COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2012/CLE/gen/1529

IN THE MATTER OF THE NATIONAL INSURANCE ACT, CH 350 of the COMMONWEALTH OF THE BAHAMAS

AND

IN THE MATTER OF THE NATIONAL INSURANCE BOARD appointed in pursuance of the NATIONAL INSURANCE ACT

BETWEEN:

BERTRAM THURSTON	PLAINTIFF
AND	
NATIONAL INSURANCE BOARD	1ST DEFENDANT
AND	
ALGERNON CARGILL (In his capacity as Chairman of the National Insurance Board)	2ND DEFENDANT

Before: The Honourable Mr. Justice Keith H. Thompson

Appearances: **Ms. Travette Pyfrom of Counsel for the Plaintiff**
Ms. Kenria Smith along with Kingsley Smith and
Heather Maynard of Counsel for the Respondent

Hearing Dates: **November 22nd, 2018**
July 02nd, 2019
July 25th, 2019
September 30th, 2019

DECISION

Civil Practice and Procedure – Rules of the Supreme Court (RSC 1978) – Strike out – O. 18 r. 19 – common law duty – statutory duty – private law remedy arising out of = statutory policy – disability assessment-duty to act with reasonable cause – causation.

FACTS AND EVIDENCE:

[1] This matter was commenced by a Generally Indorsed Writ of Summons filed November 15th, 2017. The General Endorsed Writ sets out the general claim as;

ENDORSEMENT OF CLAIM

The Plaintiff claim is against the Defendants for:-

1. Damages suffered as a result of the wrongful deduction by the Defendant of Disablement benefits for the period beginning 2001 to present date in the sum of $75,000.00 together with the periodic increases due from the 12th January 2001 to present date.

2. Damages for personal injuries suffered as a result of the negligence of the Defendant in wrongfully reducing the Disablement payment which led to the Plaintiff having to engage in other forms of employment.

3. Damages for negligence and breach of duty;

4. Exemplary damages;

5. An account of all sums found due in accordance with section 65(A) of the National Insurance Act;

6. Repayment by the defendant of all sums found to be due to the plaintiff;

7. All other accounts, inquiries and directions as are necessary;

8. Further or other relief;

9. Costs

[2] The Statement of Claim was only filed February 05th, 2016.

COMMONWEALTH OF THE BAHAMAS 2012

IN THE SUPREME COURT Cle/Gen/1529

Common Law & Equity Division

IN THE MATTER OF THE NATIONAL INSURANCE ACT CAP 350 of the Commonwealth of The Bahamas

AND

IN THE MATTER OF THE NATIONAL INSURANCE BOARD appointed in pursuance of the National Insurance Act

BETWEEN

BERTRAM THURSTON
Plaintiff

AND

NATIONAL INSURANCE BOARD
1st Defendant

AND

ALGERNON CARGILL
(in his capacity as Chairman of the National Board)
2nd Defendant

STATEMENT OF CLAIM

1. The Plaintiff has at all material times being in receipt of disablement benefits and brings this action pursuant to the provisions of the National Insurance Act 1974 ("the Act").

2. The 1st Defendant is and was at all material times a body corporate having perpetual succession and the responsibility of ensuring the proper and effective management of the payment of all benefits payable in accordance with the provisions of the Act.

3. The 2nd Defendant had at all material times oversight of the activities of the Board to ensure the proper execution of the Board obligations and responsibility as established pursuant to the Act.

4. The Plaintiff was injured on the 28th April 1997 when a 500lbs flower pot made out of concrete dropped on his left knee from the ceiling at the Radisson Cable Beach Hotel. As a result of the incident the Plaintiff's left knee was crushed and thereby rendered totally useless.

5. The extent of the injury was so severe that the Plaintiff could only move around with the aid of crutches. From 1998 to present date the Plaintiff has used the crutches to walk.

6. In January 1998 the 1st Defendant pursuant to the provisions of the Act assessed the right of the Plaintiff to disablement benefits at 100% as a result of the severity of his injury.

7. The result of the assessment referred to in paragraph 6 was that the Plaintiff became entitled to disablement benefit in the amount of Six Hundred and twenty nine dollars and thirty cents ($629.30) per month from January 1998 until such time as his condition improves and or he is reassessed.

8. On the 28th November 2011 the Plaintiff attended at the office of Dr. Dane Bowe (Dr. Bowe), the physician employed by the 1st Defendant, where he was questioned about his condition. The Plaintiff was not examined by Dr. Bowe.

9. Dr. Bowe, as a result of his questions and without performing an examination of the Plaintiff, instructed the 1st Defendant that the disablement benefit paid to the Plaintiff ought to be reduced by 50%.

10. By letter dated the 17th February 2012 the 1st Defendant informed the Plaintiff that the 1st Defendant intended to reduce the disablement benefit by 50% with the result that the Plaintiff will receive the sum of Three hundred and Fourteen dollars and sixty five cents ($314.65) per month effective February 2012.

11. From January 1998 to 17th February 2012 the Plaintiff was entitled to disablement benefits at $629.30.

12. The reassessment referred to in paragraph 8 was the only assessment the Plaintiff underwent since his injury.

13. Prior to the February 2012 the Plaintiff in fact received varied reduced amounts which amounts were said to represent his disablement benefits.

14. The Plaintiff had no knowledge and was given no explanation for the payments being reduced nor was he given any reason for the variation.

15. In April 2011 the Plaintiff became aware that the 1st Defendant improperly reduced his disablement benefit.

16. The 1st Defendant wrongly discontinued payment of the disablement benefit at 100% from the year 2001 to February 2012.

17. The shortfall in the monthly payment resulted in the Plaintiff having to find ways to supplement his income in order to support his family.

18. The improper reduction of the disablement benefit for the period 2001 to 2012 was caused as a result of the negligence of the 1st and 2nd Defendants' failure to properly execute their duties in accord with the provision of the Act.

19. The over reliance on the crutches coupled with prolonged use of the crutches from 2001 to present date have resulted in a further deterioration of the Plaintiff's condition.

20. The inability to walk unless assisted by crutches has caused the Plaintiff to suffer further injury and damage.

PARTICULARS OF INJURY

(a) Widening of the joint space in the Plaintiff's right shoulder;
(b) Osteoarthritis
(c) Arthritis in the hands and foot
(d) Severer damage to the spine

21. As a result of the matters set out above the Plaintiff has suffered pain and injury and sustained loss and damage.

22. Further the Plaintiff claim interest pursuant to the Civil Procedure Award of Interest Act 1992 on the amount found due to the Plaintiff at such rate and for such period as the Court thinks fit.

AND the Plaintiff claims:-

1. An order that the Defendants produce an account of the sums due and owing for the period 2001 to 2012 inclusive,

2. An order for damages for personal injury suffered as a result of the improper deduction of the disablement benefit which forced the Plaintiff to find other ways to supplement his income over the past 11 years;

3. An order for damages for personal injury suffered as a result of the negligent report of the 1st Defendant's physician recommending that the benefits be reduced by 50% in circumstances where the Plaintiff condition had worsened.

4. Interest under the Civil Procedure (award of Interest) Act 1992.

Dated this 22nd day of January A.D., 2016

E.P. TOOTHE & ASSOCIATES
Suite 104A, Saffrey Square
Bank Lane & East Street
Nassau Bahamas

[3] An Amended Statement of Claim was filed November 22nd, 2017.

