Judicial Review of Administrative Action in the 1980s

Problems and Prospects

Edited by
Michael Taggart

With a foreword by
Lord Wilberforce

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Papers presented at a conference held by the Legal Research Foundation Inc. at the University of Auckland on 20 and 21 February 1986

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Judicial Review of Administrative Action in the 1980s

In memory of

John Frederick Northey

Professor of Public Law
in the University of Auckland 1954-1983,
a founding member of the Legal Research Foundation Inc.,
and its first Fellow

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Foreword

This two-day seminar is described by Cooke P. as probably the most powerful seminar yet held in New Zealand. Supported by Judges from the highest Courts in New Zealand and Australia, by academics from both countries as well as the UK, and by researchers from New Zealand and Canada, it has well earned this description. If the judiciary from Canada and from the UK were not able to be included, they can recognize that Canadian and British decisions receive treatment in the papers which is generous in both quantity and in attitude.

The present is a good time for a hard look at the state of administrative law in the Commonweatth. It is interesting to see that development in the four main jurisdictions over the last forty years has proceeded convergently through shared common law concepts without overall guidance, except in a handful of cases, from the Privy Council. It seems to have been a common experience that, after the executive-minded approach of the 1940s, the pendulum has swung, with accelerating élan, in favour of judicial control of the executive and of a widening range of decision-makers, to a point, possibly reached now and certainly coming to be visible in the UK, where a swing in the direction of restraint is due. Consideration of this tendency may be seen as one of the main themes of the papers. Furthermore, after forty years of concentration on judicial review, it is beginning to be perceived that there is more to administrative law than that and that the time has come for wider perspectives in the search for administrative justice. This is the second strand in the discussion.

On judicial review, the reader will find discussion in depth of many emerging problems. There is a main argument whether an accurate formulation of the grounds for judicial review is possible or desirable. To extract certain concepts from French administrative law without the French procedures or remedies, and in relation to a vastly different legislative and administrative apparatus, may amount to a transplant that will not take. On the other hand, will the vague principle of 'natural justice' prove to be more than a 'high sounding expression' (Brennan J.)? Is 'natural justice' a synonym of 'due process of law'? Is the latter expression confined to procedural due process, or is there recognition of the concept of substantive due process – surely there should be, and see *Mahon v. Air New Zealand* [1984] AC 808? Can we do without some of the shibboleths, e.g. *Wednesbury* unreasonableness – 'a distracting circumlocution' (Cooke P.). The treatment of error, jurisdictional or non-jurisdictional, of standing, of the giving of reasons (Kirby P.), of invalidity/nullity (Taggart), of damages (Barton), open the way to much constructive thought. [If the present writer may indulge his own preoccupation, there is a perceptive discussion of *Anns v. Merton U.D.C.* [1978] AC 728. As a modest footnote, he would suggest

that the main interest of that case in the present context lies, not in any unrevolutionary thoughts about the law of negligence, but rather in the distinction in law and in fact, between public authorities' policy and operation, an area of presently shifting views, well exemplified by the Supreme Court of Canada 3-2 division in *Kamloops v. Nielsen* (1984) 10 DLR (4th) 641.] On the whole topic judicial readers will welcome the appeal of Cooke P. for more simplicity – cannot the whole thing, he asks, be summed up as expressing the duty to act fairly, and reasonably, and in accordance with law – and the conclusion of Brennan J. that, in relation to administrative acts, judicial decision alone is not enough, but that the imaginative responses of the Courts to the problems created by the explosion of administrative power affirms the vigour of the common law.

