, the plaintiff had bought a truck upon the strength of a certificate of fitness for the truck issued by the defendant Ministry of Transport. The truck contained defects which the defendants' inspection should have revealed and which cost the plaintiff money to repair. Cooke J found the defendants liable for its loss in negligence but upon the basis of misuse of its statutory power of control rather than on the

109 Those of Gibbs, CJ and Stephen, J.

110 [1971] AC 793.

111 Also, a duty may arise to indicate a changed state of facts affecting the continuing correctness of a statement which was correct when made — *Abrams v Ancliffe* [1978] 2 NZLR 421 not following the unsatisfactory decision in *Argy Trading Development v Lapid Development* [1977] 3 All ER 785.

112 *Supra*, n 101.

113 [1976] 1 NZLR 403.

making of a misstatement.¹¹⁴ A similar approach was taken by Casey J in *Bruce v Housing Corporation*¹¹⁵ to a negligent decision by the defendant to approve for loan eligibility a house of a particular fibreglass design and to grant a loan for the purchase of such a house to the plaintiff who relied on the approval. Where on the other hand an invalid planning consent is given by the defendant to the plaintiff and he has relied on it to his loss, the case has been treated by Australian courts as raising an issue of *Hedley Byrne* liability, no doubt on the ground that the grant of approval contains an implied statement that it is validly given.¹¹⁶ In *Port Underwood Forests v Marlborough*,¹¹⁷ however, the New Zealand court again explained liability in a similar situation on the ground that the defendants' statutory position of control imposed upon it a duty to act with due care. In all the cases just considered, there is no doubt that the negligence was merely operational in nature. It should also be mentioned that in the planning cases, the award of compensation in the form of damages to the plaintiff avoids the problem that has exercised English courts in a number of cases, that is, how to make binding upon the defendant some consent or approval that he has improperly given to the plaintiff and which cannot operate as a fetter upon the future exercise of his discretion.¹¹⁸ If damages are obtainable by the plaintiff, there is no need to seek to have recourse to the doctrine of estoppel, as Lord Denning has done in a number of decisions.¹¹⁹

Still further away from the *Hedley Byrne* principle, is the case where the consent is given to a third party and he has acted under it to the plaintiff's loss. Despite some early confusion, it now seems clear that this is not a case to be judged under the *Hedley Byrne* principle, though it is still a matter of difficulty what is the true basis for determining liability here.¹²⁰ Within the field of the giving of consents and approvals, it is now clear that this case must be judged within the general principles relating to liability for the wrongful exercise of statutory powers. The

114 The defendant was here under a duty to issue the certificate if satisfied of the fitness of the vehicle. This does not affect the basis of the decision. See also *Windsor Motors v District of Powell* (1969) 4 DLR (3d) 55 — negligent issue of permit to operate used car business in area excluded by law.

115 [1982] 2 NZLR 28.

116 *Hull v Canterbury MC* [1974] 1 NSWLR 300; *G J Knight v Warringah SC* [1975] 2 NSWLR 796.

117 [1982] 1 NZLR 343.

118 The Court of Appeal in *Western Fish Products v Penwith DC* (1978) 38 P & CR 7 finally held that estoppel does not operate to bind the public authority, except where there is a power of delegation of function to an official, and there are special circumstances justifying the applicant in thinking that delegation has been effected and the official in question has power to make a binding decision. It explained on this basis its own earlier decision in *Lever Finance v Westminster LBC* [1971] 1 QB 222.

119 See, especially, *Robertson v Minister of Pensions* [1949] 1 KB 227 and his judgment in the *Lever Finance* case.

120 In *Ministry of Housing v Sharp* [1970] 2 QB 223, Lord Denning, MR treated the case as raising an issue of *Hedley Byrne* liability, whereas Salmon, LJ disagreed, thinking that another principle of liability must be applied. In *Ross v Canute's* [1980] Ch 297, Megarry, VC, in dealing with the question of whether a solicitor was liable for negligent advice to a testator with a resultant loss of a benefit under the will to the plaintiff, found, with respect correctly, that the answer must be sought in general principles of negligence rather than those of liability under the *Hedley Byrne* case. His decision that the defendant was liable has been followed in *Whittington v Crease* (1978) 88 DLR (3d) 353; *Watts v Public Trustee* [1980] WAR 97; *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37. It was not followed in *Seale v Perry* [1982] VR 193.

"foundations" cases clearly raise the problem under consideration.¹²¹ *Freeman v Shoalhaven*¹²² is an example of a case in which the defendant council through negligently permitting the building of a house in breach of a planning condition caused loss to the plaintiff for which it was held liable in negligence.

(ii) *Negligent Breach of Statutory Duty*

As is well known, the tort of breach of statutory duty requires a finding by the court that Parliament intended when creating the duty that an action in tort should lie for breach of it. No such requirement applies under the *Anns* principles in deciding whether a common law duty of care arises in relation to the exercise of a statutory power, though its legislative purpose may be relevant to that question. Still the anomaly exists that where a statutory duty is imposed, no action may be available for failure to perform that duty whereas had there been instead a statutory power a common law duty of care might arise to exercise it properly. This anomaly is avoided if in the case of statutory duty, it is possible for a court to find that a common law duty of care exists to perform the duty. In principle there seems to be no reason why this should not be so, and the possibility in fact seems to be expressly contemplated in these words of Lord Wilberforce in the *Anns* case: "there may be room, once one is outside the area of legitimate discretion or policy, for a duty of care at common law. It is irrelevant to the existence of this duty of care whether what is created by the statute is a duty or a power: the duty of care may exist in either case".¹²³ That a duty of care might arise in the course of performing a statutory duty is evidenced by *Ministry of Housing v Sharp*¹²⁴ in which the defendant local authority was held liable for the negligence of its clerk who, by supplying in the course of his statutory duty false information to a third party concerning the existence of the plaintiff's development charge over certain land, caused the third party to act in such a way that the charge was destroyed. In that case, however, the duty of care was a "normal" one arising at common law and super-imposed upon one who was acting under a statutory duty. Here we are concerned with the narrower question whether the content of the statutory duty may define the nature of the common law duty, ie whether a duty of care might exist to perform the action required by the statutory duty itself. An Australian case decided prior to *Anns* approached the problem in question on the basis that the answer to the whole question lay in deciding whether an action for breach of statutory duty lay. In *Bennett v Orange CC*¹²⁵ the statutory provision was: "It shall be the duty of the board to take all practicable measures for preventing and extinguishing fires". The action in question was for negligent failure by the board to perform its statutory duty the consequence being that the plaintiff's property was damaged by fire. The action failed on the ground that the statutory

121 *Dutton v Bognor Regis UDC* [1972] 1 All ER 462 shows how dissimilar to "true" *Hedley Byrne* liability this form of liability is. In that case the council, through the negligence of its inspector, approved further building on defective foundations. The builder was in no sense misled by the approval since he knew of the existence of the rubbish tip on which the foundations were constructed.

