LIABILITY TO COMPENSATE FOR DENIAL OF A RIGHT TO A FAIR HEARING

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INTRODUCTION

The main questions considered in the article are these. First, can breach of a duty to accord natural justice, and more particularly a duty to afford a fair hearing, ever give rise to a liability at common law to compensate the person to whom the duty is owed, and, if so, in what circumstances? Secondly, assuming that breach of a duty to afford a fair hearing can give rise to a liability to compensate, to what extent, if at all, may liability be avoided by reliance on judicial and quasi-judicial immunities from civil suits and on statutory protection clauses?

There is no doubt that if a duty to afford a fair hearing is contractual, breach of it can found an action for breach of contract. Breach of a duty to afford a fair hearing may also be an element in establishing a civil wrong other than mere breach of the duty. It may also defeat a defence of statutory authority. A decision made in breach of the duty may, for example, result in acts which are *prima facie* trespassory or which are an essential element in establishing claims for restitution of moneys had and received.[1] Again, breach of a duty to afford a fair hearing may be an element in claims for damages for torts such as negligence, misfeasance in a public office, or the *Beaudesert* tort.[2]

But the primary question is, can breach of a duty to accord a fair hearing of itself give rise to a common law liability to compensate? If so, what are the essential elements of liability?

RIGHTS TO A FAIR HEARING

Before considering the question whether breach of a duty to afford a fair hearing can ever give rise to a liability to pay damages for the breach, it is necessary to say something in brief about (a) the sources of such a duty, (b) the ways in which breach of the duty may be remedied otherwise than by award of

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[1] *Cooper* v. *Wandsworth Board of Works* (1863) 14 C.B. (N.S.) 180; 143 E.R. 414 (trespass) discussed at pp. 000 infra; *Capel* v. *Child* (1832) 2 Cr. & J. 558; 149 E.R. 235; *Bonaker* v. *Evans* (1850) 16 Q.B. 163; 117 E.R. 840 (money had and received).

[2] See pp. 406–25 infra.

compensation or orders for restitution of money or property, and (c) the effect breach of the duty has on the validity of the ultimate act or decision.

Duties to afford a fair hearing are typically attached to powers to make decisions which may adversely affect the interests of individuals.[3] Such duties may be created by contract, by instruments constituting trusts, by royal charter or by or pursuant to statute. They may also arise under the common law.

When the power to which the duty attaches is statutory, the duty may be created expressly by the statute or it may simply be implied. In many cases, however, the implied duty has been said to rest rather on an antecedent principle of common law as to when a fair hearing is required and on a presumption that the legislature does not intend to abrogate the common law right.[4] There is also now judicial authority for the view that a duty to afford a fair hearing may be created by an express undertaking, or by practice of a voluntary course of conduct.[5]

Over the last twenty years or so, courts have been prepared to find duties to accord a fair hearing in an increasingly wide range of circumstances.[6] Those upon whom the duty has been imposed would, in many cases, not have supposed themselves to be subject to the duty, or a duty as extensive as that prescribed, until a court had pronounced on the matter. Certainly there have been many cases in which the breach of duty has not been intentional.

What is required to fulfil the duty, the courts repeatedly stress, is variable. The requirements vary from one statutory context to another and, within the one statutory context, from individual case to individual case.[7] In addition, those upon whom the duty is imposed are allowed some measure of discretion in choosing how they go about fulfilling it.[8] In considering whether breach of the duty should be compensable, these are factors which clearly must be taken into account.

Courts have long recognised that for the purposes of the exercise of their supervisory jurisdiction, breach of a duty to accord natural justice is an error going to jurisdiction. It is not simply an error of law within jurisdiction. Breach of this duty may thus provide a ground for award of mandamus and prohibition, as well as *certiorari*, and may be proved by material extrinsic to the record.[9] On the other hand, for the purposes of the law relating to judicial and quasi-judicial immunities from suit, breach of duty to afford a fair

[3] See generally M. Aronson and N. Franklin, *Review of Administrative Action* (Sydney, Law Book Co., 1987) Chap. 6; H.W.R. Wade, *Administrative Law* (6th ed., Oxford, Clarendon Press, 1988) Chap. 15.

[4] See discussion in P. Tate, "The Coherence of 'Legitimate Expectations' and the Foundations of Natural Justice" (1988) 14 *Mon. L.R.* 15, 18–20.

[5] Id. 48–9. See also *Kioa* v. *West* (1985) 159 C.L.R. 550, 583 (Mason J.).

[6] See fn. 3 supra.

[7] *Kioa* v. *West* (1985) 159 C.L.R. 550, 585 (Mason J.), 594 (Wilson J.), 612–6 (Brennan J.).

[8] E.g. in relation to whether an oral hearing is to be provided, whether legal representation will be permitted, whether cross-examination of witnesses will be permitted.

[9] For an early example of mandamus to restore a person to an office from which he was removed without a fair hearing see *Bagg's* case (1616) 11 Co. Rep. 93b; 77 E.R. 1271. See also *Ridge* v. *Baldwin* [1964] A.C. 40; *Durayappah* v. *Fernando* [1967] 2 A.C. 337; *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.

hearing has generally been held not to involve an excess of jurisdiction in the sense of depriving the defendant of jurisdiction in the matter.[10]

Where the duty to accord a fair hearing is attached to a statutory power, breach of the duty may be remedied not merely by prerogative writs or orders, and their statutory equivalents,[11] but also by declarations and injunctions. All of these remedies are discretionary, so the mere proof of breach of duty creates no entitlement to remedy. Remedy may be refused because of the applicant's delay in seeking it or because the matter is no longer one in which the applicant has an active interest.[12] There have even been cases in which courts have, while acknowledging that the duty has been infringed, denied remedy because the breach was considered to be of a minor nature or because they have concluded that, even if the duty had been performed, the outcome of the case would not have been different.[13] Denial of remedy for the latter reason alone has, however, been condemned not merely because it degrades the right to a fair hearing, but also because it amounts to usurpation by the judiciary of decision-making functions which belong to others.[14]

The judicial remedies so far mentioned are not the only ones available to a person whose rights to a fair hearing may have been violated. The decision ensuing from breach of the duty may be appealable. But, if a right to appeal is exercised and the appeal process involves a hearing and redetermination *de novo*, failure on the appeal does not then entitle the appellant to seek remedy in a supervisory jurisdiction on the ground of violation of the right to natural justice at first instance. A fair hearing at the appeal stage "cures" the breach of duty at first instance.[15]

Breach of a duty to accord a fair hearing may also be rectified by the person or body on whom the duty is incumbent, without any direction to do so by a court or other body having power to give such a direction. Superior courts of law have asserted an inherent jurisdiction to set aside their own judgments and orders when those judgments and orders have proceeded from denials of rights to a fair hearing.[16] In principle, there is no reason for denying a like self-corrective power to inferior courts of law, or to other persons and bodies

[10] See pp. 395–8 infra.

[11] E.g. remedies available under s.16 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth); O.56 of the General Rules of Procedure in Civil Proceedings 1986 (Vic.); O.98 of the Supreme Court Rules 1987 (S.A.); and O.56 of the General Rules of Procedure in Civil Proceedings 1987 (N.T.).

[12] See e.g. *R.* v. *Senate of Aston University; Ex parte Roffey* [1969] 2 Q.B. 538. See also Wade, op. cit. 535–7.

[13] See cases referred to in Aronson and Franklin, op. cit. 121–2.

[14] See e.g. *John* v. *Rees* [1970] Ch. 345, 402 (Megarry J.); *Dunlop* v. *Woollahra Municipal Council* [1975] 2 N.S.W.L.R. 446, 480–1 (Wootten J.); D.H. Clark, "Natural Justice: Substance and Shadow?" [1975] *Public Law* 27, 43–60; J.L. Caldwell, "Discretionary Remedies in Administrative Law" (1987) 6 *Otago Law R.* 245, 253–6; Wade, op. cit. 433–5.

[15] *Twist* v. *Randwick Municipal Council* (1976) 136 C.L.R. 106, 116; *Calvin* v. *Carr* [1980] A.C. 574; Aronson and Franklin, op. cit. 142–3.

[16] *Craig* v. *Kanssen* [1943] 1 K.B. 256; *Cameron* v. *Cole* (1944) 68 C.L.R. 571; *Taylor* v. *Taylor* (1979) 143 C.L.R. 1; *R* v. *Seisdon Justices; Ex parte Dougan* [1982] 1 W.L.R. 1476; *Re Anasis; Ex parte Total Australia Ltd* (1985) 63 A.L.R. 493.

who are bound to decide in accordance with principles of natural justice.[17] But one obstacle that now has to be overcome in establishing a universal power in decision-makers to set aside those of their decisions they recognise to have been made in violation of fair hearing rights is the current judicial doctrine about the legal effect of decisions which are susceptible of challenge in proceedings before courts of supervisory jurisdiction.

After several years of debate[18] about whether decisions in purported exercise of statutory powers were rendered void or voidable (and, if voidable, in what sense) because of the decision-maker's failure to accord a relevant party his or her right to a fair hearing, the highest courts in a number of common law jurisdictions have adopted the position stated in the following opinion of the Judicial Committee of the Privy Council in *Calvin* v. *Carr*,[19] namely —

> "a decision made contrary to natural justice is void, but that, until it is so declared by a competent body or court, it may have some effect, or existence, in law. This condition might be better expressed by saying that the decision is invalid or vitiated."

A growing body of judicial opinion[20] suggests that the position as stated in *Calvin* v. *Carr* is now true of any administrative decision which is, for some reason, claimed to be invalid. Previous decisions in which it has been held that, because a decision is void *ab initio* it can be safely ignored, and cannot therefore be regarded as the cause of any damage suffered by a person who acts in reliance on it, are now of dubious authority.[21]

ACTIONABILITY OF BREACH OF A DUTY TO AFFORD A FAIR HEARING

In *Chief Constable of North Wales Police* v. *Evans*[22] the House of Lords concluded that Evans, a probationary police constable, had been denied his right to a fair hearing before the chief constable dismissed him, or, as happened, forced Evans to resign. A regulation empowered the chief constable to dismiss a probationary constable if he considered that the probationer was not fitted physically or mentally to perform the duties of the office, or that he was unlikely to become an efficient or well conducted police officer. There was no express duty to afford a probationer a fair hearing before this power

[17] *De Verteuil* v. *Knaggs* [1918] A.C. 557, 563; *R* v. *Kensington and Chelsea Rent Tribunal; Ex parte MacFarlane* [1974] 1 W.L.R. 1486.

[18] Wade, op. cit. 526–9.

[19] [1980] A.C. 574, 589–90. See also *Forbes* v. *New South Wales Trotting Club Ltd* (1979) 143 C.L.R. 242, 277 (Aickin J.); *Macksville & District Hospital* v. *Mayze* (1987) 10 N.S.W.L.R. 708, 718, 729–30.

[20] See e.g. *F. Hoffman-La Roche & Co.* v. *Secretary of State for Trade and Industry* [1975] A.C. 295, 365–6 (Lord Diplock); *London and Clydesdale Estates Ltd* v. *Aberdeen District Council* [1980] 1 W.L.R. 182, 189–90 (Lord Hailsham); *A.J. Burr Ltd* v. *Blenheim Borough Council* [1980] 2 N.Z.L.R. 1, 4 (Cooke J.); *Wattmaster Alco Pty Ltd* v. *Button* (1986) 70 A.L.R. 330, 335 (Sheppard and Wilcox JJ.).

[21] E.g. *Wood* v. *Woad* (1874) L.R. 9 Ex. 190; *Polley* v. *Fordham* [1904] 2 K.B. 345, 358; *Stott* v. *Gamble* [1916] 2 K.B. 504; *O'Connor* v. *Isaacs* [1956] 2 Q.B. 288.

[22] [1982] 1 W.L.R. 1155.

was exercised, but such a duty was implied. Evans had not sought compensation for breach of this duty. What he sought was a judicial order for his reinstatement. Though clearly sympathetic to his claim, the House of Lords took the view that for a court to grant Evans the remedy he sought would be tantamount to exercising the discretionary power reposed in the chief constable.[23] It decided simply to make a declaration that, by reason of the unlawfully induced resignation, Evans became entitled to the same rights and remedies, not including reinstatement, as he would have had if the chief constable had not unlawfully dispensed with his services.[24] This, presumably, meant that Evans would be entitled to back pay and to accrued pension rights.

Although Evans had not sought damages, several of their Lordships indicated that he could, under Order 53 rule 7 of the Supreme Court rules, have appended a claim for damages to his application for judicial review.[25] Lord Hailsham L.C. considered that, had damages been sought, they "might well have proved substantial".[26] Lord Brightman even suggested that it might not be too late for Evans to amend his claim "by adding a claim to damages".[27] Counsel for the chief constable had, he noted, told the Lords that if their decision was in favour of Evans, "it would be the intention of the North Wales Police to offer him monetary compensation".[28] Lord Brightman trusted

> "that the compensation which the chief constable has in mind to offer would be on a generous scale, and amply reflect the fact that the respondent has been unlawfully deprived of his profession as a consequence of the wrongful procedures of chief constable's predecessor in office."[29]

On what legal basis Evans might have claimed and recovered damages was not discussed.

Order 53 (likewise s.31(4) of the *Supreme Court Act* 1981) does not permit damages to be awarded unless the wrong in question would found an independent action for damages.[30] The statutory power of courts to award damages in addition to, or instead of, an injunction is similarly confined.[31] There was no suggestion by the House of Lords that Evans might have recovered damages for breach of contract. Nor was there any suggestion that wrongful dismissal from an office is a cause of action sounding in damages, independently of whether the dismissal might be in breach of contract; or that breach of duty to accord natural justice is a separate cause of action. The clear

[23] Id. 1160–1 (Lord Hailsham), 1176 (Lord Brightman).
[24] Id. 1176.
[25] Id. 1163, 1175. See also *Supreme Court Act* 1981, s.31(4).
[26] Id. 1163.
[27] Id. 1175.
[28] Id. 1175–6.
[29] Id. 1176.
[30] *Calveley* v. *Chief Constable of Merseyside Police* [1989] Q.B. 136.
[31] *Wentworth* v. *Woollahra Municipal Council* (1982) 149 C.L.R. 672. The orders which may be made under s.16 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) do not include orders for damages though a claim for damages may be appended to an application for review and determined in the exercise of the Federal Court's accrued jurisdiction (*Park Oh Ho* v. *Minister for Immigration and Ethnic Affairs* (1988) 81 A.L.R. 288).

implication is, however, that the public duty which the chief constable owed to Evans somehow involved a violation of Evans's private rights for which he was entitled to damages.

The first question to be considered is whether there is anything in the provenance of the common law which affords a basis for the proposition that a breach of a duty to afford a fair hearing can, apart from those cases in which the duty is contractual, of itself attract a liability to pay damages. Might, for example, breach of the duty found an action for damages for breach of statutory duty? Might it even found an action on the broad principle enunciated by Holt C.J. in *Ashby* v. *White*?[32]

There have been several cases in which Canadian courts have awarded damages for breach of statutory duties to afford fair hearings. In the first and most important of these cases, *Zamulinski* v. *The Queen*,[33] a civil servant sued for damages after he had been dismissed, without the hearing to which he was entitled under civil service regulations. There was no prospect of his succeeding in an action for damages for wrongful dismissal, for he was employed at pleasure. Indeed, the Exchequer Court conceded that though Zamulinski's right to a hearing had been denied, the dismissal was valid and effective.[34] The principle invoked to support liability was stated by Thorson P. to be simply this: "It is a fundamental principle that the violation of right gives a cause of action".[35] *Ashby* v. *White*[36] was cited as authority but without elaboration.

In the subsequent cases in which Canadian courts applied *Zamulinski's* case,[37] the principle enunciated by Thorson P. was accepted without question. These other cases too involved breach of an express statutory duty to afford a hearing, though in none was there any hint that liability depended solely on the fact that the duty was statutory. Whether or not breach of the duty was actionable *per se* or only on proof of actual damage was not made clear.[38]

Before examining the arguments for and against utilisation of the tort of actionable breach of statutory duty as a basis for award of damages for breach of duties to afford fair hearings, one needs, I think, to look more closely at the tenability of the arguments which take *Ashby* v. *White*[39] as their starting point.

Ashby v. White

This was an important case in English legal and constitutional history. The action, framed as an action on the case, was brought by a plaintiff who claimed that returning officers had wrongfully denied him his right to vote for

[32] (1703) 2 Ld Raym. 938; 92 E.R. 126; (1704) 3 Ld Raym. 320; 92 E.R. 710; 14 St. Tr. 695.
[33] (1957) 10 D.L.R. (2d) 685 (Ex.Ct).
[34] Id. 693.
[35] Id. 698.
[36] See fn. 32 supra.
[37] *Peck* v. *The Queen* [1964] Ex.C.R. 966; *Hopson* v. *The Queen* [1966] Ex.C.R. 608; *Mancuso Estate* v. *The Queen* [1980] 1 F.C. 269; affd *sub nom. The Queen in Right of Canada* v. *Greenway* (1981) 122 D.L.R. (3d) 554.
[38] *Zamulinski* v. *The Queen* (1957) 10 D.L.R. (2d) 685, 698; *Hopson* v. *The Queen* [1966] Ex.C.R. 608, 647.
[39] See fn. 32 supra.

a representative in the House of Commons by rejecting the vote he sought to cast as a qualified elector. The case is memorable for several statements by Lord Holt C.J. (dissenting) at first instance which were, upon subsequent proceedings (by writ of error) before the House of Lords, presumably endorsed by that House.[40] These statements were, it should be said, principally in answer to the argument that no action on the case could be sustained without proof of actual damage.