This leads into the second theme. Do the common law countries possess a system, or even rudiments of a system, of administrative law at all? This fundamental issue is touched upon indirectly by several of the contributors and directly by Mr Bouchard from Canada speaking as a civilian lawyer. There seems to be little doubt that, due to legislative abstention in some countries, the field has come to be occupied by adversarial Courts, which have with enthusiasm embraced the opportunity to amplify jurisdiction, seeing themselves as protectors of individual rights and of the rule of law. Thought is not always given to the question whether judicial review is even effectual for its own purposes: to the Supreme Court case of *Nicholson* [1979] 1 SCR 311 (cited by Bouchard) one may add *Padfield v. Ministry of Agriculture* [1968] AC 997, legally a famous victory but in administrative result something of a failure. So often the subject, who is really interested in the merits of a decision and in showing it to be wrong, finds that after all the efforts of his lawyer in detecting an irregularity, he is simply back at square one. Should not, Bouchard asks, more thought be given to methods by which good administration may be secured, rather than bad administration quashed, and to the cost, both in money and in social terms, of securing 'fairness' to one complainant? The seminar papers well probe both the narrower question whether existing institutions should be reformed or added to, and also the broader question whether some coherent theory and epistemology of administrative law needs to be made explicit.

The love affair of the common law with judicial review has been long and intense, but, even though it may be too soon to shunt it into a backwater (Taylor), a sober rethink now seems to be due not least in the interest of the 'administré'. The papers certainly provide a stimulus for self-criticism and for constructive ideas.

Lord Wilberforce
House of Lords

Introduction

This volume contains eight papers presented at a conference on Judicial Review of Administrative Action conducted by the Legal Research Foundation at the University of Auckland in February 1986; plus a paper written since updating one of the contributions. The fact that the conference attracted more than 280 registrants from New Zealand, Australia, Canada and the South Pacific reflects the reputations enjoyed by the contributors as acknowledged leaders in their respective fields, and the importance of administrative law in all aspects of legal practice and government administration. My task is to identify the main themes that were developed during the course of the seminar, and provide a broad overview of the different perspectives, viewpoints and recommendations which emerged.

The basic concerns which dominated the seminar are familiar enough: the constitutional foundation and legitimacy of the Courts' review powers; the functional competence of Courts of general jurisdiction to scrutinize administrative decision-making; the practical impact of the Courts' review function on the performance of administrators; the choice between an 'activist' approach to judicial review marked by confident assertion of the propriety and effectiveness of legal controls on administrative action, and a more restrained approach to judicial review which recognizes a significant area of administrative discretion lying beyond the reach of the Courts' supervisory powers.

The views expressed by Sir Robin Cooke, President-elect of the New Zealand Court of Appeal, place him firmly in the 'activist' camp. The thrust of his paper is captured succinctly in its title, 'The Struggle for Simplicity in Administrative Law'. Because the subject-matter of administrative law cases is variable, difficult and often controversial, there is an urgent need to abandon obscure traditional concepts in favour of 'more direct and candid formulations of principle'. Sir Robin suggests that 'the substantive principles of judicial review are simply that the decision-maker must act in accordance with law, fairly and reasonably'. While this bears some similarity with Lord Diplock's recent classification of the grounds for review under the three heads of illegality, irrationality and procedural impropriety, Sir Robin seems prepared to extend the Courts' review powers in several important respects.

With regard to the requirement that a decision-maker 'act in accordance with law', Sir Robin asserts:

> . . . the practical truth that every Act of Parliament, even one touching the jurisdiction of the Courts themselves, is ultimately subject to interpretation by the superior Courts of general jurisdiction . . . If these Courts were to accept that some Act deprived them of a significant part of that function, they would be acquiescing *pro tanto* in a revolution.

If this is so, Parliament can never completely exclude the Courts' power to review an inferior tribunal's interpretation of its statutory mandate. Sir Robin concedes that Lord Diplock and the House of Lords have not gone this far. In the *Racal* case Lord Diplock continued to pay lip-service to the doctrine of absolute parliamentary sovereignty, founding the Courts' powers to review for error of law on a presumption that Parliament intends the High Court to correct any material statutory misconstruction by an administrative tribunal despite the presence of a privative clause. Of necessity, the possibility of this presumption being rebutted had to be acknowledged. Furthermore, the presumption of review on questions of law applied only to 'administrative tribunals and authorities'; it did not apply to 'inferior' Courts of limited jurisdiction. But although Cooke J. seemed to accept both of these theoretical limits on the Courts' powers in *Bulk Gas Users Group v. Attorney-General* [1983] NZLR 129, the first receives no direct mention in his paper and the immunity of inferior Courts from the strong presumption in favour of review receives only one oblique reference in a footnote.