122 *Supra*, n 103.

123 [1977] 2 All ER 492, at p 503.

124 [1970] 2 QB 223.

125 (1967) 67 SR (NSW) 426.

provision created no private right of action. Consideration was therefore not given to the question whether a common law duty of care might have existed to perform the statutory duty. Had that sort of duty been found to apply, the plaintiff would have avoided difficulties with the non-feasance rule. The approach of the court in this case may be contrasted with that of the Canadian Federal Court of Appeal in *Baird v R*.¹²⁶ The plaintiff was complaining of a failure by the Minister of Finance in exercising his investigatory powers in relation to a certain trust company, the consequence being that the plaintiff lost money which he had invested. The Minister's investigatory powers were exercised under a complex of statutory powers and duties and the plaintiff's cause of action was based on both breach of statutory duty and common law negligence. In refusing to strike out the plaintiff's cause of action in negligence, the court reached the satisfactory conclusion that the common law action might be available whether the Minister was performing a duty or a power. The following passage from Le Dain, J's judgment expresses the matter well: "The statutory duties and powers relied on by the appellants appear to have been created, at least in part, for the protection of persons who entrust money to a trust company. They have as their general object to ensure that the company maintains sufficient assets to meet its obligations. They are, therefore, duties and powers which do not on their face, exclude the possibility of a common law duty of care in respect of their exercise."¹²⁷

Wilful Maladministration

By the phrase "wilful maladministration" is meant conscious wrongdoing in the reaching of a decision. Certain cases exist in which reaching that sort of wrongful decision and acting upon it may be tortious. Where trespass or negligence is relied on by the plaintiff, a consciously wrongful exercise of the decision-making power will invalidate the decision and remove the defendant's immunity that would exist if he were to exercise the power correctly but both torts have additional requirements which the plaintiff must fulfil in order to succeed. An action in breach of statutory duty may be based upon a deliberate failure to perform the statutory duty, though it would be extremely unusual for a statute to create a duty which could only be breached by a deliberate flouting of it. The tort of misfeasance in a public office is the nearest approach to the embodiment of a general principle of liability for conscious wrongdoing in the exercise of public powers of decision-making. The tort may indeed provide evidence of the existence of that general principle. Liability for wilful wrongdoing is also the basis of those torts requiring the use of unlawful means by the defendant. The element of wilfulness is, however, supplied by the intention on the part of the defendant to inflict damage on the plaintiff through the use of unlawful means. The main question for the purpose of this article is whether that unlawful means includes the making of an invalid administrative decision.

Breach of Statutory Duty

The general features of this tort must be referred to briefly. The tort is a judicial creation, the descendant of the action on the case, but

126 (1983) 148 DLR (3d) 1.

127 *Ibid.*, at p 13.

whether the action lies for breach of any particular statutory provision has, at least until recently, been found to rest upon the often unexpressed intention of the Parliament that enacted the particular provision. The unsatisfactory state of the law that that creates is well-known.¹²⁸ It was at one time suggested that the action in tort should be limited to the case of the breach of industrial safety provisions in statutes and regulations, where it both serves a useful purpose and its application is well settled.¹²⁹ Clearly, however, the action may now be brought in relation to a variety of statutory duties having nothing to do with industrial safety. In consequence the action may have some part to play in the redress of wrongful administrative decision-making. The courts, for example, have consistently held that the duty of the local education authority to provide schooling under the UK Education Act, 1944 is a duty the breach of which gives rise to a private right of action in tort.¹³⁰ This is based in this particular case upon the presumption of intention arising from the absence of a legislative sanction attaching to the duty. Even in relation to statutory duties existing at an elevated level of government the court may be willing to recognise a cause of action in tort. In *Booth v National Enterprise Board*,¹³¹ for example, the court refused to strike out a cause of action against the Board for failing to observe its statutory guidelines under the Industry Act, 1975. Where the duty is of a broad nature, such as the duty to provide schools, under the Education Act, it is likely to have attendant discretions as to how it should be performed. That indeed is the position of the local education authority in relation to its obligation under the Education Act, as the Court of Appeal in *Meade v Haringey Borough Council*¹³² recognised. The decision in that case was that this was not in itself a reason for refusing to recognise a cause of action for breach of statutory duty, tort, but that success in that action would depend upon establishing an ultra vires exercise of the discretionary part of the duty by the defendant.

The person who is seeking to enforce performance of a statutory duty by the defendant may be able to rely on a remedy that is not based on tort. The leading case of *Boyce v Paddington Corporation*¹³³ established that a defendant who is committing a breach of a statutory prohibition may in certain circumstances be restrained by injunction at the instance of a person having the requisite locus standi which, in this respect, means either that the activity is an infringement of his private legal rights or is inflicting upon him special damage. By "special damage" is meant damage peculiar to the plaintiff or greater in amount than from that inflicted upon the public generally. There is no doubt that this cause of action may be available even though the plaintiff cannot establish that the statute created an action in tort for breach of statutory duty. The High Court decision in *Onus v Alcoa*¹³⁴ confirms the existence of the remedy in Australia as well as extending the concept of special damage

128 *R v Saskatchewan Wheat Pool* (1983) 143 DLR (3d) 9, a decision of the Supreme Court of Canada, denies the existence of a separate tort of breach of statutory duty. Breach of a statutory duty may, nevertheless, be relevant evidence of negligence.

129 Glanville Williams (1960) 23 MLR 233.

130 *Gateshead Union v Durham CC* [1918] 1 Ch 146; *Watt v Kesteven CC* [1955] 1 QB 408; *Meade v Haringly LBC* [1979] 2 All ER 1016.

131 [1978] 3 All ER 124.

132 [1979] 1 WLR 637.

133 [1903] 1 Ch 109.