According to Lord Holt, deprivation of the right to vote was actionable, on the case, even though the plaintiff could not establish pecuniary loss. Deprivation of the right was itself a "great injury".[41]

> "If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. . . . Where a man has but one remedy to come at his right, if he loses that he loses his right."[42]
> "[E]very injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right."[43]

Lord Holt C.J. seems not to have attached any particular significance to the source of the plaintiff's right to vote. It was, he said, a right "by the common law" and consequently the plaintiff could "maintain an action for the obstruction of it".[44] But there was also a statute, chapter 5 of the *Statute of Westminster I*, 1275,[45] which had enacted "that forasmuch as elections ought to be free, the King forbids, upon grievous forfeiture, that any great man, or other, by power of arms, or by malice, or by menaces, shall disturb to make free election". This statute, Lord Holt maintained

> "is only an inforcement [*sic*] of the common law; and if the Parliament thought the freedom of elections to be a matter of that consequence, as to give their sanction to it, and to enact that they should be free; it is a violation of that statute, to disturb the plaintiff in this case in giving his vote at the election, and consequently actionable."[46]

While Lord Holt here seems to have introduced the statute merely to fortify his argument, his opinion included more general statements about the actionability of breaches of rights conferred by statute.

> "Where a new act of parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him."[47]

[40] 14 St. Tr. 695, 799.
[41] 2 Ld Raym. 938, 953; 92 E.R. 126, 136.
[42] 2 Ld Raym. 938, 953–4; 92 E.R. 126, 136.
[43] 2 Ld Raym. 938, 955; 92 E.R. 126, 137.
[44] 2 Ld Raym. 938, 954; 92 E.R. 126, 136.
[45] 3 Ed. I.
[46] 2 Ld Raym. 938, 954–5; 92 E.R. 126, 136–7.
[47] 2 Ld Raym. 938, 954; 92 E.R. 126, 136.

> "If . . . when a statute gives a right, the party shall have an action for the infringement of it, is it not as forcible as when a man has a right by the common law?"[48]

Nowhere in Lord Raymond's report of Lord Holt's opinion was there any suggestion that the liability of the returning officers depended on proof that they had acted with malice, or, had knowingly and wilfully deprived the plaintiff of his right to vote. Yet the declaration had expressly charged the defendants with fraud and malice and in later cases, beginning with *Drewe* v. *Coulton*[49] in 1787, courts insisted that, in cases where electoral officials were sued for wrongful rejection of votes, malice was an essential ingredient of liability.[50] In *Tozer* v. *Child*[51] in 1857, the Exchequer Chamber described Lord Raymond's report of *Ashby's* case as unsatisfactory. Certainly it did not coincide with Lord Holt's revised version of his judgment in which he had stated that, according to c.5 of the *Statute of Westminster I*, the action lay, and lay because fraud and malice had been alleged and proved.[52] Both the report of the Lords Committee[53] and the subsequent resolution of the House of Lords also clearly indicated that liability depended on proof of malice.[54] The reasons why malice was considered to be an essential element of liability will be discussed later.[55]

While a right to a fair hearing may be no less important than a right to vote in parliamentary elections or other elections for public offices, it seems to me that the case of *Ashby* v. *White* does not provide a secure footing for the argument that breach of a duty to accord a fair hearing is an independent cause of action. The cause of action in the case was probably that now known as misfeasance in a public office. Lord Holt's statement that if a "plaintiff has a right, he must of necessity have a means to vindicate it and maintain it, and a remedy if he is injured in the enjoyment of it",[56] certainly does not dictate that the remedy must always be by way of an award of damages.

Breach of Statutory Duty

A more promising basis for actions for damages for breach of non-contractual duties to afford hearings may be the action for breach of statutory duty. This action is said to date back to the *Statute of Westminster II* of 1285,[57] though it did not begin to take shape until the latter part of the 18th century.[58] Over the next century, the action was developed virtually to the point where any breach of statutory duty was actionable at the suit of an individual who

[48] Ibid.
[49] (1787) 1 East 563 note; 102 E.R. 217 note.
[50] *Cullen* v. *Morris* (1819) 2 Starke 577; 171 E.R. 741; *Tozer* v. *Child* (1857) 7 E. & B. 377; 119 E.R. 1286.
[51] 7 E. & B. 377, 382; 119 E.R. 1286, 1288–9.
[52] Referred to in 1 *Smith's Leading Cases* (13th ed., London, Sweet & Maxwell, 1929) 283.
[53] 14 St. Tr. 778, 789.
[54] Id. 799.
[55] See p. 399 infra.
[56] See fn. 32 supra.
[57] 13 Ed. I c. 50. See also 36 Ed. III c. 9.
[58] K.M. Stanton, *Breach of Statutory Duty in Tort* (London, Sweet & Maxwell, 1986) 2.

could show that he had sustained injury as a result. The tests of actionability were expressed in extremely broad terms and failure to perform purely ministerial duties — duties the performance of which did not allow for exercise of discretion — tended to attract liability without proof of malice or other fault.[59] But from the 1870's on, there was a judicial reaction against the liberal tests of actionability hitherto applied.[60] This reaction may have been inspired in part by a certain distaste for liability without fault, but the principal reason was probably the realisation that, unless the boundaries of civil liability were more narrowly defined, the burden on industry and public utilities would be excessive.[61]

In their search for a principle of delimitation, the courts seized on the entirely fictional device of parliamentary intention, and a sub-set of criteria for divining that intent. The modern tests of actionability which were developed have been criticised by both judges and academic commentators.[62] For present purposes it is not, however, necessary to examine the modern judicial tests of actionability, and critiques of them, in any detail. It is sufficient to inquire whether there is anything in that law which would foreclose, or render futile, argument that breach of a statutory duty to afford a fair hearing can attract a liability to pay damages on account of the breach, or of damage suffered in consequence of the breach.

On my reading of the modern case law, there is nothing in that law which automatically excludes a statutory duty to afford a fair hearing from the range of statutory duties breach of which may be actionable. Actions for breach of statutory duty have not been limited to cases in which the plaintiff can establish physical injury to the person or to property. They can be maintained even if the loss is purely or largely economic.[63] Secondly, statutory duties to afford fair hearings are invariably duties which, when they arise, are owed to particular individuals or a particular class of individuals. They are also created for the benefit of definable classes of individuals.[64] Thirdly, statutes

[59] See e.g. *Chamberlaine* v. *The Chester and Birkenhead Railway Co.* (1848) 1 Ex. 870, 876–7; 154 E.R. 371, 374; *Couch* v. *Steel* (1854) 3 E. & Bl. 402, 412–3; 118 E.R. 1193, 1197; *The Wolverhampton New Waterworks Co.* v. *Hawksford* (1859) 28 L.J.P.C. 242, 246; *Pickering* v. *James* (1873) L.R. 8 C.P. 489, 503.

[60] See e.g. *Atkinson* v. *The Newcastle and Gateshead Waterworks Co.* (1877) 2 Ex.D. 441; *Clegg, Parkinson and Co.* v. *Earby Gas Co.* [1896] 1 Q.B. 592.

[61] For accounts of 19th century and later developments see R.A. Buckley, "Liability in Tort for Breach of Statutory Duty" (1984) 100 L.Q.R. 204; P.D. Finn, "A Road Not Taken: The Boyce Plaintiff and Lord Cairns' Act" (1983) 57 A.L.J., 493, 571.

[62] E.g. *O'Connor* v. *SP Bray Ltd* (1937) 56 C.L.R. 464, 477–8 (Dixon J.); *Haylan* v. *Purcell* (1949) 49 S.R. (N.S.W.) 1, 4 (Davidson J.); *Ex parte Island Records* [1978] Ch. 122, 135 (Lord Denning M.R.); *The Queen in Right of Canada* v. *Saskatchewan Wheat Pool* (1983) 143 D.L.R. (3d) 9, 17 (S.C.C.). For commentaries see, in addition to those referred to in fn. 61 supra, G.L. Williams, "The Effect of Penal Legislation in the Law of Torts" (1960) 23 M.L.R. 233, 246; Winfield and Jolowicz, *Torts* (12th ed., London, Sweet & Maxwell, 1984) 168. See also English Law Commission, *Interpretation of Statutes* (L.C. 21 — 1969) para. 38.

[63] See Stanton, op. cit. 63–73.

[64] Rights to fair hearings, statutory or non statutory, are strictly personal rights. Only the person to whom the duty to afford a fair hearing is owed has standing to sue in respect of it and a decision made in breach of the duty is "voidable" only at the suit of that person. See *Durayappah* v. *Fernando* [1967] 2 A.C. 337, 353; *F. Hoffman-La Roche & Co.* v.

imposing a duty to afford a fair hearing rarely prescribe sanctions or remedies for breach of the duty, though often it can be presumed that the legislature acknowledged that victims of breach of the duty would be able to obtain remedy by resort to traditional public law remedies. Sometimes the legislature may have conferred a right to appeal against decisions made by those upon whom a duty to afford a hearing is incumbent. But neither a presumed right to obtain public law remedies, nor an express right to appeal can be regarded as a specific statutory remedy for breach of the statutory duty, and thus a significant barrier to actionability.

One factor that can militate against imposition of liability to pay damages for breach of statutory duty is the breadth of the discretion involved in performance of the duty.[65] But if the duty is to afford a fair hearing, that duty will normally be absolute and the person or body on whom the duty is incumbent will have limited choice as regard the means by which the duty is to be performed. It might even be argued that a duty to afford a fair hearing is a ministerial, or largely ministerial, duty comparable with that considered by the House of Lords in *Ferguson* v. *Kinnoull* in 1842,[66] namely the statutory duty of a Presbytery to try the qualifications of a nominee for appointment to a ministry.

In this case Lord Kinnoull, whose right it was to nominate, had presented one Robert Young for installation as a minister, with proof of his qualifications. The Presbytery had refused to proceed to trial whereupon Kinnoull and Young instituted legal proceedings to establish that the Presbytery was in breach of its duty. Even though the House of Lords found in their favour, the Presbytery still refused to proceed to trial. Action was then successfully brought to recover damages for the breach of duty. None of the Lords, with the exception of Lords Brougham[67] and Campbell,[68] seem to have attached any significance to the fact that the breach of duty was knowing and wilful.[69] The majority appeared to accept that mere breach of the duty was actionable if damage resulted. Indeed, Lord Lyndhurst L.C. went so far as to say that —

> "When a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury he has so sustained."[70]

Although this broad statement of principle is not supported by more recent authorities, there have been later cases in which public officers have been held liable to pay damages for breach of statutory duties, the result of which has been to prevent or impede the exercise of a plaintiff's legal rights: for example,

Secretary of State for Trade and Industry [1975] A.C. 295, 320 (Lord Denning M.R.); H.W.R. Wade, *Administrative Law* (6th ed., Oxford, Clarendon Press, 1988) 537–8.

[65] See e.g. *Bennett and Wood Ltd* v. *Orange City Council* [1967] 1 N.S.W.R. 502.

[66] 9 Cl. and F. 251; 8 E.R. 412.

[67] 9 Cl. and F. 251, 303–4, 306; 8 E.R. 412, 431, 432.

[68] 9 Cl. and F. 251, 321; 8 E.R. 412, 438.

[69] 9 Cl. and F. 251, 279; 8 E.R. 412, 423.

[70] 9 Cl. and F. 251, 279; 8 E.R. 412, 423.

a judge's refusal to accept the plaintiff's recognizance and sureties, thereby impeding the plaintiff in the prosecution of an appeal;[71] failure to perform a duty to submit a plaintiff's petition for appeal to a Lieutenant Governor;[72] non-renewal of an occupational licence to which the plaintiff was entitled;[73] failure by the officers in charge of a polling station to issue ballot papers to qualified voters.[74]

The recent decision of the House of Lords in *Calveley* v. *Chief Constable of the Merseyside Police*[75] does, however, suggest that breach of statutory duties to afford fair hearings will rarely, if ever, be held to be actionable. In this case several police officers against whom disciplinary proceedings had been taken, and who subsequently obtained orders of *certiorari* to quash the chief constable's finding that they had been guilty of disciplinary offences,[76] sued for damages for negligence and breach of statutory duty. *Certiorari* had been granted by the Court of Appeal "on the ground that the plaintiffs had been irremediably prejudiced by the delay in giving them notice of the matters alleged against them"[77] — a delay of some two and a half years after complaints had been made about their conduct. The delay was in breach of the *Police (Discipline) Regulations* 1977 and, according to Lord Donaldson M.R., was also in contravention of the rules of natural justice.[78]

Following the judicial review proceedings, the plaintiff officers had been reinstated and were paid arrears of salary and allowances for the period of their dismissal. In their ensuing civil action they claimed damages for "anxiety, vexation and injury to reputation and consequential financial loss, and special damages . . . for loss of overtime earnings" in the period from dismissal to reinstatement.[79] The breach of statutory duty alleged by the plaintiffs was principally the duty imposed (by regulations) on the investigating officer to whom a complaint had been referred to inform the officer subject to investigation, and in writing, "as soon as practicable" of the matters alleged against that officer.

Lord Bridge of Harwich, with whom the other Lords of Appeal agreed, thought it plain that the duty had been "imposed for the benefit of the police officer subject to investigation. . . . But", his Lordship continued—

> "it seems to me equally plain that the legislature cannot have contemplated that the object of the duty was to protect the officer from any injury of a kind attracting compensation and cannot therefore have been intended to give him a right to damages for breach of the duty. The duty is imposed as a procedural step to protect the position of the officer subject to investigation in relation to any proceedings which may be brought against him. . . . If . . .

[71] *Ward* v. *Freeman* (1852) 2 I.C.L.R. 460 — cited in *Tughan* v. *Craig* [1918] 1 Ir. R. 245.
[72] *Fulton* v. *Norton* [1908] A.C. 451.
[73] *Chichester* v. *Marine Board of South Australia* [1910] S.A.L.R. 22. See also *Re Mercantile Credits Ltd* [1971] Q.W.N. 7 (re duties of a registrar of bills of sale).
[74] *Pickering* v. *James* (1873) L.R. 8 C.P. 489.
[75] [1989] 2 W.L.R. 624.
[76] *R* v. *Chief Constable of the Merseyside Police; Ex p. Calveley* [1986] Q.B. 424.
[77] [1989] 2 W.L.R. 624, 628.
[78] *Calveley* v. *Chief Constable of the Merseyside Police* [1988] 3 W.L.R. 1020, 1022.
[79] [1989] 2 W.L.R. 624, 628.

> the delay in giving [the requisite] notice ... coupled with other factors causes irremediable prejudice to the officer in disciplinary proceedings, which result in his conviction of an offence against the discipline code, he has his remedy by way of judicial review to quash that conviction and nullify its consequences. The proposition that the legislature should have intended to give a cause of action in contemplation of the remoter economic consequences of any delay in giving notice ... is really too fanciful to call for serious consideration."[80]

The question of whether actions for damages for breach of a statutory duty to afford a fair hearing can ever be contemplated, will in many cases, ultimately come down to "considerations of policy and convenience".[81] Although such considerations were not expressly adverted to by the House of Lords in *Calveley's* case, it is clear that they decided as they did largely because they thought judicial review provided an adequate means of remedy for breach of the relevant statutory duty.[82]

Other considerations of policy and convenience which may be regarded as weighing against recognition of the actionability of breaches of statutory duties to afford fair hearings include (a) the inequities that could result from allowing actions in cases where the duty was expressly imposed by statute, but not in cases where the duty was implied, or supplied by the common law; and (b) the undesirability of imposing liability on persons who, in most cases, will have acted honestly and in good faith.

Other Bases of Liability

If neither *Ashby* v. *White* nor the action for breach of statutory duty provide a secure basis for recovery of damages for losses sustained in consequence of a denial of a plaintiff's right to a fair hearing, there may still be other heads of civil liability under which the plaintiff's claim to damages may sometimes be accommodated, among them the tort of misfeasance in a public office.

In considering these other possible bases of liability, one does, however, need to bear in mind that where a plaintiff's claim to damages depends on proof that the plaintiff's right to a fair hearing has been violated, the defendant may seek to avoid liability altogether by pleading common law or statutory immunity from or protection against civil suit. The next two parts of this article examine the relevant protective principles.

[80] Id. 629–30.
[81] *Pasmore* v. *Oswaldtwistle Urban District Council* [1898] A.C. 387, 397–8.
[82] Considerations of policy figured more prominently in the reasons for decision of Glidewell L.J. in the Court of Appeal [1989] 2 W.L.R. 624, 1031.

PROTECTION AGAINST LIABILITY: COMMON LAW

Judicial Immunity

Under the common law, as refashioned by the English Court of Appeal in *Sirros* v. *Moore*,[83] judges of superior and inferior courts alike are immune from civil liability in respect of acts done in a judicial capacity unless they have knowingly exceeded their jurisdiction.[84] In this context, excess of jurisdiction means absence of jurisdiction in the cause or matter.[85] Previously, judges of superior courts enjoyed a greater degree of protection for they were immune from suit even when they knowingly acted without jurisdiction or acted with malice. Judges and members of inferior courts, on the other hand, enjoyed a lesser measure of protection. They were immune from liability if they acted, without malice, within the limits of their jurisdiction. But they were not protected from liability if they acted without or in excess of jurisdiction unless the absence or excess of jurisdiction resulted from an honest mistake as to the facts on which jurisdiction depended.[86]

As the cases of *Harman* v. *Tappenden*[87] and *Ackerley* v. *Parkinson*[88] illustrate, judges of inferior courts were not held liable merely because their decisions proceeded from breach of a duty to accord natural justice. Such an error was considered to be merely an error within jurisdiction.

