

**REPORT**  
**FROM THE UNITED KINGDOM**

Presented by

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## 1. INTRODUCTION

In England, unlike those countries which have a separate system of administrative law and separate courts to administer such law, administrative actions (in the sense it is defined in the next paragraph) come before the ordinary courts and are dealt with by ordinary law.

In recent years there have been noteworthy developments in the sphere of public authority liability, particularly in the case of negligence. There are special 'public authority' torts, involving deliberate abuse of authority, negligent misstatement, which are in process of being extended and developed.

## 2. ADMINISTRATIVE ACTION

For the purposes of this Report, the term 'administrative action' is taken to include all actions whether in tort or for breach of contract, where a claim for damages is made against the Crown, a Department of the Central Government, a local authority or other public authority. The term also includes claims for compensation made against public authorities where no legal wrong has been committed but loss has been occasioned to another, for example claims for compensation for land compulsorily acquired by a local authority.

## 3. IN WHAT COURTS OR TRIBUNALS EXERCISING QUASI-JUDICIAL FUNCTIONS CAN ADMINISTRATIVE ACTIONS BE BROUGHT

In the United Kingdom there is no separate system of administrative courts exercising a broad and exclusive jurisdiction in administrative matters. All disputes involving the Crown, Ministers, departments of central government, local authorities and other public bodies, such as nationalised industries, come before the ordinary courts and are dealt with according to ordinary law. When acting illegally, public authorities are liable for their actions in precisely the same way as private individuals. As early as 1866 in the case of *Mersey Docks & Harbour Board Trustees v. Gibbs (1866) L.R. 1 H.L. 93* the House of Lords held that statutory bodies were liable for the wrongful acts of their servants. Statutory bodies such as the National Coal Board, the British Railways Board, the British Airports Authority all have the same liability in tort or contract as private individuals.

Until 1947 the Crown was in a rather anomalous position, very largely due to historical reasons. In part it was due to the theory that the Crown could do no wrong and in part to the old feudal principle that the king could not be sued in his own Courts. This immunity has now been abolished by the Crown Proceedings Act 1947 which put an end to such archaic procedures as the Petition of Right, and made the Crown for most purposes (but not all) liable in tort and for breach of contract in the same way as a private individual. Even before the Act the immunity of the Crown from being sued was often evaded by such procedures as the Petition of Right for breach of contract, and by conferring powers on designated Ministers of the Crown, who had none of the Crown's prerogatives and immunities in law and could be sued in the same way as private individuals.

In the last 20 years many specialised tribunals have been set up, to which individuals may resort when they seek compensation for acts done by public authorities under statutory authority which causes loss or injury but which do not give rise to claims in contract or tort before the ordinary courts. The tribunals are now so numerous that, within the scope of this paper, it is only possible to deal with a few of them.

The broad principle, that all administrative actions are brought before the ordinary courts of the land and are decided according to ordinary law, has been to some extent eroded by the setting up of these specialised tribunals. The procedure in administrative actions before the courts is in

no way different from that in other cases. The procedure in the tribunals in general follows that of the ordinary courts, although there is a noticeable relaxation in the Rules of Evidence.

#### **LIABILITY OF PUBLIC AUTHORITIES AND THEIR SERVANTS OR AGENTS IN TORT**

#### **4. WHAT IS THE LIABILITY OF PUBLIC AUTHORITIES TO PAY DAMAGES FOR TORTS COMMITTED BY THEM OR THEIR SERVANTS OR AGENTS CAUSING INJURY.**

##### **(a) What are the general principles governing such liability.**

The general principle is that all public authorities, including Ministers of the Crown, are liable in damages for all torts such as negligence, nuisance, trespass, etc committed by them, their servants or agents.

Since the Crown Proceedings Act 1947 the Crown is for most purposes in the position of an ordinary litigant and can be sued in tort for the tortious acts of its servants or agents. The Crown still occupies, for certain purposes, a special position and this will be dealt with separately under the heading Crown Liability.

This general principle that public authorities are liable in tort was affirmed in the classic case of *Cooper v. Wandsworth Board of Works* (1863) 14 C.B. (W.S.) 180. Under an Act of 1855 it was provided that no one might put up a building in London without giving seven days notice to the appropriate authority, which was expressly given the power to demolish any such building erected without notice. The plaintiff erected a building without complying with the Act, and the Board of Works caused it to be demolished. They failed however to give the plaintiff a hearing, to which he was entitled, before demolishing the building. The plaintiff sued the Board of Works in trespass, and it was held that they were liable to pay damages, because their act was illegal and tortious in that they had no power to demolish the building without first giving the plaintiff the right to be heard.

In the late 18th Century those who, acting on the instructions of the Government, executed general warrants of arrest (which the courts held to be illegal) were personally held liable in damages for trespass.

In *Musgrave v. Pulido* (1879) 5 Appeal Cases, 102, the Governor of Jamaica was personally held liable to pay damages for seizing, without legal justification, a ship on charter to the plaintiffs.

##### **(b) Are public authorities liable to pay damages for torts committed by their servants, and (c) are such servants personally liable.**

The broad principle is that the public authority is vicariously liable for the wrong-doing of its servants, committed within the scope of their authority. The servant is also liable, and in theory both can be jointly sued, although in practice for obvious reasons it is usually the public authority who alone is sued.

There appears to be no good reason why a public authority should be immune from liability because it is acting ultra vires its powers when it commits a tort, although if such tort has been committed by one of its servants there may be difficulty in proving that he was acting within the scope of his authority.

Sometimes however a Statute will lay specific duties on an official employed by a public authority, either central or local, which duties are to be carried out by that official personally. If such person, in carrying out such duties, acts unlawfully then he alone is liable in damages, and not his employers. (*Stanbury v. Exeter Corporation* (1905) 2 K.B. 838). If such a person is held liable in damages, normally the public authority which employs him will indemnify him, but there is no legal obligation on them to do so.

Many servants of public authorities are given statutory powers to enter property, carry out inspections, surveys and tests, seize and destroy contaminated food and do other specified acts. If such acts were done by private individuals they would constitute trespasses or nuisances, but because the servants of the public authority are acting under statutory authority, their acts are legal and they are exempt from liability provided they have acted in good faith and have exercised reasonable care.

**(d) If the public authority is acting under statutory authority, is it liable to pay damages or compensation for injury caused.**

Public authorities are frequently given power by Act of Parliament to do acts which if done by a private individual would be tortious. When the act of the public authority is done under such authority, no action for damages will lie even if injury is caused to the property of a private individual, because no actionable wrong has been committed.

This broad principle of immunity however requires examination. If injury inevitably must follow from the doing of that which the Act of Parliament has authorised there can be no liability in tort, although it may well be that the Act provides for the payment of compensation (as distinct from damages in tort) to the person whose private interests have suffered. But in many cases where an Act of Parliament authorises the doing of an act, it leaves to the public authority a wide area of discretion as to how, when or where they do the act, so that injury to private interests does not inevitably follow. In such cases the law presumes that injury must not be caused if it can reasonably be avoided, and the onus of proving that it could not reasonably be avoided lies on the public authority (*Manchester Corporation v. Farnworth* (see under)).

Thus in *Metropolitan Asylum District v. Hill* (1881) 6 Appeal Cases 193 the public authority was given power by Act of Parliament to build hospitals in London for the benefit of the poor. The act gave no authority to build such hospitals in any particular place and gave no right of compensation to any private person whose property might be affected. The public authority built a hospital at Hampstead for contagious diseases and such act constituted a nuisance to surrounding property owners, unless it could be shown to be authorised by the Act. The House of Lords held that the Act gave no protection from an action of nuisance, because the public authority had failed to prove that the building of the hospital in that particular place was expressly or impliedly authorised by the Act. In other words It did not inevitably follow from the public authority exercising their powers under the Act.