134 (1981) 36 ALR 425.

to include a special interest of the plaintiff. It is obvious that the *Boyce* rule cannot be applied to every form of misconduct constituting the breach of a statutory prohibition. In particular it would not apply to the breach of statutory provisions forming part of a criminal code on the ground that a civil court applying the civil standard of proof should abstain from determining whether the defendant has committed some basic criminal wrong. The recent insistence by Lord Diplock, giving the judgment of the House of Lords in *Lonrho v Esso Petroleum*¹³⁵ that in the case of statutory provisions carrying a statutory penalty for breach, the *Boyce* rule applies only "where the statute creates a public right (ie a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it)" seems however unduly restrictive. It certainly does not seem representative of the position reached by the considerable amount of case law on the subject that existed prior to *Lonrho*. It seems to be impossible to rationalise the whole of this case law as being concerned with the infringement of "general public rights".¹³⁶ It is not easy, for example, to understand why a statutory prohibition which gives protection to a particular class of person should not be capable of enforcement by the remedy here under consideration at the instance of members of that class. *Onus v Alcoa* was in fact such a case — the special interest was that of aboriginals in the preservation of their relics and their preservation was the purpose of the statutory provision.

A final thought concerning the availability of the injunction under the *Boyce* rule relates to the power of the court to award damages under Lord Cairns' Act "in addition to or in substitution" for the issue of an injunction. It is clearly established that the Act confers power on a court to award "equitable" damages, ie damages in respect of claims for injunctive relief in relation to which no cause of action for damages existed prior to the passing of the Act.¹³⁷ The award of damages of this sort is discretionary in nature in the same way as is the award of the injunction itself. The question arises whether a plaintiff who seeks an injunction under the *Boyce* rule may be awarded damages whether in addition to or in substitution for that injunction. To that question the High Court gave a negative answer in *Wentworth v Woolahra SC*¹³⁸ on the ground that Lord Cairns' Act (Chancery Amendment Act 1858) was passed for the purpose of conferring jurisdiction upon courts of equity to award damages in cases where a right to those damages already existed. Certainly that was the chief purpose of Lord Cairns' Act but equally certainly that is not its only effect. It seems, perhaps, an unfortunate and unnecessary restriction on the power of the court to be altogether unable to award in its discretion damages to a private plaintiff

135 [1981] 2 All ER 456.

136 The requirement that the statute should create a general public right is not evident in a number of decisions in which the chief question has been seen to be that of locus standi of the plaintiff. See, for example, *Pudsey Coal Gas v Bradford Corporation* (1873) LR 15. Eq. 167; *Howes v Victorian Railways Commissioner* [1972] VR 103; *Neville Nitschke Caravans v McEntee* (1976) 15 SASR 330. Lord Diplock's restriction will seemingly not affect the case where invalidity is the consequence of breaking the statutory requirement, eg *Lee v Enfield BC* (1967) 66 LGR 195; *Day v Pinglen* (1981) 55 ALJR 416; *Kent v Minister of Works* (1973-4) 2 ACTR 1.

137 For example, damages may be awarded in lieu of a quia timet injunction *Leeds Industrial Cooperative v Slack* [1924] AC 851; *Hooper v Rogers* [1975] Ch 43. See generally, Jolowicz (1975) 34 CLJ 224.

138 (1982) 51 LGRA 212.

who has received damage from the commission of a public wrong by the defendant. Gibbs CJ in the *Wentworth* case accepted that the tort of public nuisance affords an analogy for the award of such damages and that there are situations in which their award would be appropriate.

Misfeasance by a Public Officer in his Office

The existence of this tort may now be regarded as being established, although at the moment perhaps, precariously.¹³⁹ It was applied in a relatively modern Victorian case.¹⁴⁰ The Privy Council in *Dunlop v Woolahra MC (No 2)*¹⁴¹ accepted its existence while finding that on the facts it had not been established. An English first instance decision has very recently recognised it to exist.¹⁴² There are it is true some earlier decisions which appear to be inconsistent with it.¹⁴³ It now seems reasonably well-settled that the tort applies in two cases, that in which the defendant though ostensibly acting within his powers has been actuated by malice towards the plaintiff¹⁴⁴ and that where the defendant is consciously acting beyond his powers. *Farrington v Thomson and Bridgland*¹⁴⁵ was a case of the latter category and the existence of this category has recently been confirmed by *Bourgoin SA v Ministry of Agriculture, Fisheries and Food*.¹⁴⁶ In that case action was brought against the defendant for revoking the plaintiff's licence to import turkeys and turkey parts into the United Kingdom, in deliberate breach of article 30 of the EEC Treaty which prohibited quantitative restrictions on imports. Finding that the statement of claim disclosed a cause of action based on the tort of misfeasance in a public office, Mann J accepted the authority of *Farrington* and *Dunlop* that there were two alternative methods of committing the tort and that it was not always necessary to prove that the officer in question had been actuated by malice.

There being so few recent examples of the application of the tort, it is not surprising that it has not been subjected to extensive or rigorous analysis. The problem of defining "malice" for the purpose of the tort is one difficulty. It of course extends to personal animus against the plaintiff and actual dishonesty. Such malice, often referred to as express malice, may sometimes be inferred from the facts of what has taken place.¹⁴⁷ As is well known, however, malice may extend beyond these cases. The term is for example legitimately used to describe the conduct of a person who has abused his powers by acting for a purpose that is foreign to the power that has been conferred. This sort of "malice" may

139 See generally, Phegan (1980) 9 Syd L Rev 93; McBride (1979) 38 CLJ 323.

140 *Farrington v Thomson and Bridgland* [1959] VR 286.

141 *Supra*, n 92.

142 *Bourgoin SA v Ministry of Agriculture*, "The Times, Oct 4, 1984 [No 542, The Times Law Reports].

143 For example, *Basset v Godsall* (1770) 3 Wils KB 121; *Poke v Eastburn* [1964] Tas SR 98; *Davis v Bromley Corporation* [1908] 1 KB 170; *Campbell v Ramsay* (1968) 70 SR (NSW) 327.

144 Apart from the cases on malice by justices of the peace [see, for example *Cave v Mountain* 113 ER 330; *Taylor v Nesfield* 118 ER 1312] see *Harman v Tappenden* 102 ER 214; *Whitelegg v Richards* (1823) 2 B 8 ss C.45; *Henly v Mayor of Lyme* (1828) 5 Bing 91.

145 *Supra*, n 140.

146 *Supra*, n 142.

