
For the purpose of his article the author divides the development of the public corporation in Britain into two stages. The first is the early period dating from the Port of London Authority set up in 1908 to the creation of the British Overseas Airways Corporation in 1939. These and similar bodies were created in order to undertake specialized tasks free from the direct executive control of ministers, although often subject to their influence or decisions on matters of policy. The second stage commenced with the election of the Labour Government in 1945, pledged to large measures of nationalization. The underlying reasons for the creation of this modern type of public corporation are the need for a high degree of freedom, boldness and enterprise in the management of undertakings of an industrial or commercial character and a desire to escape the caution and circumspection which is considered typical of government departments. In this second class are most of the nationalization acts from the Bank of England Act in 1946 to the Iron and Steel Act of 1949.

The public corporations coming under the first classification are largely immune from ministerial control except in matters of major importance. In the second classification ministerial power of control has become quite general. However, the ministers are responsible to Parliament and can be questioned by members on general policy though not on day to day management. Full-dress debates can be held on the basis of the annual report of the work of the corporation, which must be submitted to parliament by the minister.

Four basic principles of the modern public corporation are discussed. These are: (1) managerial freedom; (2) disinterestedness — the public service notice; (3) non-civil service personnel; and (4) self-contained finance. Thus the tendency is "to enlarge the unit of administration to a national or regional scale, to divorce the administration of industrial or public utility functions or the
conduct of certain services of an economic character from the ordinary activities of government, to separate the finances of these boards from the National Budget, and to eliminate the profit making incentive and substitute instead the public service motive”.

A great deal of diversity of organisation and structure has been purposely introduced. The Acts do not follow a set pattern for all industries. Most of the industries have been taken over completely and new organizations created to run them. An exception to this is the Iron and Steel Act. The Act will leave the production and sale of iron and steel products in the hands of the existing companies without attempting to create any new organization other than the Iron and Steel Corporation to which their shares will be transferred.

The size of the governing boards of the various corporations vary, depending on the size and complexity of the corporation. The governor and deputy governor of the Bank of England are appointed by the King as are the governors of the B.B.C. All other board members are appointed by the minister concerned. Appointments are for a fixed term and members once appointed can be removed by the minister in certain circumstances. Ministers are required to take into consideration special qualifications of appointees for positions on the board. Remuneration is fixed by the minister with the approval of the treasury.

Public corporations are subject to the ordinary law of the land. The court held in Tomkin v. Hannaford, [1950] 1 K. B. 18, that the British Transport Commission is not a servant or agent of the Crown and is therefore subject to the rent restriction acts. Such corporations are treated as private companies or natural persons, except where granted special immunity by the acts creating them. Powers are usually conferred on these corporations in such general terms that it is impossible in practice for the courts to apply the doctrine of ultra vires. Parliament has been careful to declare however that these corporations cannot commit unlawful acts.

Other problems in connection with labour relations, consumer representation, compensation, capital development and price policy are raised with the advent of the modern public corporation. With regard to labour relations, Professor Robson feels it is still too early to make a comprehensive study of the results. Most acts provide for the board and the union together to set up machinery for negotiation of terms and conditions of employment. But the board itself determines the designation of the organi-
zation with which it is to consult. In America the N.R.L.B., an independent body, determines this. The other problems are being met in different ways depending on what the minister or the board considers most suitable in the circumstances.

"If the public corporation performs the tasks for which it was designed efficiently and well, and if it conducts its affairs with a true sense of its accountability to the Government, to Parliament, to its own staff, and, above all, to the consumer, then it will signify an achievement of high creative value on the part of English democracy. There is good reason to feel optimistic about this matter, but whatever view one takes, there is no doubt that the public corporation is the most important constitutional innovation which has been evolved in Great Britain during the past fifty years. There it is destined to play as important a part in the field of nationalized industry in the twentieth century as the privately owned corporation played in the realm of capitalist organization during the nineteenth century." (E. G. JOHNSON)


This article considers the standard of care owed in the hospital-patient relationship by the agents and servants of the institution. This relationship is essentially based on contract, but, once a patient is admitted, the duty to take care imposed by law arises and exists with or without a contract. Hence, most of the actions are in tort.