Amended pursuant to the order of the Honourable Mr. Justice Ian Winder made on the 17th day of November A.D., 2017

COMMONWEALTH OF THE BAHAMAS 2012/CLE/gen/1529

IN THE SUPREME COURT

Common Law & Equity Division

IN THE MATTER OF THE NATIONAL INSURANCE ACT CAP 350 of the Commonwealth of The Bahamas

AND

IN THE MATTER OF THE NATIONAL INSURANCE BOARD appointed in pursuance of the National Insurance Act

B E T W E E N

BERTRAM THURSTON
Plaintiff

AND

NATIONAL INSURANCE BOARD
1st Defendant

AND

ALGERNON CARGILL
(in his capacity as Chairman of the National Board)
2nd Defendant

AMENDED STATEMENT OF CLAIM

1. The Plaintiff has at all material times being in receipt of disablement benefits and brings this action pursuant to the provisions of the National Insurance Act 1974 ("the Act").

2. The 1st Defendant is and was at all material times a body corporate having perpetual succession and the responsibility of ensuring the proper and effective management of the payment of all benefits payable in accordance with the provisions of the Act.

3. The 2nd Defendant had at all material times oversight of the activities of the Board to ensure the proper execution of the Board's obligations and responsibility as established pursuant to the Act.

4. The Defendants owed a duty to the Plaintiff to ensure that his benefits were paid pursuant to the provisions of the Act and regulations.

5. The Plaintiff was injured on the 28th April, 1997 when a 500lbs flower pot made out of concrete dropped on his left knee from the ceiling at the Radisson Cable Beach Hotel. As a result of the incident the Plaintiff's left knee was crushed and thereby rendered totally useless.

6. The extent of the injury was so severe that the Plaintiff could only move around with the aid of crutches. From 1998 to present date the Plaintiff has used the crutches to walk.

7. In January 1998 the 1st Defendant pursuant to the provisions of the Act assessed the right of the Plaintiff to disablement benefit at 100% as a result of the severity of his injury.

8. The result of the assessment referred to in paragraph 6 was that the Plaintiff became entitled to disablement benefit in the amount of six hundred and twenty nine dollars and thirty cents ($629.30) per month from January 1998 until such time as his condition improves and or he is reassessed.

9. On the 28th November 2011 the Plaintiff attended at the office of Dr. Dane Bowe (Dr. Bowe), the physician employed by the 1st Defendant, where he was questioned about his condition. The Plaintiff was not examined by Dr. Bowe.

10. Dr. Bowe, as a result of his questions and without performing an examination of the Plaintiff, instructed the 1st Defendant that the disablement benefit paid to the Plaintiff ought to be reduced by 50%.

11. By letter dated the 17th February 2012 the 1st Defendant informed the Plaintiff that the 1st Defendant intended to reduce the disablement benefit by 50% with the result that the

Plaintiff will receive the sum of three hundred and fourteen dollars and sixty five cents ($314.65) per month effective February 2012.

12. From January 1998 to 17th February 2012 the Plaintiff was entitled to disablement benefit at $629.30.

13. The reassessment referred to in paragraph ~~8~~ 9 was the only assessment the Plaintiff underwent since his injury.

14. Prior to February 2012 the Plaintiff in fact received varied reduced amounts which amounts were said to represent his disablement benefits.

15. The Plaintiff had no knowledge and was given no explanation for the payments being reduced nor was he given any reason for the variation.

16. In April 2011 the Plaintiff became aware that the 1st Defendant improperly and without reasonable and probable cause reduced his disablement benefit.

17. The Defendants wrongfully and without probable cause discontinued payment of all support including medical assistance. The Plaintiff has been unable to receive the treatment he requires with the result that his condition deteriorated.

18. The 1st Defendant wrongly and without reasonable cause discontinued payment of the disablement benefit at 100% from the year 2001 to February 2012.

19. The shortfall in the monthly payment resulted in the Plaintiff having to find ways to supplement his income in order to support his family.

20. The improper reduction of the disablement benefit for the period 2001 to 2012 was caused as a result of the negligence of the 1st and 2nd Defendants' failure to properly execute their duties in accordance with the provision of the Act.

21. The over reliance on the crutches coupled with prolonged use of the crutches from 2001 to present date have resulted in a further deterioration of the Plaintiff's condition.

22. The inability to work unless assisted by crutches has caused the Plaintiff to suffer further injury and damage.

PARTICULARS OF INJURY

(a) Widening of the joint space in the Plaintiff's right shoulder;
(b) Osteoarthritis;
(c) Arthritis in the hands and foot;
(d) Severe damage to the spine;
(e) Chronic triggering of the ulnar four digits and bilateral shoulder and neck pains;
(f) Possible rotator cuff tear in the right shoulder;
(g) Chronic neck pain;
(h) Chronic tendonitis in the left shoulder.

DETAILS OF MEDICAL REPORTS

(1) Report of Robert L Gibson M.D dated the 28 July 2017

CONTUINING DISABILITY AND CONTINUING SYMPTOMS

The Plaintiff right hand is now disabled due to the prolonged use of the crutches. His right heel has a bone growing out of it which he has been advised needs to be shaved down. The Plaintiff over doses on Advil taking a bottle a day. His body is no longer responding to any pain medication which is having an affect on his sleep. The Plaintiff's right leg sporadically becomes inflamed and painful and numb to the touch. Due to his right hand becoming disabled he is unable to carry out the basis day to day chores. Recently his upper body sporadically become numb. The result is that if he is standing upright he collapses.

23. As a result of the matters set out above the Plaintiff has suffered and continues to suffer pain and injury and sustained loss and damage.

24. Further the Plaintiff claim interest pursuant to the Civil Procedure Award of Interest Act 1992 on the amount found due to the Plaintiff and such rate and for such period as the Court thinks fit.

AND the Plaintiff claims:-

1. An Order that the Defendants produce and account of the sums due and owing for the period 2001 to 2012 and 2013 to 2017 inclusive;
2. An Order for damages to be assessed for personal injury suffered as a result of improper deduction of the disablement benefit which forced the Plaintiff to find other ways to supplement his income over the past 11 years;
3. An Order for damages for personal injury suffered as a result of the negligent report of the 1st Defendant's Physician recommending that the benefits be reduced by 50% in circumstances where the Plaintiff's condition had worsened;
4. Interest under the Civil Procedure (Award of Interest) Act 1992.

~~Dated this 22nd day of January, A.D., 2016.~~

Dated this 17th day of November 2017

~~E. P. TOOTHE & ASSOCIATES~~
~~Suite 104A, Saffrey Square~~
~~Bank Lane & East Street~~
~~Nassau, Bahamas~~

PYFROM FARRINGTON CHAMBERS
Suite #6, Grosvenor Professional Park and Medical Centre
Shirley Street
Nassau Bahamas.

[5] As a result of the Amended Statement of Claim, an Amended Defence was filed January 19th, 2019.

Amended pursuant to the Order of the Honourable Mr. Justice Ian Winder made on the 17 day of November A.D. 2017

COMMONWEALTH OF THE BAHAMAS 2012

IN THE SUPREME COURT Cle/Gen/01529

Common Law & Equity Division

IN THE MATTER OF THE NATIONAL INSURANCE ACT CAP 350 of the Commonwealth of The Bahamas

AND

IN THE MATTER OF THE NATIONAL INSURANCE BOARD appointed in pursuance of the National Insurance Act

BETWEEN

BERTRAM THURSTON

Plaintiff

AND

NATIONAL INSURANCE BOARD

1st Defendant

AND

ALGERNON CARGILL
(in his capacity as Chairman of the National Board)

2nd Defendant

AMENDED DEFENCE

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1. Paragraph 1 of the Plaintiff's Statement of Claim is admitted save and except the Plaintiff has not at all material times been in receipt of disablement benefit.

2. Paragraphs 2, 3 and 4 of the Plaintiff's Statement of Claim are admitted save and except the 2nd Defendant was the Director of the 1st Defendant.

