

MISLEADING GOVERNMENT INFORMATION:  
AN ANALYSIS OF THE LEGAL REMEDIES AVAILABLE  
TO AFFECTED CITIZENS

By

IAN ROBERT WARD

B.A., University of Cambridge, 1979

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Department of Law

The University of British Columbia  
1956 Main Mall  
Vancouver, Canada  
V6T 1Y3

Date August 13th 1985

ABSTRACT

In the twentieth century, a dynamic expansion of its activities and powers has made government a major supplier of information on an enormous range of topics of concern to citizens. Unfortunately, the information which it provides is not always completely reliable: sometimes it is inaccurate, and government is powerless to protect the citizen from the consequences; at others, it proves misleading because government chooses later to disown it. The purpose of this thesis is to analyse the legal remedies available to citizens misled by government information.

The analysis has two principal areas of investigation. First, consideration is given to the means whereby the citizen may be able to hold government bound by information which it has provided to him. Separate treatment is given to the situations in which the misleading information deprives the citizen of a benefit or inflicts on him a loss, and in which it subjects him to the risk of criminal liability. Secondly, consideration is given to the possibility of holding government responsible in damages for the consequences of its information being misleading.

Of central importance in this wide-ranging analysis is the issue of the proper role of the courts. This stems from the fact that complaints about misleading government information frequently involve challenges to government decisions. Thus the majority of

attempts by citizens to hold government bound by its information are generated by the making by government itself of a decision inconsistent with that information. Again, attempts to hold government responsible in damages for the consequences of providing misleading information commonly involve an allegation that a particular government decision relating to the provision of that information was negligent. It is emphasized throughout this thesis that the courts should refuse assistance to a citizen whose complaint of misleading government information is directed essentially towards a government decision, where that decision involves a determination of the priority of competing interests and values represented in society. The provision of a remedy in such a case would enable the courts effectively to review the choices embodied in value-laden government decisions, and as such would facilitate an unwarranted extension of their constitutional role.



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PART I  
GOVERNMENT INFORMATION

## 1. Information And Uncertainty

The focus of this thesis is information. Behind information lies uncertainty, for information can be of value only where uncertainty exists. Behind uncertainty, in turn, lies the power of selection, for information derives its significance from the existence of alternatives, of choice.<sup>1</sup> "'Information' in most if not all of its connotations seems to rest upon the notion of selection power."<sup>2</sup>

Uncertainty is a problem, for it entails the risk of making a wrong selection. This may result in the incurring of some loss or liability which might otherwise have been avoided, or in the failure to secure some gain or advantage which might otherwise have been obtained. All of us - individuals, corporations and institutions - are to some degree risk-averse.<sup>3</sup> Our aversion to risk leads us to distrust uncertainty and to adopt measures to limit its potential impact. The options are broadly twofold. First, we may seek to transfer to or share with others the risk associated with uncertainty. This involves a trade in risk. Risk-transfer takes the form of insurance; risk-sharing occurs primarily in the context of business ventures and is present in the formation of partnerships, the purchase of company stock and the provision of credit.<sup>4</sup> Secondly, we may seek to reduce or eliminate the uncertainty with which the risk is associated,<sup>5</sup> through the acquisition of information.<sup>6</sup>

Government is no less likely to be distrustful of uncertainty than are the citizens whose lives it seeks to regulate. It is merely another institution, composed of individuals, each of whom may be presumed to be risk-averse.<sup>7</sup> This explains the voracious appetite

of government for information,<sup>8</sup> required to enable it to make and maintain correct - or acceptable - policy and programme choices. But government is not only a major consumer of information; it is also a major supplier. There is a constant interchange of information in society between government and governed. The central concern of this thesis is with information provided by government to reduce or eliminate uncertainties facing its citizens. It addresses the questions whether, when such information proves for some reason incorrect or misleading, government may nonetheless be bound by it, or made responsible in damages for the consequences.

## 2. Explanation Of Terms

The word "information" has so far been used in a very general sense, as indicating the "antidote" to uncertainty.<sup>9</sup> It will continue to be used in that sense. The sophisticated definition provided by information science, which breaks the concept down into the categories of data, information and knowledge, is of only limited value in this context. Under that classification, "data" signifies collections of signs and characters generally arranged in some orderly manner to represent observed or researched facts; "information" is data analysed or refined for application by specific individuals in specific situations for specific purposes; and "knowledge" comprises a body of information collected, systematised and stored for repeated future use.<sup>10</sup> This structure is of some value in indicating the wide range of phenomena which may be covered by the term "information", but it has no

consequence for the discussion undertaken in this thesis and it will not be further employed.

Also of limited value is the distinction sometimes drawn between "information" and "advice". This distinction is at best nebulous, and in practice the two concepts inevitably shade into one another.<sup>11</sup> Moreover, the following discussion is intended to embrace the phenomena covered by both terms, as both are concerned with the reduction or elimination of uncertainty.<sup>12</sup>

The word "government" has so far also been used in a general sense, as signifying governmental as opposed to non-governmental institutions. In the following discussion it is principally intended to denote the executive.<sup>13</sup> That is, broadly, all formal administrative structures, established by the constitution or by public laws, headed by officials elected by citizens or appointed by elected officials, and principally financed by taxation or within public ownership. In Canada, this covers federal, provincial, territorial, regional and municipal authorities; Crown corporations and agents; and all statutory public bodies. But it is not intended to concentrate exclusively on Canada. The executive authorities of other states will be referred to where a reference may be helpful or illuminating, and liberal use will be made of judicial decisions from other, and particularly from Commonwealth, jurisdictions.

However, the identification of the word "government" with the executive is subject to an important caveat relating to the role of the legislature. It has already been stated that the purpose of this thesis is to consider the legal remedies available to citizens provided by the



executive with misleading information. But the provision of that information may itself be the result of a legislative, rather than an executive, decision.<sup>14</sup> Accordingly, references in the following discussion to government decisions as to the provision of information must be read as embracing the decisions in that regard of both legislature and executive.

Finally, it is impossible to divorce government from its programmes. "We judge government by what it does (delivering a multiplicity of programmes) as well as by what it is (a set of organizations)."<sup>15</sup> Consideration of the relationship between government programmes and government production and dissemination of information enables us to take a first step towards defining the remedies available to a citizen misled by such information.

### **3. Government Information: The Uncertainties Addressed**

Government maintains a bewildering number and variety of programmes, the justification for most of which lies in the delivery of goods and services to citizens entitled to benefit from them. The number of such programmes has spiralled upwards in the second half of the present century. The experience of Canada is symptomatic of a trend which has occurred throughout the western world. In 1974, the federal government made transfer payments - that is, payments other than for goods and services supplied to government itself - totalling \$9,968.6 million; by 1984, the figure had risen to \$41,697.6 million (estimated).<sup>16</sup> Some government programmes are designed specifically

to reduce or eliminate uncertainties facing corporate or individual citizens, by ensuring the provision to them of information. All programmes may in any event themselves generate uncertainties.