147 *Luetich v Walton* [1960] WAR 109 — malice to be inferred from fact of making of policeman's arrest for offence not known to law.

be established without showing any sort of personal spite by the defendant towards the plaintiff or bad faith on his part. There are statements by two members of the Canadian Supreme Court in *Roncarelli v Duplessis*¹⁴⁸ that malice for the purpose of establishing a cause of action in tort may be defined in this wide fashion. In that case the plaintiff was suing for damage caused to him through the improper revocation of his restaurant licence by the Provincial Liquor Commission of Quebec. The Commission had acted under the dictation of the defendant, the Prime Minister of the Province who had been actuated by a desire to punish the plaintiff for having acted as bail for a number of Jehovah's Witnesses who had been subject to criminal proceedings. There was no finding of express malice on the part of the defendant. Of the majority judges who held the defendant liable, Rand J, with whom Judson J concurred, did so on the basis that the defendant's action was malicious in the wider sense just referred to. "Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry".¹⁴⁹ Martland J, with whom Kerwin CJC and Locke J concurred found the defendant liable on the basis that he "deliberately elected to use means which were entirely outside his powers, and in doing so was not acting in his official capacity as Prime Minister".¹⁵⁰ Abbott J, also based his conclusion as to liability on the fact that the defendant was acting without legal authority and must have known that he was.¹⁵¹

The facts of *Roncarelli* do not raise any real question that the defendant was aware of his lack of authority. Administrative law, however, abounds with cases of well-meaning officials who exceed their powers without knowing it. They may misconstrue their powers; they may act abusively in the exercise of them, for example out of misplaced zeal. At the moment there is no firm indication that such persons could be held liable in the tort now under consideration for any damage that they cause through misuse of their power. Even if "malice" is as widely defined as the judgment of Rand J suggests it may be, he himself requires that the abusive element in the exercise of the discretion should be committed knowingly. Yet this may place a perhaps unreasonable burden on the plaintiff. Proof of this sort of awareness on the part of the defendant may well be even more difficult than proof of malice in the form of spite or dishonesty. The Canadian case of *McGillivray v Kimber*¹⁵² suggests that the law may go further in favour of plaintiffs than always to require subjective knowledge by the defendant that he is exceeding his power, but the limits of *McGillivray* are not easy to determine. In that case the defendant Kimber and other members of a pilotage authority had purported to revoke the plaintiff's pilot's licence and had acted in the matter without holding any sort of hearing or inquiry. The only ground for compulsory revocation of this sort was a finding by the authority that the pilot was "incapacitated by mental or

148 (1959) 16 DLR (2d) 689.

149 Ibid, at p 706.

150 Ibid, at p 744.

151 Ibid, at p 730. He based liability upon an express provision of the Quebec Civil Code [art 88] whereas the other members of the majority rested liability on the common law.

152 (1915) 26 DLR 164.

bodily infirmity or by habits of drunkenness". The Supreme Court of Nova Scotia found the defendants not liable to pay damages to the plaintiff on the ground that they were exercising quasi-judicial functions and could not be liable in the absence of malice on their part. Malice had not been pleaded by the plaintiff. On appeal the judgment of the Supreme Court was reversed. The ground of the decision that is common to all three members of the majority in the court is well stated in the judgment of Anglin J: "in directing the cancellation of the plaintiff's licence, the defendants neither acted, nor professed to act in the discharge of a quasi-judicial function, but exercised an assumed absolute and arbitrary power to dismiss the plaintiff or cancel his licence, without complaint, notice or investigation".¹⁵³ None of the three judgments mention any requirement of actual knowledge by the defendant of the absence of the power that they purported to exercise. The case therefore appears to be authority for a proposition which would take the law further than *Farrington v Thomson and Bridgland* but which is not obviously unsatisfactory — that if the defendant consciously assumes a power which he does not possess, intending by the exercise of that power to cause damage to the plaintiff, he is liable if that damage is caused. It is of further interest that one of the three judges Duff J in the majority went even further than his colleagues. Even if the defendants could be assumed to have begun to investigate some allegation of fact tending to show that the plaintiff had rendered himself subject to the statutory power of revocation and were therefore purporting to exercise their quasi-judicial function, their proceeding without any sort of hearing would have been beyond their powers and would still have rendered them liable to an action for damages.¹⁵⁴ So a merely abusive exercise of the power may be enough provided again that there is an intention to cause the plaintiff damage. It may be pointed out here that the liability of the justice of the peace in trespass for making an order outside his jurisdiction did not depend upon knowledge by the defendant of the excess of jurisdiction and this rule has recently been confirmed by the House of Lords.¹⁵⁵ That position is no doubt justified by reference to the nature of trespass which does not require an intentional wrong but merely an intention to do the act which causes the wrong. It would be a large step if this intention requirement were to be transposed to the particular form of the action on the case here being considered.¹⁵⁶

Other matters relevant to the tort may be mentioned briefly. Since it is derived from the action on the case, it seems that some sort of temporal loss is necessary in order to support the action. *Ashby v White*¹⁵⁷ which appears to be an early example of this tort nevertheless allowed the recovery of substantial damages for a misfeasance preventing the exercise of the plaintiff's right to vote, even though it seems that the plaintiff sustained no actual damage. The doubt as to the true basis of this

153 Ibid, at p 183.

154 Ibid, at p 179.

155 *McC v Mullan* [1984] 3 All ER 908. For a modern example, see *Gerard v Hope* [1965] Tas SR 15.

156 See, however, *Brasyer v McLean* (1875) LR 6 PC 398 in which the defendant sheriff was held liable for misfeasance in his office in that he made a false return under a writ of *capias ad respondendum* thus rendering the plaintiff liable to attachment for contempt of court. The return was found to have been made without malice or want of cause. Nor clearly was it beyond the sheriff's powers.

157 Supra, n 102.

damages award has already been mentioned. In the tort of misfeasance the defendant must occupy a public office and be exercising his public function in relation to that misfeasance. In the questionable decision of *Pemberton v A-G for Tasmania*¹⁵⁸ the court held that the Director General of Education in exercising his power of dismissal of a schoolteacher was not acting as a public officer since he was not acting in pursuance of a duty towards any member of the public. Again in *Tampion v Anderson*¹⁵⁹ it was found that neither the person appointed by Order-in-Council to conduct an inquiry into scientology nor counsel appointed to assist the inquiry were public officers for the purpose of the tort. The problem over causation mentioned earlier in the paper applies also to the tort of misfeasance. The mere fact that the plaintiff can establish the invalidity of the decision is not enough unless he can also persuade the court that the decision if properly made must have produced the result that would have avoided infliction of damage upon himself. Another causal question has caused some difficulty though it is suggested that the correct solution to it is clear. There is some rather slender authority to the effect that the plaintiff by acting on an invalid order to his loss is in effect the cause of that loss.¹⁶⁰ This seems quite unsatisfactory. A break in the chain of causation should only be established by a deliberate, voluntary act by the plaintiff, and this is hardly satisfied by obedience to an order which appears to have legal force. In *Farrington v Thomson & Bridgland* Smith J refused to follow the earlier obiter dicta and held that the plaintiff's compliance with the order did not preclude his claim to damages. This seems the more satisfactory in view of the fact that the law may create difficulties for one who disobeys the order and is subjected to enforcement proceedings, in particular the problem of raising the invalidity collaterally as a defence¹⁶¹ and of obtaining an undertaking in damages from the public body which seeks an injunction to enforce the order.¹⁶²

A general principle

The tort of misfeasance by a public officer may seem merely to afford evidence of a wider principle. This is that any act (including the making

158 [1978] Tas SR 1.