3. Paragraph 4 of the Amended Statement of Claim filed herein on 22 November, 2017 is denied. It is agreed that all benefits are paid pursuant to the provisions of the Act and Regulations.

4. Paragraph 5 of the Plaintiff's Statement of Claim is neither admitted nor denied.

5. Paragraph 6 of the Plaintiff's Statement of Claim is admitted save and except that Plaintiff was provisionally assessed at 100%and was finally assessed by Dr. Robert Gibson at 45% disablement on 17th July 2000.

6. Paragraph 7 of the Plaintiff's Statement of Claim is admitted save and except the Plaintiff received the provisional disability payment for the periods of 30th January 1998 through December 1998 in the amount of $626.56 per month representing the provisional payments for the period and for the periods of January 1998 through July 2000 in the amount of $689.21 per month representing the provisional payments for that period.

7. Further, as result of the final assessment referred to in Paragraph 4 of this Defence, the Plaintiff appealed Dr. Roberts Gibson assessment before The National Insurance Board's Medical Appeals Board on 28th January 2000 who subsequently allowed the appeal increasing the Plaintiff's disability to 55%.

8. The first sentence of Paragraph 8 of the Plaintiff's Statement of Claim is admitted and the last sentence of fore mentioned paragraph is denied and puts the Plaintiff to strict proof thereof.

9. Paragraph 9 of the Plaintiff's Statement of Claim is denied and puts the Plaintiff to strict proof thereof.

10. Paragraph 10 of the Plaintiff's Statement of Claim is admitted.

11. Paragraph 11of the Plaintiff's Statement of Claim is denied and puts the Plaintiff to strict proof thereof.

12. Paragraph 12 of the Plaintiff's Statement of Claim is admitted save and except that manner of the assessment as performed by Dr. Bowe is denied and puts the Plaintiff to strict proof thereof.

13. Paragraph 13 of the Plaintiff's Statement of Claim is admitted save and except that some of the amounts represents sickness benefit, as well as disablement benefit.

14. Paragraphs 14 and 15 of the Plaintiff's Statement of Claim are neither admitted nor denied.

15. Paragraph 16 of the Plaintiff's Statement of Claim is denied and puts the Plaintiff to strict proof thereof.

16. Paragraph 16 of the Amended Statement of Claim is denied and the Plaintiff is put to strict proof thereof.

17. Paragraph 17 of the Plaintiff's Statement of Claim is neither admitted nor denied.

18. Paragraph 17 of the Amended Statement of Claim is denied and the Plaintiff is put to strict proof.

19. Paragraph 18 of the Plaintiff's Statement of Claim is denied and puts the Plaintiff to strict proof thereof.

20. Paragraph 18 of the Amended Statement of Claim is denied and the Plaintiff is put to strict proof.

21. Paragraphs 19, 20 and 21of the Plaintiff's Statement of Claim are neither admitted nor denied and the Plaintiff is put to strict proof of each and every allegation contained therein.

22. Paragraphs 22 and 23 of the Amended Statement of Claim together with particulars of injury and Continuing Disability and continuing Symptoms are denied and the Plaintiff is put to strict proof of each.

23. As to Paragraph 24 of the Amended Statement of Claim the Defendants deny that the Plaintiff is entitled to the Orders sought and deny that the Plaintiff is entitled to damages and interest claimed in the Amended Statement of Claim or at all.

24. Save as hereinbefore specifically and expressly admitted or not admitted the Defendant denies each and every allegation contained in the Plaintiff's Statement of Claim and Amended Statement of Claim as if the same were herein set out and traversed *seriatim*.

~~Dated the ——— day of March, A.D., 2016.~~

Dated the 8th day of January, 2018

Attorney for the National Insurance Board
OFFICE OF THE ATTORNEY GENERAL
Paul L. Adderley Building
John F. Kennedy Drive
Nassau, The Bahamas

[6] There appears to be two main issues to be resolved

1. Is there a common law right which would allow the Plaintiff to seek redress directly from the Supreme Court as set out in the Amended Writ of Summons; and

2. Should the Plaintiff have proceeded by way of judicial review of the decisions of the Defendants.

[7] In this regard, there is only one question to be answered. That is "What is the proper avenue to seek relief from a decision of a statutory body? (In this case the National Insurance Board.)

[8] The Amended Statement of Claim in a nutshell takes issue with;

1. That the initial assessment which was at 100% disable benefit was reassessed at 50% disablement. This reduced the payment from $629.30 to $314.65 per month effective February, 2012.

2. The claim is that the Plaintiff only became aware that his benefit was reduced improperly by the 1st Defendant without reasonable and probable cause in April, 2011.

3. That the 1st Defendant wrongly and without reasonable cause discontinued the payment at 100% from 2001 to February 2012.

4. The improper reduction of the disablement benefit for the period 2001 – 2012 was caused as a result of the negligence of the 1st Defendant's failure to properly execute their duties in accordance with the provisions of the Act.

[9] The amended Statement of Claim seeks to set out particulars of injury and is set out at paragraph 3 above.

[10] In the ASOC in particular paragraph 2 in the actual claim it povides:

> **"2. An Order for damages to be assessed FOR PERSONAL INJURY – suffered as a result of IMPROPER DEDUCTION of the disablement benefit which forced the Plaintiff to find other ways to supplement his income over the past 11 years."**

[11] I highlight this paragraph, because it is two fold. It seeks damages for personal injury but it also speaks to the acts or omissions of a statutory board. This in and of itself raises another question.

[12] I am of the view that the position put by the Defendants that as to whether this is a matter which should have come under Order 53 of the RSC should necessarily be answered first. If the answer is yes then that will be the end of the matter. If the answer is no, then the matter will be decided as commenced by the Plaintiff.

[13] In paragraphs 5 and 6 of the Amended Statement of Claim the Plaintiff states:

> **"5. The Plaintiff was injured on the 28th April, 1997 when a 500 lb flower pot made out of concrete dropped on hisleft knee from the ceiling a the Raddison Cable Beach Hotel. As a result of the incident the Plaintiff's left knee was crushed and thereby rendered totally useless."**

6. **The extent of the injury was so severe that the Plaintiff could only move around with the aid of crutches. From 1998 to present date the Plaintiff has used crutches to walk."**

[14] At the center of this entire action is the decision of the board which is a part of the statutorily formed 1st Defendant. Paragraphs 16 and 17 of the Amended Statement of Claim provide:

"16. In April 2011 the Plaintiff became aware that the 1st Defendant improperly and without reasonable and probable cause reduced his benefit.

17. The Defendants wrongfully and without probable cause discontinued payment of all support including medical assistance. The Plaintiff has been unable to receive the treatment he requires with the result that his condition deteriorated."

[15] It is patently clear that this action has therefore come about as a result of a decision or certain decisions of the 1st Defendant a statutory creature. One must always keep in mind that one of the main objectives of judicial review is to HOLD GOVERNMENT TO ACCOUNT. All throughout the Plaintiff's submissions he complains about how decisioins were made by the board including on appeal.

[16] It becomes very clear that the Plaintiff appears to believe that his injuries were brought about by the Board. What he in fact complains about is the exercise of the discresion of a public board formed under the National Insurance Act. The Plaintiff is saying that as a result of the exercise of a discretion vested in the board,

he has suffered personal injuries and as a result of that the board is liable to him in tort.