As applied to hospitals, the basis is "such reasonable care and attention for [the patient's] safety as his mental and physical condition, if known, may require". Where physicians and surgeons are concerned, they are required "to use that amount of skill, knowledge, and diligence which others of the same school of medical thought in good standing employ in similar circumstances and in similar localities". It follows that instructions to juries may vary with the particulars of each case, depending on such factors as the mental condition and aberrations of the patient, and the type of hospital, for the standard of care owed in an institution treating the insane is greater than the duty owed to the patient of the private or public hospital.

Rules of pleading, evidence and burden of proof are the same in hospital cases as in other negligence actions. The doctrine of res ipsa loquitur may be applied, for instance, when a patient has been burned while unconscious.
Besides the application of general standards of reasonable care, such as in the use of overheated water bottles and the giving of a transfusion to the wrong patient, there are certain specific duties, not rules of conduct, which each hospital must fulfil. For example, the hospital premises must be kept safe, clean and sanitary; furniture and fixtures must be sound and adapted to the patient's needs; and technical equipment must be in good order and operated by a properly trained technician. There is a duty to safeguard from danger the mentally unbalanced patient, as well as a duty to protect all patients from injury by a third person. The hospital must also take care to select a competent, properly trained and qualified staff.

The greatest conflict in hospital-patient actions arises where the hospital is sued for the negligent conduct of a doctor or nurse, because here the doctrine of “respondeat superior” rather than the actual standard of care owed by the institution to the patient is involved. The hospital, of course, cannot be responsible for the negligence of the independent servant physician of the patient. There remains, however, the question of who is responsible where the staff physician has been negligent, or where an outside physician has been called in and is negligent.

The courts have split on this point. Some have applied the doctrine of “respondeat superior” and held the hospital liable for the negligent professional acts of physicians whom it had the power to employ or discharge. Others have treated the physician as an independent contractor as to these acts and held him personally liable. The question arises again in connection with nurses and internes. Here the doctrine of “borrowed servant” has been used to exempt this class from liability to the degree that they act under the orders and supervision of a physician. An attempt to distinguish between “professional” acts, as a ground for strict liability, and “administrative” acts, as a ground for exemption from liability, seems futile. The better rule in these cases would appear to require an examination into what the hospital has undertaken to do for the patient.

The liability of the hospital in cases of this nature is by no means absolute, as when a servant of the institution strikes a patient in self defence, but the foregoing indicates that the degree of care owed is very high. This high standard is necessary because of the vital rôle played by the hospital in our community life.

(GORDON CHOWN)

Burke, in his criticism of the French Revolution, said that the majority of the members of the French National Assembly “are of the inferior, unlearned, mechanical, mere instrumental members of the profession of the law”. This article is not to defend the members of the profession but downrightly to praise them; especially to praise the trial lawyers, the rough element, the practical lawyers, the shock troops of the law. They, with the likeminded judges before whom they practise, are in reality life’s spokesmen to discover and declare laws that will explain the characteristics of that reality “which life in the immense crucible which is our universe is at each instant forging”.

Nothing is more disgusting than to see a law teacher or a judge look down his nose at a trial lawyer. No doubt teachers and judges have their place in the making and administration of the law, but it is to the practical lawyers that the law owes both its stability and its capacity to grow and change, and, growing, live.

The period we are now passing through presents a great challenge to the practical lawyer. Government policy today, as typified by the policy of Roosevelt’s “New Deal”, tends to foster the setting up of myriads of administrative agencies whose members would like to change our government from one of laws to one of men. The judge and the lawyer, however, stand in their way by defending the constitutional way of life. Consequently, much abuse has been heaped upon the bench and the bar in an attempt to excite resentment against and create suspicion of lawyers. Certain political elements hope to discredit the profession because they know that lawyers and judges of the right stamp could not be pressured into yielding to arbitrary power. The practical lawyer has tried to keep the law just.

Good law, that is the just law that men may live by, is not made in the classroom or in juristic writings. It is made in the forums of legal controversy where the rights of men are at issue. This is lawyer’s law, made in the touch and go of actual trials. This lawyer’s law is no rigid dogma but a living power. It works against status and fixity and gives the law the changing colour and context to meet new needs. It provides rights and remedies for anyone who is unjustly treated. Its glorious uncertainty is what makes the law worthwhile.

