Part 6

CASES AND MATERIALS

THE NATURE AND DEVELOPMENT OF ENGLISH LAW

Where common law and equity are in conflict equity prevails

1 ***The Earl of Oxford's Case*** (1615) 1 Rep Ch 1

Merton College, Oxford, had been granted a lease of Covent Garden for 72 years at £9 a year, and some 50 years later sold the lease to the Earl for £15 a year. Later the college retook possession of part of it, on the ground that a statute of Elizabeth prevented the sale of ecclesiastical and college lands so that the conveyance to the Earl was void. The Earl brought a claim to eject the college from the land, and the common law judges found in favour of the college, saying that they were bound by the statute. The Earl filed a Bill in Equity for relief, and Lord Ellesmere granted it, stating that the claim of the college was against all good conscience. This brought law and equity into open conflict and resulted in the ruling of James I that, where common law and equity are in conflict, equity should prevail. (See now s 49 of the Supreme Court Act 1981.)

The court must apply an Act of Parliament and cannot declare it illegal

2 ***Cheney*** **v** ***Conn*** [1968] 1 All ER 779

Cheney objected to his tax assessments under the Finance Act 1964, on the ground that the government was applying part of the tax collected to the making of nuclear weapons. Cheney alleged that this was contrary to the Geneva Conventions – which had been incorporated into the Geneva Conventions Act 1957 – and conflicted with international law.

Held – even if there was a conflict between the 1964 and 1957 Acts, the 1964 Act gave clear authority to collect the taxes in question and being later in time prevailed. 'It is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal,' said the judge.

A statute remains law until repealed by Parliament

3 ***Prince of Hanover*** **v** ***Attorney-General*** [1957] 1 All ER 49

A statute of Anne in 1705 provided for the naturalisation of Princess Sophia, Electress of Hanover, and the issue of her body. The statute was repealed by the British Nationality Act 1948, s 34(3), but by s 12 a person who was a British subject immediately before the commencement of the Act (1 January 1949) became a citizen of the United Kingdom and Colonies. The claimant was born in 1914 in Hanover and was lineally descended from the Electress. He now claimed a declaration that he was a British subject immediately before the commencement of the British Nationality Act. It was necessary for him to establish this in order to make a claim on a fund, put up by the Polish government, to compensate Britons who had lost property in Poland because of nationalisation. It was held at first instance that the statute had not lost its force merely because of its age, but nevertheless, although the statute was unqualified and plain in its meaning, its words taken alone produced an absurd result, since, under the statute, the Kaiser, who led Germany in the 1914–18 world war, would have been a British subject. Parliament must, therefore, have intended some limitation on the operation of the words used. By referring to the preamble it seemed possible to draw the conclusion that the purpose of the Act was to be effected in the lifetime of Anne, and that after that time its purpose was spent and the claimant was not entitled to his declaration. On reaching the Court of Appeal, *it was held* that the appellant was a British subject under the statute of Anne which had remained law until repealed by the 1948 Act, the statute being so clear in its meaning that it was unnecessary to apply rules of interpretation to it. Rules of interpretation were to be used only in case of ambiguity or doubts as to meaning. The decision of the Court of Appeal was affirmed by the House of Lords.

Parliament may specifically abolish or alter statute law by a later enactment. This will take place by implication if the later enactment is wholly inconsistent with the former

4 ***Vauxhall Estates Ltd*** **v** ***Liverpool Corporation*** [1932] 1 KB 733

In 1928 the Minister of Health made a street improvement scheme order for a certain area of Liverpool. The order required the compulsory purchase of property, and the question of compensation payable to owners arose. Under s 2 of the Acquisition of Land (Assessment of Compensation) Act 1919, the claimants would receive £2,370, but if s 46 of the Housing Act 1925 applied, the claimants would receive £1,133. A provision of the Act of 1919 stated that other statutes inconsistent with the 1919 Act were not to have effect.

Held – the 1925 Act impliedly repealed the 1919 Act. It was inconsistent with it. Compensation was to be assessed under the latest enactment.

Comment (i) It was held in *Re Berry* [1936] 1 Ch 274 that the court will not construe a later Act as repealing an earlier Act by implication unless it is *impossible* to make the two Acts, or certain sections of them, stand together, i.e. if a section of the later Act can only be given a sensible meaning, as in *Vauxhall*, if it is treated as impliedly repealing the relevant section of the earlier Act.

(ii) The matter of repeal by implication was raised in *A* v *DPP* [2002] 4 Current Law 124. As noted in Chapter 4, the Powers of Criminal Courts (Sentencing) Act 2000 allows a youth court to subject an offender to a period of detention and training in a Young Offenders Institution that is followed by a period of supervision. The 2000 Act limits the making of such orders to persons under 18. The Children and Young Persons Act 1963 allows a youth court to sentence a person as if they were of the age at which they committed the offence even if because of delays in proceedings they are over 18 at the time of conviction. The issue in the above case was whether these statutes could be reconciled or whether the 1963 Act was repealed by implication by the 2000 Act.