[17] However, in the case of **STOVIN V. WISE [1996] 923 LORD HOFFMAN** opined:

> **"The duty of care at common law is therefore derived from the council's duty in public law to "give proper consideration to the question whether they should inspect or not." It is clear, however, that this public law duty cannot in itself give rise to a duty of care. A public body almost always has a duty in public law to consider whether it should exercise its powers, but that does not mean that it necessarily owes a duty of care which may require that the power should actually be exercised. As Mason J. said in *Sutherland Shire Council v. Heyman, 157 C.L.R. 424, 465:***
>
> > **"although a public authority may be under a public duty, enforceable by mandamus, to give proper consideration to the question whether it should exercise a power, this duty cannot be equated with, or regarded as a foundation for imposing, a duty of care on the public authority in relation to the exercise of the power. Mandamus will compel proper consideration of the authority of its discretion, but that is all."**
>
> **A mandamus can require future consideration of the exercise of a power. But an action for negligence looks back to what the council ought to have done. Upon what principles can one say of a public authority that not only did it have a duty in public law to consider the exercise of thepower but that it would thereupon have been under a**

duty in private law to act, giving rise to a claim in compensation against public funds for its failure to do so? Or as Lord Wilberforce puts it in the Anns case [1978] A.C. 728, 754:

> "The problem which this kind of action creates, is to define the circumstances in which the law should impose, over and above, or perhaps alongside, these public law powers and duties, a duty in private law towards individuals such that they may sue for damages in a civil court."

The only tool which the Anns case provides for defining these circumstances is the distinction between policy and operations. Lord Wilberforce said:

> "Most, indeed probably all, statutes relating to public bodies, contain in them a large area of policy. The courts call this 'discretion' meaning that the decisiion is one for the authority or body to make, and not for the courts. Many statutes also prescribe or at least presuppose the practical execution of policy decisions: a convenient description of this is to say that in addition to the area of policy or discretion, there is an operational area. Although this distinction between the policy area and the operational area is convenient, and illuminating, it is probably a distinction of degree; many 'operational' powers or duties have in them some element of 'discretion.' It can safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose upon it a common law duty of care."

The East Suffolk case [1941] A.C. 74 and Sheppared v. Glossop Corporation [1921] 3 K.B. 132 were distinguished as involving questions of policy or discretion. The inspection of foundations, on the other hand, was "heavily operational" and the power to inspect could therefore give rise to a duty of care. Lord Romer's statement of principle in East Suffolk was limited to cases in which the exercise of the power involved a policy decision.

8. **Policy and operations:**

Since *Anns v. Merton London Borough Council*, there have been differing views, both in England and the Commonwealth, over whether it was right to breach the protection which the East Suffolk principle gave to public authorities. In *Sutherland Shire Council v. Heyman, 157 C.L.R. 424, 483, Brennan J.* thought that it was wrong: one simply could not derive a common law "ought" from a statutory "may". But I think that he was the only member of the court to adhere to such uncompromising orthodoxy. What has become clear, however, is that the distinction between policy and operations is an inadequate tool with which to discover whether it is appropriate to impose a duty of care or not. In *Rowling v. Takaro Properties Ltd.* [1988] A.C. 473, 501 Lord Keith of Kinkel said:

> **"[Their Lordships] incline to the opinion, expressed in the literature, that this distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisiions on the allocation of scarce resources or the distribution of risks ... if this is right, classification of the relevant decision as a policy or planning *decision in this sense may exclude liability; but a conclusion***

that it does not fall within that category does not, in their Lordships' opinion, mean that a duty of care will necessarily exist."

There are at least two reasons why the distinction is inadequate. The first is that, as Lord Wilberforce himself pointed out, the distinction is often elusive. This is particularly true of powers to provide public benefits which involve the expenditure of money. Practically every decision about the provision of such benefits, no matter how trivial it may seem, affects the budget of the public authority in either timing or amount. The *East Suffolk* case, about which Lord Wilberforce said in the *Anns Case [1978] A.C. 728 757,* that the activities of the board, though "operational," were "well within a discretionary area, so that the plaintiff's task in contending for a duty of care was a difficult one" is a very good example. But another reason is that even if the distinction is clear cut, leaving no element of discretion in the sense that it would be irrational (in the public law meaning of that word) for the public authority not to exercise its power, it does not follow that the law should superimpose a common law duty of care. This can be seen if one looks at cases in which a public authority has been under a statutory or common law duty to provide a service or other benefit for the public or a section of the public. In such cases there is no discretion but the courts have nevertheless not been willing to hold that a member of the public who has suffered loss because the service was not provided to him should necessarily have a cause of action, either for breach of statutory duty or for negligence at common law.

There are many instances of this principle being applied to statutory duties, but perhaps the most relevant example of the dissociation between public duty and a liability to pay compensation for breach of *that duty was the ancient common law duty to repair the highway. The*

common law imposed this financial burden upon the inhabitants of the parish. But it saw no need to impose upon them the additional burden of paying compensation to users of the highway who suffered injury because the highway surveyor had failed to repair. The duty could be enforced only by indictment. This rule continued to apply when the duty to maintain was transferred by statute to highway authorities and was only abolished by section 1 of the Highways (Miscellaneous Provisions) Act 1961. Likewise in Hill v. Chief Constable of West Yorkshire [1889] A.C. 53 it was held that the public duty of the police to catch criminals did not give rise to a duty of care to a member of the public who was injured because the police had negligently failed to catch one. The decision was mainly based upon the large element of discretion which the police necessarily have in conducting their operations, but the judgment excludes liability even in cases in which the alleged breach of duty would constitute public law irrationality.

In terms of public finance, this is a perfectly reasonable attitude. It is one thing to provide a service at the public expense. It is another to require the public to pay compensation when a failure to provide the service has resulted in loss. Apart from cases of reliance, which I shall consider later, the same loss would have been suffered if the service had not been provided in the first place. To require payment of compensation increases the burden on public funds. Before imposing such an additional burden, the courts should be satisfied that this is what Parliament intended.

Whether a statutory duty gives rise to a private cause of action is a question of construction: see Reg. v. Deputy Governor of Parkhurst Prison, Ex parte Hague [1992] A.C. 58. It requires an examination of the policy of the statute to decide whether it was intended to confer a

right to compensation for breach. Whether it can be relied upon to support the existence of a common law duty of care is not exactly a question of construction, because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision. As Lord Browne-Wilkinson said in X (Minors) v. Bedfordshire Country Council [1995] 2 A.C. 633, 739C in relation to the duty of care owed by a public authority performing statutory functions.

> "the question whether there is such a common law duty and if so its ambit, must be profoundly influenced by the statutory framework within which the acts complained of were done."

The same is true of omission to perform a statutory duty. If such a duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care.

In the case of a mere statutory power, there is the further point that the legislature has chosen to confer a discretion rather than create a duty. Of course there may be cases in which Parliament has chosen to confer a power because the subject matter did not permit a duty of care to be stated with sufficient precision. It may nevertheless have contemplated that in circumstances in which it would be irrational

not to exercise the power, a person who suffered loss because it had not been exercised, or not properly exercised, would be entitled to compensation. I therefore do not say that a statutory "may" can never give rise to a common law duty of care. I prefer to leave open the question of whether the Anns' case was wrong to create any exception to Lord Romer's statement of principle in the East Suffolk case and I shall go on to consider the circumstances (such as "general reliance") in which it has been suggested that such a duty might arise. But the fact that Parliament has conferred a discretion must be some indication that the policy of the act conferring the power was not to create a right to compensation. The need to have regard to the policy of the statute therefore means that exceptions will be rare.

In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised".

[17] If the Plaintiff is to have even an inkling of an opportunity to bring himself within some exceptions, he has to prove, not just allege, that the Defendant acted improperly WITHOUT REASONABLE and PROBABLE cause.