The practical lawyer does not want the law too uncertain, however. He wants a certain amount of stability; he wants public
order; but he wants that stability and public order in terms of justice. This is the reason why one of the first moves of a tyranny or a bureaucracy, which seeks to put itself above the law, is to disparage or discredit the lawyer. The lawyer wants to know "why" and if he is told "this is the law", he answers "show me", and that kind of attitude does not sit well on the stomach of seated power. Behind the contention that lawyers are an obstruction to justice, therefore, stands always the real, well-founded fear that they will obstruct arbitrariness and injustice. If it were not for the lawyer and his great ally, the newspaper, the heavy tread of seated power would have come far closer to our doors than it has yet come. (D. A. McCarthy)


The term "quasi-judicial", while quite familiar in administrative law, has been regarded with increasing disfavour by some judges both in England and the United States. In England there are many different "quasi-judicial" tribunals, with many different functions, and in order to systemize them it is first necessary to study their powers and functions.

It is usually considered that there are three distinct powers, legislative, administrative and judicial. In recent years there has been criticism of this division; men like Sir Ivor Jennings, Professor Robson and Mr. D. M. Gordon have argued that there are only two sorts of powers. The Jennings-Robson school assert that judicial power is in reality part of administrative power, while Mr. Gordon is of the opinion that, although judicial power is distinct and separate, there is no definable border line between administrative and legislative.

It is possible that the conflict of opinions is due to the different objectives of their authors. Jennings and Robson are both concerned with the problem of allocation of functions that confronts the draftsmen of statutes conferring new powers on ministers and other executive authorities. As courts have certain administrative functions and the administration has certain judicial functions, the distinction between judicial and administrative is not, in their opinion, of value in determining the allocation of new powers.

Mr. Gordon draws a distinction between the body that is concerned with legal rights and liabilities imposed by precedent or statute and the body basing its decisions on policy and expedi-
ency. The former, he says, has a judicial function the latter, whether administrative or executive, has not. But the latter itself creates legal rights and liabilities according to policy and expediency—in short makes the law and therefore legislates. There can be no doubt that the distinction made by Mr. Gordon between law and policy is valid. All law, of course, expresses policy. But policy must undergo a fundamental change before it becomes law; in England this change is an Act of Parliament, which transforms what was before merely desirable into something legally enforceable.

A quasi-judicial function has been defined as "an administrative decision, some stage or some element of which possesses judicial characteristics". It is, therefore, included in the administrative category and cannot be viewed as a judicial process from which some of the elements are missing. The error of regarding it as a judicial process can be clearly seen by considering an example of a quasi-judicial function. Take the case of the power of a minister to confirm a local authority's "slum clearance" scheme under the Housing Acts. The minister's decision is only the final step in a longer process. Before the decision can be made facts and private interests have to be ascertained and weighed and it is this preliminary stage to which the term "quasi-judicial" applies. The decision of the minister is a purely administrative (or executive) act over which the law has no control. But in the preliminary stages the minister's procedure must satisfy the requirements of what has been called "natural justice" and the courts will examine it to see that it does.

However, the minister's decision does not necessarily depend on the facts brought out because it is based on policy. This is the main argument against the giving of reasoned decisions in such cases. To go back to the example: the courts will protect a man's right to have his objections to the clearing of a certain slum placed before the minister because natural justice requires this: but the reason that the minister rejects the objections may well be on general policy rather than the circumstances of the particular case.

The rule of English courts is to presume that "natural justice" is required in the exercise of all statutory powers which depend on the existence of certain facts or affect the rights of individuals or where a duty is imposed by Parliament.

The recent case of Franklin v. Minister of Town Planning is of considerable importance in considering the quasi-judicial function. The complaint by the objector, in that case, was that the
The minister had publicly stated he had decided to approve the scheme before he considered the objections. The complaint was held to be good in the trial court. The Court of Appeal, however, held that though the minister’s speech showed bias there was no evidence to show that the bias continued through to the time when the decision was actually made. The House of Lords upheld the Appeal Court but went on to say that no judicial or quasi-judicial duty was imposed on the respondent and that all he was required to do was to follow the procedure prescribed by the statute; therefore the question of bias could not even be considered. This judgment is contrary to a long line of decisions which had considered a minister’s duty to hold a public inquiry and hear objections as a typical example of a quasi-judicial function. The wording in the judgment is not merely a matter of terms for it appears to imply that if there were no statutory requirements as to procedure the minister would be under no duty whatsoever. Whether the decision has struck the death knell to the term “quasi-judicial” as understood heretofore is uncertain, but it is undoubtedly true that it has dealt a severe blow to the definition applied in many previous cases. (W. C. Irish)


Article 2 of the proposed Uniform Commercial Code codifies the law of sales of goods. The Code was prepared under the auspices of the American Law Institute and of the National Conference of Commissioners of Uniform State Laws. Since the first draft of the proposed Code has not yet been adopted, a few proffered observations are timely.