Uncertainties addressed or generated by government information may relate to the whole spectrum of human affairs and experience, and to both natural and unnatural phenomena. But for the purpose of the following discussion, they can be divided into two categories: namely "government-controlled" uncertainties, being those uncertainties which are associated with or generated by government, its policies, programmes and activities; and "government-uncontrolled" uncertainties, being those which exist or arise independently of government.

The first category is easily comprehended. The citizen may be uncertain as to such matters as the nature or application of government policies and programmes; or the state or interpretation of the law;<sup>17</sup> or the availability of government services. The reduction or elimination of such uncertainties is a major purpose of government production and dissemination of information. "Farmers, processors, wholesalers and retailers must know what [Agriculture Canada] is up to. Veterans must be informed of the legislation affecting their benefits. All citizens must know how changes in tax policy affect them."<sup>18</sup> Thus Revenue Canada Taxation provides general tax information to the public by means which include an inquiry service located in district taxation offices and through the publication of Interpretation Bulletins and Information Circulars.<sup>19</sup> Again, the Small Business Centre of the Department of Industry, Trade and Commerce and Regional Economic

Expansion offers information about federal government programmes and services relating to small businesses. Further, the Telidon Exploitation Program of the Centre for Service to the Public uses Telidon as a means of providing information from Cantel, the public information bank, to businesses, institutions and the public generally; and the Centre publishes annually an "Index to Federal Programs and Services."

The second category is more amorphous, as it comprehends all other possible causes of uncertainty. Within it fall uncertainties relating to natural phenomena which mankind is at present unable wholly or at all to control. Thus the Atmospheric Environment Service of Environment Canada offers a range of information services, from the provision of weather forecasts to the general public to the sophisticated application of climatic information for specialised users; the Earth Physics Branch of Energy, Mines and Resources Canada provides forecasts of geomagnetic activity; and the Animal Pathology Division of Agriculture Canada provides diagnostic services to livestock owners. Also within the second category fall uncertainties relating to the myriad human activities and experiences uncontrolled by government. Thus the Women's Bureau of Labour Canada offers to the public information regarding equal opportunities and the status of women in the workforce; the Livestock Feed Board of Canada publishes reports and disseminates information regarding the feed grain market; and the Health Promotion Directorate of Health and Welfare Canada administers health education programmes in relation inter alia to drug, alcohol and tobacco abuse. The examples could be multiplied.

The importance of the distinction between government-controlled and government-uncontrolled uncertainty lies in the light which it throws upon the position of a citizen misled by government information. Where a citizen who has been so misled seeks the assistance of the law, he may be expected to explore either or both of two broad possibilities: namely, that of holding the government bound by its information, and that of recovering from it damages for the consequences of its information having proved misleading. Where he attempts by legal proceedings to hold the government bound by its information, the citizen is concerned effectively to prevent government from acting in relation to him inconsistently with its earlier stated position. His object is to avoid the adverse consequences of the information being in fact misleading, by requiring the government to treat him as if it were correct. This approach seems eminently feasible where the information was provided in response to a government-controlled uncertainty, that is an uncertainty associated with or generated by government itself. In such a case, it would be sufficient to protect the citizen from the ill effects of being provided with misleading information for government to decide that that information must be adhered to. Accordingly, a citizen who is wrongly advised by government that he is eligible for a certain grant, or that he may effect a business transaction without incurring any liability to tax, may understandably be attracted by the possibility of compelling government to act towards him as if that advice was correct.

However, the position with respect to government-uncontrolled uncertainties is very different. The citizen will generally have no

interest in holding the government bound by information provided in response to such uncertainties, for by treating him as if the information was correct the government will be unable to relieve him of the adverse consequences of it being in fact misleading.<sup>20</sup> The government's influence over events will be limited to taking steps to implement the information or to ensure that its information is correct in future. Thus if the Atmospheric Environment Service predicts fine weather and a hurricane ensues, there is no sense in which the government may be held bound by the forecast. Similarly, if a government health warning states that brand X cigarettes contain  $n$  amount of tar, when the correct amount is in fact  $n + 1$ , it avails the citizen nothing to require the government to treat him as if its information was correct.<sup>21</sup>

The distinction between government-controlled and government-uncontrolled uncertainty accordingly enables us to take one step towards defining the availability of legal remedies to a citizen misled by government information. But it illuminates only the practical considerations affecting the availability of those remedies. More important and more complicated are the political considerations which limit their availability, and which are best approached by analysing the motivations behind government provision of information.

#### **4. Government Information: The Motivations For Its Provision**

##### **(a) Duties and Powers**

In some cases, information is provided to citizens pursuant to a statutory duty imposed on the executive by the legislature. Thus one

of the functions of the British Columbia Ministry of Consumer and Corporate Affairs it to "disseminate information and educate consumers" with respect to consumer affairs matters.<sup>22</sup> Again, the Chief Inspector of Mines of the British Columbia Ministry of Energy, Mines and Petroleum Resources is under a duty, on application by the owner of a mine and after examination of plans of the two mines and if necessary their workings, to report to the applicant whether the applicant's territory is or is not being encroached upon by an adjoining mine.<sup>23</sup> Further, one of the duties of the Economic Council of Canada is to foster and promote the dissemination of technical information<sup>24</sup>; and the Council is also obliged to publish an annual review of medium- and long-term economic prospects and problems.<sup>25</sup>

In other cases, the executive provides information to citizens in the exercise of an express statutory power, rather than in performance of a statutory duty. Accordingly, the federal Minister of Labour is empowered to "prepare and disseminate data or information bearing upon safety or health of employees."<sup>26</sup> Again, the British Columbia Heritage Trust<sup>27</sup> is empowered to "conduct and arrange exhibits or activities to inform...the interest of the public in property of heritage significance" within the province,<sup>28</sup> and to "assist in or undertake...publication concerning its objects" of supporting, encouraging and facilitating the conservation, maintenance and restoration of heritage property in the province.<sup>29</sup>

Perhaps more frequently, the informational activities of government are founded on no express statutory power. The power is then

implied, under the principle that the grant or imposition by statute of an express power or duty impliedly includes the power of doing all acts necessarily incidental to the execution of the express power or duty.<sup>30</sup>

What are the motivating considerations where the legislature acts to ensure the provision of information to citizens, or the executive decides in its discretion to provide it? What factors govern the determination of the quantity and quality of the information to be produced? A means of approaching these issues is provided by the economic theory of information, which holds out the promise of a comprehensive explanation of the informational role of government.

#### **(b) Economic Theory of Information**

Information is a commodity, and accordingly a phenomenon susceptible of economic analysis. "The outstanding fact is that the ubiquitous presence of uncertainty permeating every relation of life has brought it about that information is one of the principal commodities that the economic organisation is engaged in supplying."<sup>31</sup> Like other goods or services available in the market, information may be bought and sold; it usually has a usefulness to persons other than its producer; and its production consumes resources. But information differs from other, "ordinary" commodities in five important respects. The differences are of degree rather than of kind, but they contribute to make trade in information peculiarly difficult.<sup>32</sup> They are as follows:

(i) Division

Information does not always come in well-defined units. It may be hard to measure, and therefore to price.