It seems that Sir Robin's views have hardened since his judgment in *Bulk Gas Users,* and he is now prepared to abandon the pretence that in substituting its interpretation of a tribunal's empowering statute in the face of a strong privative clause the Court is nevertheless giving effect to Parliament's intention. He is now prepared to assert that the Courts' power to review the legality of delegated government action enjoys a higher constitutional authority quite independent of Parliamentary intention.

> . . . we are on the brink of open recognition of a fundamental rule of our mainly unwritten constitution: namely that determination of questions of law is always the ultimate responsibility of the Courts of general jurisdiction.

Sir Robin's view should come as no surprise (see e.g. *New Zealand Drivers Association v. New Zealand Road Carriers* [1982] 1 NZLR 374, 390; *Fraser v. State Services Commission* [1984]1 NZLR 116, 121). Nevertheless, it is Sir Robin who is advocating revolution by mounting an open challenge to the doctrine of absolute Parliamentary sovereignty and attempting to create a new constitutional system of checks and balances which gives the Courts wider powers to review the legality of government decision-making.

The requirements of fairness and reasonableness receive similarly broad treatment from Sir Robin. Nothing is gained by attempting to further refine or explain these terms: 'fair means fair in the natural and ordinary sense', and reasonableness simply means 'within the limits of reason'. The principle of reasonableness embraces the grounds of review based on 'relevance', and may require an administrator to take reasonable positive steps to acquire relevant material. Recognition of review for 'mistake of fact' under the rubric of reasonableness 'is probably inevitable'.

The far-reaching implications of Sir Robin's treatment of the requirement of fairness make this the most important aspect of his paper. He insists that the inquiry into fairness should not be confined to procedural

matters; the Courts may examine the fairness of the parties' conduct and the 'objective or substantive' fairness of the ultimate decision. Nor is application of the fairness requirement limited to disputes between citizens and government authorities; Sir Robin says it is capable of imposing duties of 'fair and reasonable treatment' in what are essentially private contractual relationships. In fact, Sir Robin sees the gradual emergence of 'something in the nature of a general duty of fairness to persons sufficiently closely affected by one's actions, having some affinity with the *Donoghue v. Stevenson* principle and influenced by the same permeating ideas'. This use of the *Donoghue v. Stevenson* analogy suggests that the duty of fairness, like the requirement of legality, should be seen as an independent legal obligation firmly rooted in the common law, rather than a statutory obligation founded on implied Parliamentary intention.

Clearly Sir Robin is attempting to construct a strong conceptual justification for extending the Courts' review function beyond a narrow concern with legality (which focuses upon interpretation of statutory language and identification of permissible motives and reasons) to include insistence that both the procedures used and the ultimate decisions reached by administrators demonstrate a reasonable level of responsiveness to the interests of those who will be affected by their actions. Although the requirement of reasonableness would seem to have more natural affinity with the *Donoghue v. Stevenson* principle, Sir Robin obviously sees the concept of fairness as being better suited to his purpose. The relatively new and open-ended character of the fairness concept makes it a very potent vehicle for judicial assessment of the procedural and substantive justice of both governmental and essentially private decision-making processes. At the same time, the greater emotive appeal of the term 'fairness' may make it a more convincing candidate for recognition as a principle so firmly rooted in the common law as to be part of our unwritten constitution, and as such beyond the power of Parliament to exclude or substantially curtail.

So Sir Robin Cooke's paper represents a vigorous assertion of the Courts' fundamental constitutional right to supervise the exercise of executive authority and a commitment to developing broad flexible principles of review which leave the Courts a wide discretion to identify and correct individual cases of injustice. He acknowledges that in performing this role the Courts are required to make value judgments on highly controversial social and economic issues. But Sir Robin has no doubt that Courts of general jurisdiction are qualified to make such judgments. In fact he believes that the role contemplated for the Courts under the proposed New Zealand Bill of Rights would involve 'only a small step' from the work they already perform in the area of judicial review. The full implications of Sir Robin's expansive approach to judicial review are illustrated by his enthusiastic endorsement of the approach taken by the House of Lords in the *Bromley* case. I believe that in *Bromley* their Lordships exceeded their legitimate review function by striking down a highly controversial policy decision by a representative elected Council on grounds of substantive unreasonableness; although I am prepared to concede that a decision to refer the matter back to the Council for further consultation and con-

sideration in the light of changed circumstances may have been justified on narrower grounds of procedural fairness.