In *Harman's* case an action on the case for damages had been brought in respect of a water court's decision to oust the plaintiff from membership of a chartered company for breach of the company's by-laws. In consequence of the court's decision, the plaintiff was deprived of exclusive fishing rights. Although the plaintiff had previously succeeded in an application for mandamus to restore him to office, the members of the court were held immune from liability, in the absence of proof of malice.

In *Ackerley's* case the plaintiff had been excommunicated by an ecclesiastical court for contempt in failing to take on the administration of the estate of

[83] [1975] Q.B. 118. The case concerned the liability of a judge of the Crown Court. On the liability of justices of the peace see pp. 397–8 infra.

[84] Followed in *Nakhla* v. *McCarthy* [1978] 1 N.Z.L.R. 291; *Moll* v. *Butler* (1985) 4 N.S.W.L.R. 231; *Attorney-General for New South Wales* v. *Agarsky* (1986) 6 N.S.W.L.R. 38; *Rajski* v. *Powell* (1987) 11 N.S.W.L.R. 522. See also *In re McC* [1985] A.C. 528, 540.

[85] *Nakhla* v. *McCarthy* [1978] 1 N.Z.L.R. 291, 301; *Rajski* v. *Powell* (1987) 11 N.S.W.L.R. 522, 534–5, 538–9. There may be an excess of jurisdiction also if a conviction does not provide a proper foundation in law for a sentence (*In re McC* [1985] A.C. 528).

[86] It has been held that the old law, as applied to justices of the peace, has been preserved by ss. 44 and 45 of the *Justices of the Peace Act* 1979 (Eng.) and by s.15 of the *Magistrates' Courts (Northern Ireland) Act* 1964 (*In re McC* [1985] A.C. 528). These provisions have their origin in the *Justices Protection Act* 1848 (11 & 12 Vict. c. 44) and the *Justices Protection Act (Ireland)* 1849 (12 & 13 Vic. c. 16) respectively. Similar legislation was enacted in Australia (see e.g. *Magistrates' Courts Act* 1971, Part V (Vic.)). The Australian legislation does not, however, provide, as does the current England and Northern Ireland legislation, for indemnification of justices from public funds.

On the pre-*Sirros* v. *Moore* law, see A. Rubinstein, "Liability in Tort of Judicial Officers" (1964) 15 *U. Toronto L.J.* 317.

[87] (1801) 1 East 555; 102 E.R. 214.

[88] (1815) 3 M. & S. 411; 105 E.R. 665.

a deceased person.[89] Prior to commencing the action against the ecclesiastical judge, the plaintiff had successfully appealed to higher ecclesiastical courts against both the decree of contempt and the sentence of excommunication, on the ground that he had not been given an opportunity to show cause why he should not accept letters of administration. In the subsequent action for damages the plaintiff alleged that the defendants had no jurisdiction in the administration suit and had knowingly, maliciously and unlawfully claimed and exercised jurisdiction. The damage alleged flowed in part from the public pronouncement of the excommunication. Thereby the plaintiff had been "brought to great disgrace".[90] He had also been put to great expense in procuring reversal of the sentence on appeal.

At the trial before Ellenborough C.J., the jury gave verdict for the plaintiff and awarded substantial damages.[91] But the defendant then successfully moved in the Court of King's Bench for a judgment of non suit. The Court accepted that the defendant, being a judge, could not be held liable to pay damages unless he had no jurisdiction whatsoever in the administration suit, or had acted maliciously. But there was no evidence of malice. Although the decision of the ultimate appeal court, the Court of Delegates, had shown the citation of the plaintiff to have been "a nullity",[92] inasmuch as the plaintiff had not been given an opportunity to show cause why he should not take on administration of the estate, the ecclesiastical judge did have jurisdiction over the administration suit. "The whole fallacy of the [plaintiff's] argument", Le Blanc J. observed, lay

> "in considering every step taken in the cause as an excess of jurisdiction, because some steps have been erroneously taken; whereas the distinction is, that where the subject-matter is within the jurisdiction, and the conclusion is erroneous, although the party shall, by reason of the error, be entitled to set it aside, and be restored to his former rights, yet he shall not be entitled afterwards by action to claim a compensation in damages for the injury done by such erroneous conclusion, as if, because of the error, the Court had proceeded without any jurisdiction."[93]

The decision in *Ackerley's* case may, at first sight, appear to be at variance with that in *Beaurain* v. *Scott*,[94] decided two years previously. This was another case in which action was brought by a plaintiff who complained that he had been unlawfully excommunicated by an ecclesiastical court (for contempt and contumacy), partly on the ground of a denial of natural justice and partly on the ground of want of jurisdiction. The plaintiff, Beaurain, alleged that in consequence of the public promulgation of the sentence of excommunication, he had suffered in good name, been injured in his profession as an attorney, been sued by his creditors and reduced, along with his family, to

[89] On the legal consequences of excommunication, see W.S. Holdsworth, 1 *History of English Law* (7th ed., London, Methuen, 1956) 630–2.
[90] (1815) 3 M. & S. 411, 412; 105 E.R. 665, 666.
[91] £2641–13–11.
[92] (1815) 3 M. & S. 411, 424; 105 E.R. 665, 670.
[93] (1815) 3 M. & S. 411, 427; 105 E.R. 665, 671.
[94] (1813) 3 Camp. 388; 170 E.R. 1420.

"great distress, poverty and ruin".[95] At the trial before Lord Ellenborough C.J. and jury, verdict was awarded for the plaintiff with 40 shillings damages.

The report of this case does not record the Chief Justice's direction to the jury. The outcome of the case can only be reconciled with that in *Ackerley's* case on the assumption that the jury accepted that Scott had acted without jurisdiction.

There are several points which need to be noted about these cases. First, there appears to have been no doubt in any of the cases that the defendants were relevantly judges of inferior courts and thus entitled to judicial immunity from suit in respect of acts within jurisdiction unless malice was alleged and proved. Second, there was no issue as to whether a duty to afford a hearing might be characterised as a mere ministerial duty and, as such, one the breach of which, even by a judge, could be actionable.[96] Third, the cause of action in each case was, arguably that of misfeasance in a public office and not simply wrongful ouster from office (in *Harman's* case) or unlawful excommunication. All three actions were actions on the case and in each the plaintiff alleged what could clearly be counted an abuse of office. The plaintiff also alleged malice or an intention to injure.[97]

Since *Sirros* v. *Moore* no case has arisen in which it has been necessary for a court to decide whether, for the purposes of the law relating to judicial immunities from suit, the denial of a right to a fair hearing is still to be regarded as an error within jurisdiction. The question was considered in passing by the House of Lords in *In re McC*[98] in relation to the liability of justices under s.15 of the *Magistrates' Courts (Northern Ireland) Act* 1964. This section was held to have preserved the common law rule that a justice of the peace may be civilly liable for acts committed without or in excess of jurisdiction, regardless of whether the defendant knowingly acted without or in excess of jurisdiction. Lord Bridge of Harwich, with whom Lords Keith of Kinkel, Elwyn-Jones and Brandon of Oakbrook concurred, gave several examples of what could be regarded as acting "without or in excess of jurisdiction" within the meaning of s.15. These examples included a case in which,

> "in the course of hearing a case within their jurisdiction [justices] were guilty of some gross and obvious irregularity of procedure, as for example if one justice absented himself for part of the hearing and relied on another to tell him what had happened during his absence, or of the rules of natural justice, as for example if the justice refused to allow the defendant to give evidence."[99]

[95] (1813) 3 Camp. 388, 389; 170 E.R. 1420, 1421.

[96] See *Ferguson* v. *Kinnoull* (1842) 9 Cl. & F. 251, 281, 290, 293, 296, 312–3; 8 E.R. 412, 423–4, 426–7, 428, 429, 435; *Ward* v. *Freeman* (1852) 2 I.C.L.R. 760, cited in *Tughan* v. *Craig* [1918] 1 Ir. R. 245.

[97] In *Ackerley's* case it was alleged that Parkinson had "knowingly, maliciously, and unlawfully" claimed and exercised "pretended jurisdiction over the . . . suit, and without any lawful or probable cause" had pronounced the plaintiff contumacious (3 M. & S. 411, 422; 105 E.R. 665).

[98] [1985] A.C. 528.

[99] Id. 546–7.

His Lordship, however, left "for determination if and when they arise other more subtle cases . . . in which it could be contended in judicial review proceedings that a conviction was vitiated on some narrow technical ground involving a procedural irregularity or even a breach of the rules of natural justice".[100] Lord Templeman, in contrast, thought that a magistrate who denied a party his right to natural justice was still acting within jurisdiction.[101]

Yet another question which the courts have still to resolve is whether the enhanced protection against civil liability accorded to judges of inferior courts under the *Sirros* v. *Moore* doctrine will be extended to members of bodies which, although they are not courts of law in the strict sense, nevertheless perform adjudicatory functions, for example, the function of deciding whether an occupational licence should be revoked on the ground of misconduct.

Quasi-Judicial Immunity

Prior to *Sirros* v. *Moore* the courts had extended the protection given to members of inferior courts to a wide range of bodies invested with adjudicatory functions or powers, or powers the exercise of which involved the exercise of discretion or making of a judgment.[102] With the possible exception of those cases which were concerned with whether the absolute privilege accorded to judicial proceedings, for the purposes of defamation law, was applicable,[103] the case law did not provide clear guidance as to what characteristics a body needed to exhibit to merit the same protections as were accorded to members of inferior courts. A central concern does, however, seem to have been to give protection against liability to officers whose functions entailed the exercise of judgment or discretion and who had purported to exercise those functions in good faith.

This concern was manifested in the post *Ashby* v. *White*[104] cases in which returning officers were sued for wrongful rejection of votes sought to be cast by qualified voters. In *Drewe* v. *Coulton*,[105] for example, Wilson J. acknowl-

[100] Id. 547.
[101] Id. 558.
[102] E.g.
(a) Disciplinary tribunals (*Philips* v. *Bury* (1692) Holt K.B. 715; Skin. 447; 90 E.R. 198, 1294; *Kemp* v. *Neville* (1861) 10 C.B. (N.S.) 523; 142 E.R. 556; *Groenvelt* v. *Burwell* (1700) 3 Salk. 354; 1 Ld Raym. 454; 91 E.R. 869, 1202; *Partridge* v. *General Council of Medical Education and Registration of the United Kingdom* (1890) 25 Q.B.D. 90; *Harris* v. *Law Society of Alberta* [1936] S.C.R. 88);
(b) Commercial and statutory arbitrators and quasi arbitrators (*Wills* v. *Maccarmick* (1763) 2 Wils. K.B. 148; 95 E.R. 736; *Pike* v. *Carter* (1825) 3 Bing. 78, 85; 130 E.R. 443, 446; *Pappa* v. *Rose* (1871) L.R. 7 C.P. 32, 525; *Chambers* v. *Goldthorpe* [1901] 1 K.B. 624; *Sutcliffe* v. *Thackrah* [1974] A.C. 727);
(c) Commissioners of Excise in exercise of a jurisdiction to determine whether a statutory duty had been fulfilled and to take measures to enforce the duty (*Terry* v. *Huntingdon* (1668) Hard. 480, 483; 145 E.R. 557, 559; *Fuller* v. *Fotch* (1698) Carth. 346; 90 E.R. 802; see also *Allen* v. *Sharp* (1848) 2 Ex. 352; 154 E.R. 529).
[103] See J.G. Fleming, *The Law of Torts* (7th ed., Sydney, Law Book Co., 1987) 533–5. For a recent statement see *Trapp* v. *Mackie* [1979] 1 W.L.R. 377 (H.L.).
[104] See fnn. 49 and 50 supra.
[105] (1787) 1 East 563 note; 102 E.R. 217 note.

edged that the defendant returning officer was not, strictly speaking, a judicial officer. But since the officer had to adjudge whether a person who claimed to be entitled to vote was so entitled — and this was "an intricate question of law"[106] — he should not be held liable unless it were proved that he had acted maliciously and wilfully.[107] Wilson J. reasoned thus—

> "In very few instances is an officer answerable for what he does to the best of his judgment, in cases where he is compellable to act. But the action lies where the officer has an option whether he will act or not. Besides, I think than if an action were to be brought upon every occasion of this kind by every person whose vote was refused, it would be such an inconvenience as the law would not endure. A returning officer in such a case would be in a most perilous situation. This gentleman [i.e. the defendant] was put in a station where he was bound to act [i.e. decide whether to accept or reject the plaintiff's vote]; and if he acted to the best of his judgment it would be a great hardship that he should be answerable for the consequences, even though he were mistaken in point of law."[108]

Similar sentiments were expressed in *Cullen* v. *Morris*.[109] Abbott C.J. there emphasised that a returning officer's functions were neither wholly ministerial nor wholly judicial. They were a combination of both. Some discretion and judgment had to be exercised.[110]

In *Everett* v. *Griffiths*, a case in which damages were sought against the chairman of a Board of Guardians for negligence in making a determination that a person be committed to custody, pursuant to lunacy legislation, Lord Moulton observed—

> "If a man is required in the discharge of a public duty to make a decision which affects, by its legal consequences, the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle of our law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision in the discharge of his duty to the public and then to leave him in peril by reason of the consequences to others of that decision. In the opinion of some of the noble Lords whose opinions have already been given this is expressed by saying that you cannot attack a man for doing a judicial act without alleging and proving malice or mala fides. I wish to avoid the use of the words 'judicial act', not because I think them unsuitable, but because there are varying degrees of protection given in respect of the performance of the judicial acts according to the judicial position of the person performing them, and I wish to avoid any discussion as to matters of this kind and to rest my judgment directly upon what I believe to be the universal rule applicable in all cases, which is that which I have stated above."[111]

[106] 102 E.R. 217, 218 note.
[107] Ibid.
[108] Ibid.
[109] (1819) 2 Starke 577; 171 E.R. 741.
[110] 2 Starke 577, 587; 171 E.R. 741, 744.
[111] [1921] 1 A.C. 631, 695–6.

There is no assurance that the wider immunity from suit accorded to judges of inferior courts since *Sirros* v. *Moore*[112] will be extended to persons and bodies which do not exercise judicial functions in the strict sense[113] so as to protect them against civil liability except when it can be shown that jurisdiction has knowingly been exceeded. It may be thought that the policies which inform the principle of judicial immunity do not apply, or apply with the same force, to agencies which do not exercise judicial powers in the strict sense.[114] Were this view to be taken, the question would still remain whether certain classes of officials should continue to be accorded the same protection as was, prior to *Sirros* v. *Moore*, accorded to members of inferior courts.

The question of who, in a particular case, is entitled to rely on judicial immunity from suit should not, and probably does not, depend on the cause of action alleged. If, therefore, the revised law on judicial immunity from suit is to be applied to certain classes of bodies which are not courts of law in the strict sense, universally applicable criteria as to who can claim judicial immunity must be devised. The criteria which would probably be regarded as most appropriate are those applied in determining whether proceedings are relevantly judicial in character to attract absolute privilege under the common law of defamation.[115] Adoption of these criteria would at least serve to limit the range of defendants who could claim the wider immunity from suit now accorded to judges. Their adoption would also ensure that the wider immunity could not be claimed merely because a defendant was invested with a discretionary power or a power which had to be exercised in accordance with the principles of natural justice.

Even if the operation of the new judicial immunity were to be confined in the manner suggested, it would not follow that persons and bodies exercising discretionary powers, but who could not claim judicial immunity, would not be protected against civil liability. It is possible that persons and bodies which, prior to *Sirros* v. *Moore*,[116] could have claimed the same protection as members of inferior courts would still be held entitled to claim that limited protection and would thus be regarded as immune from liability in respect of acts done in good faith within jurisdiction. But what characteristics would a person or body need to exhibit to be entitled to that measure of protection? And should that protection extend to cases where the wrong alleged was, or arose out of, breach of a duty to afford a fair hearing? Unfortunately, the authorities do not yield definitive answers.

In *Partridge* v. *The General Council of Medical Education and Registration of the United Kingdom*,[117] the Court of Appeal seems, in effect, to have decided that the limited immunity from civil liability which, prior to *Sirros* v.

[112] [1975] Q.B. 118.
[113] I.e. in the sense used in constitutional cases and in *Attorney-General* v. *British Broadcasting Corporation* [1981] A.C. 303.
[114] For a recent discussion of the policies see Kirby P.'s judgment in *Rajski* v. *Powell* (1987) 11 N.S.W.L.R. 522, 534–6.
[115] See *Trapp* v. *Mackie* [1979] 1 W.L.R. 377.
[116] [1975] Q.B. 118.
[117] (1890) 25 Q.B.D. 90.

Moore,[118] was enjoyed by members of inferior courts was enjoyed also by any body exercising a statutory discretion.