A appealed to the Queen's Bench Divisional Court in regard to the imposition of a detention and training order on him even though at the time of sentence he was over 18. He had, however, been under 18 at the time he committed the offence of wounding with intent and common assault. He claimed that sentence was invalid since the 1963 Act had been repealed by implication.

The Divisional Court dismissed the appeal. The 1963 Act was concerned mainly with procedure in the youth court, whereas the 2000 Act was purely concerned with sentencing. It was not irrational to apply the 1963 Act where a young person reached the age of 18 before conviction, and Parliament's intention was to be construed so as to allow the 2000 Act to be interpreted subject to the 1963 Act.

Modern texts as a point of reference

5 ***Boys* v *Blenkinsop*** [1968] Crim LR 513

Mrs Nellie Blenkinsop was charged at Lewes with having 'permitted' her son Donald to drive a car without third-party insurance. The registered owner of the car was the driver's father whose insurance policy did not cover driving by his son. However, it appeared that the son had asked his mother's permission to drive and she had given it and had said she was the owner when asked by a constable. The defence submitted that there was no case to answer because only the registered owner could permit use of the vehicle. The prosecution submitted that this was wrong because Mrs Blenkinsop might have been, if not joint owner, at any rate responsible for care, management or control of the car within *Lloyd* v *Singleton* [1953] 1 All ER 291. The prosecuting inspector had asked the justices to refer to *Wilkinson's Road Traffic Offences* (5th edn, 1965, p 202) which in relation to that case stated: 'A person may "permit" though he is not the owner.' Counsel for the defence objected that unless the justices were referred to the case itself they were not allowed to look at the textbook. The inspector did not have a report of the case with him. The justices dismissed the case and the prosecution appealed to the Divisional Court. The court allowed the appeal and remitted the case to the justices to continue the hearing of it. Parker, LCJ said: 'They are entitled to and should look at the textbook; and if they then feel in doubt they should, of their own motion, send for the authority, and if necessary, adjourn for it to be obtained.'

Comment Modern texts are not books of authority as the older texts are because in modern times we have statutes and law reports to give that authority but they are a useful source of reference in the case of the major practitioners' titles.

ADR rejected by a party: no award of costs

5A ***Dunnett* v *Railtrack plc*** [2002] 2 All ER 850

The claimant Susan Dunnett had lost a claim in negligence against the defendants in connection with the death of three of her horses when they were struck by an express train near Bridgend in terms of failure to restrict access to the line. She was given permission to appeal to the Court of Appeal but in giving permission the judge said she should explore the possibility of ADR. She approached Railtrack concerning this but they rejected it, though they did offer to settle the claim prior to the appeal being heard. Ms Dunnett lost her appeal and in the ordinary course of events Railtrack would have recovered its costs from Ms Dunnett but the Court of Appeal refused to make an order as to costs which meant that each party paid their own costs. This said the Court of Appeal was because Railtrack had refused to even contemplate ADR. In the circumstances it was not appropriate to take into account the fact that Railtrack had made offers to settle the claim.

Comment (i) A firm decision from an appeal court that the Civil Procedure Rules 1998 must be followed in regard to ADR, otherwise the party concerned will be punished by the refusal to award costs even though they succeed with a claim or a defence.

(ii) More recent cases show that the courts are prepared to use their powers under procedural rules to penalise parties to litigation who do not consider ADR where appropriate or who unreasonably refuse an offer from a party to mediate or who, having agreed to mediate withdraw without proper excuse (see *Leicester Circuits Ltd* v *Coates Brothers plc* [2003] EWCA Civ 333). This was

a contract dispute as to the suitability of goods supplied by Coates. The parties had agreed to mediate but before the commencement of this procedure Coates withdrew. The trial proceeded and Coates was successful. Normally Coates would have obtained the usual costs against Leicester but because of Coates' withdrawal from the agreed mediation Leicester was ordered to pay the costs up to the time when Coates withdrew from mediation. Thereafter each party paid its own costs thus penalising Coates.

However, in *Wyatt Co (UK) Ltd* v *Maxwell Batley (a firm)* Ch D, Lawtel, 15 November 2002 a successful party who refused several offers to mediate was not penalised in costs because in particular the offer to mediate was made too late for the party to whom it was made to prepare for it. To do so would have provided a distraction from the main proceedings that were well advanced. Also the motives of the party making the offer were questionable. It seemed that the motive of the party making the offer of mediation was to extract a more substantial settlement in their favour than the court might award.