[18] Section 52 of the **NATIONAL INSURANCE (Benefit and Assistance) REGULATIONS** sets out the parameters of who is entitled to disablement benefits. It provides:

"52. Subject to the provisions of these Regulations, an employed person or a self-employed person whose contributions are current at the time of the injury shall be entitled to disablement benefit if he suffers as the result of the relevant accident from loss of faculty such that the degree of the resulting disablement assessed in accordance with regulation 56 amounts to not less than one per centum."

[19] Sections 19 (1), (b) and (c), 20 and 21 of the **NATIONAL INSURANCE (Determination of Claims and Questions) REGULATIONS** provide:

"19. (1) The following medical questions may be determined in accordance with this Part of these Regulations - ...

(b) whether the relevant accident has resulted in a loss of faculty;

(c) at what percentage the degree of disablement resulting from the relevant loss of faculty is to be assessed and what period is to be taken into account by the assessment;

20. Where the case of a claimant for disablement benefit has been referred by the Director for determination of the medical question in subparagraph (c) of paragraph (1) of regulation 19 and, on that or any other subsequent reference, the degree of disablement is provisionally assessed, the medical question arising in that case shall again be referred to a medical referee not later than the end of the period taken into account by the provisional assessment.

21. (1) A medical referee shall be selected by the medical officer of the Board from a panel of medical referees prepared by him and approved by the Board.

(2) A person shall not act as a medical referee for the purpose of the consideration of a medical question in any case if he –

(c) is, or was during the material period, an employer of the claimant (my emphases).

[20] The above, 20 and 21 further demonstrate the "at arm's length" of the referral to Dr. Dane Bowe and compliance with the regulations. **Dr. Bowe IS NOT AN EMPLOYEE** of the Board.

[21] In the case of **GORRINGE V. CALDERDALE MBC [2004] 1 W.L.R. 1057 Lord Hoffmann** opined;

> **"My Lord, on 15 July 1996, on a country road in Yorkshire, Mrs. Denise Gorringe drove her car head-on into a bus. It was hidden behind a sharp crest in the road until just before she reached the top. When she first caught sight of it, a curve on the far side may have given her the impression that it was actually on her side of the road. At any rate, she slammed on the brakes and at 50 miles an hour the wheels locked and the car skidded into the path of the bus. Mrs. Gorringe suffered brain injuries severely affecting various bodily functions including speech and movement.**

On the fact of it, the accident was her own fault. It was certainly not the fault of the bus driver. He was driving with proper care when Mrs. Gorringe skidded into him. But she claims in these proceedings that it was the fault of the local authority, the Calderdale Metropolitan Borough Council. She says that the council caused the accident by failing to give her proper warning of the danger involved in driving fast when you could not see what was coming. In particular, the council should have painted the word "SLOW" on the road surface at some point before the crest. There had been such a marking in the past, but it disappeared, probably when the road was mended seven or eight years before.

When the case was before the Court of Appeal [2002] RTR 446, Potter LJ said, at p 478, para 93, that it would have been "no more than a warning of the need to do that which should have been obvious to her in any event as she drove up from the dip". Nevertheless, he was willing to hold that the council's omission to provide such a warning meant that the accident was partly its fault. The judge (Mr. Roger Thorn QC, sitting as a deputy judge of the Queen's Bench Division) had gone even further. He said that it was entirely the fault of the council. In the absence of such a warning, Mrs. Gorringe could not be blamed for driving too fast. But May LJ and Sir Murray Stuart-Smith disagreed. They said that the council was not in breach of any duty to Mrs. Gorringe and that she was entirely responsible. Her action was dismissed and she appeals to your Lordship's House.

My Lords, the general rule is that even in the case of occupiers of land, there is no duty to give warning of obvious dangers: see the recent case of Tomlinson v Congleton Borough Council [2004] 1 AC 46. People must accept responsibility for their own actions and take the

necessary care to avoid injuring themselves or others. And a highway authority is not of course the occupier of the highway and does not owe the common duty of care. Its duties (and those of its predecessors, the inhabitants of the parish) have for centuries been more narrowly defined, both by common law and statute.

At common law it was the duty of the inhabitants of a parish to put and keep its highways in repair. A highway had to be, as Diplock LJ said in Burnside v Emerson [1968] 1 WLR 1490, 1497, "in such good repair as renders it reasonably passable for the ordinary traffic of the neighborhood at all seasons of the year without danger caused by its physical condition".

The inhabitants appointed a surveyor of highways to carry out this duty on their behalf and the expense was met by levying a rate. By various statutes culminating in the Highways Act 1959, the duty was transferred from the inhabitants to statutory highway authorities. It is now contained in section 41 (1) of the Highways Act 1980; a highway authority is "under a duty ... to maintain the highway". But the common law duty to repair was the only duty of the inhabitants. In all other respects the public had to take the highway as they found it. Furthermore, the duty of the inhabitants was a public duty which was enforceable only by a prosecution on indictment. It could not be relied upon by an individual to found a claim for damages. I accept it was thought burdensome enough for the inhabitants to have to pay the highway rate. There was no reason why they should have also to pay damages for injuries caused by the deficiencies of the surveyor in carrying out repairs. The users of the highway were expected to look after themselves.

This remained the law when the duty was transferred to highway authorities. An individual who had suffered damage because of some positive act which the authority had done to make the highway more dangerous could sue for negligence or public nuisance in the same way as he could sue anyone else. The highway authority had no exemption from ordinary liability in tort. But the duty to take active steps to keep the highway in repair was special to the highway authority and was not a private law duty owed to any individual. Thus it was said that highway authorities were liable in tort for misfeasance but not for non-feasance. Sometimes it was said that the highway authority was "exempt" from liability for non-feasance, but it was not truly an exemption in the sense that the authority had a special defence against liability. The true position was that on one had ever been liable in private law for non-repair of a highway. But all this was changed by section 1 (1) of the Highways (Miscellaneous Provisions) Act 1961. The public duty to keep the highway in repair was converted into a statutory duty owed by the highway authority to all users of the highway, giving a remedy in damages for its breach.

The new private law duty was however limited to the obligation which had previously rested upon the inhabitants at large, namely, to put and keep the highway in repair. As Lord Denning MR explained in Haydon v. Kent County Council [1978] QB 343, that remains the meaning of "maintain the highway" in section 41 of the 1980 Act today. In Goodes v. East Sussex County Council [2000] 1 WLR 1356 this House decided that the duty therefore did not require the highway authority to remove ice or snow from the road. The presence of ice and snow did not mean that the highway was out of repair. Removing ice and snow was a different kind of obligation which could be imposed on highway authorities only by Parliament. It has since been added to the

repairing duty by section 111 of the Railways and Transport Safety Act 2003.

The judge decided that, in the absence of a suitable warning painted on the road or carried on a sign, the highway was out of repair. The Court of Appeal unanimously disagreed and I have little to add to their reasons. The provision of information, whether by street furniture or painted signs, is quite different from keeping the highway in repair. In Lavis v. Kent County Council (1992) 90 LGR 416, 418 Steyn LJ said in response to a similar submission that section 41 required an authority to erect a warning sign: "In my judgment it is perfectly clear that the duty imposed is not capable of covering the erection of traffic signs, and nothing more need be said about that particular provision."

This observation may be said to be short and to the point but I doubt whether, in the light of the judgment of Lord Denning MR in Haydon's case, there is a great deal more to say. At any rate, I agree with it.