Mr Justice Kirby, President of the New South Wales Court of Appeal, also supports judicial extension of the legal controls on administrative decision-making. Drawing upon the experience of his own Court in *Osmond v. Public Service Board of New South Wales* [1984] 3 NSWLR 447, Mr Justice Kirby advocates judicial imposition on administrative decision-makers of a general legal duty to supply reasons for their decisions. He maintains that unless the reasons for a decision are known, the Court cannot perform its duty to ensure that the decision-maker acted within his powers in a reasonable and principled manner. In his conclusion, his Honour attempts to meet the objection that compliance with a general duty to give reasons may prove excessively burdensome and costly by emphasizing the variable and limited nature of the duty. However, one is entitled to ask whether a legal duty which is subject to the qualifications he suggests will in practice represent a significant advance on the rather inconclusive position adopted by the New Zealand Court of Appeal in *R. v. Awatere* [1982] 1 NZLR 644.

Sir Gerard Brennan's paper provides a sharp contrast with those of Sir Robin Cooke and Mr Justice Kirby. Sir Gerald is much more conscious of the limits imposed on the Courts' review powers by considerations of constitutional authority, political reality and functional competence. He locates the legitimacy and efficacy of judicial review in the confidence of the general community, endorsing Lord Devlin's view that judicial activism must follow and not anticipate changes in consensus opinion. Sir Gerard is concerned that if the Courts' commitment to achieving just outcomes for individual citizens in their dealings with the administration unduly impedes achievement of the government's policy goals, public confidence will be lost and the Courts' general powers of review will be revoked or severely curtailed.

Sir Gerard takes a narrow 'syllogistic' view of the nature and process of judicial decision-making: judicial decisions normally raise only issues of law and fact and are free from 'broad policy elements'. While Courts of general jurisdiction are qualified to review the factual and legal elements of administrative decision-making, they have neither the capacity nor the procedures appropriate for review of policy. Formulation of policy and its application to particular cases requires the interests of individuals to be balanced against those of the community at large, and this is the proper function of the political branches of government.

Sir Gerard is therefore concerned to put the brakes on the process of active judicial development which has led, particularly in England and New Zealand, to assertion of extremely wide theoretical powers of review. Whereas Sir Robin Cooke promotes judicial development of simple broad principles which can be readily applied to achieve just results in individual deserving cases, Sir Gerard emphasizes the need for continuity of doctrine and respect for precedent. The traditional grounds for review should not suddenly be subsumed within a few broadly stated principles. Instead the law of review should be developed cautiously by the traditional judicial method of incremental extension of established rules and principles.

Consequently, Sir Gerard's discussion of the substantive principles of review focuses upon interpretation of the old formulae traditionally used to limit (or perhaps merely disguise) the full extent of the Courts' supervisory power. To have standing to sue, a person must still show a 'special interest' in the subject-matter of a decision distinct from the interests of the public at large; decisions of a 'legislative' nature should normally be immune from review on the grounds of 'natural justice'; and attempts to extend the fairness requirement beyond procedure to the substance of administrative decisions should be resisted. Sir Gerard does not support judicial assertion of a general power to review for error of law, preferring to preserve the distinction between jurisdictional errors and errors of law within jurisdiction which can be corrected only if they appear on the face of the record.