159 [1973] VR 715. But in *Dunlop v Woolahra MC (No 2)* the Privy Council accepted that the defendant council was a public officer, 33 ALR 621 at p 630.

160 The authority consists of obiter dicta of Diplock, J and Romer, LJ in *O'Connor v Isaacs* [1956] 2 QB 288 at p 313 and pp 367-368; and of Horridge, J in *Stott v Gamble* [1916] 2 KB 504 at p 508.

161 In *Hinton v Lower (No 2)* [1971] 1 SASR 512 the court refused to allow the accused to challenge in criminal proceedings brought against him a determination by the Registrar of Motor Vehicles as to the load capacity of his vehicle on the basis, as he claimed, that it had been arrived at in breach of natural justice — by Bray, CJ on the ground that it was voidable only and must be accepted until set aside; by Wells, J on the ground that even if void, its voidness could not be asserted in collateral proceedings unless it bore its "brand of invalidity on its forehead". In *Hoffman La Roche v Secretary of State for Trade* [1975] AC 295 the House of Lords held, in an action by the Crown to enforce certain regulations by obtaining an interlocutory injunction against the appellants, that the law would presume the validity of the regulations and that in order to displace the Crown's right to an injunction in interlocutory proceedings the appellants would have to show a strong prima facie case that the statutory instruments was ultra vires.

162 The Crown, for example, will not be required to give an undertaking as to damages when seeking an interlocutory injunction for the purpose of enforcing the law as opposed to protecting a proprietary or contractual right of its own — *Hoffman La Roche* supra n 161

of a decision or order) that is done consciously in excess of a publicly conferred power that is being exercised by the actor is a tort if the intended result of that decision is to inflict damage upon the plaintiff. Malice on this view is therefore merely one sort of abuse of power which renders the decision ultra vires. There is considerable evidence that a tort of this nature exists, even though in general malice will not suffice to establish a cause of action in tort. The justification for this must be that there is a difference in principle between the making of private and public decisions. That difference is firmly pointed out by the judgment of Rand J in *Roncarelli v Duplessis*. That case and *McGillivray v Kimber* supply clear evidence of the existence of the principle mentioned above. There is no indication in the judgments in either case, for example, that the tort under consideration is limited to the actions of "public officers". Nor was there any such limitation prescribed by the Privy Council in the case of *David v Abdul Cader*¹⁶³ in which the court refused to strike out a cause of action alleging malicious refusal to issue a cinema licence to the plaintiff and claiming damages for that refusal. The torts of malicious prosecution and abuse of process are further pointers to the existence of the general principle. Both depend upon the establishment of malice in relation to use of the public process of law. There is also authority in those cases concerning the exercise of the power of expulsion from membership of bodies such as clubs, professional associations or trade unions that malicious abuse or conscious excess of power may give rise to an action for damages.¹⁶⁴ It is suggested that there is a sound basis for this authority at least to the extent that the body in question through its ability to control entry into or retention of membership of a particular profession or occupation is exercising a power that is public in nature. Clearly, however, the persons

163 [1963] 1 WLR 835. This case was explained in *Campbell v Ramsay* (1968) 70 SR (NSW) 327 as turning on the fact that the plaintiff was entitled to the issue of the licence, ie that the defendant had no discretion. But the judgment of the Privy Council is based on a much broader principle.

164 The authorities to the effect that an expulsion obtained by malice or vitiated by breach of natural justice is void are numerous. See *Partridge v GMC* (1890) 25 QBD 90; *Calvert v Law Society of Canada* (1981) 121 DLR (3d) 169; *Wood v Wood* (1874) LR 9 Ex 190; *GMC v Spackman* [1943] AC 627; *Abbott v Sullivan* [1952] 1 All ER 226 is one of the few cases in which the principles governing a damages award have been discussed in a matter of expulsion from an association. In that case the plaintiff, a cornporter had had his name removed from the register of cornporters by the committee. That removal was wrongful and ultra vires the committee, but its members had acted in good faith. It was found that the committee drew its disciplinary powers from an implied contract among the cornporters. The Court of Appeal held by a majority that the plaintiff's claim for damages (based mainly on tort) against two members of the committee failed. Sir Raymond Evershed, MR held that the claim must rest on contract alone and as such failed because no contractual term establishing such a right had been pleaded. Nevertheless, he accepted that there might be a difference in the case of excess of powers by statutory tribunals or in the case of wrongful expulsion from membership of proprietary clubs. Two cases in fact supported the award of damages in the latter case, *Baird v Wells* (1890) 44 Ch D 661 and *Young v Ladies' Imperial Club* [1920] 2 KB 523. Morris, LJ also found that the claim for damages for breach of contract had been inadequately pleaded. He found that the claim in tort against the defendants for acting beyond their powers failed in the absence of malice on their part. Lord Denning, MR dissented. On the facts of the case he thought that a claim in breach of contract should succeed. In the case of statutory tribunals, the claim for damages in tort should succeed if the members of the tribunal knowingly exceeded their powers and in this respect a mistake of law was no defence.

exercising disciplinary functions of this sort would not be classified as public officers.