In the case of *Manchester Corporation v. Farnworth* (1930) AC 171 (where the Manchester Corporation were held liable in nuisance for contamination of farm land by sulphurous fumes from an electric power station they had built on land outside the city under the express powers of a private Act of Parliament), Lord Dunedin said in the House of Lords:

"When Parliament has authorised a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorised. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, (and) the criterion of inevitability is ..... what is possible according to the state of scientific knowledge at the time, having also in view a certain common-sense appreciation ... of practical feasibility in view of situation and expense." In the *Manchester Corporation* case, the Corporation were held not to have used the care that the then state of scientific knowledge required to prevent the creation and escape of sulphurous fumes.

The border line between what is inevitable and what is not depends in each case on the construction of the Statute. Thus in *Marriage v. East Norfolk Rivers Catchment Board* (1950) 1 K.B. 284 the plaintiff failed in his action against the river authority who had caused the collapse of a bridge owned by him, by dredging a river and depositing the silt along the river banks and thus preventing the flood waters of the river from

escaping via their usual escape channels. It was held that the depositing of silt along the river banks was a normal way of disposing of such silt and that the damage naturally resulting was inevitable. It is difficult to understand the reasoning behind this decision, and perhaps the real reason is that the Land Drainage Act 1920 (under which the river authority had acted) gave a right to compensation for damage caused, and this was by implication held to be in substitution for remedies in tort under the common law.

While public authorities are not liable in tort for doing what Parliament has authorised them to do, they must exercise their powers reasonably, so as to avoid unnecessary encroachments on private rights, otherwise they may be liable in negligence, nuisance or trespass. The wilful misuse of statutory powers causing economic loss, may possibly be an independent tort rendering a public authority liable to pay damages. *David v. Abdul Cader* (1963) 1 W.L.R. 834. A public authority may also be vicariously liable in tort for damage caused by negligent mis-statements by its servants in circumstances where there is a duty to exercise reasonable care. *Ministry of Housing and Local Government v. Sharpe* (1970) 2 Q.B. 223.

If a public authority is proved to have committed a tort, for which no legal justification can be shown, it is no defence to show that it was acting reasonably in the public interest. Similarly it is no defence to show that the injury caused to the individual is minimal compared with the benefit to the public. In *Pride of Derby and Derbyshire Angling Association Limited v. British Celanese Limited* (1953) Ch. 149 the Corporation of Derby had taken to discharging insufficiently treated sewerage into a river - because the rapid growth of the city had overloaded their existing sewage system - and as a result had polluted it. They were then committing a nuisance, and the Court of Appeal held that the fact they were acting in the public interest and for the benefit of many thousands of people gave them no immunity from legal action by an angling association.

#### **BREACH OF A PUBLIC AUTHORITY'S STATUTORY DUTY.**

If a public authority, being under a duty, fails in that duty, other considerations apply.

The broad principle is that if a public authority commits a breach of its statutory duty, whether or not an action for damages will lie for the breach (as distinct from an action at Common Law) is dependent on the intention of the legislature. This intention must be ascertained "by a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted." per Lord Simonds in *Cutler v. Wandsworth Stadium Limited* (1949) AC 398.

While it is easy to state such rule, its application in practice may give rise to many difficulties.

In most cases neither the draftsman nor the legislature have given any thought to the question whether an action for damages should lie, and it is left to the courts, in construing the Act, to decide whether, if the legislature had considered the question, they would have intended to protect the plaintiff's interests by giving him a right of action in tort for the defendant's breach of duty.

Many Acts and the regulations made thereunder are designed to protect workmen from danger in their employment. In this category are for example the complex duties imposed on the National Coal Board under a network of regulations for the protection of mine workers in their hazardous occupation. Similarly there are safety regulations in the Docks, Electricity Generating Stations and indeed in all industrial plants. Breach of these safety regulations by the public authority employers confer a right of action for damages for breach of statute (often concurrently with a right of action at common law for negligence), and are often also penal.

No difficulty arises in such cases. On the other hand breach of other statutory regulations confers no right of action. Thus in *Becker v. Home Office* (1972) 2 AB 407, it was held that breach of Prison Rules confers no right of action on those affected by their breach. They were merely regulations laid down for the good management of prisons.

In some recent Acts the legislature has expressly given a right of action to those injured by a breach (see *Mineral Workings (Offshore Installations) Act 1971* Section 11: *Disposal of Poisonous Waste Act 1972* Section 2).

From the many decided cases it is possible to extract these broad principles which a court will consider when deciding whether an action will lie against a public authority for breach of statutory duty.

(a) as a general rule if the Act provides a specific remedy for breach of the duty, this will exclude a private action for damages. But this is only a rebuttable presumption of law, and a court will consider if the remedy provided is an adequate sanction, and if it compensates the plaintiff for the harm done to him. Thus breach of the Act may involve the employers in criminal sanctions, but this will not necessarily exclude the plaintiff's action for damages.

(b) if it is considered that a plaintiff's interests are already adequately protected at common law, the breach of a new statutory duty will generally be held not to give him an additional right under the Statute.

(c) if an entirely new duty is imposed by Statute, the plaintiff will generally succeed in an action for breach of that Statute if he can establish that the duty was imposed for his personal benefit and safety, or for the benefit and safety of an ascertained class of which he is a member.

(d) if the new duty reinforces, defines or strengthens a duty of care already imposed on the employers at common law, the plaintiff will generally be entitled to proceed either at common law or for breach of statutory duty or under both heads of liability concurrently.

In the end however it will be the duty of the court to decide whether an action for damages will lie, and whether the Statute must be construed as being intended to protect the plaintiff's interests by giving him a right of action in tort for the defendant's breach of duty.

**(e) Can a public authority be made liable for the non-exercise of its powers and duties by itself or officials, and if so, in what circumstances.**

A clear distinction must be drawn between a 'power', which is discretionary, and a 'duty', which is obligatory. It is not always easy to distinguish between the two, because the permissive (as opposed to the mandatory) language of the Statute conferring a power is not always a safe guide. What would appear from the permissive words in the Statute to confer merely a power, such as "may" or "it shall be lawful", may on a true interpretation be a power coupled with a duty to exercise it in certain circumstances. A discretionary power implies freedom of choice: the competent authority may decide whether or not to act, and if so, how to act. A duty is an act that must be performed, and performance of such duty can normally be enforced in judicial proceedings. In practice, powers and duties tend to be interwoven, and discretionary powers are normally accompanied by express or implied duties. Thus Commissioners of Traffic have a discretion to attach such conditions as they think fit when granting a licence; but they will be under a legal duty to adopt a genuine discretion in each individual case, and the conditions imposed must not be irrelevant to the purpose for which the power was conferred. Nevertheless the distinction between a 'discretionary power' and a 'duty' is of importance. Mere inactivity by itself cannot be a tort, so a mere failure to exercise a power cannot give rise to any liability to pay damages. Failure to fulfil a duty may give rise to liability in damages.

Thus if a local authority has a duty to light a street and fails to do so, anyone who suffers injury by reason of their failure can recover damages (*Carpenter v. Finsbury Borough Council (1920) 2 K.B. 195*). But if the public authority has merely a power to provide street lighting which it may or may not exercise according to its unfettered discretion, and it does not

exercise that power, a person injured by reason of the unlit street has no claim against the public authority (*Sheppard v. Glossop Corporation* (1921) 3 K.B. 132).