However the apparent gulf between the views of Sir Robin Cooke and Sir Gerard Brennan may be more theoretical than real. Sir Gerard overstates his case for excluding Courts from consideration of policy issues. The purely syllogistic model of judicial decision-making no longer provides an accurate description of the Courts' function even in the traditional 'private law' areas (the developing law of negligence provides an obvious example), and Sir Gerard concedes that a Court may properly intervene where an administrative policy 'is inconsistent with the express or implied provisions' of an empowering statute, or is such that 'a repository of the power, acting reasonably and in good faith, could not have made it'. Furthermore, he is happy for an Administrative Appeals Tribunal to exercise extremely wide powers to review government policy. On the other hand, while Sir Robin Cooke asserts very broad *theoretical* powers of judicial review, in practice the New Zealand Court of Appeal has shown considerable restraint in the *exercise* of its powers. Sir Robin concedes that very few challenges based on substantive unreasonableness in fact succeed, and sometimes the Court has gone to considerable lengths to uphold highly controversial executive policy decisions (e.g. *CREEDNZ Inc. v. Governor-General* [1981] 1 NZLR 172; *Ashby v. Minister of Immigration* [1981] 1 NZLR 222). The very different views expressed by the two Judges appear to have been carefully tailored for their rhetorical effect on government and the community at large. While Sir Gerard Brennan, influenced perhaps by the High Court of Australia's wider constitutional role in a federal system, emphasizes the need for judicial caution in order to allay government fears of judicial interference, Sir Robin Cooke's bold assertion of a wide review jurisdiction which is beyond the power of Parliament to revoke is intended to caution the Government by keeping before it the *prospect* that if at some future time the executive goes too far the superior Courts have the conceptual tools and the political will to intervene. It may well be that the most practical contribution that the judiciary can make towards fair and responsive administration is to keep sounding such warnings at regular intervals.

Professor D.G.T. Williams develops the central theme of the 'justiciability' of administrative decisions. He accurately identifies the real question at issue here: the Courts' *theoretical* powers of review have been progressively extended and the real problem confronting the Courts is to decide *when* intervention is appropriate and desirable. Professor Williams

identifies a number of factors which in fact influence the Courts' willingness to subject an administrative decision to close scrutiny: the extent to which the impugned decision is based on broad value judgments and policy choices; the political sensitivity of the policy which the decision reflects; the availability of alternative remedies. It is, of course, essential to distinguish between the 'avoidance' formulae routinely employed by Judges to justify their refusal to expose a decision to close scrutiny, and the underlying considerations which in fact influence their choice. But while Professor Williams quite properly insists that 'assertions of non-justiciability [should be] examined on a realistic and up-to-date basis', he seems somewhat overwhelmed by the difficulty of this task. His conclusion that 'the determination of justiciability . . . should depend in each case on good sense and timing' offers little real consolation or guidance.

The 'justiciability' of the issues raised on review of administrative action is central to Dr G.D.S. Taylor's paper. Dr Taylor focuses attention on the extent to which judicial review in fact operates to improve the quality of 'primary' administrative decision-making. He maintains that achievement of this goal is impeded by the present tendency of Courts to review essentially non-justiciable decisions which require resolution of 'polycentric' policy issues, and to impose unrealistic standards on administrators. To remedy this situation, Dr Taylor advocates a programme of legislative action to produce 'an integrated system of administrative law'.

First, the grounds for normal judicial review should be redefined by statute in more limited terms: (a) erroneous findings of law (which is intended to exclude consideration of the reasonableness of a tribunal's findings); (b) breach of procedures required by enactment or the common law; (c) bad faith and fraud; and (d) negligence (which would found an action in tort for damages as well as provide a ground for judicial review). However it is unlikely that this formulation would operate in practice to limit the Courts' powers of review. Indeed, to the extent that new terms are introduced Dr Taylor's proposal would tend to increase the uncertainty and capacity for semantic manipulation that has long plagued the law of judicial review.

Secondly, Dr Taylor recommends a new multi-level process of appellate review. An aggrieved person would have a general right to have his case reconsidered informally by a superior administrator. Having exhausted this remedy, the citizen would then be entitled to have the decision reviewed on its merits, either by a new Administrative Appeals Tribunal based on the Australian model, or by the Office of the Ombudsman. The Administrative Appeals Tribunal would review 'those decisions which are readily justiciable', while the Ombudsman would review those actions which are 'insufficiently justiciable to be appealable' to the Tribunal. A further permanent body ('a public law committee or administrative review council') would be required to apply the justiciability criterion to different tribunals and administrators and 'recommend jurisdiction, monitor the process and update it'. Decisions of the Administrative Appeals Tribunal would be subject to a limited right of appeal to the High Court (the proposed formula is 'as from a discretion'), while the Ombudsmen's decisions would

be enforceable in the High Court 'in the same way as an arbitrator's award'.