Again, in *Corenso (UK)* v *Burden Group plc* [2003] EWHC 1805 (QB) a successful party that had refused to mediate was not penalised by having to pay the costs because it had entered into another form of ADR i.e. Part 36 of the Civil Procedure Rules 1998 offers had been made. This means they had paid sums of money into court to try to settle the dispute without trial.

In *Halsey* v *Milton Keynes General NHS Trust; Steel* v *Joy* [2004] 4 All ER 920, the Court of Appeal gave guidance as to when it is reasonable to refuse ADR. In *Halsey* the claim was for clinical negligence involving an elderly patient. The claimant made invitations to mediate, but the trust refused on the grounds that the claim had no prospects of success before a court and the low value of the claim which meant that the costs of mediation would be disproportionate. The claim was brought before the court and failed. The judge refused to penalise the trust in costs because of its failure to mediate. The Court of Appeal agreed and found that the trust's position was not unreasonable.

The *Steel* case, which was a conjoined appeal, was a personal injury claim where the defendant felt he had a strong defence and refused to compromise. The Court of Appeal found that the defendant's stance was a reasonable one and, the claim having failed, the defendant was entitled to recover the defence costs from the claimant.

The Court of Appeal then offered some general guidelines on the matter of ADR, as follows:

- the court has no power to order litigants to mediate: to do so would be a violation of their human rights;
- the court does, however, have a role to encourage ADR;
- all parties should consider as a matter of routine whether their claims are suitable for ADR;
- where a successful party has acted unreasonably in refusing ADR then the court can displace the normal costs rule and require the successful party to pay the costs;
- the burden of showing 'reasonableness' lies with the successful party;
- while most cases are suitable for ADR, there should not be a presumption in favour of mediation.

Comment The Court of Appeal did, however, recognise that some disputes are 'intrinsically unsuitable' for ADR. These include cases which involve allegations of fraud, cases where an injunction may be required as a remedy, cases where it would be useful to have a judicial precedent, and cases where the parties wish the court to determine an issue of law or construction.

OTHER COURTS AND TRIBUNALS AND LEGAL SERVICES

The courts can control the defective jurisdiction of a tribunal or administrative authority by the doctrine of *ultra vires*

6 ***Attorney-General* v *Fulham Corporation*** [1921] 1 Ch 440

The local authority was authorised by the Baths and Wash-houses Acts 1846–78 to establish a wash-house where people could come and wash their own clothes. The Corporation decided to run a municipal laundry where people could bring their clothes to be washed by employees of the Corporation.

Held – the statutory powers did not cover running a laundry. The action of the authority was, therefore, *ultra vires* and an injunction was granted to prevent the Corporation from running the laundry.

Comment (i) The *ultra vires* principle was used in *Bromley London Borough Council* v *Greater London Council* [1982] All ER 153, where the House of Lords decided that the Labour-controlled GLC had no power under the Transport (London) Act 1969 to pass resolutions to enforce a 25 per cent cut in London's bus and tube fares. It was also decided that a public authority is under a *fiduciary duty* to hold the balance fairly between the various interests of those who are within its care, i.e. in this case between the ratepayers and the transport users. The effect of the resolutions was to pass on the cost of the reduction to ratepayers. The Labour Party's manifesto, which had advocated a reduction in fares, was no justification. It could not be assumed that all who voted Labour agreed with the whole of the manifesto. A manifesto is not a binding contract between a party and its supporters.

(ii) In *R* v *Lewisham BC, ex parte Shell UK* [1988] 1 All ER 938 the Council passed a resolution to boycott all Shell

products where suitable alternatives were available as part of the Council's anti-apartheid policy and on the basis of alleged activities by Shell in South Africa. The court granted Shell a declaration that the resolution was *ultra vires*. The Council had no power to put pressure on Shell in this way no matter how reasonable its desire to promote good race relations might be.

(iii) In *R* v *Lord Chancellor, ex parte Witham* [1997] 2 All ER 779 the Lord Chancellor made an order repealing previous provisions so that those on income support and who were litigants in person were no longer excused from paying court fees. W wished to bring a claim in defamation for which there is no legal aid and he claimed that the further requirement for him to pay court fees, even though he was on income support, was a violation of his right to access to the courts and, therefore, *ultra vires* as being beyond the order-making powers vested in the Lord Chancellor under s 130 of the Supreme Court Act 1981. The court allowed W's application. The order was *ultra vires*. There was nothing in s 130 to suggest that court fees might be imposed in a manner that could deny absolutely a person's access to the courts and thus the relevant Article of the Supreme Court Fees (Amendment) Order 1996 was *ultra vires*.