In that case action had been brought for unlawfully and maliciously causing the plaintiff's name to be removed from the register of dentists kept under the *Dentists Act* 1878. The plaintiff's name had been erased from the register, at the Council's direction, after it had been informed that the Royal College of Surgeons in Ireland had withdrawn the diploma which it had previously conferred on the plaintiff. In acting as it did, the Council did not, apparently, purport to act under the section in the statute, s.13, which empowered it to erase entries from the register in specified circumstances, e.g. a finding of guilt of infamous or disgraceful conduct in a professional respect. Rather it appeared to rely on a provision — s.11(5) — which obliged the registrar to conform with any orders made by the Council under the Act, and to any special directions given by the Council. Its direction was made without any prior warning to the plaintiff.

Prior to the institution of the action for damages, Partridge had obtained a writ of mandamus to restore his name to the register.[119] The writ was granted on the ground that the withdrawal of the plaintiff's diploma was not of itself a ground for removing his name from the register.[120] But, in the subsequent action it was held that the Council could not be held liable to pay damages, in the absence of proof of malice. The reasoning of the Court of Appeal was, essentially as follows. Under the Act the Council did have power to direct erasure of entries from the register. That power was not ministerial, but discretionary.[121] Although the Council had proceeded under the wrong section of the Act, it had nevertheless purported to proceed under the Act. It could not be held liable for an act done in good faith in purported exercise of a discretionary power. The general principle applied was summed up by Lord Esher M.R. when he said —[122]

> "when a public duty is imposed by Act of Parliament upon a body of persons, which duty consists in the exercise of a discretion, it cannot be said that the exercise of that discretion is a merely ministerial act. If what the defendants did cannot be considered to be merely ministerial, then I think for the purposes of the question, whether they are protected from an action, it must be considered as judicial . . . [A] body such as the defendants can only be made subject to an action for things which they have done erroneously without malice in carrying out their duties under the Act, if it can be shown that they were acting merely ministerially."

No authorities were cited in support of this proposition, though in argument[123] the Court was referred to *Ashby* v. *White*,[124] *Cullen* v. *Morris*[125] and *Tozer* v. *Child*.[126]

[118] See fn. 116 supra.
[119] *Ex parte Partridge* (1887) 19 Q.B.D. 467.
[120] But it was still open to the Council to proceed under s.13.
[121] (1890) 25 Q.B.D. 90, 96, 98.
[122] Id. 96.
[123] Id. 93.
[124] (1703) 2 Ld Raym. 938; (1704) 3 Ld Raym. 320; 92 E.R. 126, 710.
[125] (1819) 2 Starke 577; 171 E.R. 741.
[126] (1857) 7 E. & B. 377; 119 E.R. 1286.

Several points need to be made about *Partridge's* case. First, Partridge was not claiming damages for breach of a right to a fair hearing. His claim was rather in respect of unlawful removal of his name from the register and malice was alleged (but not proved) which seems to suggest that the cause of action was misfeasance in a public office. Secondly, counsel for Partridge argued that the function the Council was purporting to exercise when it directed that Partridge's name be erased from the register was purely ministerial. That seems to suggest that it was accepted that the Council was entitled to the same protection from civil liability as members of inferior courts. Thirdly, although the Court of Appeal did not expressly equate the Council with an inferior court of law, or even advert to the distinction between acting within and acting without jurisdiction, its decision effectively allowed the Council the same degree of protection against civil liability as was then enjoyed by members of inferior courts. And fourthly, there was no doubt that, had the Council proceeded under the applicable provisions of the Act, Partridge was entitled to be heard.

I mention these features of *Partridge's* case because there are other, prior English decisions in which plaintiffs had been awarded damages for wrongs other than misfeasance in a public office, primarily because the defendant had, in exercising a statutory discretion to the plaintiff's detriment, violated the plaintiff's right to a fair hearing. What distinguishes these prior cases from *Partridge's* case, apart from the fact that the cause of action in each of them was different, is that the defence of judicial immunity or quasi-judicial immunity from suit was not even raised.

Take, for example, *Cooper* v. *Wandsworth Board of Works*.[127] There the defendant Board was held liable in trespass for causing the plaintiff's half-completed house to be demolished. The Board pleaded the defence of a statutory authority. It relied on a statutory provision which required that a person intending to build a house give seven days' notice to the Board before beginning construction and which empowered the Board, in default of such notice, to demolish. The exercise of that power was held to be subject to a requirement that the person alleged to be in default be afforded a fair hearing before a decision was made and executed. This was because the power was one which authorised interference with proprietary rights. Failure to comply with the fair hearing requirement destroyed the defence of statutory authority.

Neither in the reasons for judgment nor in the reported arguments of counsel was there any suggestion that the Board sought to resist liability by recourse to common law principles protecting officials against civil liability on account of the nature of the powers reposed in them. On the other hand, the reasons for judgment indicate that the judges acknowledged that the power relied on by the Board was discretionary. According to Erle C.J., the Board was exercising a "judicial discretion";[128] according to Willes J., it was exercising a judicial power.[129] In so characterising the Board's function, Erle C.J. and Willes J. seem to have equated judicial powers with powers to make

[127] (1863) 14 C.B. (N.S.) 180; 143 E.R. 414.
[128] 14 C.B. (N.S.) 180, 189; 143 E.R. 414, 418.
[129] 14 C.B. (N.S.) 180, 191; 143 E.R. 414, 418.

decisions affecting legal rights and liabilities and to do so with reference to the facts of individual cases. They were clearly not invoking the concept of judicial authority to determine whether the Board was entitled to rely on judicial immunity from suit. For Byles J., on the other hand, it was immaterial whether the Board's power was characterised as judicial or ministerial.[130] The power could not validly be exercised unless the person whose proprietary rights stood to be adversely affected was afforded a fair hearing, and failure to accord a fair hearing defeated the defence of statutory authority.

Cooper's case, it should be said, was not the first in which an English court had, in a civil suit, ruled that breach of duty to decide in accordance with the principles of natural justice rendered a decision invalid and thereby destroyed a defence of legal authority. In the prior cases,[131] however, the defendants were not the persons who had decided in contravention of that duty, but rather persons appointed to enforce invalid orders, in each case orders for the sequestration of profits attaching to a benefice. In both cases the plaintiff, the occupant of the benefice, succeeded in his action for money had and received.

Cooper's case is still regarded as a leading authority on the implication of rights to fair hearings and its correctness on the question of whether damages for trespass were recoverable has not been challenged. But if, as seems to have been the case, the statutory power the Wandsworth Board of Works purported to exercise was discretionary, the Court's decision on the issue of civil liability is difficult to reconcile with that of the Court of Appeal in *Partridge's* case.[132] The causes of action in the two cases were admittedly different: trespass to land in *Cooper's* case and misfeasance in a public office in *Partridge's* case, the former being a tort of relatively strict liability, the latter being a tort involving a high degree of fault, proof of which fell on the plaintiff. From the defendants' point of view claims to protection against liability on account of unintentional violations of rights to a hearing would, in my opinion, have been equally defensible. From the plaintiffs' point of view, the only distinguishable features of the two cases were that, in *Cooper's* case, the damage was done by subtraction from a proprietary right and was damage which could not be remedied save by award of compensation, whereas in *Partridge's* case the damage was done by an unauthorised withdrawal of a necessary license to practise a profession prohibited, under pain of criminal sanctions, save under licence.

Modern case law to do with implication or attribution of duties to accord fair hearings has long since discarded the notion that such duties arise only when the proprietory rights, or rights in the name of liberty of the person, stand to be adversely affected by exercise of governmental powers. The modern case-law on rights to procedural fairness rather takes notice of judicially noticeable facts concerning the impact of statutory, regulatory law on the facility of individuals to engage in income-earning activities of their

[130] 14 C.B. (N.S.) 180, 194; 143 E.R. 414, 420.
[131] *Capel* v. *Child* (1832) 2 C. & J. 558; 149 E.R. 235; *Bonaker* v. *Evans* (1850) 16 Q.B. 163; 117 E.R. 840.
[132] (1890) 25 Q.B.D. 90.

choice which are not prohibited under the common law. That same body of case-law has even accommodated claims to fair hearings before decisions are made to withdraw benefits or entitlements which exist solely by virtue of decisions made in exercise of governmental powers, e.g. decisions made in exercise of statutory powers to grant monetary payments.

Summary

The main concern of this part of this article has been with judicial and quasi-judicial immunities from suit and the extent to which they may protect defendants who are sued either for breach of a duty to afford a fair hearing or for independent wrongs which arise from breach of such a duty. The position at common law since *Sirros* v. *Moore*[133] seems to be as follows. Unless breach of a duty to accord a fair hearing is characterised as breach of a purely ministerial duty, which is unlikely, those who are entitled to judicial immunities from suit cannot be fixed with civil liability on account of breach of that duty. Nor can they be held liable for other wrongs which result from breach of the duty unless there is, in addition, a knowing assumption of a power or jurisdiction which does not exist. Breach of the duty to afford a fair hearing will, for the purposes of the judicial immunity, continue to be regarded as an error within jurisdiction.

What, apart from statutory expressions of it,[134] remains of the old law regarding the immunity from suit of members of inferior courts has yet to be determined. The question of whether or not there are still bodies, other than courts, the members of which can still claim the limited immunity from civil action previously enjoyed by judges of inferior court was not considered in *Sirros* v. *Moore*[135] or in the later cases in which *Sirros* v. *Moore* was followed.[136]

Courts today would probably not dissent from the proposition that many officials, who are not, strictly speaking, judges, have just claims to protection against civil liability, notwithstanding that, for the purposes of the law applied to those officials by courts exercising a supervisory jurisdiction, their acts are characterised as *ultra vires*, in excess of jurisdiction or in breach of duties which may be enforced by mandamus, injunction or like remedies. The pre *Sirros* v. *Moore* cases which clothed officials exercising discretionary powers with the same immunity from suit as was enjoyed by members of inferior courts were, it is true, often cases in which no one could have been held vicariously liable for the defendant's torts. The liability, if any, would have to be borne by the defendant alone. But that would still be the position today where the alleged wrong by the defendant official arose out of the exercise of an independent discretion.[137]

[133] [1975] Q.B. 118.
[134] See fn. 86 supra.
[135] [1975] Q.B. 118.
[136] See fn. 84 supra.
[137] *Rajski* v. *Powell* [1987] 11 N.S.W.L.R. 522, 530–1; cf. *Law Reform (Vicarious Liability) Act* 1983 (N.S.W.) and *Justices of the Peace Act* 1979 (Eng.), s.53 which provides for indemnification of justices against whom damages have been awarded. On the inde-

Assuming that *Sirros* v. *Moore* has not withdrawn from officials invested with statutory discretions (not involving exercise of judicial power in the strict sense) the limited immunity from civil suit previously accorded to members of inferior courts, the question remains: Can that immunity be relied upon when the plaintiff's claim to damages depends on proof that the defendant has denied him his right to a fair hearing? The answer to that question depends on whether, for the purposes of determining civil liability, breach of such a duty is or should be regarded as involving an excess of jurisdiction. There is a clear conflict between nineteenth century judicial opinions on this question and the views expressed by the majority of the House of Lords in *In re McC.*[138] How that conflict should be resolved is discussed in the last part of the article.

PROTECTION AGAINST LIABILITY: STATUTORY

So far I have dealt only with protections against civil liability under the common law. Nowadays persons contemplating civil actions against officials often need to have regard to statutory protections against civil liability. Depending on how it has been framed, a statutory protection clause may afford almost complete immunity from liability. It may be expressed to give the same protection as is given to judges of a named court.[139] It may provide that an official of a designated class is not liable to an action or other proceedings for damages for or in relation to an act done or omitted to be done in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power or authority, conferred on officials of that class by the statute.[140]

Statutory clauses of the latter variety afford substantial protection against liability. If what the person relying on the clause has done is something of a kind which broadly falls within the power conferred by the statute, and if that person has acted in the honest belief that he is exercising power under the Act and for the purposes of the Act, he is protected against liability.[141] The burden

pendent discretion rule see M. Aronson and H. Whitmore, *Public Torts and Contracts* (Sydney, Law Book Co., 1982) 24–6.

[138] [1985] A.C. 528. See pp. 397–8 supra.

[139] See e.g. *Administrative Appeals Tribunal Act* 1975, s.60; *Broadcasting Act* 1942, s.23(1); *Environment Protection (Impact of Proposals) Act* 1974, s.19; *Industries Assistance Commission Act* 1973, s.38; *Royal Commissions Act* 1902, s.7; *Trade Practices Act* 1974, s.38 (Cth).

Query whether statutory protective clauses enacted before *Sirros* v. *Moore* [1975] Q.B. 118 which give the same protection as was then enjoyed by the named superior court are to be read down in the light of that case.

[140] E.g. *Human Rights and Equal Opportunity Commission Act* 1981 (Cth), s.33(1).

There are numerous variants of this type of provision. See e.g. *Ombudsman Act* 1975 (Cth), s.33(1) and *Ombudsman Act* 1973 (Vic.), s.29(1). Justices' protection legislation provides further examples of delimitation of liability techniques. See fn. 86 supra.

[141] See e.g. *McLaughlin* v. *Fosbery* (1904) 1 C.L.R. 546; *Hamilton* v. *Halesworth* (1937) 58 C.L.R. 369; *Little* v. *Commonwealth* (1947) 75 C.L.R. 94; *Trobridge* v. *Hardy* (1955) 94 C.L.R. 147. On judicial interpretations of statutory protection clauses generally see M. Aronson and H. Whitmore, op. cit. 147–53, 162–73.

of proving lack of good faith, or malice, if that is required, falls on the plaintiff.[142]

MISFEASANCE IN A PUBLIC OFFICE

Duties to accord a fair hearing are typically duties which accompany the exercise of judicial powers, in the strict sense, and the exercise of statutory powers which involve assessment of individual cases according to predetermined rules or criteria. Very often those on whom the duty falls will be persons who can claim judicial or quasi-judicial immunity from suit. This means that in many cases a plaintiff whose claim to damages rests primarily on violation of his right to a fair hearing will have little or no prospect of recovery unless he can establish that the case falls outside the zone of immunity and does so because the defendant has been guilty of the tort of misfeasance in a public office.

To establish that a defendant is liable to pay damages for the tort of misfeasance in a public office, the plaintiff needs to prove the following —

(a) The defendant holds an office the occupant of which owes "duties to members of the public as to how the office shall be exercised";[143]
(b) The defendant did an act amounting to an abuse of the office;[144]
(c) The defendant did that act maliciously or knowing it to be an abuse of the office;[145]
(d) The plaintiff is "the member of the public, or one of the members of the public, to whom the holder of the office owed a duty not to commit the particular abuse complained of";[146]
(e) The plaintiff suffered damage in consequence of the abuse of the office.[147]

These elements of liability will now be considered in more detail.

The Abuse

What can and cannot amount to abuse of a public office is not yet altogether clear. The decided cases indicate that there can be an abuse of office if the defendant has assumed a power or jurisdiction of a kind he does not possess[148] or has exercised a power for an improper purpose.[149] If the voters' rights

[142] *Hamilton* v. *Halesworth* (1937) 58 C.L.R. 369.
[143] *Tampion* v. *Anderson* [1973] V.R. 715, 720.
[144] *Farrington* v. *Thomson and Bridgland* [1959] V.R. 286, 293.
[145] Ibid. See also text accompanying notes 167–169 infra.
[146] *Tampion* v. *Anderson* [1973] V.R. 715, 720.
[147] See fn. 143 supra. See generally M. Aronson and H. Whitmore, op. cit. 120–3; Wade, op. cit. 777–83.
[148] *Farrington* v. *Thomson and Bridgland* [1959] V.R. 286; *Wood* v. *Blair and Helmsley Rural District Council* [1957] *Administrative Law Rev.* 243; *Roncarelli* v. *Duplessis* (1959) 16 D.L.R. (2d) 689; *McGillivray* v. *Kimber* (1915) 26 D.L.R. 164.
[149] *Bourgoin SA* v. *Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716; *The Mihalis* [1984] 2 Lloyds Rep. 525.

cases[150] are regarded as cases in which the cause of action was misfeasance in a public office, then it follows that the abuse may consist also of a breach of duty to do something which is required to give effect to a plaintiff's rights. In several cases it seems to have been assumed that the abuse may consist also of exercise of a power in breach of the defendant's duty to afford the plaintiff a fair hearing.[151] In the most recent of these cases, *Dunlop* v. *Woollahra Municipal Council*,[152] there was certainly no suggestion that exercise of a power in breach of such a duty could never be regarded as an abuse of office.

Often the abuse alleged will have invalidated the purported exercise of a statutory power. But the courts have never stated that liability for the tort depends on proof that the act complained of is invalid or is in excess of power or jurisdiction. Indeed the old cases concerning the immunity of inferior court judges from civil liability recognised that, for the purposes of the misfeasance action, the act complained of could be an act within jurisdiction. Immunity was lost and liability potentially attracted by the malicious exercise of the jurisdiction.

No case appears to have arisen in which it has been necessary to decide whether the mere breach of a duty to afford a hearing can constitute an abuse of office. This is perhaps not surprising for in most cases in which the duty was not performed the defendant had also taken some further action injurious to the plaintiff. If exercise of a power in breach of a duty to afford a fair hearing can be an element in establishing abuse of office, there can be no reason in principle why breach of the duty alone cannot equally be regarded as an abuse.