So far the distinction between failure to exercise a mere discretionary power and failure to fulfil a duty is clear.

There is however a further distinction between not exercising a power, and exercising it negligently. In the former case there is no liability, while in the latter case the public authority will probably be liable for damages in negligence.

In some cases there may be difficulty in deciding whether the damage has been caused by the action or inaction of the public authority.

A river Catchment Board, which has a statutory power to repair a sea wall on the river Deben, took 178 days to complete the work of repair, whereas a reasonable time would have been 14 days. As a result of their failure, the occupier of flooded land suffered a much greater loss than he otherwise would have done. The Catchment Board had the power, but not the duty, to repair. If they had done nothing, they could have been under no liability to pay the owner of the flooded land damages. When the case came before the House of Lords the majority view was that the Board were not liable, because their slowness amounted to no more than inaction or failure to exercise the power. The minority were of the opinion that once the Catchment Board had decided to exercise the power, they were under a duty at common law to use all reasonable care in carrying out the work and that this included commencing and completing the work within a reasonable time. *East Suffolk Rivers Catchment Board v. Kent* (1941) AC 74. It is however clear from the speeches of Lord Wilberforce & Lord Salmon in the recent case of *Anns v. Merton London Borough Council* (1977) 2 W.L.R. 1024 that today the minority view of the Lords in the East Suffolk Rivers Catchment Board case would prevail, and that the Catchment Board, having decided to exercise their power, would be liable for its negligent exercise. In the *Anns* case Lord Wilberforce, dealing with possible liability under public statutes which conferred discretionary powers on public authorities, said: "For a civil action based on negligence at common law to succeed, there must be acts or omissions taken outside the limits of the delegated discretion." Referring to the East Suffolk Rivers Catchment Board case he said: "It is irrelevant to the existence of the duty of care (on which a claim for damages in negligence is founded) whether what was created by the Statute is a duty or a power: the duty of care may exist in either case. The difference between the two lies in this, that, in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of power."

**(f) Can a public authority be made liable for delay in the exercise of its powers and duties.**

Since a power from its nature is discretionary, no action will lie against a public authority for delay or non-exercise of the power. If however it decides to exercise its power and then delays, it is possible it could be sued for damages in negligence (see *Anns v. Merton London Borough Council* supra).

If a public authority is under a duty to do a certain thing, then failure or delay in doing that thing may result in an action for damages. Thus employers (including public authorities) are under an absolute duty to fit safety devices to machinery to safeguard their employees. If they delay in fitting such devices and as a result one of their employees suffers injury they are liable in damages. If a highway authority delays in carrying out repairs to a highway which thereby becomes a danger, the highway authority can be made liable to anyone injured, unless they can show they have used reasonable care. These however are rather examples of a failure to fulfil a duty than a delay in exercising it.

A statutory duty must be performed within a reasonable time. In *R. v. Home Secretary exp. Phansopkar (1976) Q.B. 606*, a British 'patrial' was entitled by Statute to enter the country 'without let or hindrance,' but under an administrative procedure devised by the Home Office she would have had to wait a year before obtaining the certificate of patriality. The Court of Appeal held that this years delay in issuing the certificate was an abuse of power, and ordered the Home Office to issue the certificate immediately. These proceedings were by way of *Mandamus*, and at that time no damages could be then claimed in such proceedings. In the case of *Revesz v. Commonwealth of Australia (1951) 51 S.R. (N.S.W.) 63*, the Customs Department negligently delayed issuing to an importer an import licence, with the result that when eventually the licence was issued, the importer had to pay higher rates of import duty. The importer failed in his action for damages based on negligent delay.

**(g) Can a public authority be made liable for the mala fide exercise of its powers and duties.**

This is an area of the law that has not yet been fully explored. It seems however that a public authority can be made liable in damages for malicious abuse of power, deliberate maladministration and perhaps knowledge that it is acting without authority.

The earliest and best known English case is *Ashby v. White (1703) 1 Smiths Leading Cases 13th Edition 253*. At a disputed Parliamentary election, the plaintiff was wrongly prevented from exercising his right to vote. He sued the village constables, who at that time were in charge of the poll, for damages, alleging that they prevented him from voting fraudulently and maliciously. The plaintiff failed in the Court of Kings Bench, but succeeded in the House of Lords. Holt CJ said:

"If the plaintiff has a right, he must of necessity have the means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it ...."

The plaintiff would appear to have succeeded on the principle *ubi jus, ibi remedium*, but later cases make it clear that the true gist of the action was malice, and that where this element was absent a plaintiff probably would fail.

In *Partridge v. General Medical Council (1890) 25 A.B.D.*, the plaintiff, who was a dentist, had been struck off the register without being given the opportunity of being heard in his own defence. His name had been restored to the Register by *mandamus*, but he failed in his action for damages against the General Medical Council because although they had acted wrongly, they had acted without malice.

Canada furnishes one of the leading modern cases of misfeasance in public office. On the instructions of the Prime Minister of Quebec, the Liquor Commission cancelled the liquor licence of a restaurant owner because the latter had on a number of occasions provided bail for fellow members of the sect of Jehovah's Witnesses. Such cancellation was of course based on totally irrelevant and improper grounds, and the Prime Minister had no power to give orders to the Liquor Commission.

The restaurant owner successfully sued for damages on the ground that the Liquor Commission had no power to order cancellation of his licence on such grounds, and also on the ground of malicious abuse of power.

Rand J said:

"What could be more malicious than to punish this licensee for having done what he had an absolute right to do (ie to provide bail) in a matter utterly irrelevant to the Alcoholic Liquor Act? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was here added the element of intentional punishment by what was virtually vocational outlawry."

(*Roncarelli v. Duplissis (1959) 16 D.L.R. (2nd) 689*).

In *Farrington v. Thompson* (1959) V.R. 286 a licensing inspector and a police officer, purporting to exercise an authority they did not possess, ordered the plaintiff to close his hotel and cease supplying liquor. He obeyed and sued for damages in the Supreme Court of Victoria. The trial judge awarded damages on the broad principle that if a public officer does an act which to his knowledge is an abuse of his office and which causes damage he can be made liable in damages.

The boundaries of this tort or misfeasance in public office have not yet been defined but it is clear that a public officer can be made liable in damages if his action is ultra vires, and

(a) he is actuated by a desire to injure another for improper reasons or for personal spite, or

(b) he knows that he does not possess the authority or power he purports to exercise.

**(h) Can a public authority be made liable for the negligent carrying out of its powers and duties.**

(i) *General Principles*

Public authorities are under a duty to use reasonable care in carrying out their statutory duties, and failure to exercise such care which causes damage or injury to another, will make them liable in damages for the tort of negligence. In *Geddis v. Proprietors of Bann Reservoir* (1873) 3 Appeal Cases 420, at page 455 Lord Blackburn stated the general principle in these words: "It is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone: but an action does lie for doing what the legislature has authorised, if it be done negligently."

Public authorities are liable for the negligence of their servants and agents, acting within the scope of their authority.

Examples can be given for almost every sphere of life, where public authorities have been held liable to pay damages for the negligence of their servants or agents.

For example: A district council failed to light an air raid shelter they had built in a road, and a motorist collided with it and was injured:

Doctors at a hospital, for whom the Ministry of Health were responsible, negligently performed an operation on a patient:

A Water Board supplied water through old lead pipes and neglected to warn consumers who suffered lead poisoning:

Negligent driving of vehicles by servants of a public authority causing injury to others.