The principle set out above is defined restrictively in requiring that the defendant should be conscious of the fact that he is acting in excess of power. This, despite the doubt that *McGillivray v Kimber* creates, is perhaps inevitable. It is in accord with the general principle of the law of torts that liability is based on fault. To impose liability in tort upon the administrator merely because he has acted abusively or in excess of his power is to accept the proposition that is generally denied that invalidity in itself may give rise to a cause of action. It is of course possible that there is negligence by the defendant and that may be a ground for liability under principles already discussed. Again, what exactly is a "conscious" excess of power may give rise to difficulty, in particular whether the defendant may rely on an error of law by himself. In *Farrington v Thomson and Bridgland* the problem was conveniently avoided by the defendants' admission that they knew they had no power to order the closure of the hotel. In the principle as defined, it is suggested that the damage the plaintiff has suffered should be the intended result of the wrongful decision. That requirement should present no difficulty in cases where the damage to the plaintiff is the inevitable consequence of the decision, for example, in the case of a refusal of planning permission. It is assumed that in this tort the intention to ignore the plaintiff need not be predominant, though a predominant intention of that sort is required in the tort of conspiracy and perhaps some of the other economic torts. Under the principle as defined there would be no liability for omission to exercise public powers. That is in line with the more narrowly defined version of the tort as "misfeasance" by a public officer, and in any case it seems correct in principle. Mere omission to exercise a power by its very nature will not raise a case of exceeding powers. On the other hand a deliberate refusal to exercise a power may be just as damaging as an abuse of it. *Anns* is authority for the view that there is a duty of care to give due consideration to the power's exercise, and the plaintiff clearly should be entitled to found upon that if he can establish a deliberate refusal to do so. The same problem of establishing liability for omissions will nevertheless apply as were considered in relation to negligence. In relation to omission, the curious case of *Ferguson v Earl of Kinnoul*¹⁶⁵ may be mentioned at this point. In that case, the Earl succeeded in an action for damages against the Presbytery of the Auchterarder Church for having refused to take on trial the Earl's presentee to that Church. The House of Lords decided the case on the basis that the duty to take the presentee was ministerial rather than discretionary in nature and that where the law casts such a public duty upon a person which he refuses to perform he is answerable in damages to one injured by its failure. The authority of this case can hardly be in question being a unanimous decision of the House of Lords which has not been subject to overt criticism. Nor was it limited in any way by the judgments of the House as applying only to Scots law. Yet it is difficult to see how the case can be reconciled with the modern law relating to the action for breach of statutory duty.¹⁶⁶

165 (1842) 9 Cl & F 251.

166 Wade, "Administrative Law", 5th edition pp 666-667 accepts the authority of *Ferguson v Earl of Kinnoul*. However, he does not appear to differentiate between liability under the principle it lays down and liability for breach of statutory duty.

Unlawful Means

If there is a general principle under which the conscious misuse of public powers with the intention to cause damage to the plaintiff is a tort, this renders of lesser importance the category now to be considered viz the use of unlawful means for the same purpose. Nevertheless the category may have some utility. Under a number of torts the plaintiff may succeed by showing that the defendant has used unlawful means to inflict loss upon him. "Unlawful means" for present purposes, is taken to include the making of an invalid administrative decision, though there is some doubt whether that does in fact constitute unlawful means for the purposes of the torts in question. The torts in question are the various "economic torts" in which unlawful means may be a requirement, that is, interference with contract, intimidation, conspiracy and the tort of unlawful means itself. There is also the tort seemingly created by the High Court of Australia in the *Beauesert* case.¹⁶⁷ In relation to the economic torts, we have the authority of the House of Lords in *Lonrho v Shell Petroleum*¹⁶⁸ that conspiracy by the use of unlawful means is subject to the requirement of the tort of conspiracy in general that the defendant must be acting out of a predominant desire to injure the plaintiff.¹⁶⁹ The existence of the tort of unlawful means itself has long given rise to doubt. However, it survived the recent criticism by Lord Diplock in the *Lonrho* case of Lord Denning's too extensive definition of it in ex parte *Island Records*¹⁷⁰ and the existence of the tort has been confirmed by a later House of Lords decision and by one of the New Zealand Court of Appeal.¹⁷¹ In all these economic torts, the intention to injure the plaintiff is a necessity. They are therefore relevant in this context as providing examples of a possible liability for wilful maladministration. This is not the case, however, with the *Beauesert* principle under which the defendant is said to be liable in tort for his intentional, unlawful and positive act of which damage to the plaintiff is the inevitable consequence. There is no point here in repeating the numerous criticisms that have been made of this decision. The principle has been doubted by the Privy Council and declared by the House of Lords to form no part of English law.¹⁷² Nor has it been applied in

167 *Beauesert SC v Smith* (1966) 120 CLR 145.

168 *Supra* n 135; cf however, *Latham v Singleton* [1981] s NSWLR 843 — no paramount intention to injure the plaintiff necessary in conspiracy to intimidate by the use of unlawful means.

169 This means that one who can prove a conspiracy has no advantage in relying on the use of unlawful means by the defendants. The decision on this point was justified by reference to the need to keep the tort of conspiracy, an anomalous tort in the present day, confined within narrow limits — *ibid*, at p 464.

170 [1978] 3 All ER 824. Lord Denning had spoken of a wide principle under which any damage suffered by the plaintiff as the result of a contravention by the defendant of a statutory prohibition was actionable (semble) in tort. This omits what seems to be the essential requirement of the tort of unlawful means, viz an intention in the defendant to use the unlawful means to cause damage to the plaintiff.

171 *Merkur Island Shipping Corporation v Laughton* [1983] 2 All ER 189, 196. *Van Camp Chocolates v Aulsebrooks* [1984] 1 NZLR 354. The New Zealand case requires that the intention to injure the plaintiff should be the motivating force behind the defendant's action, ie that it should be predominant.

172 *Dunlop v Woolahra MC (No 2)* (1981) 33 ALR 621 at p 628; *Lonrho v Shell Petroleum* [1981] 2 All ER 456 at p 463.

Australia, though it has a number of times been distinguished on what seem specious grounds.¹⁷³

The question of whether administrative invalidity constitutes unlawful means is an unsettled one. In *Gershman v Manitoba Vegetable Board*,¹⁷⁴ the Manitoba Court of Appeal held that a consciously abusive exercise of a discretionary power by the defendant was unlawful means capable of establishing liability under the torts of intimidation and the use of unlawful means. The defendant had threatened to exercise its statutory power to withdraw credit from a certain company unless the plaintiff's employment with that company was terminated. The company complied with the threat immediately. The defendant was found to have been motivated not by a legitimate desire to protect its assets but by a desire to punish the plaintiff who had been engaged in litigation with one of its associated bodies. The later Canadian decision of *Central Canadian Potash Co v Government of Saskatchewan*¹⁷⁵ is not inconsistent with the *Gershman* case. That case held that a threat by a government minister to use his powers of enforcement of certain regulations did not constitute the tort of intimidation, even though the regulations were later declared to be ultra vires and void, because the minister in question acted in good faith believing in their validity and not out of a desire to cause damage to the plaintiffs. The case rests upon a proposition that is not entirely free from doubt, that intimidation, like conspiracy, requires a predominant intention to injure the plaintiff. It might be more acceptable merely to require that the defendant should know of the unlawfulness of the means he has used. The case however throws no doubt upon the *Gershman* finding that an invalid administrative decision may constitute unlawful means. Certain cases decided under the *Beauesert* principle adopt a narrower viewpoint as to what is unlawful means. For example in *Dunlop v Woolahra MC(No 2)* Yeldham J held at first instance that council resolutions which had been declared to be ultra vires the council and void were nevertheless not unlawful means for the purpose of applying the principle.¹⁷⁶ He drew a distinction between acts which are "contrary to law" and acts which are merely devoid of legal effect and his judgment to this effect was approved by the Privy Council.¹⁷⁷ There is some support for the distinction drawn by Yeldham J in the decision by the House of Lords in *Mogul SS v McGregor*¹⁷⁸ that a contract that is void as being in restraint of trade as opposed to an illegal contract is not unlawful means for the purpose of establishing liability in conspiracy. Nevertheless it is suggested that in relation to administrative decisions which have a public character, the distinction is an unsatisfactory one and draws its strength from a no doubt natural desire to restrict the ambit of the *Beauesert* principle.¹⁷⁹ The *Gershman* case