(ii) Exclusion

"A viable business must restrain the flow of benefits from its products from reaching people who do not pay for them."<sup>33</sup> However, information is difficult to control, and therefore difficult to withhold from non-paying beneficiaries, or "free-riders." Property rights in it may be hard to maintain.

(iii) Alienation

Ordinary goods may be described to or inspected by prospective purchasers in some detail prior to sale without the prospective seller having parted with the essence of their value. Information presents the difficulty that "to the extent that one has information about the product, one already has the product itself."<sup>34</sup> A buyer of information may accordingly be unaware of what he is purchasing.

(iv) Depletion

Ordinary goods are depleted or used up by consumption, but not so information. Information may lose its value or become obsolete due to changes in circumstances, but it will endure indefinitely.



(v) Appropriation

Ordinary goods can usually have only one owner or possessor at a time, which entails that to serve another consumer requires the creation of another unit. But information may be possessed by any number of persons at the same time without thereby rendering the commodity scarce; and marginal cost, or the cost of serving another user, is accordingly low.

These inherent characteristics or attributes of information create "imperfections" in the information market. The concept of a market imperfection can be understood only by reference to the "neoclassical model" of economic analysis, from which an imperfect market is said to deviate.<sup>35</sup> This model is used to demonstrate that, under certain assumptions, reliance on competitive markets will result in optimal welfare for society as a whole. The atom of this analysis is the individual; the welfare of society as a whole is equated with the welfare of each of its members. Welfare in this sense is normally measured according to the criterion named after the Italian economist Pareto, whereby a movement from one situation to another constitutes an improvement of society's welfare if no individual's welfare is reduced and at least one individual is made better off. The new situation is "Pareto superior" to the old one; and "Pareto optimum" is accordingly the situation in which no Pareto improvement is possible. "The central point of the neoclassical model is that under certain assumptions an economy consisting of competitive markets, i.e. having many sellers and many buyers, for all goods and services as well as productive factors would

bring about a Pareto optimum and be in equilibrium at that point."<sup>36</sup>

When this occurs prices are equal to marginal cost, that is the cost of producing the last unit of the commodity concerned.

If the assumptions upon which the model rests are not met, particularly that which postulates a free exchange of commodities between suppliers and purchasers, there is a divergence from the model, or an "imperfection" in the market. In that event, prices are not equal to marginal cost, and so they do not reflect the scarcity of the commodity. This tends to a misallocation of resources, which constitutes economic inefficiency: "too much, relative to other commodities or factors, given their scarcity, [is] used of the under-priced items, too little of the over-priced ones."<sup>37</sup>

One of the assumptions of the neoclassical model is that every resource is owned, so that one person can exclude all others from its use. This assumption is not met by what are commonly called "public goods", from whose use nobody can be excluded and which may be used by any number of persons at once without their utility being diminished.<sup>38</sup> It has already been pointed out that information is a commodity from the use of which it may be difficult to exclude others and which may be possessed by any number of persons at the same time.<sup>39</sup> Accordingly, information may possess the characteristics of a public good, and as a result one might expect imperfections to occur in the information market.

The result of the peculiar characteristics of public goods is that, at Pareto optimum, where price is equal to marginal cost, the use

of such goods would be free. But producers must charge in order to cover their costs; and if information, as a public good, were available free of charge, the result would be underproduction. On the other hand, if any charge were levied, the price of the information would be greater than marginal cost, and this would tend to underutilisation and to "free-riding" - attempts to retain the full benefit of information without paying one's share.

The remedy for market imperfections is seen to lie in government intervention. To the extent that government intervenes to remove the imperfection, the economy as a whole will move closer to Pareto optimum. In relation to public goods, government intervention may take a variety of forms,<sup>40</sup> the most important of which for the purposes of this discussion is the supply of the good by the government itself at the expense of the taxpayer.

### **(c) Weaknesses of the Economic Theory**

As a theoretical approach to the realities of the market for information, the neoclassical model is less than entirely satisfactory. First, it is clear that information does not always fall to be treated as a public good. This is apparent from the fact that large parts of the private sector are profitably engaged in its provision. Lawyers and accountants, among others, thrive on supplying the antidote to uncertainties facing their fellow citizens. The point was demonstrated with wit and erudition by the work of Coase on the British lighthouse

system,<sup>41</sup> pertinent because the essential purpose of a lighthouse lies in the production and dissemination of information.<sup>42</sup> As a phenomenon, the lighthouse has been subjected to overuse by economists as the classic example of a public good, which must be provided by government intervention.<sup>43</sup> The reason was said to be that the private sector would find it impossible to secure payment from owners of ships benefitting from the existence of a lighthouse, there being no way to restrict its benefit to ships whose owners did pay, so that lighthouses would be unprofitable to build and maintain. But his studies of the early history of British lighthouses enabled Coase to demonstrate that a successful and profitable lighthouse system was developed by the private sector, payment being secured in the form of light dues raised on ships entering and leaving port. The role of government - the Crown - was limited to permitting the construction of lighthouses and the levying of dues. When in 1836 English lighthouses were vested by statute<sup>44</sup> in Trinity House, a private organization with public duties,<sup>45</sup> it was because lighthouse owners were thought to be making excessively large profits and in the hope that the establishment of a unified system under Trinity House would lead to a lowering of dues. It did not. The system continues to be managed by Trinity House, not by government; and to be financed by dues, not from general taxation.

The conclusion reached by Coase that the private sector in Britain both built lighthouses and ran a system of charges for their use commensurate with the benefit received<sup>46</sup> indicates that information does not always possess the attributes of a public good. It follows that

its optimal production and dissemination are not necessarily attainable only through government intervention.<sup>47</sup>

But the neoclassical model contains a second deficiency as a theoretical approach to the information market, which has important consequences for the legal remedies available to citizens misled by government information. This deficiency follows from the model's limitation of the purpose of government as a supplier of commodities to that of remedying market imperfections in the interests of achieving economic efficiency.

Many government activities can indeed be analysed according to this model. With respect to public goods, examples usually cited range from national defence<sup>48</sup> through the snowploughing of city streets<sup>49</sup> to the construction of roads and bridges.<sup>50</sup> These are all public goods, the characteristics of which act as a disincentive to the private sector to supply them. In the case of national defence and the snowploughing of city streets, there is no way to exclude non-paying beneficiaries and therefore no way of collecting from any beneficiary the value to him of the good. In the case of construction projects, marginal cost would be too low to enable the private sector to levy charges sufficient to cover its costs. The only answer is government intervention. It has been pointed out that in certain circumstances information may possess the attributes of a public good, and government provision of information may accordingly be susceptible of a similar analysis. In such cases, the decision of government to supply the good concerned is the result of its identification of a market

failure, which in turn is based upon its assessment of what will enhance the welfare of society as a whole, by achieving a situation Pareto superior to the preexisting one.