The list of cases is endless, and the above are merely given as examples illustrating the wide liability of public authorities for negligence.

(ii) *Can a public authority be made liable for the negligent exercise of discretionary powers.*

When an Act of Parliament confers discretionary powers on a public authority, it is at least possible that in the exercise of such powers mistakes will be made. There may be mistakes, errors of judgment, even perhaps some carelessness. If public authorities were to be made liable for every such mistake, error of judgment or carelessness they might be effectively deterred from exercising any discretionary power confided to them.

The law as to their liability for misuse of discretionary powers cannot yet be regarded as completely settled. But in the case of *Dorset Yacht Company Limited v. Home Office* (1970) A.C. 1004 (see infra) Lord Reid said:

"When Parliament confers a discretion .... there may, and almost certainly will, be errors of judgment in exercising such discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person exercising the discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that."

'In the case of *Anns v. Merton London Borough Council* (see under Lord Wilberforce, referring to the case of *East Suffolk Rivers Catchment Board v. Kent* said:

"..... quite apart from such consequences as may flow from an examination of the duties laid down by a particular statute, there may be room, once one is outside the law of legitimate discretion on policy, for a duty of care at common law. It is irrelevant to the existence of this duty of care whether what is created by the statute is a duty or a power: the duty of care may exist in either case. The difference between the two lies in this, that, in the case of a power, liability cannot exist unless the act complained of lies outside the ambit of power."

And again in the course of the same speech:

"for a civil action based on negligence at common law to succeed there must be acts or omissions taken outside the limits of the delegated discretion."

It is not therefore for every careless act or wrong decision in exercise of a discretionary power that a public authority is to be made liable. A margin of error is permitted.

In the present state of the authorities it would appear that a person may sue a public authority for damages for injury suffered in the purported exercise of a discretionary power, if the mistake or negligence is so serious as to make the acts causing the damage *ultra vires* the power.

- (iii) *Are there any cases peculiar only to public authorities, in which it can be made liable for the acts or omissions of its servants or agents.*

There are a number of modern authorities which illustrate the development of the common law in this sphere.

The first case to be considered is the *Dorset Yacht Company Limited v. Home Office (1970) AC 1004*, where the Crown was held liable for damage done by Borstal Boys (young criminals sentenced by the courts to Borstal training) who escaped from custody. They were taken out on a training exercise by Borstal officers whose instructions were to keep them in safe custody. The three officers in charge of the boys failed to supervise them properly, and in fact went to bed and left them at large. Seven of the boys escaped, boarded a yacht in Poole Harbour, cast her adrift and damaged her.

The plaintiffs who owned the yacht sued the Home Office and contended that the custody of these potentially dangerous young criminals imposed a duty to take reasonable care that they did not escape and do damage. The Home Office claimed immunity on the ground of public policy contending that they should not be inhibited in carrying out experimental penal policies by the fear of being condemned in damages. The House of Lords held the Home Office liable on the ground that a duty of care existed arising from a relationship of proximity where the damage done was the natural and probable result of the breach of duty. What Lord Denning MR had to

say in this case is of particular importance when considering the exercise of discretionary power by public authorities. He said:

"But I wish to say this: an action does not lie except on proof of negligence. It is not negligent to keep an open Borstal, or to let the boys have a great deal of freedom. The prison authorities are only negligent if, within that system, they do not take such care and supervision as a reasonable person, operating such a system, would take. It is one of the risks of that system - a conscious and deliberate risk - that boys will sometime escape and do damage. So the fact that boys escape and do damage is no evidence of negligence. There must be proof of something more. An error of judgment will not do. There must be something which can genuinely be regarded as blameworthy."

It seems that the Home Office cannot be made liable for crimes committed out of the area of escape.

In *Ministry of Housing and Local Government v. Sharpe* (1970) 2 Q.B. 223, a Government Department successfully sued a local authority for negligence in administrative office work. A clerk employed by a local authority had negligently searched a local register of land charges, overlooking a compensation notice entered in the Registry and issued a certificate which was untrue and misleading. Pecuniary loss was suffered by the Ministry who were able to recover such loss from the local authority.

In the Court of Appeal Lord Denning MR said:

"I have no doubt that the clerk is liable. He was under a duty at common law to use due care. That was a duty he owed to any person - incumbrancer or purchaser - whom he knew or ought to have known might be injured if he made a mistake. The case comes four square within the principles which are stated in *Candler v. Crane, Christmas & Company* (1951) 2 K.B. 179-185, which was approved by the House of Lords in *Hedley Byrne & Company Limited v. Heller & Partner Limited* (1964) AC 465."

The case of *Ministry of Local Government v. Sharpe* is an example of the tort of negligent mis-statement now being developed by the courts. This tort appears to be of increasing importance in the sphere of public authority liability.

Thus in *Windsor Motors Limited v. District of Powell River* (1969) 4 Dominion Law Reports (Canada), an inspector appointed by a municipality had negligently advised a car dealer to rent a site, from which he subsequently had to move, because zoning law forbade the carrying on of his business on that site. The municipality were held liable for the negligent advice of their inspector.

In *Dutton v. Bognor Regis Urban District Council* (1972) 1 Q.B. 373 the local authority's surveyor, purporting to carry out his statutory duty under the Public Health Act 1936 inspected the foundations of a house, and passed them as satisfactory. In fact the foundations were partly on the site of an old rubbish tip and there was no proper concrete foundation. They should have not been passed. The house was built and sold to a purchaser who in turn sold it to the plaintiff. Because the foundations were unsatisfactory there was subsidence. Both builder and the local authority were sued, although the action was pursued against the local authority only.

The surveyor had either made a cursory and unsatisfactory inspection of the foundations or he turned a blind eye to their defects, and in either case he was negligent in the performance of his duties.

The claim against the local authority was a completely novel one. There was no reported case of a claim being made against a Council for the negligence of its surveyor in passing a house.

Lord Denning MR in his judgment said:

"Who in justice ought to bear (the loss). I think that those who are responsible should bear it. Who are they? In the first place the builder is responsible. It was he who laid the foundations so badly that the house fell down. In the second place, the Council's surveyor was responsible. It was his job to examine the foundations to see if they would take the load of the house. He failed to do it properly. In the third place, the Council should answer for his failure. They were entrusted by Parliament with the task of seeing that houses were properly built. They received public funds for the purpose. The very object was to protect purchasers and occupiers of houses. Yet they failed to protect them."

Holding the Council liable in damages for the negligence of their inspector, Lord Denning said:

"All these considerations" (referring to earlier parts of his judgment) "lead me to the conclusion that the policy of the law should be, and is, that the Council should be liable for the negligence of their surveyor in passing the work as good when in truth it was bad."

This case was considered and approved by the House of Lords in *Anns v. Merton London Borough Council* (1977) 2 L.L.R. 1024 - an important decision in this line of cases.

The plaintiffs were lessees under long leases of seven flats in a two storey block of flats in Wimbledon. The owners of the flats were the builders and after their completion in 1962 they granted long leases. Some of the plaintiffs were the original lessees whilst others were assignees. The Defendants were the successors of the public authority for the area at the time the flats were built and in law responsible for any wrong committed by the latter. In February, 1970, structural movements began to occur in the building and these resulted, inter alia, in cracks in the walls and sloping floors. The plaintiffs sued both the builders and the defendants the Merton London Borough Council. Their claim against the latter was for damages for negligence in allowing the builders to construct the block upon inadequate foundations, as appeared from the deposited plans and alternatively in failing to carry out the necessary inspections sufficiently carefully or at all, as a result of which the structural movement occurred. It was alleged that under the building bye laws made pursuant to the powers conferred by the Public Health Act 1936 the defendant local authority was under a duty to ensure that the building was constructed in accordance with the plans, and that it should have been inspected before the foundations.