The Defendant

The only persons who may be held liable for a tort of misfeasance in a public office are persons who hold an office the occupant of which owes "duties to members of the public as to how the office shall be exercised".[153] Liability can arise only in respect of the performance of those duties. The existence of the requisite element of office will normally be indicated by statutory provisions which attach particular powers, duties and functions either to the holder for the time being of a designated position[154] or to a designated entity, incorporated or unincorporated.[155] Presumably a person can be relevantly an office-holder if he exercises powers validly delegated to him by the primary respository of the power.

[150] See fnn. 49 and 50 supra. The cases were so regarded in the first case referred to in fn. 149 supra.

[151] *Harman* v. *Tappenden* (1801) 1 East 555; 102 E.R. 214; *Ackerley* v. *Parkinson* (1815) 3 M. & S. 411; 105 E.R. 665; *Pemberton* v. *Attorney-General* [1978] Tas. S.R. 1; *Dunlop* v. *Woollahra Municipal Council* [1982] A.C. 158.

[152] [1982] A.C. 158.

[153] See fn. 143 supra.

[154] On the concept of a public office see *Edwards (Inspector of Taxes)* v. *Clinch* [1981] 3 W.L.R. 707, 710–11; *Mitchell and Edon* v. *Ross* [1960] Ch. 498, 530; *Palais Parking Station Pty Ltd* v. *Shea* (1977) 16 S.A.S.R. 350, 359.

[155] *Dunlop* v. *Woollahra Municipal Council* [1982] A.C. 158, 172: *Jones* v. *Swansea City Council* [1990] 1 W.L.R. 54.

What then of the requirement that the defendant should owe duties to the public? There is no doubt that public duties for the purpose of the tort of misfeasance in a public office include duties associated with the performance of licensing functions and with the adjudication of disputes between individuals.[156] While courts have not said as much, it may be that the general test to be applied is whether the duty in question is one capable of being enforced by mandamus or other prerogative remedies or by injunction at the suit of an Attorney-General, suing as *parens patriae*. There are, however, judicial opinions in which a more restrictive view has been taken in relation to whether the office holder's duties in the performance of the office are relevantly duties owed to members of the public.

For example, in *Tampion* v. *Anderson*[157] at first instance, McInerney J. held that a person appointed as a board of inquiry under Victoria's *Evidence Act* 1958 was not the holder of a public office for "though he was appointed by the Governor in Council and was required to report to the Governor or, alternatively, the Governor in Council the nature of the functions committed to him by the Order in Council, which appointed him [to inquire into and report on certain matters], ... [did] not ... bring him within the concept of a public officer".[158] On appeal, the Full Court neither endorsed nor expressly rejected this analysis, though since it conceded that the Board owed duties to witnesses summoned pursuant to the provisions of the Act, it must have impliedly rejected it. There is little doubt that powers of the kind which the Act gives to boards of inquiry are ones which, in some circumstances, can attract fair hearing requirements. That being so, it can hardly be said that such a board never owes duties to members of the public.

Another example of what, it seems to me, to be an altogether too restrictive view of what, for the purposes of the misfeasance tort, counts as a public office and a public duty appears in Neasey J.'s opinion in *Pemberton* v. *Attorney-General*.[159]

In this case the plaintiff sought, *inter alia*, damages against Tasmania's Director-General of Education for dismissing him from the State's teaching service. The Full Court of the Supreme Court held the dismissal to be invalid because the Director-General had failed to comply with a regulation which, in substance, required the Director-General not to exercise his power of dismissal without giving a teacher an opportunity to answer the case against him. None of the judges thought the action for damages for misfeasance could be sustained, but for different reasons. Chambers and Nettlefold JJ. found that the requisite mental element had not been established. Neasey J., on the other hand, considered that neither plaintiff nor defendant came within the scope of the tort of misfeasance in a public office. In his view, the Director-General, albeit a statutory officer, was not, when exercising his power to dismiss officers of the teaching service, "exercising a public office"; nor was the

[156] See fn. 166 infra.
[157] [1973] V.R. 321.
[158] Id. 337.
[159] [1978] Tas. S.R. 1.

plaintiff "a member of the public in the relevant sense".[160] The relationship between the plaintiff "and the Director-General, and in particular the relationship in question in this action, arose and was regulated entirely by the provisions of the Act [the *Education Act* 1932] and the regulations made thereunder".[161]

What Neasey J. seems to have been saying was that legislation governing the powers and duties of officers of governmental services, *inter se*, does not, at least for the purposes of the misfeasance tort, create either public offices or public duties. He relied on a number of old authorities.[162] But none of these was directly concerned with legal relationships between officers of a governmental organisation or service. They were concerned with dealings between officers of government and members of the general public. There was therefore no occasion for the courts to have considered whether a case like Pemberton's could or could not give rise to liability for the tort of misfeasance in a public office.

Neasey J. offered no rational basis for excluding a case like Pemberton's from the potential reach of the misfeasance tort. He did not advert to how the concepts of public office and public duty have been interpreted in other legal contexts. In particular he did not consider the illogicality or even absurdity of treating a case such as Pemberton's as distinctively public for the purpose of the exercise of the Supreme Court's jurisdiction to award prerogative remedies, but as non public when the remedy sought was damages for misfeasance in a public office.

Duty to the Plaintiff

In *Tampion* v. *Anderson*[163] the Victorian Full Court stated that, to succeed in an action for misfeasance of office, the plaintiff "must show he was a member of the public, or one of the members of the public, to whom the holder of the office owed a duty not to commit the particular abuse complained of".[164] The Court did not explain what test was to be applied in determining whether the requisite duty to the plaintiff existed, though it is arguable that the test it in fact applied when it decided that the plaintiff's statement of claim failed to allege facts sufficient to establish the duty was: Would the plaintiff have had standing to sue for a public law remedy?

The abuse alleged by the plaintiff was failure by the board of inquiry, and counsel assisting, to confine the deliberations, addresses, comments, report and recommendations to matters within the board's terms of reference. The Full Court agreed that, as the board had power under the *Evidence Act* 1958 to require the giving of evidence on oath or affirmation, it owed a duty to witnesses summoned to appear before it not to abuse that power by asking questions not germane to the board's terms of reference. But the plaintiff had

[160] Id. 14.
[161] Ibid.
[162] *Henley* v. *The Mayor and Burgesses of Lyme* (1828) Bing. 91, 107–8; 130 E.R. 995; 1 *Comyn's Digest* (New York, Collins & Hannay, 1824) 406–7.
[163] [1973] V.R. 715.
[164] Id. 720.

not made specific allegations relating to the questioning of himself when he had appeared as witness. His allegations related rather to the general conduct of the inquiry. "In relation . . . to any questioning of persons other than the plaintiff himself", the Court said, "there can be no possible ground for saying that the Board owed the plaintiff any duty not to abuse its powers".[165]

Where the alleged abuse of office consists of, or arises from, breach of a duty to afford a fair hearing, there can be no doubt that the requisite duty relationship is established wherever the plaintiff shows that the defendant owed that duty to him personally.

The Mental Element

The greatest hurdle a plaintiff suing for misfeasance in a public office has to surmount is that of proving the required fault on the part of the defendant. Some of the older formulations of the elements of liability suggested that the plaintiff needed to prove that the abuse of power was malicious. Malice (or bad faith) was also the term consistently used in formulations of the limited immunity from suit accorded to members of inferior courts and others in like case. (It was, and still is, a term used also in statutory provisions conferring protection against liability.) But the old case law failed to yield any clear concept of what, in this context, malice signified.[166]

The prevailing view now is that it is enough for the plaintiff to prove that the defendant "acted with knowledge that what he did was an abuse of his office".[167] In *Dunlop* v. *Woollahra Municipal Council*[168] the Judicial Committee of the Privy Council expressed its agreement with the conclusion of the trial judge "that, in the absence of malice, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is capable of amounting to such 'misfeasance' as is a necessary element in this tort".[169] The English Court of Appeal has interpreted this statement to mean that malice (in the sense of an intention to injure the plaintiff) and knowledge are alternatives.[170] The knowledge to be proved seems to be knowledge that what is done is beyond power or in breach of duty.

[165] Id. 721.

[166] See e.g. *Harman* v. *Tappenden* (1801) 1 East 555, 562–3; 102 E.R. 214, 217; *Partridge* v. *General Council of Medical Education and Registration of the United Kingdom* (1890) 25 Q.B.D. 90; *Roncarelli* v. *Duplessis* (1959) 16 D.L.R. (2d) 689, 706, 707; *Campbell* v. *Ramsay* [1968] 1 N.S.W.R. 425; *Takaro Properties Ltd* v. *Rowling* [1978] 2 N.Z.L.R. 314, 328, 338; *Lucas* v. *O'Reilly* (1979) 36 F.L.R. 102. Cf. *Ferguson* v. *Kinnoull* (1842) 9 Cl. & F. 251, 303–4, 321; 8 E.R. 412, 431, 435. Note also the distinction made in other contexts between malice in law and malice in fact, e.g. *Trobridge* v. *Hardy* (1955) 94 C.L.R. 147, 162, 171.

[167] *Farrington* v. *Thomson and Bridgland* [1959] V.R. 286, 293; *Little* v. *Law Institute of Victoria*, unreported, Supreme Court of Victoria, Full Court 16 May 1989 — transcript 20–3.

[168] [1982] A.C. 158.

[169] Id. 172.

[170] *Bourgoin SA* v. *Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716, 777; *Jones* v. *Swansea City Council* [1990] 1 W.L.R. 54, 69, 71. See also *R* v. Forsey 1988 S.L.T. 572 (H.L.) and *Calveley* v. *Chief Constable of the Merseyside Police* [1989] 2 W.L.R. 624, 632.

In *Farrington* v. *Thomson and Bridgland*[171] the plaintiff's case was materially assisted by admissions made by the defendants in the course of their evidence. But it is very likely that in many cases plaintiffs will not be able to establish a knowing abuse of office except by circumstantial evidence, that is to say, evidence from which the conclusion may be drawn that the defendant must have known that what was done was an abuse of the office.

Where the alleged abuse of office consists of, or arises from, breach of a duty to afford a fair hearing, proof that the duty was knowingly infringed is likely to be especially difficult. The very existence of the duty may be in genuine dispute, or may not have been established except by prior proceedings before a court exercising a supervisory jurisdiction. Even if the defendant knew that there was a duty to afford a fair hearing, his breach of the duty may have been, not that he made no attempt at all to discharge it, but that he failed to provide the kind of hearing that was required. Precisely what was required may not have been clear or readily ascertainable.

Unless the bases of liability for the misfeasance tort are broadened, a plaintiff's prospects of succeeding in a misfeasance action on account of a breach of a duty to afford a fair hearing must therefore be regarded as fairly remote. The question of whether a defendant should be liable if, in the circumstances, he could reasonably have been expected to know that what he did was an abuse of office, is considered in the concluding section of the article.

Damage

It is generally assumed that there can be no liability for misfeasance in a public office unless the plaintiff proves that actual damage has been suffered as a result of the abuse. Judicial formulations of the elements of the tort certainly suggest that actual damage is an essential ingredient of liability. A requirement that there be proof of actual damage is also consistent with the law governing liability when the cause of action is one that, formerly, would have been pursued by an action on the case. But there were exceptions to the general rule that a plaintiff suing on the case had to prove actual damage. Actual damage was not required to be proved where the plaintiff sued for libel, or in certain cases of slander,[172] or for wrongful deprivation of the right to vote[173] or for breach of an innkeeper's duty to provide accommodation.[174] If the voters' rights cases are regarded as ones in which the cause of action was misfeasance in a public office,[175] that would seem to indicate that, depending on the nature of the abuse of office alleged, there can be cases in which a plaintiff suing for misfeasance may recover without proof of actual damage. And could it not be argued that a right to a fair hearing is sufficiently analogous to a right to vote that, providing other elements of liability for mis-

[171] [1959] V.R. 286.
[172] Fleming, op. cit. 518–9.
[173] See p. 389 supra.
[174] *Constantine* v. *Imperial Hotels Ltd.* [1944] K.B. 693.
[175] As they were in *Bourgoin SA* v. *Ministry of Agriculture, Fisheries and Food* [1986] Q.B. 716, 737–8, 776.

feasance are present, deprivation of the right should be treated as actionable *per se*?

Certainly there will be some cases in which a plaintiff who has been denied a right to a fair hearing will find it extremely difficult to show that actual damage has been sustained as a result of denial of the right. For example, where is the loss to a plaintiff who has been wrongfully refused a discretionary licence to engage in an activity which is prohibited except under licence, a licence to which he has no right, and which might properly have been refused even if the plaintiff had been accorded his right to a hearing?[176] If the cause of action in *Zamulinski* v. *The Queen*[177] had been misfeasance in a public office, what actual damage could the plaintiff have claimed to have suffered in consequence of his not being accorded his right to a hearing prior to being dismissed from government service? As has already been noted,[178] the Court in that case found that the dismissal was not unlawful, having been effected in exercise of a power to dismiss at will. It concluded that the denial of the right to a fair hearing was actionable, but had difficulties when it came to identifying the factors which could and could not properly be taken into account in assessing the damages to be awarded. One factor to be considered was that had the plaintiff been granted a hearing, the dismissal might have been delayed. On the other hand, the evidence had shown that the plaintiff would have been dismissed in any event. Still damages had to be awarded for breach of the plaintiff's right, and those damages had to be more than nominal.[179]

Similar problems arose in *Hopson* v. *The Queen*,[180] a case very similar to *Zamulinski's*. Here the Court conceded that what might have happened had the plaintiff been accorded his statutory rights — the right to a hearing after suspension and another hearing prior to dismissal from government service — was a matter for speculation. On the other hand, it was probable that the plaintiff had incurred expenses in consequence of the defendant's breach of duty. And the Court thought it should also have regard to the importance of the rights in question and the need to discourage violations of the rights of others in like case.[181]

One difficulty which a plaintiff may have to overcome if actual damage has to be proved is that of establishing the necessary causal connection between the abuse complained of and the loss alleged. If the abuse of office has rendered the defendant's decision or order invalid, and that decision or order was one to revoke or suspend the plaintiff's licence, or one that required the plaintiff to take certain action or to desist from a certain course of conduct,

[176] There have been cases in which it has been held that malicious exercise of a discretion to refuse an application for a licence is not actionable — *Bassett* v. *Godschall* (1770) 3 Wils. K.B. 121; 95 E.R. 967; *Davis* v. *Bromley Corporation* [1908] 1 K.B. 170; *Wright* v. *Concord Municipal Council* (1937) 13 L.G.R. (N.S.W.) 183, 185; *Campbell* v. *Ramsey* [1968] 1 N.S.W.R. 425. Were damages to be awarded, the Court of Appeal reasoned in *Davis*, the court would, in effect be usurping the discretion of the licensing authority. Cf. *David* v. *Abdul Cader* [1963] 1 W.L.R. 834.

[177] (1957) 10 D.L.R. (2d) 685.

[178] See p. 388 supra.

[179] (1957) 10 D.L.R. (2d) 685, 698.

[180] [1966] Ex. C.R. 608.

[181] Id. 647–50.

the defendant may argue that the plaintiff could have ignored the decision or order, and that if he chose to submit to it, he was, in a sense, the author of his own loss.

This line of defence has succeeded in a number of cases, though most of them were not cases of misfeasance in a public office.[182] In *Wood* v. *Woad*,[183] for example, the plaintiff's action for damages for expulsion from membership of a mutual assurance association, in breach of a duty to afford a fair hearing, was dismissed on the basis that if there had been a breach of the duty, the expulsion was invalid and the plaintiff had not been deprived of membership of the association.