173 *Kitano v Commonwealth* (1973) 129 CLR 151 (damage was neither inevitable nor intentional); *Hull v Canterbury MC* [1974] 1 NSWLR 300 (damage through plaintiff's acting on invalid planning permission not "inevitable"); *Freeman v Shoalhaven SC* [1980] 2 NSWLR 826 (need for initial tort apart from unlawfulness); *Grand Central Park v Tivoli Freeholders* [1969] VR 62 (operating car-park in breach of statutory prohibition not unlawfully). The tort appears to survive; however, see the refusal to strike out the cause of action in *HCF v Hunt* (1982-83) 44 ALR 365.

174 (1976) 69 DLR (3d) 114.

175 (1978) 88 DLR (3d) 609.

176 (1978) 40 LGRA 218, at pp 228-231.

177 (1981) 33 ALR 621, at p 628.

178 [1892] AC 25.

shows the value of the plaintiff being able to fall back upon the defendant's use of unlawful means. Liability for the malicious or abusive exercise of its powers by the defendant could not have been established since it had not proceeded beyond the stage of threatening that sort of action.

Damages and Wilful Maladministration

There are a number of pointers to the way in which damages may be awarded in cases of wilful maladministration. The causation problem has already been mentioned. In *David v Abdul Cader*,¹⁸⁰ for example, the plaintiff may not have been able to establish a good cause of action even if he had succeeded in proving malice, because the court would not have assumed in his favour that a proper exercise of the discretion would have resulted in his obtaining a licence.¹⁸¹ A similar problem exists in relation to establishing a claim to damages. The success of a claim to damages for future loss might depend upon the plaintiff's persuading the court that a number of future exercises of discretion would have operated in his favour. That was the situation in *Roncarelli v Duplessis*. The plaintiff was clearly entitled to loss of profit deriving from the liquor licence from the time of its cancellation to the time at which it became renewable. However the court did not limit his damages to that loss. He was found to be also entitled to a substantial sum by way of damages for loss of future goodwill of his business and loss of future profits. Although the court admitted that damages in a case of this sort must be assessed in "somewhat arbitrary fashion", it was clearly prepared to assume that his licence would be extended beyond the first date for renewal. No doubt the court may be the more ready to make that assumption when the defendant's conduct is actuated by malice or is knowingly wrongful. When that is the case, two further factors may swell the award of damages beyond that in the normal award. The first is that the *Liesbosch* rule¹⁸² will not apply to reduce damages. That rule has been found to be inapplicable in the case of the tort of deceit¹⁸³ and there is no good reason to distinguish other torts involving wilful misconduct. The second is that an award of exemplary damages may be appropriate. In the *Gershman* case, the court approved such an award on the ground that the defendant's conduct fell within the first category of Lord Devlin's judgment in *Rookes v Barnard*¹⁸⁴ of "oppressive, arbitrary or unconstitutional conduct by servants of the Government". In those jurisdictions like Australia which have not accepted the limitation on exemplary damages proposed by *Rookes v Barnard*,¹⁸⁵ there is clearly a possibility of their award whenever the defendant is found to have been actuated by malice or was in bad faith. In *Farrington v Thomson and Bridgland*, the court approved an award of exemplary damages for the trespass committed by Bridgland prior to his ordering the plaintiff to

¹⁷⁹ In *Grand Central Car Park v Tivoli Freeholders* supra n 173, another case in which liability was sought to be established on the basis of the *Beaudesert* principle, McInerney, J found that operating a car park without the necessary council permit was not unlawful even though a statutory penalty existed for breach of the Act.

¹⁸⁰ Supra n 163.

¹⁸¹ See on this point, Bradley [1964] CLJ 4.

¹⁸² *Liesbosch Dredger v S S Edison* [1933] AC 449.

¹⁸³ *Doyle v Olby Ironmongers* [1969] 2 QB 158; *Archer v Brown* [1984] 2 All ER 267.

¹⁸⁴ [1964] AC 1129.

¹⁸⁵ *Uren v John Fairfax* (1966) 117 CLR 118; *Australian Consolidated Press v Uren* (1969) 117 CLR 221; [1969] 1 AC 590.

close the hotel. Smith J took the view that such damages could only be awarded for the trespass and not for the misfeasance tort itself. That may well reflect the view that exemplary damages are only capable of being awarded when damages are at large as in trespass and defamation. But this may be unduly restrictive. The possibility of exemplary damages has been canvassed in two English cases concerning the tort of deceit, a tort not actionable per se and in which damages are not at large.¹⁸⁶ The result of the cases is inconclusive, but in both the possibility of an action based on deceit falling into Lord Devlin's second category of conduct calculated to make a profit out of the commission of the tort was recognised.¹⁸⁷