The alternative claim is for common law negligence. Mr. Wingate-Saul, who appeared for Mrs. Gorringe, accepts that in the absence of the statutory provision to which I shall shortly refer, such a claim would be hopeless. If the highway authority at common law owed no duty other than to keep the road in repair and even that duty was not actionable in private law, it is impossible to contend that it owes a common law duty to erect warning signs on the road. It is not sufficient that it might reasonably have foreseen that in the absence of such warnings, some road users might injure themselves or others. Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an

activity which carries risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it. The law does recognize such duties in special circumstances: see, for example, Goldman v Hargrave [1967] 1 AC 645 on the positive duties of adjoining landowners to prevent fire or harmful matter from crossing the boundary. But the imposition of such a liability upon a highway authority through the law of negligence would be inconsistent with the well-established rules which have always limited its liability to common law.

> **"Each local authority must prepare and carry out a programme of measures designed to promote road safety ..."**

"Without prejudice to the generality of subsection (2) above, in pursuance of their duty under that subsection each local authority – (a) must carry out studies into accidents arising out of the use of vehicles on roads ... within their area, (b) must, in the light of those studies, take such measures as appear to the authority to be appropriate to prevent such accidents, including the dissemination of information and advice relating to the use of roads, the giving of practical training to road users or any class or description of road users, the construction, improvement, maintenance or repair of roads for which they are the highway authority ... and other measures taken in the exercise of their powers for controlling, protecting or assisting the movement of traffic on roads..."

These provisions, with their repeated use of the word "must", impose statutory duties. But they are typical public law duties expressed in

the widest and most general terms: compare section 1 (1) of the National Health Service Act 1977: "It is the Secretary of State's duty to continue the promotion ... of a comprehensive health service ..." No one suggests that such duties are enforceable by a private individual in an action for breach of statutory duty. They are enforceable, so far as they are justiciable at all, only in proceedings for judicial review.

Nevertheless, Mr. Wingate-Saul submits that section 39 casts a common law shadow and creates a duty to users of the highway to take reasonable steps to carry out the necessary studies and take the appropriate measures. At any rate, their conduct in compliance with these duties must not be such as can be described as "wholly unreasonable". The judge found that it was unreasonable for the council not to have painted a warning sign on the road and Potter LJ thought that he was entitled to come to this conclusion.

The effect of statutory powers and duties on the common law liability of a highway authority was considered by this House in Stovin v Wise [1996] AC 923. Mrs. Wise emerged from a side road and ran down Mr. Stovin because she was not keeping a proper look-out. When he sued her for damages, she (or rather her insurance company) joined the Norkfolk County Council as a third party because the visibility at the intersection was poor and they said that the council should have done something to improve it. The council had statutory powers which would have enabled the necessary work to be done and there was evidence that the relevant officers had decided in principle that it should be done, but they had not got around to doing it.

The decision of the majority was that the council owed no private law duty to road users to do anything to improve the visibility at the intersection. "Drivers of vehicles must take the highway network as they find it:" p 958. The statutory power could not be converted into a common law duty. I point out in my speech that the council had done nothing which, apart from statute, would have attracted a common law duty of care. It had done nothing at all. The only basis on which it was a candidate for liability was that Parliament had entrusted it with general responsibility for the highways and given it the power to improve them and take other measures for the safety of their users.

Since the existence of these statutory powers is the only basis upon which a common law duty was claimed to exist, it seemed to me relevant to ask whether, in conferring such powers, Parliament could be taken to have intended to create such a duty. If a statute imposes a duty, it is well settled that the question of whether it was intended to give rise to a private right of action depends upon the construction of the statute: see R v Deputy Governor of Parkhurst Prison, Ex p Hague [1992] 1 AC 58, 159, 168-171. If the statute does not create a private right of action, it would be, to say the least unusual if the mere existence of the statutory duty could generate a common law duty of care.

For example, in O'Rourke v Camden London Borough Council [1998] AC 188 a homeless person sued for damages on the ground that the council had failed in its statutory duty to provide him with accommodation. The action was struck out on the ground that the statute did not create a private law right of action. In a speech with which all other members of the House concurred, I said at p 193:

> **"the [Housing] Act [1985] is a scheme of social welfare, intended to confer benefits at the public expense on grounds of public policy. Public money is spent on housing the homeless not merely for the private benefit of people who find themselves homeless but on grounds of general public interest: because, for example, proper housing means that people will be less likely to suffer illness, turn to crime or require the attention of other social services. The expenditure interacts with expenditure on other public services such as education, the National Health Service and even the police. It is not simply a private matter between the claimant and the housing authority. Accordingly, the fact that Parliament has provided for the expenditure of public money on benefits in kind such as housing the homeless does not necessarily mean that it intended cash payments to be made by way of damages to persons who, in breach of the housing authority's statutory duty, have unfortunately not received the benefits which they should have done."**

In the absence of a right to sue for breach of the statutory duty itself, it would in my opinion have been absurd to hold that the council was nevertheless under a common law duty to take reasonable care to provide accommodation for homeless persons whom it could reasonably foresee would otherwise be reduced to sleeping rough. (Compare Stovin v Wise [1996] AC 923, 952 – 953.) And the argument would in my opinion have been even weaker if the council, instead of being under a duty to provide accommodation, merely had a power to do so.

This was the reasoning by which the majority in Stovin v Wise came to the conclusion that the council owed no duty to road users which could in any circumstances have required it to improve the intersection. But misunderstanding seems to have arisen because the majority judgment goes on to discuss, in the alternative, what the nature of such a duty might have been if there had been one. It suggests that it would have given rise to liability only if it would have been irrational in a public law sense not to exercise the statutory power to do the work. And it deals with this alternative argument by concluding that, on the facts, there had been no breach even of such a duty. The suggestion that there might exceptionally be a case in which a breach of a public law duty could found a private law right of action has proved controversial and it may have been ill-advised to speculate upon such matters.

The approach of the minority, in a speech by Lord Nicholls of Birkenhead, was very different. He thought that the statutory powers had invested the highway authority with general responsibilities which could in appropriate circumstances give rise to a common law duty of care. He referred to a number of circumstances which might singly or cumulatively justify the existence of a duty and he said that on the facts there had been such a duty and that the council had been in breach.

Stovin v Wise was considered by the Court of Appeal in Larner v Solihull Metropolitan Borough Council [2001] RTR 469. Mrs. Larner was injured in a collision when she failed to give way on entering a major road at a junction. She had passed two "Give Way" signs but sued the highway authority on the ground that its duties under section 39 of the 1988 Act required additional warning to be given. The

Recorder of Birmingham, Judge Crawford QC, sitting as a judge of the Queen's Bench Division, dismissed the action on a number of grounds. The foremost was that section 39 neither gave rise to an action for breach of statutory duty nor generated a duty of care. He also held that there had been no breach of any duty which might conceivably exist and that if there had been, it would not have been the cause of the accident.

Mrs. Lamar appealed to the Court of Appeal (Lord Woolf CJ, Judge and Robert Walker LJJ). Lord Woolf CJ, at p 472, described the duty under section 39 as a "target duty" which did no more than "require the council to exercise its powers in the manner that it considers is appropriate". Lord Woolf CJ, at pp 473-474, cited a passage from my speech in Stovin v Wise [1996] AC 923 in which I said, at pp 952-953:

> "If [a statutory] duty does not give rise to a private right to sue for breach, it would be unusual if it nevertheless gave rise to a duty of care at common law which made the public authority liable to pay compensation for foreseeable loss caused by the duty not being performed. It will often be foreseeable that loss will result if, for example, a benefit or service is not provided. If the policy of the Act is not to create a statutory liability to pay compensation, the same policy should ordinarily exclude the existence of a common law duty of care."