But the difficulty with orthodox neoclassical analysis of the activities of government is that it glosses over the more fundamental aspects of the governmental role. This is the result of the narrow focus of the analysis. The neoclassical model defines the optimum level of production of a commodity in relation to the given distribution of resources within society; it does not question that distribution. The object is to achieve the optimum allocation of distributed wealth, not the optimal distribution of wealth. Orthodox neoclassicism eschews distributional considerations, and adopts a definition of welfare which leaves them "to the preacher and the politician."<sup>51</sup> Less orthodox is that version of neoclassicism which attempts to broaden the scope of the model by broadening the concept of welfare so as to include "any objective which contributes to society's welfare in the sense that it satisfies the wishes or desires of some citizens - or more generally, of those whose preferences count - and which requires decisions on the allocation of scarce resources."<sup>52</sup> This, like most unorthodoxies, brings its own difficulties.<sup>53</sup> The important point for present purposes is that both orthodox and unorthodox neoclassicists recognise that there exist other considerations than merely the economically efficient use of distributed resources. Whether or not they have a part to play in neoclassical economic analysis, distributional considerations are undeniably taken into account by "the politician"; that is, they

play a part in government decision-making. The result may be decisions which have little to do with economic efficiency, or which involve the control or restriction of market forces.<sup>54</sup> The making of such decisions is an entirely proper function of government. "Its [government's] purpose must be in part to ensure that decisions which affect the community reflect the...values and desires within that community...The decisions of ...any government are value laden."<sup>55</sup> The recognition by government in its decisions of particular values and interests represented in society may involve the overriding of market forces and the disregard of economic efficiency in order to achieve a redistribution of resources.

Of course, not all citizens within a given community will share the same value-structure. Conflicts will inevitably occur. It will sometimes be necessary for government - perhaps after some procrastination - to choose between conflicting values and interests, to determine which shall be reflected in the decision on a particular matter, and in what proportions. This may necessitate the sacrifice of particular interests, a fact which is masked by those who view the role of government as being always to "reflect the conglomeration of societal values" and "compromise and harmonise competing interests."<sup>56</sup> Compromise and harmony will sometimes be impossible of attainment. Reasonable citizens may adopt attitudes on particular issues which are diametrically opposed. A decision of the British Columbia Ministry of the Environment to provide winter fodder for elk in a certain area may be greeted with dismay by local farmers, fearful of crop and property damage which hungry elk may inflict on them when the programme is discontinued,

but welcomed by those who live further away and who value the continued existence of healthy elk herds.<sup>57</sup> Again, a municipal decision to construct a domed sports-stadium may receive approbation from the sports-loving section of the community, but be roundly condemned by those whose interests lie in other directions.<sup>58</sup> Such decisions represent the recognition and promotion of values not shared by all members of the community. They are not made by reference to an agreed or objective standard. Governments of different political complexions would undoubtedly make different decisions, reflecting other values in other proportions and so redistributing in other ways the resources of society.<sup>59</sup>

Distributional considerations are as apparent in decisions of government relating to the provision of information as they are in its other decisions. In determining what information to provide, in what quantity, by what means, and to whom, government is generally concerned with far more than the efficient allocation of resources. Decisions to produce and disseminate information, whether on the results of archaeological research or the availability of welfare payments or on any other matter, involve a redistribution of society's wealth, the nature and extent of the redistribution depending upon the content of the decisions themselves.

#### **(d) The Role of the Courts: Standards**

The function of government as the maker of value-laden decisions has important implications for the role of the courts when



faced with attempts by citizens to hold the government bound by or responsible in damages for misleading information. A government decision as to the provision of information may reflect a particular value-structure, and as such may be politically controversial. It is not for the courts to pass judgment upon that value-structure, by determining at the instance of a dissatisfied citizen that the decision in which it is reflected is "good" or "bad", "right" or "wrong".<sup>60</sup> The courts lack both the mandate and the competence to substitute another value-structure for that of government. The role of the courts is to enforce obedience to the law, not to "second guess" difficult but lawful choices made by government between competing values and interests represented in society. The recourse for the dissatisfied citizen lies in the machinery of the democratic process, and ultimately in the ballot-box at the next election.

This is not to argue that government decisions ought necessarily to be immune from review by the courts whenever they are underpinned by distributional considerations. Rather, immunity should be reserved for those cases where the citizen is essentially asking the courts to question the decision's distributional underpinning. This issue has been analysed by Makuch in relation to the review of government decisions through actions in negligence.<sup>61</sup> Makuch argues that the focus of the rule of immunity applied in such cases should be the crucial issue of whether, in the particular case, the values of the relevant decision-maker are being challenged.<sup>62</sup> He demonstrates that there will be no such challenge where evaluative criteria exist, such as national or provincial codes or standards, by reference to which the

decision may be scrutinised. The existence of objective standards, either agreed or commonly accepted, enables the courts to evaluate whether, in the circumstances, the particular decision was "reasonable". The decision is admittedly value-laden, but there are means available of assessing its quality. Makuch also argues that, even if external standards exist, review will rarely be appropriate where the decision is "polycentric" in nature, that is multi-faceted. "To the extent that the decision being challenged is one which relates to many different factors the courts should be reluctant to allow an action in negligence."<sup>63</sup> He quotes<sup>64</sup> the spider's-web analogy used by Fuller: "Pull a strand here, and a complex pattern of adjustment runs through the whole web. Pull another strand from a different angle, and another complex pattern results."<sup>65</sup> If the review of a government decision by a finding of negligence would amount to pulling one strand of a web of interrelated decisions, so as substantially to affect other strands of the web, that decision is likely to be one which it is inappropriate for the courts to review. Makuch concludes that "To the extent that evaluative criteria are present and to the extent that the decision does not substantially affect many other activities and decisions",<sup>66</sup> the courts should be more willing to allow an action in negligence.

This analysis is fully as applicable to actions against the government in negligent misstatement as it is to other actions in negligence. Accordingly, attempts to make government responsible in damages for the negligent provision of misleading information ought to fail where the complaint is directed towards a decision which cannot be evaluated by reference to external standards, or which forms an inextricable part of a web of interrelated decisions. However, the rule

of government immunity currently favoured in the Commonwealth is concerned rather to protect from review government decisions taken within the bounds of a valid discretion. Although this rule is capable of focussing the attention of the courts on the issue of the existence of standards for review, it fails to do so expressly, with the result that in certain cases the importance of that issue has not been recognised. This point is elaborated later.<sup>67</sup>

The Makuch analysis is also applicable by extension to cases where the citizen seeks to hold government bound by misleading information.<sup>68</sup> Such attempts have historically tended to involve the use of the doctrine of estoppel, although more recent cases have sought to employ the principles of judicial review. In relation to estoppel, the courts have developed certain principles which are designed to limit the application of the doctrine to government. Of particular importance in the present context is the duty/discretion principle, which is intended to ensure that estoppel cannot operate where it would have the effect of interfering with government in the performance of its duties or in the exercise of its powers. This principle performs in relation to estoppel a role closely similar to that performed in relation to the tort of negligent misstatement by the rule of government immunity discussed in the previous paragraph. The effect of its application is to rob estoppel of much of its potential impact in this area, in the interests of leaving government free to make value-laden decisions inconsistent with information earlier provided to citizens. This argument is developed later.<sup>69</sup>