While many would share some of Dr Taylor's basic concerns, his proposed scheme seems unduly complex and unwieldy, and many of the more specific legislative provisions he recommends seem unlikely to achieve his stated objects. Perhaps the ideal combination of specialist expertise and the overview provided by the able 'generalist' could be achieved by insisting that the Administrative Division of the High Court hear all applications for judicial review as well as statutory appeals from selected tribunals.

Mr Mario Bouchard, formerly co-ordinator of the Canadian Law Reform Commission's Administrative Law Project, sets out to debunk what he considers to be widely held myths or misconceptions about the Courts' review function. In the course of this discussion he makes a number of telling points, drawing attention to the capacity of individualized judicial decisions for unintended adverse consequences and criticizing the reluctance of many Judges to consider openly and give due weight to considerations of cost and administrative efficiency. His overall assessment of the Courts' performance in the area of judicial review is extremely bleak: most judicial decisions have little or no practical effect on the administration, and when they do their impact is usually negative and undesirable.

However many of Mr Bouchard's criticisms seem to rest on assumptions that could equally be described as myths, or at best, half-truths: (i) the prevailing 'legal vision of society originated in the nineteenth century' and 'assumes that major social and economic arrangements result from the activity of private unregulated individuals'; (ii) judicial review is a reactionary tool used to protect individual interests by impeding government efforts to achieve 'distributive justice'; (iii) because of its inherent 'polycentric' character administrative decision-making is beyond the competence of 'generalist' Judges who should always defer to the expertise of specialist administrators. Given these kinds of premises, Bouchard's recommendations are predictable. We must develop a 'coherent theory of administrative law' which recognizes that achievement of the collectivist policy goals fixed by government takes priority over concerns of individual fairness. This must include a 'coherent theory of judicial deference' to administrators by which Judges confine themselves to consideration of 'general principles of law' and withdraw from 'issues of policy, fact or specialized law'. However, not all administrative action is founded on fully informed and sensitive balancing of difficult 'polycentric' issues. The public demands protection not only against the incompetent administrator, but also from the weak official who succumbs to pressure exerted by narrow interest groups and the dedicated 'expert' who is determined to pursue his own conception of the public good with scant regard to the effect of his action on legitimate individual interests. The Courts must preserve the right to intervene in such circumstances.

Mr Michael Taggart's paper addresses the difficult and important question of the practical consequences of a judicial finding that an administrative act is invalid. He exposes the deficiencies, both conceptual and practical, of the 'absolute' theory of invalidity whereby an invalid decision

is null and void from its inception and therefore incapable of any legal consequence or effect. He then describes how most of the problems associated with the 'absolute' theory are overcome by Professor H.W.R. Wade's principle of 'legal relativity' by which a defective decision, although 'hypothetically a nullity', is 'accepted or treated as valid' until it is successfully challenged in appropriate court proceedings. Adoption of Wade's approach enables the Courts to confine collateral challenge within narrow limits, permits a more selective approach to the effect of privative clauses, avoids the logical consequences of the absolute theory in relation to administrative appeals, and avoids the need for strict classification of express procedural requirements as either 'mandatory' or 'directory'. However, Mr Taggart objects to the fact that Wade's principle remains 'linked with' the absolute theory of invalidity (indeed it is really a gloss on the absolute theory). This invites 'judicial hedging' whereby a decision is treated as 'void' for some purposes but not for others.