The matter came before the House of Lords on preliminary points of law.

It was held:

- (i) that the local authority was a public authority discharging functions under Statute, and that its powers and duties were definable in terms of public not private law: that the problem which this type of case presented was to define the circumstances in which the law should impose over and above, or alongside, the public law powers, a duty in private law towards individuals such that they might sue for damages.
- (ii) that the local authority were under a duty to give proper consideration to the question whether there should be an inspection or not, and their immunity from attack in the event of failure though great was not absolute. This appears to envisage a possibility of liability in damages for a negligent decision, although the degree of negligence required would probably have to go beyond a mere error of judgment, mistake or carelessness.

- (iii) that where an inspection was made the duty was to take reasonable care, and that the standard of care had to be related to the duty to be performed, namely to ensure compliance with the bye laws; that there might be a discretionary element in its exercise; that a Plaintiff complaining of negligence had to prove that the action taken was not within the limits of a discretion *bona fide* exercised before he could begin to rely upon a common law duty of care.
- (ii) that quite apart from such consequences as might flow from an examination of the duties laid down by the particular statute, there might be room once outside the area of legitimate discretion or policy, for a duty of care at common law; that it was irrelevant to the existence of that duty of care whether what was created by statute was a duty or a power: the duty of care might exist in either case, the difference between them lay that in the case of a power, the liability could not exist unless the act complained of lay outside the ambit of the power.

In the result:

- (a) the question whether the local authority came under a duty of care towards the Plaintiffs must be considered in relation to their powers, duties and discretions arising under the Public Health Act, 1936.
- (b) the local authority would not be guilty of a breach of duty in not carrying out an inspection of the foundations of the flats UNLESS they were shown (a) not properly to have exercised their discretion as to making the inspection and (b) to have failed to exercise reasonable care in their acts or omissions to secure that the bye laws were complied with.
- (c) that the local authority would be liable to the Plaintiffs for breach of duty if it were proved that their inspector, having assumed the duty of inspecting the foundations, and acting otherwise than in the *bona fide* exercise of any discretion under the Statute, did not exercise reasonable care to ensure that the bye laws applicable to the foundations were complied with.
- (i) Has a public authority any immunity from actions for damages or compensation for acts committed by itself or its servants. What are such limits.**

This question can be considered under three quite separate headings:-

- (a) judicial immunity
- (b) act of State
- (c) lapse of time.

(a) *Judicial Immunity*

In order to strengthen the independence of Judges and Magistrates and to remove any fear they might have that they could be sued for acts done in their judicial capacity, the judiciary enjoy a special immunity from actions in tort.

Judges of the Superior Courts have always enjoyed this immunity, but formerly Judges of inferior Courts had no such protection for acts done outside their jurisdiction.

There appears to have been no logical reason for this distinction which was abolished by the Court of Appeal in *Sirros v. Moore (1975) Q.B. 118*. There a Crown Court Judge had ordered the summary arrest of an immigrant whose appeal against a deportation order he had dismissed. The Judge had no power to order the arrest and the immigrant sued both the Judge who had made the order and the police officer who executed it. He failed in his action. Lord Denning MR said: "Every Judge of the Courts of this country - from the highest to the lowest - should have protection to the same degree, and be liable to the same degree .... What he does may be outside his jurisdiction - in fact or in law - but so long as he honestly believes it to be within his jurisdiction he should not be liable."

It is apprehended that this immunity extends to quasi judicial Tribunals, such as the Lands Tribunal, National Insurance Tribunals, Industrial Tribunals, and Rent Tribunals, Immigration Tribunals and (probably) Commissioners of Traffic.

However if a public authority is exercising what are essentially administrative functions, it enjoys no immunity from actions in tort, even although it acts through a Tribunal set up to find and determine facts. Thus an inspector appointed by a Minister to hold an enquiry under Town & Country Planning legislation would probably have no immunity from an action in tort.

(b) *Act of State*

For acts done by the Government and its servants abroad, the defence of Act of State can be successfully pleaded. This can never be pleaded as a defence to acts done within the realm, because to allow such a plea would be to admit the defence of State Necessity which has always been rejected by the Courts of this country.

The limits of Act of State have never been clearly defined but the act complained of must

(a) be done outside the realm

(b) it must be of a nature essentially different from the class of act normally committed by a private individual. It must be an act dictated by Government policy, and fall within the realm of public and not private law. The nature of this kind of act appears from the following examples.

A British naval commander destroyed property of a Spanish slave trader in a campaign against the slave trade. The Spaniard brought an action for trespass against him claiming damages. Act of State was successfully pleaded. (*Burton v. Denman (1848) 2 Ex. 167*).

A British subject lost valuable concessions granted by the paramount chief of Pondoland when the British Government annexed that country. He claimed damages for their loss, but failed in his action because Act of State was pleaded.

In the recent 'cod war' with Iceland, it is apprehended that if the owner of an Icelandic fishing trawler had brought an action for damages against the British Government for damage caused to his trawlers by collision with a British frigate, Act of State could have been successfully pleaded.

(c) *Lapse of Time*

This is not now an immunity from action special to public authorities. Before 1954 they did enjoy an immunity more favourable than that enjoyed by private individuals, in that the period within which an action could be brought against them was severely limited. By the *Law Reform (Limitation of Actions etc) Act, 1954*, actions in tort against Public Authorities and their servants or agents are now governed by the same limitations applicable to all actions in tort, namely three years for actions based on personal injury, and six years in other cases. This is part of the post-war policy of putting, as far as possible, Public Authorities in the same position as private individuals.

## **LIABILITY OF PUBLIC AUTHORITIES IN CONTRACT**

### **(a) General Principles**

In England there is no separate code of rules governing contracts made by public authorities. Until 1947 the Crown occupied a special position, but now for most purposes the ordinary law of contract applies to contracts made by Departments of the Central Government. Other public authorities, such as local councils occupy in contract the same position as the private individual.

**(b) Are there special cases in which public authorities have immunity from actions or in which there are special rules.**

In many cases there is not the freedom of contract that one finds when private individuals are contracting, and this is due to the public nature of the Contract. Thus rates of profit are kept under review by the Review Board for Government Contracts, set up by agreement between the Treasury and the Confederation of British Industries in 1969, and may be varied up or down.

The Government Departments make use of standard conditions to produce uniformity. These standardised clauses may also be used as an administrative device in order to enforce some policy, such as the Fair Wages Resolution of the House of Commons, designed to maintain a fair standard of wages of employees of Government Contractors. This, and similar Resolutions can only have legal effect in so far as they are incorporated into contracts.

A public authority cannot by contract disable itself from exercising its discretion in the future, in the public interest. It must always be free to take decisions required in the public interest. It follows therefore that a public authority contract can contain no term, express or implied, which conflicts with the freedom to exercise a governmental power confided to it for the purpose of carrying out its public duties. Difficult questions may arise from time to time as to whether a public authority has deprived itself of its necessary powers and whether the contract is for that reason void.