The principles of judicial review, on the other hand, were developed by the courts in order to facilitate, rather than to prevent,

judicial scrutiny of the decisions of government. They offer a means of ensuring the legality of government decision-making and of the decisions which it produces. However, the control which they exert over the content of government decisions is at a relatively low level. Thus a decision will be unreasonable and therefore unlawful only if it is so irrational or outrageous that no reasonable person or authority in the position of the decision-maker could have made it.<sup>70</sup> Again, while all relevant considerations must be taken into account in the decision-making process,<sup>71</sup> it is extremely rare for the resulting decision to be overturned merely on the ground that the decision-maker failed to attach to those considerations their "correct" weight.<sup>72</sup> Of course, this generalization, like all others, is subject to exceptions. In particular, the degree of penetration of the principles of judicial review into the administrative system will vary with the activism of the courts. But the overall picture remains clear: the courts will be slow to allow citizens to use the medium of judicial review to overturn value-laden government decisions. The reason is that "error[s].... of political judgment, using the expression not in a party sense but in the sense of weighing the relative importance of different aspects of the public interest... are not appropriate for decision in the courts."<sup>73</sup> The "different aspects of the public interest" are in truth the different private interests represented within society.<sup>74</sup> The courts are reluctant to question, whether through the principles of judicial review or otherwise, government decisions which involve the weighing of those different interests. "The very fact that ... decisions are of the type to attract political criticism and

controversy, shows that they are outside the range of discretionary problems which the courts can resolve."<sup>75</sup>

However, the principles of judicial review continue to develop and expand. Recent English decisions have sought to harness their potential in order to resolve the problems generated by misleading government information. Thus the duty to act fairly and the requirement that decision-makers take into account all relevant considerations have been used to ensure that government pays a measure of respect during its decision-making to the expectations aroused by information which it has earlier provided to citizens. These developments have proved acceptable to the courts precisely because their impact is on the process of government decision-making rather than on the substantive content of government decisions. The parallel development of a duty of substantive, as opposed to procedural, fairness at first sight appears to threaten a more dramatic extension of judicial control. However, it is likely that in this context the discretion of the courts to refuse to classify conduct as unfair, or to refuse relief for acknowledged unfairness, will perform a role similar to that performed in relation to estoppel by the duty/discretion principle: that is, the role of protecting from review decisions which are value-laden. Again, these points are elaborated later.<sup>76</sup>

Thus the legal issues arising from the provision by government of misleading information are underpinned by considerations relating to the proper roles of government and courts. Where the courts are asked effectively to hold the government bound by misleading information, or to make it responsible in damages for the consequences of having provided

that information, they apply principles which are intended to ensure that the right of government to implement values and to promote interests through its decision-making is not usurped. The effect is to limit the circumstances in which a judicial remedy will be available to an aggrieved citizen. This is fundamentally a political constraint, and as such it does not operate in relation to information provided by non-governmental institutions. There is accordingly a possibility of divergent judicial approaches depending upon the means employed by government actually to supply information in any particular case.

#### **5. Government Information: The Means Of Provision**

Where government provides information to citizens, it may do so by any of a number of means. First, and most importantly, it may itself produce and disseminate the information.<sup>77</sup> Secondly, it may encourage the private sector to provide the information, by offering subsidies or other incentives. Thirdly, it may compel disclosure directly to the public of information which is in the possession of the private sector.<sup>78</sup> Lastly, it may employ a combination of the above methods; for example, it may compel disclosure to itself and then itself disseminate the information to citizens.<sup>79</sup>

This thesis is concerned with the situation where government itself produces and disseminates information. But it is important to recognise that the means adopted may have a profound impact upon the legal remedies available to a citizen where the information proves misleading. This follows from the reluctance of the courts, discussed in the previous section, to hold government bound by or responsible in

damages for misleading information where to do so would effectively involve the substitution of other values for those of the elected or appointed decision-maker, as embodied in a decision relating to the provision of the information or in a subsequent decision to act inconsistently with it. The same constraints do not apply where the information emanates from a non-governmental source. While the decision of government to encourage or compel the supply or disclosure of information by the private sector may be value-laden, that fact will not avail the supplier where the information proves misleading. If government decides to allocate \$X to the production of information on a certain matter, and as a consequence of under-funding the information produced is misleading, a citizen who suffers as a result will be prevented from challenging the level of funding through an action in negligent misstatement. But if the same decision is made by the private sector, there will be no political objection to such an action. Similarly, if the government informs a citizen that its policy on a certain matter is A, and it later seeks to apply policy B, any attempt by the citizen to compel the government to apply in relation to him policy A is likely to be defeated by principles intended to protect the value-laden decisions of government. But if the private sector were to provide similar policy advice, there would be no political objection to holding it bound by that advice at the instance of an aggrieved citizen.

## **6. Government Information: Characteristics And Reliability**

Government information has no fixed characteristics. Its form and content are determined by a variety of factors, among which the most important are the nature of the uncertainty addressed; the cost and

practicability of producing and disseminating information to reduce or eliminate that uncertainty; the motives underlying the provision of information; and the nature and number of its intended recipients. These factors also influence the reliability of government information; indeed, form, content and reliability are inextricably bound together. With this in mind, certain issues require specific consideration.

(a) Information Express, Implied or Inferred

Government may provide information by express words. But informational statements may also be implied into or inferred from the words or conduct of government.<sup>80</sup> Every act, omission or decision of government may have informational aspects. This is of particular importance in relation to claims to bind the government by estoppel or to hold it responsible in damages for negligent misstatement, in which the citizen must point to a representation made by or on behalf of government. It has long been accepted that a representation sufficient to found an estoppel may be implied or inferred,<sup>81</sup> but the position with respect to negligent misstatement is less clear. Some Commonwealth courts have been unwilling to allow implied or inferred statements to attract liability<sup>82</sup>; others have adopted sub silentio a more liberal approach, and in a series of cases liability has been based upon representations implied into or inferred from licences, consents and permits.<sup>83</sup> This matter is treated later in greater depth<sup>84</sup> but it is important at the outset to recognise the divergent judicial approaches.



**(b) Information Volunteered or Requested**

Government information may be either volunteered or provided pursuant to a specific request. It is likely to be volunteered when it is directed to citizens as a whole or to groups of citizens, through information circulars or pamphlets, advisory bulletins, interpretative statements and the like. The implications of holding the government bound by or responsible in damages for misleading information at the instance of a citizen may clearly be more far-reaching where the information was provided to that citizen as a member of a group, rather than as an individual. As is demonstrated later,<sup>85</sup> this consideration has proved particularly significant in relation to actions for negligent misstatement. The reason lies in the desire of the courts to limit the ambit of potential liability, a desire which has manifested itself in the cases in consideration of the connected issues whether "volunteered statements" and "statements to a class" may found liability. The underlying premise is that the courts, in deciding whether or not its provision of information placed the government under a duty of care, will be influenced by the size of the class to which the information was provided; the more limited the number of potential plaintiffs, the more likely the finding of a duty of care. The issue has not arisen in relation to attempts to bind the government to misleading advice through use of the doctrine of estoppel. The great majority of those attempts have concerned information given specifically, pursuant to request, to an individual citizen, but in any event the principles applied by the courts, by effectively preventing estoppel by representation from ever operating against the government, have made the issue redundant. As for

judicial review, English courts have shown no reluctance to quash decisions which are inconsistent with widely disseminated information.<sup>86</sup> This is undoubtedly the correct approach. It is one thing for the courts in tort cases to apply principles designed to limit the potential liability of the defendant; it would be quite another for them on applications for judicial review to apply principles intended to protect from challenge government decisions inconsistent with earlier government information, merely in order to limit potential administrative disruption.<sup>87</sup> Such an approach would run counter to the rule of law by granting dispensation from the principles of judicial review to more widespread illegalities.