The existing Sales Act was based on the English Sale of Goods Act, which has also been adopted by many parts of the British Commonwealth. Except in a few respects, the American act followed the English statute both in substance and in wording. When the American act was drafted it was thought to be a considerable advantage that it so closely resembled the English statute. This advantage has subsequently become even more obvious with the wide adoption of the English statute, especially in the provinces of Canada.

Although on many states of fact the substantive law laid down in the proposed Code is necessarily the same as under the English statute and the existing American Uniform Act, there is no evidence of an effort to express the same ideas in the words
used in them. The American Sales Act, like its English prototype, was intended to express the rules of common law, except in making documents of title negotiable. The new Code, on the other hand, proposes many rules which have never existed anywhere, and often adopts unusual language.

To deal briefly with one example, there is the question of "title". Many of the most important questions in the law of property, both real and personal, have always turned on the requisites for transfer of title, the moment when the transfer occurs and the consequences of transfer. The important thing in transfer of title is the intention of the parties. Since intention is frequently not expressed, rules of presumption as to intention, based on attributes of title upon which the parties have agreed, were developed by the common law, and these presumptions have been enacted in both the English and American statutes. If neither actual nor presumed intention to transfer title can be found, it is not transferred.

The proposed Code does not state the present comprehensive rule that title passes if the parties so intend actually or by presumption, and that it does not pass otherwise. Nor does the section state any other comprehensive rule. Particular situations only are covered. It appears to be the purpose of the Code to make the question of title immaterial, so far as possible, for the rights of the parties. Doubtless the reason is because the intention of the parties to pass or retain title, which is controlling under present law, is often not manifested and can be determined only by presumption. The attempt to make title unimportant is unsatisfactory and can only result in confusion, when taken in connection with other laws.

Lawyers are well aware that the words of a long statute, comprehending a large branch of the law, never clearly give the answers to all possible problems. Years of judicial decisions are necessary to resolve the problems. Under a statute as long as the proposed Code, in which many of the rules and most of the language differ from those in existing statutes, the determination of countless cases will be necessary to give reasonable certainty to the law. Precedents cease to have certain application when words are wholly changed from those in existing statutes. The question whether principles are also changed is always present, even though no change in them was intended.

It is argued in support of the Code that the existing uniform acts on negotiable instruments, on sales and on documents of title were drafted many years ago, that they not only contained
defects when they were drafted but that changes in modern business situations and methods demand new laws. The answer to this argument, so far as concerns the law of sales of goods, is that, in the main, customs of buying and selling have not changed, and that the proper remedy is the enactment of amendments, not wholesale repeal; and further, that even if an entire revision is attempted, so much of the phraseology of existing statutes as states undisputed rules should be retained unless judicial construction has shown defects in wording. (W. E. Norton)


This article deals mainly with the judgment delivered by du Pareq L.J. in the case of Bowmakers Ltd. v. Barnet Instruments Ltd., [1945] K.B. 65, The facts are briefly: the defendants desired to purchase certain tools from a Mr. Smith, and in order to facilitate the financing of the purchase arranged that they should actually be bought by Bowmaker Ltd., and rented to them on normal hire purchase agreement. Three separate hire purchase agreements were made, dated respectively March, April and June 1944. Subsequently the defendants made some of the payments under the agreements but, before all were made, they sold for their own advantage and converted to their use the tools covered by the earliest and last agreement. The tools covered by the other agreement they refused to deliver up to the plaintiffs on demand. The plaintiffs sued for damages on conversion. The defendants pleaded that the contracts were tainted with illegality as having infringed on certain orders lawfully made by the Ministry of Supply.