A similar argument was accepted by the Judicial Committee of the Privy Council, on appeal from New South Wales, in *Dunlop* v. *Woollahra Municipal Council*[184] in relation to a claim for damages for the negligence of a local government council in passing a resolution fixing a building line affecting the plaintiff's land. In prior proceedings before the State's Supreme Court it had been held that the resolution was invalid because it had been passed in violation of the plaintiff's right to be heard on the matter.[185] In those prior proceedings the Court had also held that a resolution of the Council to restrict the height of any building erected on the plaintiff's land was *ultra vires*. The plaintiff afterwards sued the Council for damages for financial loss alleged to have been sustained between the time the Council passed the invalid resolutions and the expiration of the time by which the Council could have appealed against the declarations of invalidity. The loss which the plaintiff claimed to have suffered in consequence of the invalid restrictions imposed by the Council was deprivation of the opportunity of selling the land at its true value.[186]

As regards the claim for negligence, the Judicial Committee did not find it necessary to decide whether the Council owed a duty of care to the plaintiff. It decided merely that even if the duty existed, it had not been infringed. Breach of a duty to afford a fair hearing, it was said, was not in itself a breach of duty of care.[187] The Committee went on to observe:

> "The effect of the failure [to comply with a duty to afford a fair hearing] is to render the exercise of the power void and the person complaining of the failure is in as good a position as the public authority to know that that is so. He can ignore the purported exercise of the power. It is incapable of affecting his legal rights."[188]

This statement is not easily reconciled with what the Judicial Committee had said in *Calvin* v. *Carr*[189] about the legal consequences of a breach of a duty

[182] *Polley* v. *Fordham* [1904] 2 K.B. 345, 358; *Stott* v. *Gamble* [1916] 2 K.B. 504; *Thompson* v. *New South Wales Branch of the British Medical Association* [1924] A.C. 764, 775; *McClintock* v. *Commonwealth* (1947) 75 C.L.R. 1, 18; *O'Connor* v. *Isaacs* [1956] 2 Q.B. 288.
[183] (1874) L.R. 9 Ex. 190.
[184] [1982] A.C. 158.
[185] *Dunlop* v. *Woollahra Municipal Council* [1975] 2 N.S.W.L.R. 446.
[186] [1982] A.C. 158, 168–9.
[187] Id. 171.
[188] Id. 172.
[189] [1980] A.C. 574.

to afford a fair hearing. It also runs counter to a substantial body of contemporary judicial opinion.[190] The statement, it is true, was made solely with reference to the plaintiff's action for negligence, but it was expressed in such general terms that it could equally well have been made in answer to the plaintiff's other, alternative counts, namely misfeasance in a public office and liability under the principle enunciated in *Beaudesert*.[191]

Even though the invalid resolutions in *Dunlop's* case were incapable of affecting the plaintiff's legal rights and might have been ignored by him, the connection between the Council's invalid acts and the loss which the plaintiff claimed to have sustained was rather speculative. Irrespective of whether the resolutions had been passed, the site could not have been developed without the Council's permission. No such permit had been granted.[192]

Dunlop's case is distinguishable from those in which the invalid act consists of a decision to suspend or cancel a licence or of an order to an individual either to take certain action or desist from certain conduct. Unless the decision or order is manifestly invalid, the individual affected by it will usually be well advised to treat it as valid and binding until such time as the question of validity is determined by a court of law. (There will also be cases in which the individual who has submitted to the decision or order will not have recognised that there is a question of validity until legal advice has been sought.) There is now ample judicial authority for the view that in situations such as those described, the plaintiff's submission to the invalid order or decision does not interrupt the chain of causation.[193]

In assessing the damages payable to a plaintiff who has sustained damage in consequence of an abuse of office, a court is, of course, entitled to have regard to the measures which the plaintiff could reasonably have been expected to take to mitigate his loss. In some cases, e.g. revocation or suspension of a licence or an order to desist from certain conduct, the plaintiff may reasonably be expected to have instituted judicial review proceedings to test the validity of the decision or order complained of or to have exercised a statutory right of appeal.[194]

[190] See text accompanying fn. 20 supra.

[191] *Beaudesert Shire Council* v. *Smith* (1966) 120 C.L.R. 145, 156.

[192] [1982] A.C. 158, 166–7.

[193] *McGillivray* v. *Kimber* (1915) 26 D.L.R. 164, 182; *Wood* v. *Blair* [1957] *Administrative Law Rev.* 243; *Farrington* v. *Thomson and Bridgland* [1959] V.R. 286, 294–7; *Roncarelli* v. *Duplessis* (1959) 16 D.L.R. (2d) 689, 705. See also *Abbott* v. *Sullivan* [1952] 1 K.B. 189, 197 (Lord Evershed M.R.), 201–2 (Denning L.J.); *Bonsor* v. *Musicians' Union* [1954] 1 Ch. 479, 513 (Denning L.J.). On general question see C. Harlow, *Compensation and Government Torts* (London, Sweet & Maxwell, 1982) 92–7, 135–41; Wade, op. cit. 347–8; Justice — All Souls, *Administrative Justice* (Oxford, Clarendon Press, 1988) para. 11.40. Query: Is the plaintiff's right to recover damages contingent on proof that, in the circumstances, he could reasonably be expected to have submitted to the decision or order? See *Central Canada Potash Co. Ltd* v. *Saskatchewan* (1978) 88 D.L.R. (3d) 609, 640–2.

[194] See J. McBride, "Damages as a Remedy for Unlawful Administrative Action" [1979] C.L.J. 323, 342–3 and H. Luntz, *Assessment of Damages for Personal Injury and Death* (2nd ed., Sydney, Butterworths, 1983) paras 1.10.01–1.10.08.

NEGLIGENCE

The decision of the Judicial Committee of the Privy Council in *Dunlop* v. *Woollahra Municipal Council*,[195] discussed earlier in this article,[196] suggests that denial of a right to a fair hearing will seldom if ever give rise to liability for negligence. The Judicial Committee did not, however, go so far as to say that a statutory function, exercise of which attracts a duty to accord natural justice, can never give rise to a duty of care.[197] It held merely "that failure by a public authority to give a person an adequate hearing before deciding to exercise a statutory power in a manner which will affect him or his property, cannot by itself amount to breach of a duty of care sounding in damages".[198] This conclusion was based on the dubious argument that since a failure to accord natural justice renders the exercise of the power void, the person to whom natural justice is denied can ignore the purported exercise of power.[199]

There is no good reason in principle why the existence of a duty to take care in the exercise of a statutory function should be negated merely because the exercise of the function is qualified by a duty to conform with the rules of natural justice. Persons and bodies invested with statutory functions can be under a duty to take care not to exceed their authority.[200] Where duties to accord natural justice exist, they operate as a limit on that authority. The existence of a duty to take care depends primarily on whether the defendant could reasonably have foreseen that carelessness on his part might be likely to cause harm to the plaintiff, and whether there is a sufficient relationship of proximity between plaintiff and defendant as regards both the type of activity alleged to be subject to the duty of care and the harm complained of, e.g. whether the harm is purely economic.[201]

The proximity test is not without difficulties,[202] but in cases in which the alleged negligence consists of acts or omissions in the course of exercising statutory functions in relation to a particular individual, e.g. the function of determining whether a benefit or licence is to be granted or withdrawn, the test may not be difficult to satisfy. On the other hand, there may be difficulties in establishing that injury of the kind of which the plaintiff complains was injury of a type which could reasonably have been foreseen by the defendant as likely to be suffered by the plaintiff if the function was not carried out with due care. A case in point is where a plaintiff submits that anxiety, distress, and

[195] [1982] A.C. 158.
[196] See pp. 407, 410, 413–4 supra.
[197] Cf. *Rowling* v. *Takaro Properties Ltd* [1988] 1 A.C. 473, 503.
[198] [1982] A.C. 158, 172.
[199] See pp. 413–4 supra.
[200] See *Rowling* v. *Takaro Properties Ltd* [1988] 1 A.C. 473; *Dorset Yacht Co. Ltd* v. *Home Office* [1970] A.C. 1004.
[201] *Jaensch* v. *Coffey* (1984) 155 C.L.R. 549, 583–7; *Sutherland Shire Council* v. *Heyman* (1985) 157 C.L.R. 424, 441, 461, 471, 495–7; *Stevens* v. *Brodribb Sawmilling Co. Pty Ltd* (1986) C.L.R. 16, 30, 45, 51; *San Sebastian Pty Ltd* v. *The Minister Administering the Environmental Planning and Assessment Act* (1986) 162 C.L.R. 340, 355; *Hawkins* v. *Clayton* (1988) 62 A.L.J.R. 240, 255–7.
[202] In the High Court of Australia, Brennan J. has expressed criticisms of the concept on several occasions, most recently in *Hawkins* v. *Clayton* (1988) 62 A.L.J.R. 240, 246–7.

injury to reputation is a likely consequence of careless performance of a function involving inquiry into an allegation of misconduct against the plaintiff.[203] Problems may also arise when the injury complained of is purely economic, for example, when the plaintiff claims damages in respect of legal and other expenses incurred in obtaining remedy on judicial review or an appeal[204], or loss of earnings between the time the defendant cancelled his occupational licence, invalidly, and the date on which the defendant's decision was quashed on judicial review.

Even where the forseeability/proximity test is satisfied, a defendant sued for negligence in the performance of a statutory function may escape liability because the existence of a duty of care is negatived on grounds of public policy.

While reservations have been expressed about the appropriateness of the two-stage test for determining the existence of a duty of care formulated by Lord Wilberforce in *Anns* v. *Merton London Borough Council*[205] — the foreseeability/proximity stage and the policy stage — the courts have continued to have regard to considerations of policy when the very existence of a duty of care is contested on grounds other than absence of reasonable forseeability of harm or of proximity between the parties. Their readiness to do so has been particularly evident in cases where negligence is alleged against public officers and bodies in the performance of governmental functions. In such cases the duty issue may come down to whether, in the court's opinion, it is "just and reasonable" that a duty of care be imposed on the defendant.[206]

In none of the cases post-*Anns* has it been suggested that it would not be just and reasonable to impose a duty of care in relation to the exercise of a statutory function merely because the function is one required to be exercised in accordance with the rules of natural justice.[207] On the other hand, a number of factors which have been identified as relevant in determining whether it is just and reasonable to impose a duty of care in relation to the exercise of a statutory function would clearly be relevant in cases where the function in question is required to be performed in accordance with the rules of natural justice.

Factors which have been identified as militating against the imposition of a duty of care have included —

[203] See *Calveley* v. *Chief Constable of Merseyside Police* [1989] 2 W.L.R. 624, 630. See also *Jones* v. *Department of Employment* [1988] 2 W.L.R. 493.

[204] See cases referred to in fn. 203 supra.

[205] [1978] A.C. 728, 751–2. See *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd* [1985] A.C. 210, 240; *Leigh and Sillivan Ltd* v. *Aliakmon Shipping Co. Ltd* [1986] A.C. 785, 815; *Curran* v. *Northern Ireland Co-ownership Housing Association Ltd* [1987] A.C. 718, 726; *Yuen Kun Yeu* v. *Attorney-General of Hong Kong* [1988] A.C. 175; *Sutherland Shire Council* v. *Heyman* (1985) 157 C.L.R. 424; *Rowling* v. *Takaro Properties Ltd* [1988] 1 A.C. 473, 501.

[206] *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson & Co. Ltd* [1985] A.C. 210, 240–1; *Jones* v. *Department of Employment* [1988] 2 W.L.R. 493.

[207] Cf. *Yuen Kun Yeu* v. *Attorney-General of Hong Kong* [1988] A.C. 175, 195 where in holding that no duty of care was owed to depositors by the Commissioner of Deposit-Taking Companies, the Judicial Committee appears to have attached some significance to the fact that, in exercise of the power to refuse registration, or revoke or suspend registration, the Commissioner was exercising a quasi-judicial function.

(a) The likelihood or possibility that if a duty of care were to be imposed, the processes of decision-making would be prolonged;[208]
(b) In cases where the function entails investigation of allegations of crime or misconduct for which sanctions may be imposed, the danger that potential liability for misconduct might deter "fearless and efficient discharge" of the function;[209]
(c) The availability of remedy for the error complained of by way of application for judicial review or exercise of a statutory right to appeal;[210]
(d) The probability that the kind of error complained of will rarely be attributable to negligence;[211]
(e) The danger that were an action for negligence to be open, the court trying that action would be drawn into determining the correctness of a decision which is judicially reviewable only in a supervisory judicial jurisdiction.[212]

Particular statutory functions which have been held not to be attended by a duty of care are that of determining claims to unemployment benefit[213] and that of investigating claims of misconduct against police officers.[214] In the former case paramount considerations were that the statute in question gave disappointed claimants a right to appeal (which right the particular plaintiff had already exercised, with success) and that it had also provided that, subject to this right, determinations of adjudicating officers were to be final. If liability for negligence were to be imposed, the Court of Appeal reasoned, a court deciding a negligence action would be drawn into examination of the correctness of the determination of the adjudicating officer, contrary to the finality clause.[215] The main reason why the function of investigating complaints of police misconduct was held not to be subject to a duty of care was that potential liability for negligence could be a deterrent to fearless discharge of the function, a function similar to that of investigating criminal suspects.[216]

Whether a duty of care can arise in the type of case exemplified by *Rowling* v. *Takaro Properties Ltd*[217] is now in some doubt. In that case the plaintiff company had sought the requisite ministerial consent to issue shares to a foreign company. The Minister's decision to refuse consent had been held invalid on the ground that the Minister had misconstrued the governing

[208] *Rowling* v. *Takaro Properties Ltd* [1988] 1 A.C. 473, 502; see also *Yuen Kun Yeu* v. *Attorney-General of Hong Kong* [1988] A.C. 175, 198.
[209] *Calveley* v. *Chief Constable of Merseyside Police* [1989] 2 W.L.R. 624, 631. See also *Hill* v. *Chief Constable of West Yorkshire* [1989] 1 A.C. 53, 63–4.
[210] *Rowling* v. *Takaro Properties Ltd* [1988] 1 A.C. 473, 502; *Jones* v. *Department of Employment* [1988] 2 W.L.R. 493.
[211] *Rowling* v. *Takaro Properties Ltd* [1988] 1 A.C. 473, 502.
[212] *Jones* v. *Department of Employment* [1988] 2 W.L.R. 493; *Calveley* v. *Chief Constable of Merseyside Police* [1989] 2 W.L.R. 624, 630.
[213] *Jones* v. *Department of Employment* [1988] 2 W.L.R. 493.
[214] *Calveley* v. *Chief Constable of Merseyside Police* [1989] 2 W.L.R. 624.
[215] For a critique of this aspect of the case see W.J. Swadling, "Liability for Negligent Refusal of Unemployment Benefit" [1988] *Public Law* 328.
[216] [1989] 2 W.L.R. 624, 630–1.
[217] [1988] 1 A.C. 473.

legislation and thereby an irrelevant consideration had been taken into account.[218] In the ensuing negligence action by the company for economic loss sustained by reason of the Minister's refusal of consent, the New Zealand Court of Appeal held the Minister liable and awarded $300,000 damages.[219] On the further appeal, the Judicial Committee of the Privy Council did not find it necessary to decide whether the Minister owed a duty of care to the plaintiff, for even if such a duty existed, it had not been breached.[220] The Committee nevertheless identified several factors considered to be of importance in deciding whether it was appropriate that a duty of care be imposed. They were —

(a) "[T]he only effect of a negligent decision, such as is here alleged to have been made, is delay". This was because of the availability of judicial review of the decision. If "the alleged error of law is so serious that it can be described as negligent, the decision will surely be quashed" on review.[221]
(b) It was likely to be very rare that an error of law consisting of misconstruction of legislation could be characterised as negligent.[222]
(c) If it were known that liability for negligence might be imposed because a minister had misconstrued legislation, and thereby acted *ultra vires*, public servants might "go to extreme lengths in ensuring that legal advice ... is obtained before decisions are taken, thereby leading to delay in a considerable number of cases".[223]
(d) It was "very difficult to identify any particular case in which it can properly be said that a minister is under a duty to seek legal advice".[224]

The Judicial Committee also observed that the legislation under which the Minister had acted had been "enacted not for the benefit of applicants for consent to share issues but for the protection of the community as a whole", and that if the Minister acted *ultra vires* and delay thereby occurred before he made an *intra vires* decision, the effect of the delay would "only be to postpone the receipt by the plaintiff of a benefit which he has no absolute right to receive".[225] Whether the case for imposing a duty of care would have been stronger had the plaintiff been entitled to grant of the benefit sought on satisfying certain qualifications, the Judicial Committee did not indicate.

If factors of the kind identified by the Judicial Committee are to be regarded as relevant in determining whether exercise of a statutory function is

[218] *Rowling* v. *Takaro Properties Ltd* [1975] 2 N.Z.L.R. 62.
[219] *Rowling* v. *Takaro Properties Ltd* [1986] 1 N.Z.L.R. 22.
[220] The Committee observed that the duty of care issue had not been "fully exposed before them in argument. In particular, no reference was made in argument to the extensive academic literature on the subject of the liability of public authorities in negligence, study of which can be of such great assistance to the courts in considering areas of the law which, as in the case of negligence, are in a continuing state of development" ([1988] 1 A.C. 473, 500).
[221] [1988] 1 A.C. 473, 502.
[222] Ibid.
[223] Ibid.
[224] Ibid.
[225] Id. 502–3.

attended by a duty of care, more particularly in relation to economic loss, a number of those factors would be equally relevant in cases where the valid exercise of the statutory function entails compliance with principles of natural justice. The question, however, remains whether a statutory function of the latter kind should be treated as a special case, a case in which the very existence of a duty to accord natural justice to the plaintiff gives rise to a duty to take care not to act in violation of that right.

The fact that the plaintiff whose right to natural justice has been denied may obtain remedy on an application for judicial review (or on appeal) is not, in my view, a sufficient reason for negativing such a duty of care;[226] neither is the fact that it will be a rare case in which the default will be capable of being categorised as negligent. The rare case may be precisely the kind of case in which compensation should be capable of being awarded. It may be a case in which a person's means of livelihood have been taken away without the fair hearing to which that person was entitled because, say, notice of the time and place of hearing, and particulars of the charges to be investigated, were, through sheer carelessness, posted to the wrong address. Could it not then be argued that a person or body which is obliged to accord a fair hearing to another is also under a duty of care to that other to take reasonable steps to communicate to that other the information that the other is entitled to receive, and must have, to enjoy the right to a fair hearing? Is not this situation analogous to that considered in *Hawkins* v. *Clayton*[227] in which a majority of the High Court of Australia[228] concluded that the solicitor of a client-testator who has custody of the client's will is duty bound, on learning of the client's death, to take steps to locate the executor of the estate and inform him of the will?