(c) Information Oral or Written

Information taking verbal form may be oral or written. Written information may itself take a variety of documentary and other forms. Information provided to citizens as a whole or to groups of citizens is likely to be published in a form which is permanent and written, but much will depend upon the nature of the uncertainty addressed.<sup>88</sup>

Information provided to an individual citizen pursuant to request may fall anywhere on a range from the informal, oral reply given to an ad hoc query over a counter or by telephone, to the formal written advice provided by a senior official in response to a detailed, arm's length inquiry. Clearly, sophisticated or complicated information is likely to fall at the more formal end of the range. But in every case the degree of formality adopted will vary with the circumstances, and in particular

with the degree of reliability which the citizen wishes to obtain or the government to achieve.

The word "reliability" bears a subtly different meaning according to whether the uncertainty in response to which the information is supplied is government-uncontrolled or government-controlled. Where the uncertainty is government-uncontrolled, the degree of reliability of the information is a gauge merely of the likelihood that it is accurate, or right. There is always a risk that information, whether provided by government or by some other person or institution, will in fact be inaccurate, or wrong. A weather forecast may predict rain which never arrives; a health warning may state that the tar content of brand X cigarettes is lower than in fact it is. However, where the uncertainty is government-controlled, the degree of reliability of the information is a gauge, not merely of its likely accuracy, but also of the likelihood of it being adhered to by government. The second concern arises because of the risk that information, which may be accurate when provided, will later be disowned by government because of a change of policy or interpretation. For example, where an official advises a citizen that he is entitled to a particular statutory benefit, that advice may be misleading either because it is wrong when given, or because it is right when given but later invalidated by a deliberate change of approach on the part of government to the interpretation or application of the relevant statutory provisions.<sup>89</sup> But the two concerns - whether the information provided by government is accurate and whether it will be adhered to - are separate only on a theoretical analysis; in practice they will be meshed. They will present themselves to the citizen in the compendious form, how reliable is this information?

The degree of reliability of government information may be of great importance to a citizen deciding how to shape his future conduct. But it will also be highly relevant, maybe even crucial, when the information proves misleading and the citizen seeks to hold the government bound by or responsible in damages for it. The willingness of the courts to grant a remedy to a citizen misled by government information must and does to a large extent reflect the reliability of the information itself when provided. It is clear that the courts regard the inherent reliability of written information as being greater than that of oral information. Information committed to paper is likely to receive more detailed consideration during its formulation. In addition, there is a greater possibility of a check being made on written information, by the official responsible for writing it or by a colleague or superior, before it is published to the citizen or citizens concerned. "Written advice... requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism and reexamination."<sup>90</sup> The very fact that it is expressed in permanent form<sup>91</sup> is an incentive to those responsible for written information to ensure, within the limits of cost and practicability, that it is reliable. The lesser reliability of oral information may be reflected by the law in a variety of ways, depending upon the nature of the remedy sought by the aggrieved citizen. All are manifestations of a natural judicial reluctance to hold the government bound by or responsible in damages for information the inherent reliability of which was from the outset low. The present state of Commonwealth authorities indicates that this reluctance is most likely to take either of two forms.

First, the courts are reluctant to find that the provision of oral information places upon government a duty of care in negligence. Thus it was held that no duty of care arose where the owner of a building, who wished to learn whether he could in accordance with the local zoning by-law lease it as offices to a government department, "committed his fortune to one brief telephone conversation with the planning officer."<sup>92</sup> In another case, the High Court of Australia declined to find a duty of care where a solicitor, instructed by his clients to ascertain whether their property was affected by road-widening proposals, relied upon an oral statement made over the telephone by an unidentified officer of the local authority concerned.<sup>93</sup> These cases avowedly proceed on the basis that no "special relationship" existed between the supplier and the recipient of the information, but the operative consideration is the reliability of the information itself. It is clear from other cases that oral information may, in appropriate circumstances, be sufficiently reliable to found a special relationship.<sup>94</sup> But where the nature of the information and the circumstances of its provision conspire to render reliance upon it unreasonable, a duty of care is unlikely to be found. Thus a duty of care in the provision of oral information is unlikely to arise where there exists a common practice of formal, written inquiry and response<sup>95</sup>; or where the inquiry was made on a social occasion<sup>96</sup>; or where the inquirer was himself expert in the field<sup>97</sup>; or where the inquiry related to a matter of some complexity, perhaps involving the exercise of skill or judgment, as opposed to a straightforward matter of fact.<sup>98</sup> The effect is that

the likelihood of a duty of care being found to exist is made to correspond broadly to the likely reliability of the information when provided.

Secondly, the lesser reliability of oral information may be reflected in the approach adopted by the courts to the requirement, common to estoppel,<sup>99</sup> negligent misstatement<sup>100</sup> and the criminal defence of officially induced error,<sup>101</sup> that in order to succeed the citizen must establish that it was reasonable for him to rely upon the information concerned. In relation to actions for negligent misstatement, as has been demonstrated, a finding that the citizen's reliance upon oral information was unreasonable will usually manifest itself in a judicial refusal to impose a duty of care,<sup>102</sup> although the requirements of a special relationship and of reasonable reliance are, at least in theory, distinct. In relation to estoppel, it may be reasonable for the citizen to have acted upon a misunderstanding of the information provided to him,<sup>103</sup> which may prove important where the information was provided orally.<sup>104</sup> In such a case, both the citizen's misunderstanding and his subsequent conduct must have been reasonable.<sup>105</sup>

An issue of importance in this context is whether the applicable standard of reasonableness is objective or subjective. It is reasonably clear in relation to both estoppel<sup>106</sup> and negligent misstatement<sup>107</sup> that the standard is objective. Such authority as exists in relation to the defence of officially induced error suggests a similar conclusion.<sup>108</sup> An objective standard means that the courts will not consider the citizen's mental or emotional idiosyncracies in

assessing the reasonableness of his reliance. "The law takes no account of the infinite varieties of temperament, intellect and education which makes the internal character of a given act so different in different men."<sup>109</sup> This may work hardship to the less advantaged members of society, who may be less discriminating in their definition of and reliance upon official guidance, and to whom the admonition "Make sure you get it in writing" may be meaningless. A citizen who is illiterate may be expected to rely more heavily than other citizens upon oral information; but the degree of protection against misleading information afforded to him by the courts is likely to be correspondingly lower. A subjective standard of reasonableness would alleviate this problem. The possibility that the less assiduous citizen might abuse such a standard, by making meagre efforts to obtain information and then alleging that he believed those efforts to be reasonable, would be mitigated by the necessity for him to satisfy the court of the honesty of his alleged belief. However, the objective standard appears to be fixed in relation to estoppel and negligent misstatement. It is argued later<sup>110</sup> that the particular justification for the defence of officially induced error of law newly recognised by Canadian criminal courts makes it appropriate for an objective standard of reasonableness to be adopted in that context.