In *Ayr Harbour Trustees v. Oswald* (1883) 8 Appeal Cases 623 the Harbour Trustees had power compulsorily to acquire certain land for the purpose of carrying out works. On acquiring part of the land they wished to diminish the compensation payable by giving to the former owners a right of way from the land he retained to the harbour over the land they had acquired. The House of Lords held that they had no power to grant such right of way, because they had a specific statutory right to build on the land they had acquired and they could not enter into any undertaking which would fetter that right.

In the case of *Birkdale District Electric Supply Company v. Southport Corporation* (1926) A.C. 355 the House of Lords upheld an agreement of the Statutory electricity company not to raise their charges above that of the neighbouring Southport Corporation. It was contended that as the company had the statutory right to charge what it liked (subject to statutory limits) it could not fetter the future exercise of this power by any agreement. In the *Ayr Harbour* case the Harbour Company attempted to 'renounce part of their birthright', by partly sterilising the land they had acquired, while in the *Birkdale* case the agreement was within the scope of their normal commercial operations.

Contracts with Local Authorities are governed basically by private law. There are however certain matters to be noted:-

(a) While the general rules of agency apply, a local authority cannot make or be bound by a contract that is *ultra vires*.

(b) There is a general principle of law that Local Authorities cannot preclude themselves from exercising their more important discretionary powers or performing their public duties by incompatible contractual undertakings. For example a Local Authority could not bind itself by contract to grant or refuse a planning application, if such an application were made some time in the future.

(c) Local Authorities in entering into contracts make use of standard clauses, drawn up after consultation between themselves and a body representative of the profession or industry concerned. This makes for uniformity.

The Crown for certain purposes occupies a special position in the Law of Contract, but this will be dealt with later.

## IMMUNITY OF PUBLIC AUTHORITIES FOR 'ACTS OF STATE'

**Liability of Public Authorities to pay damages or compensation where no tort or breach of contract has been committed, and where all the acts or omissions complained of are lawful.**

Compensation will often have to be paid by a public authority even although it has committed no tort or breach of contract and has acted perfectly lawfully under the authority of an Act of Parliament. Normally a Statute which enables a public authority to deprive a private person of his rights makes express provision for the payment of compensation. Even without this however, there is a presumption that an intention to take away the property of a subject without giving him a right to compensation is not to be imputed to the legislature unless that intention is expressed in unequivocal terms. (*Central Control Board v. Cannon Brewery Company Limited (1919) AC 744*).

There have been two departures from this Rule in recent years in which the legislature has expressly provided that no compensation should be paid for loss of property. Both are explainable on political grounds.

(A) Under the Leasehold Reform Act 1967 tenants of houses let on long leases at ground rents were empowered to purchase the property compulsorily on site value only. The owners, whose reversionary rights were thus expropriated, were expressly disentitled to compensation.

(B) In *Burmah Oil Company Limited v. Lord Advocate (1965) A.C. 75* the House of Lords held that the oil company whose property had been destroyed on the orders of the Crown to deny its use to the Japanese were entitled at Common Law to receive compensation. This decision was immediately nullified by the War Damage Act 1965, which provided that no compensation should be payable at Common Law for damage or destruction of property caused by acts lawfully done on or by the authority of the Crown during or in contemplation of war, whether before or after the act. This is one of the very rare cases where an Act retrospectively deprived a subject of compensation to which the Courts had decided it was entitled.

In the following cases compensation is payable by a public authority -

(a) *Compensation on compulsory purchase of land.*

Where land is compulsorily acquired by a public authority under the authority of an Act of Parliament compensation is payable to the dispossessed owner. The rules under which compensation is assessed are very complex and have varied from time to time and are now contained in the Land Compensation Acts 1961 and 1973. If the parties are unable to agree on the amount of the compensation, then the issue is decided by the Lands Tribunal with a right of appeal to the Court of Appeal.

(b) *Compensation for 'injurious affection'.*

If part only of a person's land is acquired by a public authority, and the value of the remaining part is diminished by the severance or by the use made of the part taken, the owner is entitled to claim compensation for 'injurious affection'. Thus if part of a farm is taken for an air-field the owner may claim compensation for the fall in the value of the retained part due to noise and general disturbance.

(c) *Compensation for nuisance and disturbance.*

Formerly if land suffered a fall in value because of public works lawfully executed on adjoining land, the owner of such land had no claim. He could not claim in nuisance because the execution of such works was lawful, and he was left to bear the loss himself, even although the value of his land was greatly diminished or even destroyed. This injustice was remedied by the Land Compensation Act 1973. Under that Act compensation is now payable by public authorities where the value of an interest

in land is depreciated by 'physical factors caused by the use of public works', whether highways, aerodromes or other works on land provided or used under statutory powers.

The 'physical factors' are defined as noise, smell, fumes, smoke, artificial lighting and the discharge of any substance onto the land. The person entitled to compensation must be either the freeholder or a leaseholder with three or more years of the lease unexpired. There are provisions governing the time when claims for compensation must be made.

Similar rights to compensation apply where the nuisance arises from alterations or changes of use of public works.

Disputed claims are referred to the Lands Tribunal.

(d) *Compensation payable under Town & Country Planning legislation.*

In general no development of land can take place without planning permission from the planning authority, which is usually the local authority for the area where the land is, subject to appeal to the Minister concerned. If planning permission is refused there is normally no right to compensation. It has for many years been recognised that as a matter of social policy the right of an owner to use his land as he wishes must be restricted in the interests of the community at large. Planning legislation amounts therefore to a system of expropriation without compensation, the element expropriated being the development value of the land.

To this general rule there are a few exceptions, where compensation is payable. Examples are:-

(a) a planning authority exercises its power to order the existing use of land to be discontinued:

(b) a planning authority revokes or modifies a planning permission already given:

(c) where planning permission is refused for 'existing use development', ie comparatively small development which is normally permitted under a General Development order.

In all these cases (and there are others) compensation is payable to the owner of the land whose rights have been interfered with.

(e) *Compulsory sale to public authorities.*

There are certain cases in which the owner may compel a compulsory sale of his land to a public authority, and receive from it compensation.

If the owner of land proves that, by reason of refusal, revocation or modification of planning permission or after an order requiring discontinuance of an existing use, his land has become incapable of reasonably beneficial use in its existing state, he may require the local authority to purchase it. This is a form of compensation for what is known as 'planning blight'.

Where the overall plans for some area, diminish the value of land or result in it being unsaleable, the owner of such land may serve a 'blight notice' on the appropriate authority requiring that authority to purchase his land at the market price because it suffers from 'planning blight'.

Thus if a motorway is planned which is to run across A's land, this will almost certainly diminish the value of the remainder or even render it unsaleable. In such a case the owner could serve notice on the Department of the Environment requiring it to purchase his land at the price it would have fetched on the open market before the motorway was planned.

### **The Criminal Injuries Compensation Board**

In 1964 the Government promulgated a non-statutory scheme for compensating victims of criminal acts of violence by ex gratia payments out of funds authorised by Parliament. A Criminal Injuries Board was appointed to hear and determine all claims, and the decisions of the Board are subject to control of the Queens Bench Division by Prerogative Orders. All payments of compensation to the claimants are made out of a government fund set up for this purpose.

Society has thus recognised its duty to compensate the victims of criminal violence committed by one of its members on another. All such payments are ex gratia, so that it cannot be said that a public authority is under a legal liability, enforceable at law to make such payments, but in practice where the Criminal Injuries Compensation Board has made an award, payment is made out of the special fund.