The supervisory jurisdiction of the High Court cannot normally be invoked if other and more appropriate procedures for appeal exist

Note. The order of *mandamus* is, since July 2000, referred to as a mandatory order, an order of prohibition is called a prohibitory order and *certiorari* becomes a quashing order. This should be borne in mind when referring to cases heard before the above date.

7 *R* v *Brighton Justices, ex parte Robinson* [1973] 1 WLR 69

The defendant was convicted and ordered to pay a fine in her absence for failing to give information about a driver's identity. She applied for *certiorari* on the grounds that she had not received the summons.

Held – by the Queen's Bench Divisional Court – the application would be granted but the court would not be minded to grant *certiorari* in such cases in the future since a statutory procedure existed under s 24(3) of the Criminal Justice Act 1967 (see now, Magistrates' Courts Act 1980 s 14(1)).

Comment (i) Section 14(1) provides that the defendant may make a statutory declaration that he did not know of any summons or proceedings until after the trial commenced. The statutory declaration must be served on the clerk to the justices within 14 days of the date when the defendant came to know of the proceedings whereupon the summons and subsequent proceedings are void.

(ii) Judicial review may be granted in exceptional cases. Thus in *R* v *Inspector of Taxes, ex parte Kissane* [1986] 2 All ER 37 taxpayers were granted leave to apply for judicial review against the decision of a tax inspector, even though they could have appealed to the Special Commissioners, because they could not recover costs on an appeal to the Commissioners (and see *R* v *Wiltshire CC, ex parte Lazard Bros* [1998] CLY 95).

An application for judicial review will not be granted unless the applicant has a sufficient interest in the matter to which the application relates

8 *Inland Revenue Commissioners* v *National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93

The Federation asked for an order of *mandamus* on the Commissioners of Inland Revenue to assess and collect arrears of income tax said to be due from casual employees on national newspapers. The long-standing practice of Fleet Street employers had been to pay the casuals without deduction of tax and for the casuals to supply fake names and addresses when drawing their pay in order to avoid tax. Their true identities were known only to their union which operated a closed shop and controlled all casual employment on the newspapers.

Held – by the House of Lords – the Federation could not be granted the order of *mandamus*. The Federation had no *locus standi*. 'The total confidentiality of assessments and of negotiations between individuals and the Revenue is a vital "element in the working of the system". As a matter of general principle I would hold that one taxpayer has no sufficient interest in asking the court to investigate the tax affairs of another taxpayer or to complain that the latter has been underassessed or overassessed; indeed there is a strong public interest that he should not. And this principle applies equally to groups of taxpayers: an aggregate of individuals each of whom has no interest cannot of itself have any interest.' (*Per* Lord Wilberforce)

A quashing order is also available to control tribunals which have acted beyond their powers

9 *R* v *London County Council, ex parte Entertainment Protection Association Ltd* [1931] 2 KB 215

The Council granted a new licence, under s 2 of the Cinematograph Act 1909, in respect of a cinema called the Streatham Astoria. One of the conditions contained in the Act was that the premises were not

to be opened on Sundays, Christmas Day or Good Friday. Subsequent to the grant of the licence, a committee of the Council considered an application that the Streatham Astoria be allowed to open on the above-mentioned days. The committee resolved that 'no action be taken for the present in the event of the premises being opened . . . on Sundays, Christmas Day and Good Friday', subject to the applicants paying a sum of money to a selected charity. The Association challenged the ruling of the committee by *certiorari*.

Held – the Council was usurping its jurisdiction in breaking a condition of the licence, and that this was prohibited by the Act of 1909. *Certiorari* lay to quash the committee's ruling.

A court or other authority must not act if there is bias in the sense of any substantial pecuniary, personal or proprietary interest in the dispute before it. Natural justice also embraces the right to be heard

10 ***Dimes* v *Grand Junction Canal*** (1852) 3 HLC 759

Dimes was the Lord of a manor through which the canal passed, and he had been concerned in a case with the proprietors of the canal in which he disputed their title to certain land. Dimes had obtained an order of ejectment, but the canal company approached the Lord Chancellor (Lord Cottenham) to prevent Dimes enforcing the order and to confirm the company's title. The Lord Chancellor granted the relief sought. Dimes now appealed to the House of Lords on the ground that the Lord Chancellor was a shareholder in the company and was therefore biased.

Held – the Lord Chancellor's order granting the relief must be quashed because, although there was no evidence that his pecuniary interest had influenced him, yet it should not appear that any court had laboured under influences of this nature.