He then said, at p 475:

> "However, so far as section 39 of the 1988 Act is concerned, we would accept that there can be circumstances of an exceptional

nature where a common law liability can arise. For that to happen, it would have to be shown that the default of the authority falls outside the ambit of discretion given to the authority by the section. This would happen if an authority acted wholly unreasonably ... As long as any common law duty is confined in this way, there are no policy reasons which are sufficient to exclude the duty. An authority could rely on lack of resources for not taking action and then it would not be in breach ... These difficulties in the way of claimants mean that the existence of the residual common law duty should not give rise to a flood of litigation. On the other hand for the desirability of a duty in the exceptional case we adopt the reasons of Lord Nicholls of Birkenhead in Stovin v Wise."

There is nothing in this reasoning to explain why the passage which Lord Woolf CJ cited from the majority judgment in Stovin v Wise did not apply to section 39 of the 1988 Act. He simply says that he adopts the view of the minority in Stovin v Wise. Mr. Wingate-Saul submitted that this was legitimate because the only real disagreement between majority and minority in Stovin v Wise was over the facts: the majority thought that the council was immune from liability because it was exercising a discretion whereas the minority thought that there had been an operational failure. But that is not in my opinion a correct analysis of the decision. The majority rejected the argument that the existence of the statutory power to make improvements to the highway could in itself give rise to a common law duty to take reasonable care to exercise the power or even not to be irrational in failing to do so. It went no further than to leave open the possibility that there might somewhere be a statutory power or public duty which

generated a common law duty and indulged in some speculation (which may have been ill-advised) about what that duty might be.

Speaking for myself, I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has power (or a public law duty) to provide. For example, the majority reasoning in Stovin v Wise was applied in Capital & Counties plc v Hampshire County Council [1997] QB 1004 to fire authorities, which have a general public law duty to make provision for efficient fire-fighting services: see section 1 of the Fire Services Act 1947. The Court of Appeal held, in my view correctly, that this did not create a common law duty. Stuart-Smith LJ (giving the judgment of the Court of Appeal) said, at p 1030:

> **"In our judgment the fire brigade are not under a common law duty to answer the call for help, and are not under a duty to take care to do so. If, therefore, they fail to turn up, or fail to turn up in time, because they have carelessly misunderstood the message, got lost on the way or run into a tree, they are not liable."**

[22] Lord Roskill in the case of **COUNCIL of CIVIL SERVICE UNIONS AND OTHERS** (Appellants) v **MINISTER FOR THE CIVIL SERVICE** (Respondent) [1985] H.O.L. opined at 414 – 415:

> **"LORD ROSKILL, My Lords, this appeal arises out of the exercise by the respondent, the Minister for the Civil Service, of a specific power**

vested in her by article 4 of the Civil Service Order in Council 1982. That specific power purported to be exercised orally on 22 December 1983. The terms in which it is claimed to have been exercised are contained in a letter dated 7 February 1984 from Sir Robert Armstrong writing as Head of the Civil Service to the Director of the Government Communications Headquarters at Cheltenham ("GCHQ"). The exercise of the power took the form of:

> "Instructions that the conditions of service under which civil servants are employed as members of the staff of the Government Communications Headquarters shall be varied so as to provide that such civil servants shall not be members of any trade union other than a departmental staff association approved by yourself."

The making of this change in the conditions of service of civil servants employed at GCHQ was announced in the House of Commons by the Secretary of State for Foreign and Commonwealth Affairs on 25 January 1984 and on the same day he issued certificates under section 12(4) of the Employment Protection Act 1975 and under section 138(4) of the Employment Protection (Consolidation) Act 1978 certifying that employment at GCHQ was to be excepted from those sections "for the purpose of safeguarding national security." On the same day the Director of GCHQ informed his staff in writing of the decision, of the issue of the certificates and of the various options which were thereafter to remain open to them.

My Lords, the background to these actions in December 1983 and January 1984 is fully set out in the speech of my noble and learned

friend, Lord Fraser of Tullybelton, which I gratefully adopt. It requires no repetition. Nor does the history of the antecedent rights of those concerned to join trade unions. That the instructions thus given and the certificates thus issued drastically altered the trade union rights of those civil servants concerned cannot be doubted. Nor can it be doubted that the issue of the instructions and of the certificates without prior warning or consultation of any kind with the various trade unions concerned either at a national or at a local level involved a complete departure from the normal manner in which relations between management and staff had hitherto been conducted and was bitterly resented by some of those immediately involved on the staff side.

My Lords, with matters of that kind you Lordships are in no way concerned. This appeal is concerned with and only with judicial review. Judicial review, as my noble and learned friend Lord Brightman stated in Chief Constable of the North Wales Police v. Evans [1982] 1 W.L.R. 1155, 1174, "is not an appeal from a decision, but a review of the manner in which the decision was made." It is the appellants' case, stated in a sentence, that the oral instruction of 22 December 1983 should be judicially reviewed and declared invalid because of the manner in which the decision which led to those instructions being given was taken, that is to say without prior consultation of any kind with the appellants or indeed others. Initially the respondents also s9ught judicial review of the two certificates to which I have referred but that claim has been abandoned.

Before considering the rival submissions in more detail, it will be convenient to make some general observations about the process now known as judicial review. Today it is perhaps commonplace to

observe that as a result of a series of judicial decisions since about 1950 both in this House and in the Court of Appeal there has been a dramatic and indeed a radical change in the scope of judicial review. That change has been described – by no means critically – as an upsurge of judicial activism. Historically the use of the old prerogative writs of certiorari, prohibition and mandamus was designed to establish control by the Court of King's Bench over inferior courts or tribunals. But the use of those writs, and of their successors the corresponding prerogative orders, has become far more extensive. They have come to be used for the purpose of controlling what would otherwise be unfettered executive action whether of central or local government. Your Lordships are not concerned in this case with that branch of judicial review which is concerned with the control of inferior courts or tribunals. But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case of case basis and no doubt hereafter that process will continue. Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, Wednesbury principles (Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 K.B. 223.) The third is where it has acted contrary to what are often called "principles of natural justice." As to this last, the use of this phrase is no doubt hallowed by time and much judicial repetition, but it is a phrase often widely misunderstood and therefore as often misused. That phrase perhaps might now be allowed to find a permanent resting-place and

be better replaced by speaking of a duty to act fairly. But that latter phrase must not in its turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfillment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken.

My noble and learned friend, Lord Diplock, in his speech has devised a new nomenclature for each of these three grounds, calling them respectively "illegality", irrationality' and "procedural impropriety" – words which, if I may respectfully say so, have the great advantage of making clear the differences between each ground.

In the present appeal your Lordships are not concerned with the first two matters already mentioned, with the exercise of a power which does not exist or with Wednesbury principles. But this appeal is vitally concerned with the third, the duty to act fairly.

The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had "a reasonable expectation" of some occurrence or action preceding the decision complained of and that that "reasonable expectation" was not in the event fulfilled."

[23] Order 53 (1), (a) and (b), (2), (a), (b) and (c) provide:

"ORDER 53

JUDICIAL ORDER

1. (1) An application for –

(a) an order of *mandamus*, prohibition or *certiorari*;

or

(b) an injunction under section 18 of the Act restraining a person from acting in any office in which he is not entitled to act,

Shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction (not being an injunction mentioned in paragraph (1) (b) may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to –

(a) the nature of the matters in respect of which relief may be granted by way of an order or *mandamus*, prohibition or *certiorari;*

(b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and

(c) all the circumstances of the case,

It would be just and convenient for the declaration or injunction to be granted on an application for judicial review."

[24] The very wording of Order 53 makes it patently clear which matters are subject to judicial review. The way that the Plaintiff's claim has been formulated, strongly implies that it is the negligence of the Board which caused the Plaintiff's injury. The fact of the matter is that at the time the Plaintiff sustained the industrial injuries, he was employed with the hotel. What he ought to have contemplated was suing his employer for breach of the common law duty to provide a safe work environment as the Health and Safety at Work Act was not yet in force.