The Court of Appeal held the three hire purchase agreements to be illegal, but in spite of this they found that the plaintiffs were entitled to damages on conversion. The court goes on to say: “In our opinion a man’s right to possess his own chattels will as a general rule be enforced against one who, without any claim of right, is detaining them, or has converted them to his own use, even though it may appear either from the pleadings or in the course of the trial that the chattels in question came into the defendant’s possession by reason of an illegal contract between himself and the plaintiff, provided the plaintiff does not seek and is not forced either to found his claim on the illegal contract or to plead its illegality to support his claim”.

This raises a rather fine point — when must the bailor who
is suing the bailee in tort be said to be relying on the contract and when is he relying merely on his property? But while the court excepts cases of illegal contracts, it does not define the term "illegal contract" nor does it differentiate between the various acts of conversion in the *Bowmaker* case. Under agreements one and three, the machines were sold to the defendants but, under agreement two, the plaintiff's claim was substantially a failure to pay the instalments. Thus it would appear that by framing the action in tort it is possible to force the defendant to pay the instalments due under an illegal contract.

It would seem from the judgment that the court decided that where the bailee, even under an illegal bailment, deals with the goods in some manner outside the scope of the bailment, he is liable to an action for conversion at the suit of the original owner. It is also evident that the court intended to extend this principle to cover the case of a purchaser under a hire purchase agreement. It would be of some interest to determine if the court intended the extension to include the circumstances where the wrongful act complained of was not the sale but the retention of the goods by the bailee — as is the case in agreement two. For this is something quite different and would come very close to doing what the court specifically said it would not do, namely enforce an illegal contract under cover of an action in tort. If this was the case, it would appear that the court adopted the general principle that even where a bailment is illegal, it is a condition of the subsistence of the bailment that the terms of it are actually performed by the bailee and if these terms are not carried out, the bailor is entitled to prove that the bailment is therefore at an end and reclaim possession of the goods. But we must be careful to limit the generality of this proposition. If the actual terms of the bailment required acts to be done by the bailee which were illegal or immoral, there is little doubt that the court would not allow the bailor to recover.

There appeared to be little moral indignation on the part of the judges in the *Bowmaker* case over the infringement of the ministerial order that made the contract illegal.

Limiting the proposition to the facts arising under agreement two of the *Bowmaker* case — namely, where the bailment is illegal but does not require the commission of further illegal acts by the bailee and the bailee refuses to pay as required by the terms of the bailment — it is of interest to consider whether this principle might not be applied to illegal leases. Could a landlord recover possession of property, in an action for ejectment, for
failure to pay rent as required by a lease, even if that lease were illegal? Cheshire and Fifoot in their work on contract say that the landlord could not, and they support their opinion with the judgment of Romer L.J. in *Alexander v. Rayson*, [1936] 1 K.B. 169. However, while there is a difference between a lease and a bailment, it seems strange that a lessor bringing an action for ejectment for failure to pay rent reserved by an illegal contract should fail, whereas a bailor suing for a regain or chattel from a bailee, held on an illegal contract of bailment, should recover. Surely both the tenant and the bailee have obtained a limited interest in the respective properties and the two interests are so limited that the lessor’s right to entry and the bailor’s right to possession spring into existence upon non-payment of the rent or hire reserved. If the proposition is applicable to the latter case it would seem also to be applicable to the former. (W. C. Irish)

Survey of the Legal Profession: Provincial Directors

Following conversations with local Bar leaders during the annual meetings of the provincial bar associations, the Hon. C. P. McTague, K.C., Director of the Survey of the Legal Profession in Canada, has announced the appointment of provincial directors in the Maritime Provinces. Local Director for Nova Scotia is Mr. Gordon S. Cowan, K.C., of the firm of Stewart, Smith, MacKeen, Covert and Rogers, of Halifax. In New Brunswick, Mr. Charles J. A. Hughes of the firm of Winslow, Hughes and Dickson, of Fredericton, has accepted the appointment. The Prince Edward Island Director will be Mr. John P. Nicholson of Charlottetown, and the Newfoundland Director, Mr. Fabian A. O’Dea of the firm of Mercer, Mifflin and O’Dea, Saint John’s. The Maritime directors will act as local advisors to the Director and assist in the conduct of the Survey in their respective provinces. Appointments of the directors for the Western Provinces were announced earlier; the appointment in the Province of Quebec is expected to be made shortly.