Comment (i) This case was distinguished in *R* v *Mulvihill* [1990] 1 All ER 436 which was an appeal from a conviction in connection with bank robberies. It appeared that the trial judge had 1,650 shares in one of them – National Westminster Bank plc. The Court of Appeal would not accept a plea of bias. This was a criminal trial with a jury, which had found M guilty so that the judge was bound to give effect to the verdict of the jury whether he personally agreed with it or not. *Dimes* was a civil matter without a jury, the decision being a matter for the judge alone.

(ii) The Court of Appeal ruled in *AT & T Corp* v *Saudi Cable Co* [2000] 2 All ER (Comm) 625 that the common law test of bias applies to an arbitrator conducting arbitration proceedings.

11 ***R* v *Bingham Justices, ex parte Jowitt***, *The Times*, 3 July 1974

In announcing the conviction of the defendant for speeding, the chairman of the justices said: 'Quite the most unpleasant cases that we have to decide are those where the evidence is a direct conflict between a police officer and a member of the public. My principle in such cases has always been to believe the evidence of the police officer, and therefore we find the case proved.' Mr Jowitt applied to the Divisional Court for *certiorari* and it was *held* that the attitude of the chairman clearly amounted to bias and the conviction was quashed.

Comment (i) More recently, in *R* v *Liverpool City Justices, ex parte Topping* [1983] 1 All ER 490, a conviction by magistrates was quashed by *certiorari* on the basis of bias where it was shown that they had gone on to try a case of criminal damage after becoming aware from court computer sheets of T's previous convictions.

(ii) A famous case of non-pecuniary bias is *R* v *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 1 WLR 272. Following a House of Lords decision that PU as former head of the state of Chile did not have immunity from arrest and extradition, PU discovered that one of the judges, Lord Hoffmann, had been an unpaid director and chairman of the Amnesty International charity since 1990. The charity was a party to the proceedings and in favour of PU's extradition. In a subsequent decision recorded above, PU's application to a differently constituted House of Lords to set the decision aside was granted on the basis of Lord Hoffmann's possible bias.

(iii) As regards the right to be heard, see *R* v *Wear Valley District Council, ex parte Binks* [1985] 2 All ER 699 where B operated a hot-food take-away caravan at a market under an informal arrangement with the Council. She was given notice to quit without reasons or warning. Taylor, J quashed the Council's decision on the grounds of denial of natural justice. B had a right to be heard and to prior notification and reasons.

(iv) Again, in *R* v *Board of Governors of London Oratory School, ex parte R*, *The Times*, 17 February 1988 the rules of natural justice were applied to an expulsion of a child from school. The child must have an opportunity to state his case and know the nature of the accusations.

(v) The right to be heard was also raised in *R* v *Secretary of State for the Environment, ex parte Slot* [1998] CLY 2873. A landowner asked the county council to divert a bridleway on her land. There was an objection to this. The matter was resolved by written submissions but Ms Slot was not allowed to make representations nor to see the objector's submissions. The decision not to divert the

bridleway was quashed by the Court of Appeal because a rule of natural justice had been infringed.

Rules of natural justice need not be applied where matters of national security are involved

12 ***R* v *Secretary of State for Home Department, ex parte Hosenball*** [1977] 3 All ER 452

Mr Hosenball was an American journalist working in London. He received a letter from the Home Department saying that the Home Secretary had decided to deport him in the interests of national security. The statement said that Mr Hosenball had tried to obtain and, indeed, had obtained, information harmful to the United Kingdom and relating to security arrangements and that that information was prejudicial to the safety of servants of the Crown. Mr Hosenball was given no further particulars and was told that he could not appeal but might make representations and appear before an independent advisory panel. Mr Hosenball did so but he did not see the panel's report, though the Home Secretary gave it his personal consideration. A deportation order was made under the Immigration Act 1971, s 5, and Mr Hosenball applied for an order of *certiorari* to quash the Home Secretary's decision. The Court of Appeal *held* unanimously that the application would be refused. Mr Hosenball had not been given enough information to enable him to meet the charge made against him. However, this was a case in which national security was involved, and where the state was in danger, even the rules of natural justice must take second place.

In addition, there was no infringement of Art 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The European Commission of Human Rights in the case of Mr Philip Agee, whose deportation had been ordered by the Home Secretary at the same time as Mr Hosenball, had considered his application against the United Kingdom under the Convention as manifestly ill-founded. The Commission considered that where the public authorities of a state decided to deport an alien on grounds of security that constituted an Act of State falling within the public sphere this did not constitute a determination of his civil rights or obligations within the meaning of Art 6.

Comment In *R* v *Secretary of State for the Foreign and Commonwealth Office, ex parte The Council of Civil Service Unions, The Times*, 23 November 1984 (and [1984] 3 All ER 935) the House of Lords decided that the government, in preventing its employees at Government Communication Headquarters (GCHQ) from joining trade unions, was acting in the interests of national security, and was entitled to act irregularly as regards procedure by not consulting its employees. Procedural propriety must give way to national security, when personal rights taken away by the action of the executive conflict with that security.