Finally, there is in all cases concerning oral information an antecedent evidential difficulty, namely that of satisfying the court on the appropriate standard of proof<sup>111</sup> that the government in fact provided the alleged information. This difficulty is unlikely to occur in relation to written information which has been preserved, any problem

that may arise with respect to such information being more likely to concern construction than evidence.<sup>112</sup> But in relation to oral information the evidential hurdle may be insurmountable. Memories fade; precise words are forgotten. There may be a conflict of evidence between the citizen and the official with whom he dealt.<sup>113</sup> That official may even be unidentified and untraceable, in which case judicial scepticism is likely to be at its strongest: the courts are understandably hesitant to accept uncorroborated allegations of misleading government information. Even the Ombudsman, equipped with investigatory powers and not obliged to make decisions upon facts elicited in a courtroom within the constraints of the adversarial process and the law of evidence, may find it extremely difficult to ascertain what was actually said across a counter or on a telephone.<sup>114</sup>

#### **(d) Assurances and Undertakings**

Government information often relates to the future. Obvious examples of information provided in response to future uncertainties which are government-uncontrolled are weather and crop forecasts. Where the uncertainty is government-controlled, the information is likely to take the form of an assurance or undertaking. This "promise" may be express, as where the government undertakes to shareholders of a company that it will not allow the company to fail,<sup>115</sup> or where it assures illegal immigrants that, if they surrender to the appropriate authorities, their cases will all be treated on their merits.<sup>116</sup> In other cases the promise may be implied or inferred. Thus if a citizen



who wishes to bring a child of another nationality into the country for adoption is advised that he may be allowed to do so by the appropriate Minister if he first meets certain conditions, he may with some justification treat the advice as an assurance that, if the conditions are met, the relevant discretion will be exercised in his favour.<sup>117</sup>

The courts have experienced considerable difficulty when asked by citizens to hold government bound by or responsible in damages for even the clearest assurances or undertakings, whether express, implied or inferred.

It was early established that estoppel by representation applied only to statements of existing fact, and not to promises.<sup>118</sup> A statement of intention could accordingly found an estoppel only in so far as it misrepresented the maker's actual intention, the state of his mind being as much a fact as the state of his digestion.<sup>119</sup> Such cases are rare. "What the representee is generally found in the last resort to complain of...is that the representor is refusing to carry out his intention, not that...he never had any such intention in the first place."<sup>120</sup> The refusal of the law to countenance such complaints did not commend itself to Denning J., as he then was, in Central London Property Trust Ltd. v. High Trees House Ltd.,<sup>121</sup> and he contrived effectively to overturn it by propounding the doctrine of promissory estoppel. Later courts in Canada<sup>122</sup> as well as in England<sup>123</sup> have recognised the new doctrine, by which an assurance as to the future may found an estoppel if the promisor intended to be legally bound by it and intended it to be acted upon, with the result that it was acted upon to his detriment by the promisee. However, a citizen who wishes to

employ the doctrine against the government faces the difficulty that its operation is subject to the principles discussed later<sup>124</sup> by which the government is largely protected from estoppels generally. The emergence of the doctrine has accordingly failed to benefit those misled by government assurances or undertakings.

However, recent developments in England and Australia in the field of judicial review have opened up the possibility that the citizen may be able to achieve by a sidewind what he cannot achieve directly; namely, the enforcement of promises made to him by government. The authorities are discussed in detail later,<sup>125</sup> but in essence they offer the possibility of challenging by applications for judicial review government decisions which depart from earlier government assurances or undertakings, at least where no opportunity is first offered to the applicant to present reasons why any decision made in relation to him should respect that assurance or undertaking. It remains to be seen how far the courts will be prepared to take this development, and whether it will find favour in Canada.

If some Commonwealth courts have recently manifested a willingness to apply the principles of judicial review so as effectively to bind government to its promises, it appears that others may be prepared to develop a corresponding willingness to use the tort of negligent misstatement to hold government responsible in damages for breaking those promises. Broken promises have traditionally been unable, in the absence of a contract, to found an action in damages.<sup>126</sup> However, a recent decision of the New Zealand Court of Appeal<sup>127</sup> opens up the possibility that the making by government of promises which

it subsequently fails to execute may give rise to an action in negligent misstatement. The authority is particularly important for the present discussion as it concerns a government assurance. This development and its implications are discussed later.<sup>128</sup>

#### (e) Fees and Charges

In the mini-budget of November 1984, the recently-elected Canadian government evinced an intention to impose charges upon those benefitting from certain of its informational activities.<sup>129</sup> The activities concerned are on a wide range, from quality control to weather forecasting. Solutions to practical problems generated by the imposition of charges, such as the means of collection, have been left in each case to the discretion of the appropriate department, indicating an assumption that solutions may readily be devised. The immediate and most obvious effect of the new charges will be to increase government revenues. But the economic theory of information discussed above<sup>130</sup> indicates that further effects may be generated.

It has been seen<sup>131</sup> that on the neoclassical model of economic theory, government may be expected to undertake the production and dissemination of information in response to imperfections in the information market. These imperfections are the consequence of the characteristics of information as a commodity, which operate to prevent its economically efficient production by the private sector. This is the result of the fact that, at Pareto optimum, where price is equal to marginal cost, the use of information would be free. If information is

available free of charge, the private sector will underproduce it: a charge must be levied if production costs are to be covered. On the other hand, levying a charge will tend to underutilisation, as the price of information will exceed marginal costs.

The use of government resources may circumvent the first of these difficulties, but it cannot eradicate the latter. The levying of charges for government information may be expected, just like the levying of charges by the private sector, to encourage underutilisation. Accordingly, if government intervenes to provide information to citizens, it must be prepared to do so free of charge if the optimal welfare of society is to be achieved.

Fundamental to this analysis is the assumption that the characteristics of information prevent its economically efficient production by the private sector. But it has already been pointed out<sup>132</sup> that large parts of the private sector are profitably engaged in attempts to reduce or eliminate the uncertainties facing others. It is accordingly clear that in many cases the economically efficient production of information may be achieved by the private sector without the necessity for government intervention.