[25] The claim, framed as it is transfers liability from the Plaintiff's employer to the Board thereby imposing assumption for causation on the Board. This would be a most unsound position to take.

[26] REGULATION 19 (4) of the **NATIONAL INSURANCE DETERMINATION OF CLAIMS and QUESTIONS) Regulations** provides:

> **"19. (1) The following medical questions may be determined in accordance with this Part of these Regulations –**
>
> **(2)** ----------
>
> **(3)** ----------
>
> **(4) Subject to these Regulations, the decision of a medical appeal board on a medical question SHALL BE FINAL (my emphasis).**

[26] The defendants take the view that the above section ousts the jurisdiction of this Honorable Court. I am reminded that the Plaintiff did appeal to the Medical Appeal Tribunal as in the following case. In the case **of R V. MEDICAL APPEAL TRIBUNAL, EX PARTE GILMORE [1957] 1 QB 574 (CA)** Denning LJ stated:

[27] "The claim in this case involved a challenge TO THE AMOUNT OF COMPENSATION an individual received for a work related injury from the Medical Appeal Tribunal. The National Insurance (Industrial Injuries Act [1946] stated that **"the decision of the Medical Appeal Tribunal SHALL BE FINAL."**

> **"The second point is the effect of Section 36 (3) of the 1946 Act which provides that: "any decision of a claim or question ... shall be final."**

Do those words preclude the Court of Queen's Bench from issuing a certiorari to bring up the decision?

This is a question which we did not discuss in Rex v. Northumberland Compensation Appeal Tribunal, 1952 1 King's Bench, 338, because it did not there arise. It does arise here, and on looking again into the old books I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word "final" is not enough. That only means "without appeal". It does not mean "without recourse to certiorari". It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made "final", certiorari can still issue for excess of jurisdiction or for error of law on the face of the record.

Lord Coke started this train of authority when he said that the words of an Act of Parliament "shall not bind the King's Bench because the pleas there are *coram ipso Rege*". See Foster's Case, (1615) 11 Coke's Reports, at page 64b. Chief Justice Kelynge gave the train an impetus in 1670 when an order of the Commissioners of Sewers was brought before him. It was pointed out that the Statute enacted "that they should not be compelled to certify or

return their proceedings" and "that they shall not be reversed but by other Commissioners". Chief Justice Kelynge disposed of the objection by saying:

> **"Yet it was never doubted, but that this Court might question the legality of their orders notwithstanding: and you cannot oust the jurisdiction of this Court without particular words in an Act of Parliament. There is no jurisdiction that is uncontrollable by this Court". See Rex v. Smith & Others Commissioners of Sewers, 1 Modem Reports, at page 45, Callis on Sewers, Fourth Edition, page 342.**

A few years later, in 1686, the Court of King's Bench had a case where the collectors of the tax on chimmeys had distrained on the landlord of a cottage. The Act said that "If any question shall arise about the taking of any distress, the same shall be heard and finally determined by the justices". The justices made a determination which was erroneous in law on its face in that it did not state sufficient grounds for making the landlord liable. The Court issued a certiorari to quash their determination and said:

> **"The statute doth not mention any certiorari which shows that the intention of the lawmakers was that a certiorari might be brought, otherwise they would have enacted, as they have done by several other statutes, that no certiorari shall lie. Therefore the meaning of the Act must be that the determination of the justices shall be final in matters of fact only": Rex v Plowright, (1686) 3 Modern Reports, 94."**

In 1699, in the famous case of the College of Physicians, Lord Holt gave the full weight of his authority to those decisions, especially mentioning the case of the Commissioners of Sewers: see Groenwalt v. Burwall, 1 Lord Raymond's Reports, at page 469. In 1760 Lord Mansfield was faced with the Coventicles Act which said "that no other Court whatsoever shall intermeddle with any cause or causes of appeal upon this Act: but they shall be finally determined in Quarter Sessions only". Nevertheless Lord Mansfield ordered certiorari to issue, saying:

> "The jurisdiction of this Court is not taken away, unless there be express words to take it away: this is a point settled". See Rex v Moreley, (1760) 2 Burrow's reports, at page 1042."

In 1800 a conviction by justices was erroneous on the fact of the record, because it did not exclude a possible defence. When the defendant moved to have it quashed, the prosecutor objected "that the defendant having elected to appeal to the Sessions, the certiorari was in effect taken away by the Act, because it said that the determination of the Sessions shall be final": but Lord Kenyon, the Lord Chief Justice, said "That would be against all authority; for the certiorari being a beneficial writ for the subject, would not be taken away without express words": see Rex v. Jukes. (1800) 8 Term Reports, at page 544. Joseph Chitty commenting on this case said the words "finally determine" merely prohibit a reinvestigation of the facts: see Chitty's Practice, Volume II, page 219. Finally, in 1823 the Court of King's Bench in its golden age presided over by Chief Justice Abbott summed up the whole matter by saying that "certiorari always lies, unless it is expressly taken away, and an appeal never lies, unless it is expressly given by the Statute": see Rex v. Cashiobury Justices, (1823) 3 Dowling and Ryland, at page 35.

It was no doubt that train of authority which Lord Summer had in mind when he said in Rex v. Nat Bell Liquors Ltd., 1922 Appeal Cases, 128, at page 159:

> "Long before Jervis's Acts, statutes had been passed which created an inferior court and declared its decisions to be 'final' and 'without appeal', and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by certiorari".

I venture therefore to use in this case the words I used in the recent case Taylor v. National Assistance Board, 1957 2 Weekly Law Reports, at page 193, (about declarations) with suitable variations to certiorari:

> "The remedy is not excluded by the fact that the determination of the Tribunal is by Statute made 'final'. Parliament only gives the impress of finality to the decisions of the Tribunal on the condition that they are reached in accordance with the law".

In my opinion, therefore, notwithstanding the fact that the Statute says that the decision of the Medical Appeal Tribunal is to be final, it is open to this Court to issue a certiorari to quash it for error of law on the face of the record. It would seem to follow that a decision of the National Insurance and Industrial Insurance Commissioners is also subject to supervision by certiorari (a point left open by the Divisional Court in Regina v. National Insurance Commissioners, 1954 2 All England Reports, 292) but they are so well versed in the law and deservedly held in such high regard that it will be rare that they fall into error such as to need correction."

[28] Two things can be considered from this decision. In the first instance the jurisdiction of this Court is not ousted unless it is stated as such in the relevant act and secondly, the natural process dictates "JUDICIAL REVIEW" for certiorari.

[29] The Defendants, in their defence, pray that this Honorable Court strikes out the action as it is an abuse of the process of the Court.

[30] Having set out in great detail the evidence and facts in this matter together with all the authorities cited and in light of all the circumstances, looking at the instant matter on its own facts, I find that the instant action is an abuse of process. In this regard I make reference to the case of **NASSAU CRUISES Ltd. v. BAHAMAS HOTEL CATERING and ALLIED WORKERS UNION (2000) BHS. J. 1996, No. 789,** wherein they cite paragraph 68 of the Supreme Court Practice Vol. 1, where the comment provides:

> **"The Court will prevent the improper uses of its machinery, and will, in a proper case, SUMMARILY prevent its machinery from being used as a means of vexation or oppression in the process of litigation ... The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and justice may be very material."**

[31] In light therefore of the authorities and in consideration of all the circumstances the instant action is hereby struck out.

[32] Costs to the Defendants to be taxed if not agreed.

I so order.

Dated this 26th **day of** April **A.D., 2021.**

Keith H. Thompson

Justice