The decision of a tribunal acting in breach of the rules of natural justice (or *ultra vires*) is void

13 ***Ridge* v *Baldwin*** [1963] 2 All ER 66

Mr Ridge, who was the Chief Constable of Brighton, had been acquitted on a charge of conspiring with other police officers to obstruct the course of justice, though the trial judge, Donovan, J said that Mr Ridge had not given the necessary professional or moral leadership to the Brighton Police Force. The Brighton Watch Committee subsequently dismissed Mr Ridge from his post as Chief Constable under a power in the Municipal Corporations Act 1882, giving them a right to dismiss 'any constable whom they think negligent in the discharge of his duty or otherwise unfit for the same'. Ridge was not given a chance to answer the charges or appear before the Watch Committee.

Held – by the House of Lords – the action taken, i.e. the dismissal, was void; Mr Ridge should have been heard.

A mandatory order lies to compel the exercise of a discretionary power but not in any particular way

14 ***R* v *Commissioner of Police of the Metropolis, ex parte Blackburn*** [1973] 1 All ER 324

Blackburn sought what was then an order of *mandamus* requiring the Commissioner of Police to secure the enforcement of the law against pornography upon various publishers and booksellers, and to reverse his decision that no prosecution should be undertaken without the prior consent of the Director of Public Prosecutions.

Held – by the Queen's Bench Divisional Court – although the evidence showed that pornography was widely available, the Commissioner, because of an under-manned force, had to decide an order of priorities to deal with various offences. In these circumstances it was perfectly proper for the Commissioner to seek the Director's advice before embarking on a prosecution, so long as he did not consider himself bound to follow his advice, and, accordingly, the situation in London was not attributable to any breach of legal duty by the Commissioner

and the court would not interfere with the legitimate exercise of his discretion in the matter of police powers.

A mandatory order is not available against the Crown itself but it can issue against a Minister

15 ***R* v *Secretary of State for Social Services, ex parte Grabaskey***, *The Times*, 15 December 1972

A dentist treating a patient with a broken tooth claimed payment not only for crowning the tooth but also for an amalgam filling. The latter claim was disallowed by the Dental Estimates Board and the Minister dismissed the appeal as unarguable under the proviso to reg 18 of the National Health Service (Service Committees and Tribunals) Regulations 1956.

Held – by the Queen's Bench Divisional Court – the dentist's case was reasonably arguable and accordingly the Minister had no jurisdiction to dismiss the appeal and *mandamus* would be granted requiring him to refer the matter to two dental referees.

Comment In *Padfield* v *Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694 the House of Lords decided that an order of *mandamus* should issue to the Minister of Agriculture, requiring him to refer a complaint by milk producers against the working of a Milk Marketing Board Scheme to a committee of investigation in the exercise of a discretionary power conferred on him by s 19 of the Agricultural Marketing Act 1958.

A simple declaration of what the law on a particular matter is may sometimes be an appropriate remedy against an administrative authority or a Minister

16 ***Laker Airways* v *Department of Trade*** [1977] 2 All ER 182

The Civil Aviation Authority granted Laker Airways a licence for 10 years from 1973 for a cheap passenger service between the UK and the USA called 'Skytrain'. Laker Airways was then designated as an airline under the Bermuda Agreement of 1946 made between the UK and the USA. Such designation was essential to get 'Skytrain' across the Atlantic. The Civil Aviation Act 1971, gave the Secretary of State for Trade wide powers to revoke licences without reference to anyone and subject only to questions being asked in Parliament. However, these powers were restricted to time of war or great national emergency or where international relations might be affected. This part of the Act could not, therefore, have been applicable in regard to the revocation of the licence granted to Laker Airways. The Act also gave the Secretary of State power to give policy guidance in regard to civil aviation and it was under this power that the Secretary of State announced in 1976 by a White Paper that future policy would be to license only one UK airline on any given long route. Paragraphs 7 and 8 of the White Paper contained an instruction to the Civil Aviation Authority to revoke the licence for 'Skytrain'. Laker Airways now claimed a declaratory judgment that paras 7 and 8 were *ultra vires* and that the Secretary of State was not entitled to withdraw their licence. Mocatta, J granted the declaration sought, holding among other things that the power given to the Secretary of State to issue policy guidance did not extend to the revocation of licences in this way. On appeal to the Court of Appeal by the Department of Trade it was held, dismissing the appeal, that Laker Airways were entitled to the declaration sought. The Secretary of State could not lawfully use the procedure of 'guidance' for the revocation of licences.