The approach taken by Gaudron J. in *Hawkins* v. *Clayton* is particularly apposite to cases in which the right to a fair hearing has been denied by reason of failure to communicate vital information. According to Gaudron J., in circumstances in which a duty of care is alleged to arise in relation to the provision of information, the requisite "relationship of proximity may be constituted by the reasonable expectation of a person (including a reasonable expectation that would arise if he turned his mind to the subject) that the other person will provide relevant information ..., if that expectation is known or ought reasonably to be known by the person against whom the duty is asserted".[229] The concept of a reasonable expectation was, she thought, an appropriate criterion of proximity "where the information is necessary for the exercise or enjoyment of a legal right and the person against whom the duty is asserted knows or ought to know of that right and the necessity for the information before the right can be exercised or enjoyed".[230] In such a situation, the person entitled to the right might reasonably expect "that another, knowing that he is a position to control ... the exercise or the

[226] As to mitigation of loss by the plaintiff see p. 414 supra.
[227] (1988) 62 A.L.J.R. 240.
[228] Brennan, Deane and Gaudron JJ., Mason C.J. and Wilson J. dissenting.
[229] (1988) 62 A.L.J.R. 240, 265.
[230] Ibid.

enjoyment of that right in circumstances that loss may ensue if the right is not exercised or its enjoyment impaired would take reasonable steps to inform him . . .".[231]

Gaudron J.'s analysis could conceivably be applied to cases in which a person's right to a fair hearing has been denied because of failure to inform that person of matters about which it was necessary for him to be informed to enjoy the right. It does not, however, afford any foothold for establishing liability for negligence where the right to a fair hearing was denied for other causes, e.g. improper refusal of a request for representation or a request for an adjournment of a hearing, or wrongful refusal to allow cross-examination of witnesses. In such cases the only possible duty of care which might be imposed on the defendant would be a more general duty to take care not to overreach the limits of the statutory power the exercise of which was subject to the rules of natural justice.

OTHER HEADS OF LIABILITY

Examples have already been given of cases in which persons whose rights to a fair hearing have been violated have obtained redress by action for trespass to land, for conversion of goods and for money had and received.[232] This part of the article examines some other heads of civil liability under which plaintiffs have sought to recover damages for losses they attributed to violations of their admitted rights to a fair hearing, they being the innominate tort delineated by the High Court of Australia in *Beaudesert Shire Council* v. *Smith*,[233] malicious exercise of jurisdiction, and wrongful removal from office.

The Beaudesert Tort

According to the High Court, "a person who suffers harm or loss as an inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other".[234] The correctness of this principle has been questioned,[235] but until it is repudiated by the High Court[236] it remains part of Australian common law.[237] Plaintiffs who have invoked the principle have rarely done so with success and it is now most

[231] Ibid.
[232] See pp.402–3 supra.
[233] (1966) 120 C.L.R. 145.
[234] Id. 156.
[235] G. Dworkin and A. Harari, "The Beaudesert Tort: Raising the Ghost of the Action upon the Case" (1967) 40 A.L.J. 296, 347. Doubts have been expressed whether the principle forms part of the law of England or of New Zealand (*Lonrho Ltd* v. *Shell Petroleum Ltd (No. 2)* [1982] A.C. 173, 188 (Lord Diplock); *Takaro Properties Ltd* v. *Rowling* [1978] 2 N.Z.L.R. 314, 317, 328, 339–40).
[236] In *Elston* v. *Dore* (1982) 57 A.L.J.R. 83, 88 Gibbs C.J., Wilson and Brennan JJ. stated that if and when it becomes necessary to reconsider *Beaudesert* it would be desirable that the question be considered by a Court of seven Justices.
[237] *Kitano* v. *Commonwealth* (1974) 129 C.L.R. 151; *Hull* v. *Canterbury Municipal Council* [1974] 1 N.S.W.L.R. 300; *Copyright Agency Ltd* v. *Haines* [1982] 1 N.S.W.L.R. 182; *Hospital Contributions Fund of Australia* v. *Hunt* (1982) 44 A.L.R. 365.

unlikely that it can be relied on where the act claimed to be unlawful is no more than breach of a duty to afford a fair hearing.

In *Dunlop* v. *Woollahra Municipal Council*[238] the Judicial Committee held that, even if a decision made in breach of a duty to accord a fair hearing can be regarded as an intentional and positive act, the fact that breach of the duty renders the decision invalid does not of itself render that decision relevantly unlawful. The Committee did not consider whether the mere breach of the duty to afford a fair hearing could itself be regarded as unlawful though it may be inferred that its view was that it could not. The Committee seems to have accepted that an act in breach of a statutory duty is not necessarily unlawful. It quoted, without dissent, the statement by Mason J. in *Kitano* v. *Commonwealth*[239] that the plaintiff "must show something over and above what would ground liability for breach of statutory duty if the action were available".

In the earlier case of *Freedman* v. *Petty*,[240] Marks J. doubted, but did not find it necessary to decide, whether breach of a duty to afford a hearing could be actionable under the *Beaudesert* principle. If, he said, a decision

> "is vitiated by a denial of natural justice it may be that 'unlawfulness' is the failure to comply with the requirements of the law in that regard. If that is the proper analysis there is considerable difficulty in identifying particular intentional and positive acts constituting the 'unlawful' denial of natural justice."[241]

Quite apart from the difficulty in identifying what was the intentional and positive act or acts involved in breach of a duty to accord a fair hearing, there is the further difficulty in establishing that the loss complained of was an inevitable consequence of that breach.

Malicious Exercise of Jurisdiction

Mention has already been made of the qualified immunity from civil suit enjoyed by members of inferior courts prior to *Sirros* v. *Moore*[242] in respect of acts done within jurisdiction.[243] Prior to this decision there were many judicial decisions which asserted that members of inferior courts could be liable in tort for erroneous acts within jurisdiction if the plaintiff proved malice.[244] On the other hand, there appears to be no reported case in which an action for malicious exercise of jurisdiction succeeded.

As has already been noted,[245] in *In re McC*,[246] the House of Lords concluded that the pre *Sirros* v. *Moore* law on judicial immunity from suit still applies to magistrates and justices of the peace where their civil liability is governed by

[238] [1982] A.C. 158, 170.
[239] (1974) 129 C.L.R. 151, 175.
[240] [1981] V.R. 1001.
[241] Id. 1032.
[242] [1975] Q.B. 118.
[243] See p. 395 supra.
[244] E.g. *Cave* v. *Mountain* (1840) 1 M. & G. 257, 263; 133 E.R. 330, 333; *Taylor* v. *Nesfield* (1854) 3 E. & B. 724, 730; 118 E.R. 1312, 1314; *Kirby* v. *Simpson* (1854) 10 Ex. 358; 156 E.R. 482; *O'Connor* v. *Isaacs* [1956] 2 Q.B. 288, 312.
[245] See pp. 397–8 supra.
[246] [1985] A.C. 528.

legislation based on the English *Justices Protection Act* 1848. This legislation presupposes not only liability for acts without or in excess of jurisdiction, but also liability in tort for acts done by a justice "in the execution of his duty as such justice, with respect to any matter within his jurisdiction . . .". It provides that if at the trial of an action against a justice for an act within jurisdiction the defendant pleads "not guilty by statute", and if the plaintiff fails to prove that "such act was done maliciously and without reasonable and probable cause", judgment shall be given for the defendant.

In *In re McC* the House of Lords appears to have treated actions of this kind as involving a distinct cause of action.[247] In their opinion such actions should no longer be entertained. The old common law, Lord Bridge of Harwich reasoned,

> "clearly has no application whatever in today's world either to stipendiary magistrates or to lay benches. The former are competent professional judges, the latter citizens from all walks of life, chosen for their intelligence and integrity, required to undergo some training before they sit, and advised by legally qualified clerks. They give unstinting voluntary service to the community and conduct the major part of the criminal business of the courts. Without them the system of criminal justice in this country would grind to a halt. In these circumstances, it would seem to me a ludicrous anachronism that, whilst a judge sued for an act within his jurisdiction alleged to have been done maliciously is entitled to have the proceedings dismissed in limine, a magistrate, in the like case, should have to go to trial to defend himself against the allegation of malice. It follows that, in my opinion, the old common law 'action on the case as for a tort' against justices acting within their jurisdiction maliciously and without reasonable and probable cause no longer lies."[248]

Subject to one reservation by Lord Brandon of Oakbrook,[249] the other Lords agreed with these sentiments.[250]

The opinion of the House of Lords on the liability of justices for acts done within jurisdiction is not, of course, binding on any Australian court and, in any event, is no more than *obiter dictum*. The relationship between the action in tort against justices for acts within jurisdiction and the action for misfeasance in a public office was not even considered.

Wrongful Removal from Office

If a person is removed from an office, and more particularly from a public office, and the removal is subsequently held invalid, as in *Ridge* v. *Baldwin*,[251] on the ground that the person was denied his or her right to a fair hearing, is that person then entitled to recover damages?

[247] Id. 541, 552–3, 559.
[248] Id. 541.
[249] Id. 552 ("So far as England is concerned, the question is not entirely free from doubt . . .").
[250] Id. 533, 572.
[251] [1964] A.C. 40.

In *Evans* v. *Chief Constable of North Wales Police*[252] it was assumed that Evans, the probationary constable who had been forced to retire, would have been entitled to damages had he claimed them. On what basis damages would have been payable was not, however, explained. Possible bases of liability to pay damages to a person whose appointment to a public office was terminated, in breach of that person's right to natural justice, were considered by the New South Wales Court of Appeal in *Macksville & District Hospital* v. *Mayze*,[253] though without final resolution of the plaintiff's claim.

Mayze had held the position of visiting medical practitioner to a public hospital. His appointment, made pursuant to the *Public Hospitals Act* 1929 (N.S.W), was terminated by the hospital Board, whereupon Mayze appealed, as he was entitled to do under the Act. But before the appeal was heard, the period for which Mayze had been appointed expired. Mayze then commenced proceedings in the Equity Division of the Supreme Court claiming a declaration that the termination of his appointment was null and void and that he was entitled to damages. He requested that "the question of damages be referred to the master to inquire and certify as to the sum lost by" him by reason of his exclusion from the hospital since the date his appointment was terminated.[254]

The trial judge, Needham J., declared that the termination of Mayze's appointment was null and void since Mayze had been denied his right to a fair hearing. He declared further that Mayze was "entitled to damages for the wrongful revocation of his appointment . . ." and ordered that the assessment of damages be referred to the master.[255] The orders as to damages were made notwithstanding that no evidence had been directed to establishing the plaintiff's entitlement and that no attempt had been made to identify the cause of action.

The hospital's appeal to the Court of Appeal was dismissed. The majority, Mahoney and Priestley JJ.A., concluded that it was proper that the trial judge should have directed an inquiry as to damages. On the other hand, they did not think it appropriate for the Court to attempt a definitive answer to the question of Mayze's entitlement to damages. That question could only be answered at the inquiry before the master.[256] The Court nonetheless needed to be satisfied that there was a possible basis for liability.[257]

Mahoney J.A., with whom Priestley J.A. concurred, identified two possible bases of liability. The first was wrongful exclusion from the hospital and ensuing financial loss, i.e. fees which Mayze might have earned had he not been excluded.[258] The second was "breach by the Board of its statutory or other duties".[259] In elaborating on this second possible basis of liability Mahoney J.A. acknowledged that there is a distinction between (a) the case

[252] [1982] 1 W.L.R. 1155. See pp. 386–8 supra.
[253] [1987] 10 N.S.W.L.R. 708.
[254] Id. 723.
[255] Ibid.
[256] Id. 732.
[257] Id. 731.
[258] Ibid.
[259] Id. 732.

where a public officer "in the execution of his duty, causes damage to the person or property of another", and does so by committing an act which "would under the general law be a wrong for which an action could be brought against an individual", and (b) the case where "what the holder of a public office does in breach of the duties of his office" occasions injury but the act is one which, "if done by an ordinary person, would not provide a cause of action".[260] Whether the injured party can recover damages in the latter type of case "has not", Mahoney J.A. observed, "been finally determined".[261] The particular question of whether a mere failure to fulfil a duty to afford a hearing can give rise to a liability to pay damages had "not been fully explored".[262] But it was not necessary for the Court to express an opinion on that question, or on the related question of whether the hospital could be held liable for the breach of the duty by the members of its Board.[263]

In the opinion of Kirby P., the declarations of the trial judge in relation to the damages claim should be set aside. Both the plaintiff's claim and the trial judge's declaration as to his entitlement to damages appeared to rest of the assumption that damages were payable merely in consequence of the invalidity of the Board's action. No other identifiable course of action had been assigned or even suggested at the trial. "No general cause of action", Kirby P. pointed out,[264] "exists by our law under which public authorities which exceeded their jurisdiction (as by denial of natural justice which they are obliged to accord) are liable in damages for the consequences they thereby occasion". His Honour did not, however, rule out the possibility that Mayze might have a cause of action. "In general where a statutory officer is wrongly removed from office the remedy, if any, for removal is damages for unlawful termination of services".[265] But the declaration that the Board's decision to terminate Mayze's appointment was void "would not, of itself, establish, one way or the other, the correctness of the termination of the ... appointment".[266] The declaration that Mayze was entitled to damages merely in consequence of the invalidity of the decision to remove him amounted to "the deprivation of the Hospital's right to endeavour to justify the termination of ... [Mayze's] appointment upon some ground other than the Board's decision declared to have been void".[267] In other words, the termination of an appointment to an office cannot be said to be unlawful merely because it is invalid. In a case where the invalidity stems from denial of a right to a fair hearing, the party denying that right may nonetheless escape liability to pay damages if it can be established that there were grounds on which the office-holder could, legally, be removed from office.

The distinction Kirby P. drew between invalidity and unlawfulness seems to be akin to that which the Judicial Committee of the Privy Council drew in

[260] Ibid.
[261] Ibid.
[262] Ibid.
[263] Ibid.
[264] Id. 724.
[265] Id. 725.
[266] Id. 723.
[267] Ibid.

Dunlop v. *Woollahra Municipal Council*[268] in relation to the question of whether breach of a duty to accord natural justice is an unlawful act for the purposes of the *Beaudesert* tort.

The Court of Appeal's analysis of the damages issue in *Mayze's* case is inconclusive. All of the judges accepted that Mayze had been appointed to a statutory public office. His relationship with the hospital, Mahoney J.A. said, "was not, or was not merely, one of master and servant".[269] The position of visiting practitioner "to a public hospital was created by statute or, at least was regulated by it . . .". It "involved discharge by a medical practitioner of specified kinds of duties, for the public benefit. Therefore the doctor's relationship to the Hospital involved . . . the occupation of an office . . .".[270] Indeed, since the termination of the appointment to the office was invalid, Mayze, legally, continued to occupy the office until the end of the term of the appointment.[271] (Kirby P. expressed no opinion on that issue.)

If, as the majority concluded, Mayze "remained in his office of visiting medical practitioner notwithstanding what the Board did",[272] the Board could not have been held liable for wrongful termination of his services, for such an action, if it exists, surely presupposes that the plaintiff's services have been effectively terminated. The liability to compensate, if any, must rest on some other basis. What that basis might be *Mayze's* case does not resolve.

In suggesting that Mayze might have sued for wrongful termination of services, Kirby P. did not consider whether such a cause of action can exist independently of any contractual relationship between the parties, or whether there was indeed such a relationship between the parties in the instant case. The only precedent to which he referred as authority for the proposition that an office-holder whose services are wrongfully terminated may recover damages involved an officer of the Commonwealth public service. In that case, however, the High Court clearly regarded the action for damages as one for breach of contract.[273]

After the Court of Appeal had handed down its decision, the hospital sought special leave to appeal to the High Court of Australia. Although this application was refused, the High Court recognised that the reasons for decision given by the majority in the Court of Appeal on the damages issue could not be reconciled with the order made by the trial judge that Mayze was entitled to damages, which order had not been set aside. Mason C.J. suggested that the appropriate course was for the matter to be taken back to the Court of Appeal and that application be made to that Court for amendment of the order as to damages (not as yet formalised) to remove its disconformity with the majority's reasons for decision.[274]

[268] [1982] A.C. 158, 170.
[269] [1987] 10 N.S.W.L.R. 708, 730.
[270] Ibid.
[271] Id. 731.
[272] Ibid.
[273] *Lucy* v. *Commonwealth* (1923) 33 C.L.R. 229, 237, 238, 248, 249, 253. On the question of whether officers of public services are also employees, see G.J. McCarry, *Aspects of Public Sector Employment Law* (Sydney, Law Book Co., 1988) 18–21.
[274] *Macksville and District Hospital* v. *Mayze*, High Court, 19 Feb. 1988, transcript p. 9. In the event, the matter was referred back to the Master of the Supreme Court of New South

COMPENSATION FOR DENIAL OF CONSTITUTIONAL RIGHTS TO FAIR HEARINGS

In some countries rights to natural justice or due process have been constitutionally guaranteed. For example, the Fifth Amendment and s.1 of the Fourteenth Amendment to the Constitution of the United States of America provide that "no person shall be deprived of life, liberty or property without due process of law". A similar guarantee appears in the Constitution of Trinidad and Tobago.[275]

Section 7 of Canada's Charter of Rights and Freedoms declares that —

> "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[276]

Section 33 (1) of the Constitution of the Federal Republic of Nigeria provides that —

> "In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."[277]

Where individual rights have been constitutionally guaranteed, provision is sometimes made in the constitution itself for award of judicial remedies for denial or infringement of those rights, or for enactment of legislation for enforcement of those rights. A general provision of the former type in the Constitution of Trinidad and Tobago[278] was considered by the Judicial Committee of the Privy Council in *Maharaj* v. *Attorney-General of Trinidad and Tobago (No. 2)*[279] and was held to authorise a judicial award of compensation, against the state, to a person whose guaranteed right to due process had been violated, even though there would have been no liability to pay damages at common law.