Mr Taggart advances an alternative theory which he terms 'the relative theory of invalidity'. This holds that an erroneous decision 'is valid and effective in law unless and until it is retrospectively invalidated (i.e. declared "void") by a Court'. This formulation extracts the practical essence of Wade's theory and expresses it in terms of a workable legal principle. But later in his paper Mr Taggart seems to qualify his theory by limiting the power of retrospective nullification to review proceedings in the High Court. Because he recognizes a continuing need for collateral challenge, particularly in respect of delegated legislation, he feels obliged to concede a limited 'pragmatic' exception to his general principle. I see no real need for Mr Taggart to qualify his principle in this way. Surely District Courts can be recognized as enjoying a power of retrospective nullification in respect of patently invalid decisions which are challenged in collateral proceedings; indeed section 17 of the *Bylaws Act 1910* (NZ) seems to recognize such a power in respect of local authority bylaws.

The great virtue of Mr Taggart's theory is that it focuses attention on the discretionary character of the remedies available in review proceedings. It is important that Courts openly identify and discuss the factors which influence the exercise of their discretion to grant or withhold public law remedies. In particular, it is essential that Judges recognize administrative expediency and the effect of decisions on third parties as legitimate grounds for withholding discretionary remedies. Open recognition and discussion of these factors should lead to development of functional principles that will confine judicial discretion within acceptable limits and ensure a reasonable level of certainty and predictability.

Dr G.P. Barton's paper on 'Damages in Administrative Law' considers the scope of a citizen's right to compensation for loss suffered as a result of invalid government action. Dr Barton provides a careful survey of the tort of misfeasance in a public office, and traces the history of the broad principle of liability enunciated by the High Court of Australia in *Beaudesert Shire Council v. Smith* (1966) 120 CLR 145.

Turning to the liability of public authorities for negligence, Dr Barton draws attention to the uncertainty and confusion associated with the

distinction drawn by Lord Wilberforce in the *Anns* case between 'operational' and 'discretionary' aspects of the exercise of a statutory function. I have argued elsewhere ((1985) 23 U of Western Ontario LR 213) that this distinction raises unnecessary problems and should be abandoned. Liability for official action which attracts a common law duty of care by reference to established principles of private law developed in analogous cases between private citizens should be determined by application of ordinary negligence principles. Any special administrative or allocational problems faced by a public authority can be given due weight when the Court considers whether the authority was in breach of its duty to take reasonable care in all the circumstances of the case. The decision of the New Zealand Court of Appeal in *Meates v. Attorney-General* [1983] NZLR 308 provides a good example of this approach. The true significance of *Anns* lies in its recognition that public authorities may owe a special limited duty of care in respect of action which does not attract a duty by reference to principles established in cases between private citizens. In cases of this kind the Court should inquire whether the public authority took reasonable care to consider and give due weight to any statutory purpose of protecting persons in the plaintiff's position from the kind of harm suffered. The reasoning employed by the House of Lords in *Governors of the Peabody Donation Fund v. Sir Lindsay Parkinson & Co. Ltd* [1985] AC 210 seems broadly consistent with this approach, although it can be argued that their Lordships took an unnecessarily narrow view of the range of private interests which the legislature intended to protect through exercise of the power.

In the concluding section of his paper Dr Barton recommends adoption of the approach taken in some civil law jurisdictions by which persons who suffer loss as a result of invalid administrative action can recover compensation from the State without proof of bad faith or negligence. He illustrates the practical implications of this approach by reference to a group of cases decided by the French *Conseil d'Etat.* However, as explained by Dr Barton, the principles applied in these cases impose quite significant limits on the citizen's right to compensation. The first principle seems to limit the right of action to persons whose interests the legislature clearly intended to protect through exercise of the delegated power. The second and third principles seem to require something very close to proof that the authority was negligent, and the fourth principle seems intended to impose a fairly arbitrary limit on the number of successful claims. It is difficult to accept that a right to compensation from the State should be limited to claims for substantial losses. Substantial losses from invalid administrative action are normally suffered only by business enterprises which are often well placed to anticipate the risk and either insure against it or make due allowance for it in their cost structures. The *Sealink* case referred to by Dr Barton seems to be a case of this kind.

To conclude, the papers published in this volume make a valuable contribution to the continuing debate as to where the balance should be struck between the Courts' concern to protect individual interests from