Comment (i) An example of the use of a declaratory judgment against a Minister is to be found in *Congreve* v *Home Office* [1976] 1 All ER 697. Mr Congreve, on discovering that the price of a TV licence was to be increased shortly, bought a new one at the old rate before his old one expired thereby saving about £6. Some 25,000 others did the same. The Home Secretary claimed to revoke the licences under s 1(4) of the Wireless Telegraphy Act 1949, under which he had power. Mr C asked for a declaratory judgment that he could not do so. This was granted by the Court of Appeal. Mr C had done nothing unlawful and the revocation was a misuse by the Home Secretary of the powers in the 1949 Act.

(ii) Note the use of the declaratory judgment in *R* v *Secretary of State for Employment, ex parte Equal Opportunities Commission* (1994) in Chapter 19.

Where discretionary powers are entrusted to the executive by statute, the courts may examine the exercise of those powers in order to ensure that they have not been exercised mistakenly or improperly

17 ***Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council*** [1976] 3 All ER 665

Tameside, a local education authority, submitted proposals for a comprehensive system of education to the Secretary of State in March 1975. These proposals were approved and Tameside planned to implement them by September 1976. In May 1976, local elections were held and the membership of Tameside changed from a Labour to a Conservative authority. The Conservative council decided not to implement the scheme for comprehensive education fully and on

7 June 1976 notified the Secretary of State of that intention. The Secretary of State was given a supervisory role by s 68 of the Education Act 1944. The section provides: 'If the Secretary of State is satisfied, either on complaint by any person or otherwise, that any local education authority or the managers or the governors of any county or voluntary school have acted or are proposing to act unreasonably with respect to the exercise of any power conferred or the performance of any duty imposed by or under this Act, he may, notwithstanding any enactment rendering the exercise of the power or the performance of the duty contingent upon the opinion of the authority or of the managers or governors of the authority, give such directions as to the exercise of the power or the performance of the duty as appear to him to be expedient.' On 11 June the Secretary of State replied to Tameside saying that it had acted, or was proposing to act, unreasonably within s 68 of the 1944 Act and accordingly directed Tameside to implement the 1975 scheme. Tameside refused, so the Secretary of State applied for *mandamus*. The Divisional Court of Queen's Bench granted the order but the Court of Appeal and the House of Lords reversed that decision. Before giving directions under s 68, the Secretary of State had to be satisfied that Tameside was acting unreasonably, i.e. that its conduct was such that no authority could reasonably engage in it. It had been alleged that there was insufficient time to carry out the necessary selection procedure for entry into grammar school. However, the House of Lords said that there were no grounds for concluding that the authority was acting unreasonably in taking the view that there was sufficient time available to carry out the necessary selection procedure. Although the Secretary of State might legitimately take the view that the authority's proposal to retain the grammar schools and to implement the selection procedure for the two schools where places were available was misguided or wrong, there were no grounds which could justify a conclusion that the proposal was such that no education authority, acting reasonably, would carry it out. It followed that the Secretary of State's direction was *ultra vires* and of no effect.

Advocates and litigators are now liable in contract or tort for negligence in connection with litigation

18 ***Arthur J. S. Hall & Co (a firm)*** **v** ***Simons*** [2000] 3 WLR 543

As regards the facts, three clients sued their solicitors for negligence. In the first case, Mr Simons claimed his solicitors negligently allowed him to become involved in lengthy and expensive litigation when they should have advised him to settle. In the second case, Mr Barrett claimed his solicitors, involved in matrimonial proceedings out of court, negligently advised him to settle his divorced wife's claim for a share of the matrimonial home on disadvantageous terms. In the third case, Mrs Harris complained about the terms on which her solicitors, involved in matrimonial proceedings out of court, advised her to settle her maintenance claim against her ex-husband. The solicitors applied for the claims to be struck out, relying on the advocates' immunity from suit in negligence. The Court of Appeal heard the cases together and ruled that in none of them were the solicitors immune from suit and ordered that the claims be reinstated. The solicitors appealed to the House of Lords. The main issue for the House of Lords to decide was whether the current immunity of both solicitors and barristers in relation to the conduct of legal proceedings as set out in *Rondel* should continue.

The judges stated that the issue was relevant to both barristers and solicitor advocates. The Court of Appeal had decided that in all three cases the alleged negligence of the solicitors was not within the scope of the immunity as extended to out-of-court work. The solicitors' advice was not closely connected with the way in which the cases would have been conducted in court if not settled. However, in the House of Lords, counsel on behalf of the three clients made a basic attack on the immunity in general and argued that it should be abolished.

The judges considered the changes in society and in the law that have taken place since the decision in *Rondel* and decided that it was appropriate to review the whole matter of advocates' immunity from liability for the negligent conduct of a case in court. Maintaining such immunity depended on the balance between, on the one hand, the normal right of the individual to be compensated for a legal wrong done to him and, on the other, the advantages which accrued to the public interest from such an immunity.