Tort and Judicial Review

The purpose of seeking an order for judicial review of an administrative decision under the prerogative writ procedure is entirely different from that of seeking a remedy in tort. That procedure is concerned with quashing an invalid decision (*certiorari*), seeking to prevent the making of such a decision (*prohibition*), or compelling the decision-maker to make a decision in accordance with law (*mandamus*). The purpose of suing in tort is to obtain compensation for damage that the decision has caused the plaintiff. Clearly the making of a prerogative order by the court in relation to a decision will not confer compensation upon the plaintiff. Indeed under the typical prerogative writ procedure obtaining in Australia it will not be possible to claim damages in the same action as that in which a prerogative remedy is claimed. This points to the possibility of using the action in tort for both purposes, ie both to enable the court to declare the invalidity of the decision and at the same time to award the plaintiff damages if the consequences of the decision establish a remedy in tort. That collateral attack upon an administrative decision through the means of an action in tort is possible is established by *Cooper v Wandsworth Board of Works*.¹⁸⁸ In that case the success of the plaintiff's action in trespass depended upon establishing as he did that the decision to demolish his house was void for breach of natural justice. The court did not consider the general question of the desirability of the plaintiff sidestepping the normal processes of judicial review by suing in tort, but the facts of the case itself may suggest the limits within which it is acceptable. In the first place, quashing the decision could not give the plaintiff what he wanted, ie compensation for the loss of his house. Nor in the circumstances would an order for rehearing of the decision have been of any use. Secondly the decision that was being questioned was that of the defendant to the action. Finally the order in question being limited to the plaintiff's house had no general application — establishing its invalidity could not affect the rights of other persons not parties to the action. In *Davis v Bromley Corp*,¹⁸⁹ on the other hand, the court dismissed a claim for damages arising from the malicious refusal of a building permit on the basis that no cause of action existed. One ground for this was that the plaintiff's

186 *Mafo v Adams* [1970] 1 QB 548; *Archer v Brown* [1984] 2 All ER 267.

187 But two members of the House of Lords in *Broome v Cassell & Co* [1972] AC 1027 expressed the opinion obiter that Lord Devlin's second category had not been intended to extend the power to award exemplary damages — *ibid*, at p 1076 (Lord Hailsham), at p 1131 (Lord Diplock).

188 *Supra* n 9.

189 [1908] 1 KB 170.

proper remedy was to seek an order for mandamus. There is considerable force in this, although by means of mandamus the plaintiff could not obtain compensation. In order to establish a claim for compensation in a case of this sort, the plaintiff would have to establish not only a wrongful exercise of the discretion to grant licences but also that a proper exercise of it would have entitled him to a licence. The court, however, will not in general determine the way in which discretions should have been exercised and the plaintiff is therefore unable to show that the decision has caused him loss. That problem did not arise in *Cooper* because the plaintiff was able to show a trespass by the Board of Works without reference to the question of the rightness or wrongness of its decision to demolish the house.

Clearly there are dangers in allowing the action in tort to be used as a means of upsetting decisions of a public nature on which rights and expectations may have been founded. The prerogative writ procedure has safeguards built into it which are not applicable to actions commenced by writ of summons. They are set out in the judgment of Lord Diplock in *O'Reilly v Mackman*.¹⁹⁰ In particular the initial application for the issue of the writ must be before a judge and must be supported by affidavit evidence, which, being given on oath, would expose the applicant to a prosecution for perjury if it was knowingly false. This initial "screening process" is not present in actions commenced by writ. Perhaps even more important is the presence of a very short time-limit within which applications to quash a decision under the certiorari procedure must be brought.¹⁹¹ Again limitation periods upon the ordinary action commenced by writ are usually far more generous. The use of the action for a declaration to evade the judicial review procedures is well known. There is no initial screening process to that action nor does any special time limit on it exist. It is especially valuable when the validity of an administrative decision is sought to be impugned since as a general rule the effect of the invalidity is that the decision is void ab initio and a declaration which merely points that out is just as effective a remedy as a quashing of the decision through the certiorari process.¹⁹² *Locus standi* in the case of a declaration may be a more stringent requirement than in the case of the prerogative writs though the exact nature of the differences is as yet far from being clearly defined. There is no reason why an action for a declaration commenced by writ should not be combined with a claim for damages arising from the making of the decision whatever the basis of that claim may be. The unsatisfactory result is that orders and determinations of public bodies may be questioned in proceedings commenced long after they are made by litigants who do not have to satisfy a judge initially that their case has some merit, or to support it by affidavit evidence. All of this points to the need for a unification of remedies whereby the prerogative writ procedure becomes a necessity in all cases where the validity of the decision of public body is being questioned, but has transferred to it a number of the important advantages of the proceeding begun by private writ. This is the change that has been effected in England by the Order

190 [1982] 3 All ER 1124.

191 For example, Supreme Court Rules (SA) Order 59, Rule 10 (6-month limit on certiorari).

192 As in *Ridge v Baldwin* supra n 97. A declaration is, however, not obtainable where the decision is voidable — *Punton v Ministry of Pensions* [1963] 1 WLR 186.

53 procedure.¹⁹³ Put briefly the Order creates a unified procedure for judicial review together with changes in that procedure allowing for interlocutory proceedings, discovery of documents, and the making of a declaratory order or the award of damages in favour of an applicant for judicial review. The procedure clearly contemplates that the Order 53 procedure should be the only means of challenge where the validity of a public decision is being questioned. So where this is so, it is not proper to proceed by means of an ordinary action seeking a declaration. That action will be struck out as an abuse of the process of the Court.¹⁹⁴ Clearly this must also affect the bringing of actions in tort where the basis of the claim is the invalidity of a particular decision. In *Cocks v Thanet DC*¹⁹⁵ the House of Lords dismissed as an abuse of the process of the court an action in which the plaintiff sought to question the defendant's decision to refuse him accommodation in breach of its duty towards homeless persons under the Housing (Homeless Persons) Act, 1977 by suing in tort for breach of statutory duty. The House of Lords ruled that the proper form of challenge to this decision was by proceeding for an order for judicial review under Order 53. Giving the leading judgment in the House of Lords, Lord Bridge emphasised the problem that presented itself to the court when faced with an ordinary action in tort in that it could review the decision of the local authority but could not substitute its own decision as to whether the plaintiff complied with the statutory requirement of "homelessness". Whether the approach in *Cocks* will be taken where the plaintiff has suffered damage that cannot, as it could have been in that case, rectified by the making of a valid decision and, in particular, whether the courts will insist upon the judicial review procedure with its stringent three-month time-limit being adopted in every case in which the plaintiff seeks to establish a remedy in tort by showing *inter alia* the invalidity of a decision are matters for future resolution.¹⁹⁶

193 SI 1977 No 1955, SI 1980 No 2000 (3-month time limit on applications for judicial review); Supreme Court Act, 1981, s 31. A unification of the remedies provided by judicial review is created by the Administrative Decisions (Judicial Review) Act, 1977, s 16. Section 16 contains, however, no power to award damages.

194 *O'Reilly v Mackman* [1982] 3 All ER 1124.

195 [1982] 3 All ER 1135.

196 If the plaintiff is not seeking judicial review of a decision, he may proceed by means of an ordinary action for tort even though the action raises issues of public law — *Davy v Spelthorne BC* [1983] 3 All ER 278.