### **Special position of the Crown.**

So far as legal liability is concerned, until very recently the Crown occupied a very special position in our law. The King could not be sued in his own Courts, and no writ or execution would issue against him because there was no way of compelling submission to it. This position would have been intolerable had not the Courts found a way of evading this rule to a limited extent. Although the Crown could not be made liable in contract, a procedure, known as a "Petition of Rights" existed. A Petition could be presented by a subject claiming damages, which the Crown referred voluntarily to the Courts for trial. The petition was tried by the ordinary law and if the plaintiff was successful, the Crown honoured the judgment and voluntarily paid the damages. This procedure was not available in tort, and therefore the Crown could not be made liable for the torts of its servants or agents. The Crown was immune from liability: the King could, in theory of law, do no wrong. The Crown's immunity in tort did not extend to its servants or agents, although individual Crown servants were personally liable as tortfeasors, even though they were purporting to act in execution of their official functions.

The position had long been felt to be unsatisfactory, and was completely altered by the Crown Proceedings Act, 1947. Archaic forms of procedure advantageous to the Crown were abolished, and the Crown was at last made liable in tort.

#### *(A) Liability of the Crown in Tort.*

Under the Crown Proceedings Act 1947 the Crown is made liable in tort to the same extent "as if it were a private person of full age and capacity". The personal liability of a Crown servant or agent remains unaltered, so that where a servant or agent of the Crown commits a tort, the Crown and its servants or agent are jointly and severally liable.

The Crown Proceedings Act 1947, Section 2, specifically makes the Crown liable for

- (a) torts committed by its servants or agents,
- (b) breach of duties which a person owes to its servants or agents at Common Law by reason of being their employer, and
- (c) breach of duties attaching at Common Law to the ownership, occupation, possession or control of property.

The personal liability of the Sovereign remains unaltered.

The Crown is now liable for torts committed by its servants or agents acting in the general course of their functions, and for the breach of the common law duties owed by employers and for those owed by owners and occupiers of property. In the case of Crown liability for the acts or omissions of its servants or agents, there must also be a right of action against the latter. But by Section 2 (6) the Crown is made liable for the

acts or omissions only of such of its officers as are (i) appointed directly or indirectly by the Crown and (ii) paid wholly out of central funds. The main practical effect of this is to exempt the Crown from liability for the Police who, both in London and the provinces are paid partly out of local taxation. But by the Police Act 1964 Chief Constables are made liable in a representative capacity for wrongful acts or omissions by the Police officers under their command.

No action in tort will lie against the Crown as a result of any act or omission, by a member of the armed forces who, while on duty, causes death or injury to another member of the forces on duty, or on land, premises or transport being used for the purpose of the forces, provided that the responsible Minister certifies that the death or injury results in the entitlement to a service pension. Nor is the member of the armed forces personally liable. (Section 10).

Similarly no action will lie against the Crown, or any member of the armed forces, for death or injury suffered by a member of the forces as a result of the condition of land, premises or transport, or equipment or supplies (for example for the crashing of a plane due to negligence, or for a dangerous building) provided the appropriate certificate of pensionability is awarded. (Section 10).

Formerly the Post Office was a Government Department, but now it is a public corporation under the Post Office Act 1969. When it was a Crown service, the Crown and its officers were given immunity in tort for any default in connection with postal, telephone or telegraphic services, together with limited financial liability for wrongful loss or damage to registered inland postal packets. These immunities are continued now that the Post Office is a public corporation.

#### ACTS OF STATE

The Crown is not liable for Acts of State.

#### JUDICIAL IMMUNITY

The Crown is exempt from liability for the acts or omissions of persons discharging or purporting to discharge responsibilities of a judicial nature or in connection with the judicial process. (Section 2 (5)). By "persons discharging or purporting to discharge responsibilities of a judicial nature or in connection with the judicial process" are meant not only Judges and Magistrates, but also members of such independent Tribunals, such as the Lands Tribunal, the Special Commissioners of Income Tax, Rent Tribunals, and possibly of independent Licensing Authorities, such as Traffic Commissioners. It is in any event questionable whether judges or those exercising judicial functions are strictly Crown servants. Because Judges and Magistrates are appointed by the Crown and paid (except Magistrates) out of public funds they could be said in a broad sense to be Crown servants. But their relationship to the Crown is completely unlike the normal relationship between master and servant.

#### PUBLIC CORPORATIONS

Public Corporations administering nationalized industries are not servants or agents of the Crown. The point is usually expressly stated in the Statutes incorporating them, but in any event they have the requisite degree of autonomy in relation to Ministers for them to be excluded from the category of Crown servants. There are other Corporations - for example the Supplementary Benefits Commission - and other Corporations promoting or regulating economic activity - which may possibly be Crown servants, and in deciding this the Court will examine not only the constituent instrument, but also the degree of ministerial control over the Corporation.

The Crown can be made liable for breach of statutory duty only if the Act, expressly or impliedly, says so. But many important Acts do make the Crown liable for breach of statutory duty, such as the Road Traffic Act 1960, the Factories Act 1961 and the Occupiers Liability Act 1957.

Under the last Act the Crown becomes liable, just like any other occupier of premises for not taking reasonable care for the safety of visitors permitted or invited to be there.

Subject to these exceptions, the tortious liability of the Crown is much the same as that of other public authorities.

Reasonable care must be exercised in the discharge of statutory powers and duties so as to prevent the occurrence of reasonably foreseeable damage to private rights. Thus in the case of the *Dorset Yacht Company Limited v. Home Office* (supra) the Crown was held liable in negligence in respect of damage to a yacht done by escaping Borstal boys after the responsible officer had failed to exercise proper supervision over them.

(B) *Liability of the Crown in Contract.*

The general rule since 1947 is that the Crown is liable in contract to the same extent as other public authorities. There are however a number of cases where Crown liability differs from that of other public authorities or private persons.

(a) The common law rule is that civil servants hold office at the pleasure of the Crown and unlike the ordinary servant cannot sue for damages for wrongful dismissal. They are legally entitled to be paid for the work they have done, and they have a right to obtain a statutory award of compensation for their unfair dismissal. But those in the military service of the Crown cannot even sue for arrears of pay.

(b) It is a rule that the Crown cannot by contract hamper its freedom of action in matters which concern the welfare of the state. The leading case on this is *Rederiaktie bolaget Amphitrite v. Rex* (1921) 3 K.B. 500. During the first world war, the Crown through the British Legation in Stockholm assured the owners of a neutral Swedish ship that if it put into a British port with a specified cargo, it would be given clearance and allowed to depart. Despite this promise, the ship was detained, and, using the only procedure then in force, the owners brought a Petition of Right against the Crown for breach of contract. Disregarding the preliminary question whether what was promised formed a binding contract or was merely an expression of intention, the Court held that the Crown could not hamper its freedom of action in matters that concerned the welfare of the State.

This ruling has not escaped criticism. Some authorities deny that such a rule exists, but that if it does then the problem remains, of how to define its scope. The Crown, when acting for example in time of grave emergency, should be free to act as it thinks best in the public interest even if it means repudiating existing contracts. Perhaps the courts should retain the power to decide in a given case whether executive necessity entitled the Crown to break what would appear to be a binding contract.

Treaties made by the Crown, that is to say agreements made between States rather than between individuals, fall outside the ordinary laws of contract and will not be enforced by the courts.

For the Crown to be able to discharge its obligations under a contract, funds must be appropriated by Parliament. It used to be said that where there was no such appropriation, the Crown was under no contractual liability, but the modern view would appear to be that if money is not made available to meet the Crown's obligations, the contract is not void, but unenforceable, ie judgment against the Crown could be awarded but not executed.