Wales, but was eventually resolved by an out-of-court settlement. (I am indebted to Harrington, Maguire and Co., solicitors for the hospital, for the above information.)

[275] Section 4(1).

[276] This section guarantees more than procedural fairness: see *Reference re Section 94(2) of the Motor Vehicle Act* (1985) 24 D.L.R. (4th) 536 (S.C.C.).

[277] Section 33(2) goes on the provide —

> "Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law —
> (a) provides for an opportunity for the person whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person;
> (b) contains no provision making the determination of the administering authority final and conclusive."

[278] Section 6(1).

[279] [1979] A.C. 385, 399–400. See also *Ramlogan* v. *The Mayor, Aldermen and Burgesses of San Fernando* [1986] L.R.C. (Const.) 377.

Under s.5 of the Fourteenth Amendment to the United States Constitution the Congress is expressly authorised to enact legislation to enforce the due process and other rights guaranteed by that Amendment.[280] Similar provisions appear elsewhere in the Bill of Rights. It was in reliance on these provisions that the Congress enacted the *Civil Rights Act* in 1871.[281]

This legislation, as amended, appears as s.1983 of title 42 of the United States Code. It provides —

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

This section, it should be noted, does not apply where the right infringed is done under colour of federal law. Its operation is further confined by the immunities from suit which are accorded to various classes of officials. The scope of these immunities will be explained presently.[282]

It has long been recognised that s.1983 authorises award of damages, but, in contrast to the position adopted by the Judicial Committee of the Privy Council in *Maharaj's* case,[283] the United States Supreme Court has taken the view that the liability to pay damages falls on the "tortfeasor" and that the principles to be applied in determining the damages payable are, essentially, the principles of tort law. Section 1983, it has been said, creates "a species of tort liability,[284] and damages may be awarded under the section only when the violation of right has caused compensable injury.[285]

As the leading case of *Carey* v. *Piphus*[286] illustrates, plaintiffs seeking damages for infringement of their rights to a fair hearing have little prospect of obtaining more than nominal damages unless they can establish that, had the right not been infringed, the outcome of the proceedings would have been different.

In this case, two students who had been suspended by school authorities from the public schools they had been attending sued for damages for violation of their due process rights. By the time their cases came before the United States Supreme Court there was no contest over whether due process rights had been infringed or over whether the defendants had immunity from suit. Nor was there any contest over the correctness of the ruling of the court

[280] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article". (The Fourteenth Amendment applies only to the States.)
[281] Ch. 22, 17 Stat. 13 (42nd Congress 1st Sess.).
[282] See pp. 428–9 infra.
[283] [1979] A.C. 385.
[284] *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976).
[285] *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975); *Carey* v. *Piphus*, 435 U.S. 247, 255 (1978).
[286] 435 U.S. 247 (1978).

below[287] that, if the defendants could prove that they would have suspended the students even if a proper hearing had been held, then the students would not be "entitled to recover damages to compensate them for injuries caused by the suspensions".[288] Indeed, the Supreme Court endorsed that ruling and the reasoning in support of it, namely that if the suspensions would have been justifiable in any event, "an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation" to the students.[289]

The Court nevertheless concluded that —

> "Because the right to procedural due process is 'absolute' in the sense that it does not depend on the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed . . . the denial of procedural due process should be actionable for nominal damages without proof of actual injury."[290]

Thus, if on remand to the District Court the suspensions of the students were found to be justified, the students would be entitled to recover nominal damages not exceeding one dollar.[291]

Damages for actual injury sustained through denial of procedural due process rights may include compensation not only for monetary harm but "impairment of reputation . . . and mental anguish and suffering".[292] If, however, damages are claimed for mental and emotional distress, the claimant has to show that the distress was occasioned by the denial of due process itself and not simply by the decision made against him.[293]

Damages awarded under s.1983 may be punitive and punitive damages may be awarded even in the absence of actual damage.[294] Such damages may be awarded where the defendant was motivated by "evil motive or intent" or where his conduct involved "reckless or callous indifference" to the protected rights of others.[295]

Although s.1983 applies only when something has been done under colour of State or Territory law, violations of constitutional rights by federal officials can nevertheless give rise to liability to pay damages where Congress has not provided other adequate remedy.[296] Violations of Fifth Amendment rights are among those which have been held to give rise to this implied cause of action.[297] The principles of liability are essentially the same as those applied in s.1983 actions.

[287] Court of Appeals, Seventh Circuit.
[288] 435 U.S. 247, 260.
[289] Ibid.
[290] Id. 266.
[291] Id. 267.
[292] *Memphis Community School District* v. *Stachura*, 477 U.S. 299, 307 (1986). See also *Burt* v. *Abel*, 585 F. 2d 613 (1978); *McCulloch* v. *Glasgow*, 620 F. 2d 47 (1980).
[293] *Carey* v. *Piphus*, 435 U.S. 247, 263 (1978).
[294] *Smith* v. *Wade*, 461 U.S. 30 (1983); *McCulloch* v. *Glasgow*, 620 F. 2d 47 (1980).
[295] 461 U.S. 30, 56.
[296] *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971); *Butz* v. *Economou*, 438 U.S. 478 (1978). See also *Schweiker* v. *Chilicky*, 108 S. Ct 2460 (1988) and A.W. Bradley's comment thereon in [1989] *Public Law* 199.
[297] *Davis* v. *Passman*, 442 U.S. 228 (1979).

Defendants to both s.1983 actions for damages and actions for implied constitutional torts may plead immunity from suit. Absolute immunity from suit may be pleaded by judges in respect of acts done in a judicial capacity and by others where functions are considered to be akin to those of judges.[298] Other officials may rely on a defence of qualified immunity. The scope of this qualified immunity was defined by the United States Supreme Court in *Harlow* v. *Fitzgerald*[299] thus —

> "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . . [But] if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained."[300]

Determination of whether an official is entitled to qualified immunity requires not merely an examination of the state of the law at the relevant time but also an objective assessment of the reasonableness of the official's conduct with reference to that law.[301] Thus if action were brought in respect of a violation of the clearly established right to procedural due process, the question would be whether a reasonable official in the defendant's position would have known that what was done was in violation of that right.[302]

The defence of qualified immunity from suit may be claimed by virtually any governmental official invested with discretionary powers.[303] But no immunity, absolute or qualified, can be claimed by municipalities.[304]

CONCLUSIONS

Under the common law of England, breach of a duty to afford a fair hearing, whether the duty be statutory or non statutory, is not an independent cause of action. Breach of such a duty can, however, be an element in proving liability to pay damages or make restitution for other wrongs.

[298] *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Stump* v. *Sparkman*, 435 U.S. 349 (1978). See R.D. Rotunda, J.E. Nowak and J. Nelson Young, *Treatise on Constitutional Law* (St Paul, West Pbl. Co., 1986) paras 19.21–19.27.

[299] 457 U.S. 800 (1982).

[300] Id. 818–9. This test displaced that enunciated in *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). Under the *Wood* test, an official entitled to qualified immunity would not be protected if either (a) he knew or reasonably should have known that his action would violate the plaintiff's constitutional rights, or (b) if he acted "with the malicious intention to cause a deprivation of constitutional rights or other injury" to the plaintiff.

[301] *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Davis* v. *Scherer* 468 U.S. 183 (1984).

[302] The District Court which tried the cases of Piphus and Briscoe held that the defendants has lost their qualified immunity because they should have known that suspensions of the plaintiffs without a hearing would violate procedural due process (*Carey* v. *Piphus*, 435 U.S. 247, 251 (1978)).

[303] Rotunda, Nowak and Young (fn. 298 supra) para. 19.28.

[304] Id. para. 19.32.

While there are Canadian cases[305] in which damages have been awarded for breach of statutory duties to provide hearings, these cases were, in the main, cases decided at first instance. They are, moreover, unsupported by precedent or firmly established common law principles. They do not even make it clear whether liability was imposed because of the nature and importance of the duty or because the duty happened to be statutory.

I have argued that although breach of a statutory duty to accord a fair hearing could, according to commonly applied tests, be regarded as actionable, to allow actions for damages for breach of express statutory duties of this kind, but not implied duties or duties arising under the common law, would be inequitable. I have suggested that the head of tort liability which best accommodates claims for compensation for denial of fair hearing rights, particularly when the loss complained of is purely economic, is that of misfeasance in a public office.

The utility of this tort is, however, considerably diminished by the requirement that the plaintiff prove that the defendant was actuated by malice or knowingly abused his office.

The burden of proving that the defendant acted maliciously or in the knowledge that what he did was an abuse of office will seldom be easy to discharge. One is therefore led to ask: Why should it not be sufficient for the plaintiff to establish that, in the circumstances, the defendant could reasonably have been expected to have known that what he did was an abuse of power? In this connection it is worth noting that at least one judge has suggested that in some cases proof of knowledge "is unnecessary, and it is sufficient that the act was in breach of . . . [the defendant's] official duty, even though it is not shown either that he realized this or that he acted maliciously . . .".[306] What cases might be brought within that category was not explained.[307] It is also to be noted that the House of Lords has recently suggested, tentatively, that a defendant may be liable for abuse of office if he acted "without reasonable cause".[308]

To extend liability for misfeasance in a public office to cases in which the defendant could, in the circumstances, reasonably have been expected to have known that what he did was an abuse of office would be to introduce into the definition of the tort the first limb of the test adopted by the United States Supreme Court in *Harlow* v. *Fitzgerald*[309] for determining whether, in an action for a constitutional tort or a s.1983 action, the defence of qualified

[305] See p. 388 supra.

[306] *Farrington* v. *Thomson and Bridgland* [1959] V.R. 286, 293 (Smith J.).

[307] The only case mentioned was *Brasyer* v. *Maclean* (1875) L.R. 6 P.C. 398, 406. In this case the defendant, a sheriff, had made a false return to a writ of *capias ad respondendum*. He had stated that the plaintiff had rescued the person to whom the writ related. The plaintiff had subsequently been attached for contempt of court. In *Pemberton* v. *Attorney-General* [1978] Tas. S.R. 1, 29–30, Chambers J. doubted whether *Brasyer's* case was truly one of misfeasance. He thought it was in substance an action for false imprisonment. The Judicial Committee, however, expressly referred to the action as one for "misfeasance by a public ministerial officer".

[308] *Calveley* v. *Chief Constable of the Merseyside Police* [1989] 2 W.L.R. 624, 632.

[309] 257 U.S. 800 (1982).

immunity is defeated.[310] It would preserve a requirement of fault on the defendant's part. It would mean that officials who had not troubled themselves to discover the ascertainable limits of their powers or the nature and extent of their duties were as culpable as those who, with knowledge of the limits of their powers and the extent of their duties, chose to ignore them.

The case for broadening the bases of liability for misfeasance in a public office is strengthened by the fact that nowadays the injuries sustained by abuses of office are very largely economic and often incapable of attracting a liability to compensate save by a misfeasance action. Abuses consisting of a breach of a duty to accord a fair hearing will frequently fall into this category. Rarely will it be possible for the person whose right has been denied to be able to bring a claim for damages under any other head of tort liability, e.g. trespass to land, goods or the person.

The fact that some remedy for abuses of public office, and in particular denial of a right to a fair hearing, may be obtained by applications for judicial review should not, in my view, be regarded as a sufficient reason for not extending the scope of the misfeasance tort. The specific remedies available on applications for judicial review may be futile or inadequate or may, for good reasons, be denied on discretionary grounds. In some circumstances the most appropriate remedy may be an award of compensation. In *Chief Constable of North Wales Police* v. *Evans*[311] the House of Lords clearly considered that the most appropriate remedy would have been damages. Damages would also seem to be the most appropriate remedy in cases where a person has been dismissed from a public office, in breach of that person's right to a fair hearing, but another person has since been appointed to fill the office. It needs also to be borne in mind that even if an application for judicial review has been successful, the applicant will often have incurred expenses in making the application, expenses over and above those recoverable by award of costs, as between party and party, against the respondent.[312] If the order on judicial review necessitates a redetermination by the respondent, the applicant may incur further expenses in presenting his case to the respondent.

Although rights to fair hearings are not, in Australia, constitutionally guaranteed, they are nonetheless regarded by the courts as important rights — rights which are not to be overridden by statute except by express words or necessary implication. The United States Supreme Court has accepted that denial of constitutional rights to procedural due process should be capable of remedy by award of nominal damages even though the plaintiff is not able to establish that the denial has caused actual injury.[313] In *Ashby* v. *White*[314] it was recognised that denial of the right to vote in parliamentary elections was

[310] Adoption of the test in *Harlow* would leave it open to the defendant to plead "extraordinary circumstances" and to prove that he neither knew nor ought to have known of the legal standard he was required to apply.

[311] [1982] 1 W.L.R. 1155.

[312] See E. Campbell, "Award of Costs on Applications for Judicial Review" (1983) 10 *Syd. L. R.* 20. If the aggrieved party has succeeded in an appeal, there may be no provision at all for award of costs.

[313] See pp. 427–8 supra.

[314] (1703) 2 Ld Raym. 938; (1704) 3 Ld Raym. 320; 92 E.R. 126, 710.

actionable *per se*. If, as seems to be the case,[315] the action for wrongful denial of the right to vote was, in substance, an action on the case for misfeasance in a public office, it follows that proof of actual injury is not an invariable condition of liability for the tort.[316] An abuse of office consisting of a breach of a duty to afford a fair hearing can, I think, be regarded as sufficiently similar to denial of a person's right to vote to justify it being treated as actionable without proof of actual damage. Were it to be so treated, damages might be awarded at large, and might even include exemplary damages,[317] but unless actual damage has been sustained, the plaintiff would be unlikely to be awarded more than nominal damages.[318]

The present limited bases of liability for misfeasance in a public office are not the only factors which limit its utility as a remedy for denial of fair hearing rights. Defendants who are alleged to have abused office by denying such rights may be able to plead judicial immunity from suit, in which case they cannot be held liable unless it is shown that they knowingly exceeded jurisdiction, or they plead the more limited immunity from suit which, prior to *Sirros* v. *Moore*,[319] was extended to members of inferior courts and various officials invested with statutory discretions. If this more limited immunity can be pleaded, the defendant cannot be held liable unless the plaintiff proves that he acted with malice or exceeded jurisdiction.

The opinion of the majority of the House of Lords in *In re McC*[320] has cast doubt on the authority of previous judicial decisions according to which the denial of a right to a fair hearing was, for the purposes of the immunity doctrines, regarded as no more than an error within jurisdiction. The majority did not go so far as to say that denial of fair hearing rights would, in every case, result in an exceeding of jurisdiction. Rather they seemed to suggest that jurisdiction would be exceeded only in extreme cases, for example when an accused person was denied any opportunity of being heard in his defence.[321]

To adopt the House of Lord's view would, in my opinion, be to introduce an undesirable measure of uncertainty into the law governing official immunities from suit. The question is whether denial of a right to a fair hearing, serious or trivial, should, for the purposes of this law, be treated as an excess of jurisdiction. To treat denial of such a right as simply an error within jurisdiction would, in many cases, leave aggrieved persons without any compensatory remedy, even for misfeasance in a public office. On the other hand, to

[315] *Bourgoin SA* v. *Minister for Agriculture, Fisheries and Food* [1986] Q.B. 716, 737–8, 776.

[316] See also *Hammerton* v. *Dysart (Earl)* [1916] 1 A.C. 57, 70–1.

[317] See *Rookes* v. *Barnard* [1964] A.C. 1129, 1226–7; *Uren* v. *John Fairfax & Sons Pty Ltd* (1966) 117 C.L.R. 118, 122, 132–3, 147, 153; *Cassell & Co. Ltd* v. *Broome* [1972] A.C. 1027, 1120, 1130, 1134; *Gershman* v. *Manitoba Vegetable Producers' Marketing Board* (1976) 69 D.L.R. (3d) 114; *Attorney-General of St Christopher, Nevis and Anguilla* v. *Reynolds* [1980] A.C. 637, 662–3. In *Farrington* v. *Thomson and Bridgland* [1959] V.R. 286, exemplary damages were awarded because the defendants' misfeasance also involved trespass (291).

[318] *Street on Torts* (8th ed., London, Butterworths, 1988) 464.

[319] [1975] Q.B. 118.

[320] [1985] A.C. 528.

[321] See p. 397 supra.

treat each and every denial of the right as resulting in an exceeding of jurisdiction might be thought to confine the zone of immunity too narrowly.

Given that those who can claim official immunity from suit, judicial or otherwise, are usually persons for whose official acts no one can be held vicariously liable, it seems to me that the traditional view that a denial of a right to a fair hearing is, for the purposes of the immunities doctrines, but an error within jurisdiction should be adhered to. If this view is maintained, those entitled to true judicial immunity from suit will, of course, never be liable to compensate for denying fair hearing rights, even if they do so knowingly. Defendants who are entitled to the more limited immunity from suit may, however, still be liable for misfeasance in a public office if they have knowingly denied the plaintiff's right to a fair hearing. Were the bases of liability for that tort to be broadened in the way I have already suggested,[322] no immunity could be claimed if the plaintiff could establish that the defendant could, in the circumstances, reasonably have been expected to know that the plaintiff's right to a fair hearing was being denied.

[322] See pp. 430–1 supra.