As regards the decision, the public interest in the administration of justice no longer required that advocates enjoy immunity from suit for alleged negligence in the conduct of litigation. The appeal was dismissed.

Comment (i) Advocates therefore no longer enjoy immunity from suit in respect of their conduct of civil and criminal proceedings, although three of the seven judges dissented on the conduct of criminal proceedings, thinking that the immunity should be preserved in such proceedings. It will not be easy to sue advocates successfully since Lord Hoffmann, in particular, suggested that

the collateral attack principle would be applied, certainly in criminal proceedings and to some extent in civil matters. This means that the court may strike out claims that involve the same issues being tried again as part of proving an advocate's negligence. It is also unclear as to whether the immunity is retrospective, as case law can be. Lord Hope expressed the view (without reasons) that the abolition of immunity would only apply to future cases.

(ii) In *Moy* v *Pettman Smith (a firm) and another* [2005] 1 All ER 903 the House of Lords ruled that when giving clients advice as to whether to accept a settlement offer at the door of the court and given that the advice was not negligent barristers need not spell out all the factors and reasons behind their advice. The claimant builder sustained fractures of the left leg. The surgical treatment was he alleged carried out negligently. He brought a claim against the relevant health authority. In this claim a necessary report by a consultant orthopaedic surgeon was not obtained by the claimant's solicitors in time. Eventually a report was made and the claimant's barrister, Ms Perry, asked for an adjournment of the proceedings to adduce further evidence. A county court judge turned her request down and the proceedings went on. The health authority had made an offer to settle out of court in the sum of £150,000. However Ms Perry advised her client, the claimant, to refuse it, as he would get more by proceeding to trial. The offer was made by the health authority on the day of the trial. Ms Perry had in mind that the claimant would have a separate action against the solicitors which would make up any shortfall. This was the claimant's safety net but this did not form part of Ms Perry's advice to continue to trial. The offer of £150,000 was turned down by the claimant. When the health authority realised that the report would not be available in this trial, they dropped their offer to £120,000, which the claimant accepted contrary to advice. He then claimed against Ms Perry for negligent advice and made a separate claim against the solicitors for alleged negligence in failing to obtain the report in time to comply with the timetable set for the proceedings. Their Lordships ruled that Ms Perry was not in breach of her duty to the claimant. She was not obliged to spell out all the factors and reasons behind her advice.

Criminal conduct cannot be prevented by injunction unless the Attorney-General is prepared to take or agree to the taking of proceedings

19 ***Gouriet* v *Union of Post Office Workers*** [1977] 3 All ER 70

Under ss 58 and 68 of the Post Office Act 1953, it is an offence punishable by fine and imprisonment for persons employed by the Post Office wilfully to delay or omit to deliver packets and messages in the course of transmission and for any person to solicit or endeavour to procure another to commit such an offence. The Council of the Union of Post Office Workers called on its members not to handle mail to South Africa for a week because they disapproved of South Africa's policies. The claimant, who was the Secretary of the National Association for Freedom, asked the Attorney-General for his consent to act as claimant in relator proceedings for an injunction to restrain the Union from soliciting or endeavouring to procure any person wilfully to detain or delay a postal packet in the course of transmission to South Africa. The Attorney-General refused. The claimant took the matter to court and eventually the House of Lords decided that proceedings to prevent the infringement of public rights can only be instituted by the consent of the Attorney-General unless an individual has a special interest as where his private rights are threatened. Mr Gouriet had no such interest and was not entitled to the relief sought. Presumably, a company which dealt on a regular basis with South Africa by mail would have had the necessary *locus standi*.

CRIMINAL PROCEDURE

Excessive reporting of criminal proceedings: no need to show prejudice to accused

20 ***The Eastbourne Herald Case***, *The Times*, 12 June 1973

The *Eastbourne Herald* published an article upon the committal proceedings of a case in which a man was charged with unlawful sexual intercourse. The prosecution of the editor and proprietors which followed was based on the following matters which appeared in the articles:

(*a*) a headline reading 'New Year's day Bridegroom Bailed';
(*b*) a description of the offence charged as being 'serious';
(*c*) a description of the alleged offender as 'bespectacled and dressed in a dark suit';
(*d*) a note to the effect that he had been 'married at St Michael's Church on New Year's Day';
(*e*) a reference to the way in which the prosecuting solicitor had handled the case.

The editor and proprietors were each found guilty by the Eastbourne magistrates on the five counts relating to these different passages and were each fined a total of £2,000 and ordered to pay £37.50 costs. This strange decision stems initially from the fact that