Crown contracts are made by agents acting on its behalf, and under the ordinary law of principal and agent, the Crown is liable but not the agent. Thus in *MacBeath v. Haldiman* (1786) 1 T.R. 172 it was held that the Governor of Quebec could not be made liable on promises made by him to pay for supplies for the army in Canada.

Within the normal sphere of principal and agent, an agent who exceeds his authority can be made liable for breach of warranty of authority and his principal is not liable. But where an agent for the Crown exceeds his authority, he may be free of such liability. In *Dunn v. Macdonald* (1897) 1 Q.B. 410, the Court of Appeal held that a Crown servant acting in his official capacity, is, on grounds of public policy, not liable for breaches of warranty of authority.

The law is not free from doubt. The decision appears to be open to criticism, and probably would not be followed today.

### **Crown Privilege**

By Section 28 of the Crown Proceedings Act 1947 the courts could make an order for discovery of documents against the Crown and require the Crown to answer interrogatories (questions that had to be answered on oath). But this was subject to the qualification that it was not to affect any rule of law about the with-holding of any document or refusal to answer any question on the ground that disclosures or answers would be injurious to the public interest, nor was it to affect any rules made to secure non-disclosure of the very existence of a document if in the opinion of a Minister it would be injurious to disclose its existence. This was merely declaratory of a number of decisions dealing with what had come to be known as Crown Privilege.

One of the most important cases in which Crown Privilege was discussed was *Duncan v. Cammell, Laird & Company* (1942) AC 624. The submarine *Thetis* sank on its trials, and the dependents of the men lost sued the shipbuilders in negligence. In order to present their case the plaintiffs sought production of various documents in the possession of the defendants. If disclosed these documents would have been of considerable advantage to the enemy, against whom England was then waging war. On Government instruction, the Defendants refused to produce the documents, and the First Lord of the Admiralty swore an affidavit to the effect that their production would be damaging to the public interest. The Courts upheld the objection, and the House of Lords unanimously laid down the sweeping rule that the courts could not question a claim of Crown Privilege made in proper form, regardless of the nature of the document, and would not even inspect the document. Thus by this decision Crown Privilege was given a great extension. The Crown was given an absolute legal power to override the rights of litigants not only in cases of genuine necessity, but in any case where a Government Department so decided.

In the succeeding years, and in face of mounting criticism Crown Privilege was claimed in cases which it would have been difficult to justify on the ground of public interest. Thus in *Ellis v. Home Office* (1953) 2 Q.B. 135 a prisoner on remand in the hospital wing of Winchester prison was violently assaulted by a convict who was under observation as a suspected mental defective. The injured prisoner sued the Crown in negligence, and sought production of his prison medical reports which would have shown whether or not the authorities knew he was dangerous. The Home Office refused production on the ground of Crown Privilege. In another case the Secretary of State intervened in a soldier's divorce case so as to prevent disclosure of the reports of a representative of the Soldiers, Sailors & Airmen's Families Association who had attempted to reconcile husband and wife.

It was clear that unjustifiable use was being made of the doctrine of Crown Privilege by Government Departments, and the matter came to a head in *Conway v. Dimmer* (1968) A.C. 910. A probationary police constable was prosecuted for theft. He was found not guilty, but he was dismissed from his employment not long afterwards. He brought an action for malicious prosecution against his former superintendent, and in the preliminary stages of preparing for trial, he required production of five reports about himself from Police records which were important as bearing on the question of malice. The Home Secretary objected in proper form, stating that in his view the production of these documents would be injurious in the public interest. The House of Lords unanimously held that the Minister's assertions as to the effect of disclosure was not conclusive, and although *Duncan v. Cammell, Laird & Company* (supra) was rightly decided on its own facts, the broader propositions for which the case had been considered an authority was wrong, and the courts in every case had the power to inspect the documents privately in order to determine whether the public interest in suppressing them outweighed the interests of parties to the proceedings and the general public in the administration of justice. Later the House of Lords inspected the reports, over-ruled the Minister's claim to Crown Privilege and ordered disclosure.

This decision has not escaped criticism. It has been said that for absolute executive discretion, there has been substituted absolute judicial discretion, and there is no reason to think that one is more reliable than the other. But ministers and civil servants tend to give far too much weight to the interests of secrecy and confidentiality and far too little weight to the interests of litigants. Decisions of the Courts subsequent to *Conway v. Rimmer* shows that where there is a genuine case where production would be against the public interest, the Courts will uphold a claim for Crown Privilege. Thus in *R v. Lewis JJ., ex p. Home Secretary* (1972) 3 W.L.R. 279 the House of Lords upheld a claim by the Home Secretary and the Gaming Board to set aside a witness summons obtained by a gaming club proprietor for the purpose of procuring a confidential police report on him to the Gaming Board. It was held that the Gaming Board would be seriously hampered in its statutory duty of making stringent enquiries into the character of an applicant for a licence, if confidential information obtained from the Police was liable to be disclosed. In that case the Court described the term 'Crown Privilege' as wrong and misleading.

In 1974 the House of Lords upheld a claim by the Commissioners of Customs & Excise to withhold information supplied to them in confidence by traders about dealing in amusement machines supplied by a manufacturer whose liability to purchase tax was being investigated.

In such cases as these there will always be a conflict between the public and the private interest. But now that the Courts have reasserted their traditional role of examining claims put forward by the Crown, a fairer balance than existed prior to *Conway v. Rimmer* has been struck.

**Liability of Public Authorities to pay damages or compensation where their acts or omissions are brought before the Courts for judicial review.**

For centuries the High Court has exercised a large measure of control over inferior courts and tribunals, and authorities exercising quasi-judicial functions by means of writs (now Orders) of Mandamus, Prohibition and Certiorari. Until recently it was not possible to include a claim for damages with applications for the relief sought.

Order 53 of the Rules of the Supreme Court, entitled 'Applications for Judicial Review', provides by Rule 7 that on an application for judicial review, the Court may award damages to the applicant if -

(a) he has included in his statement in support of his application for leave under Rule 3 a claim for damages arising from any matter to which the application relates, and

(b) the Court is satisfied that, if the claim has been made in an action begun by the applicant at the time of making the application, he could have been awarded damages.

**In the event of public authorities being ordered by the courts to pay damages or compensation what steps (if any) can be taken to compel payment if necessary.**

This is largely an academic question because in the vast majority of cases if a public authority is ordered by a court to pay damages or compensation, such payment is made.

Should however a judgment of a court not be honoured by a public authority, then precisely the same methods of compulsion can be used against public authorities and their responsible members or officers as are available against a private individual.

Again special rules are applicable to the Crown, which has complete immunity under the Crown Proceedings Act 1947.

**Special position of the Crown**

No execution or similar process may be issued for enforcing payment by the Crown of any money or costs, and no person is individually liable for any order for payment of money made by any court in favour of any person against -

(a) The Crown, or

(b) a Government Department, or

(c) an officer of the Crown as such

in any civil proceedings,

(i) by or against the Crown, or

(ii) on the Crown side of the Queens Bench Division, or

(iii) in connection with any arbitration to which the Crown is a party (Crown Proceedings Act 1947, Section 25).

No injunction may be granted against the Crown but instead the Court may make a declaratory judgment (1947 Act, Section 21). But neither an injunction nor an interim injunction may be made against the Crown to prevent a threatened wrong. (*International GEC of New York v. Customs & Excise Commissioners* (1962) Ch 784).