Furthermore, it has been demonstrated above<sup>133</sup> that government decisions relating to the production and dissemination of information may be underpinned by considerations other than the need to ensure economic efficiency by remedying market imperfections. Government may be motivated by distributional considerations. In relation in particular to government-controlled uncertainties, it may possess advantages over the private sector in the provision of information, which

operate as incentives to it to intervene in the market.<sup>134</sup> In any event, it is clear that government sometimes produces and disseminates information in response to uncertainties which the private sector is itself addressing. An example is provided by taxation problems. There is a large and successful industry in the private sector, the purpose of which is in part to reduce or eliminate uncertainties generated for individual and corporate citizens by tax laws and policies. Yet Revenue Canada Taxation has itself established an elaborate system of information provision in the same field, involving Advance Rulings, Interpretation Bulletins and over-the-counter advice or assistance on routine or simple matters.<sup>135</sup> Charges are levied for Advance Rulings.<sup>136</sup>

It follows from the facts that the private sector may find it possible to provide information to citizens at a profit and that government sometimes duplicates the provision of information by the private sector, that not all information provided by government must necessarily be made available free of charge, at the expense of taxpayers, if economic efficiency is to be achieved - although that is the logical conclusion to be drawn from the neoclassical model. Indeed, where the raising of charges for government information is a practical possibility, economic efficiency may actually militate in favour of their imposition. For if information is made available at a price less than marginal cost, demand may be expected to be artificially stimulated, which in turn will tend to involve an over-allocation of government resources to the provision of that information.<sup>137</sup> But once again, allocative considerations are not determinative. The main burden of the arguments for and against the imposition of charges in such cases is

distributional.<sup>138</sup> The decision reached by government on this issue, as on many issues relating to the production and dissemination of information, will be value-laden. Thus it would be surprising if charges were levied for information as to the entitlement of citizens to grants or benefits, for that would operate effectively to reduce any grant or benefit found to be payable.<sup>139</sup> In fact, the basic assumption of government seems for long to have been that, as citizens provide government with its resources through the payment of taxes they should be entitled free of charge to any information produced by government for their benefit by means of those resources. The exceptional cases have been those where the information has had a value to the recipient over and above that which accrued to citizens at large. Thus Information Circular 70-6R of the Department of National Revenue, announcing the fee schedule for Advance Rulings, stated that "it seems reasonable...that the cost of providing the service should be borne by those who benefit from it and that taxpayers in general should not be further burdened."<sup>140</sup> This has effectively limited the levying of charges to cases where the reliability of the information is high, if not total.<sup>141</sup> Thus the Revenue Canada Taxation treats Advance Rulings as binding.<sup>142</sup> The recent move towards the more general imposition of charges for government information represents a recognition of their revenue-generating potential, and the stronger call of economic efficiency during a recession. Its result is to require more cogent distributional arguments if government is to continue to write off, in whole or in part, the cost of providing information to citizens, where the levying of charges would be economically efficient.

If charges are imposed only for information which the government intends to treat as binding, their imposition will have no legal ramifications: the information cannot prove misleading, and therefore is unlikely to generate court proceedings. The more widespread imposition of charges raises a new issue. For if charges are to reflect, not the fact that the information concerned is binding, but rather a tension between the desires for an economically efficient allocation and a socially just distribution of society's resources, information for which a charge has been levied may well generate court proceedings. In such a case, the court must decide whether the imposition of the charge has any legal significance, and in particular whether it can be treated as an indication of the degree of reliability of the information. Clearly, the motives of government in imposing a charge and the assumptions made about those motives by citizens required to pay it may differ. The government may intend merely to reduce or remove a subsidy by making the citizen meet some part or all of the cost of producing the information; the citizen may assume that the imposition of the charge indicates that he is buying a high degree of reliability. That assumption may be objectively reasonable, an assessment which will depend upon all the circumstances, and in particular on the nature of the uncertainty concerned, the form and content of the information and the source from which it emanated. If the assumption is reasonable, the question arises whether the courts should reflect that fact in subsequent proceedings brought by the citizen seeking to hold the government bound by or responsible in damages for the information concerned, for example by displaying a greater willingness to impose a duty of care or to make a

finding of reasonable reliance.<sup>143</sup> This issue has not been canvassed in any authority to date, and indeed it may be of little advantage to the citizen to raise it. This follows from the fact that the reasonableness of the citizen's belief that the charge indicates high reliability must be assessed by reference to the circumstances, the effect of which is to make that belief more likely to be reasonable where the circumstances are such as in any event to confer on the information a relatively high degree of reliability. In other words, the courts may be expected to allow charges at most to reflect, rather than to generate, high reliability. As a result, their imposition for misleading information will involve not so much an increase in the citizen's injury as the addition of an insult to that injury, a matter which should not affect the issue of liability.

## **7. Self-Binding Government Information**

In an ideal world, all government information would be perfectly correct when provided and would subsequently be adhered to. That this state of affairs is far from being achieved is apparent from the large number of cases dealing with misleading government information to be found in Commonwealth and United States law reports. One means of alleviating the problem would be for government voluntarily to treat as binding information provided by it to citizens. Of course, as has already been pointed out,<sup>144</sup> this could provide a solution only where the information is provided in response to a government-controlled uncertainty. Where the uncertainty is government-uncontrolled,



government is unable by treating the citizen as if its information was correct to relieve him from the adverse consequences of it being in fact misleading.<sup>145</sup>

Some departments of the Canadian and United States federal governments have voluntarily adopted systems whereby citizens may in certain specified circumstances obtain information which the department is prepared effectively to regard as binding.<sup>146</sup> These are exceptional cases, involving more or less sophisticated procedures designed to provide formal and specific information, in contrast with the more usual government practice of relying on absence of procedure and on informality. In this regard, an illuminating contrast is provided by the different systems employed by taxation authorities in Canada (Revenue Canada Taxation) and the United Kingdom (Inland Revenue) in order to reduce or eliminate the uncertainties facing citizens as a result of tax law or policy.

The system developed by Revenue Canada Taxation to provide tax information to citizens offers three main avenues by which information may be obtained as to the interpretation or application of tax law or policy. In the first place, the citizen may obtain an Advance Ruling, which is a written statement provided to a taxpayer by the Department's Corporate Rulings Directorate, informing him or her of how it will interpret a specific tax provision in relation to a particular contemplated transaction.<sup>147</sup> An application for an Advance Ruling will be accepted if it relates to a proposed transaction and does not fall within one of the general categories of excluded transactions.<sup>148</sup> The application must contain a clear statement of

the question on which the Ruling is sought, and a complete and detailed statement of the relevant facts.<sup>149</sup> It must also be accompanied by a minimum fee of \$250, a charge of \$50 an hour currently being made for the preparation of Advance Rulings.<sup>150</sup> The recently-elected federal government has announced its intention to commence the publication of Advance Rulings of broad general interest.<sup>151</sup> But published Rulings will serve only as guidance; Advance Rulings apply only to the taxpayers to whom they are given.<sup>152</sup>

The principal advantage to the taxpayer of an Advance Ruling is the reliability which it provides. However, a Ruling may be revoked and will not bind the Department if the statement of relevant facts contained a material omission or misrepresentation,<sup>153</sup> or where an interpretation of law on which the Ruling was based is later changed as the result of a court decision, in which case revocation will not take effect prior to the date of decision and will be effected by notice to the taxpayer.<sup>154</sup> Similarly, a Ruling will not bind the Department where the transaction is not substantially completed within the time-limit specified in the Ruling, unless the taxpayer obtains confirmation that the Ruling is still in effect. Again, where the law on which a Ruling is based changes, the Ruling ceases to be valid from the effective date of the change, and the taxpayer will not be so notified by the Department.<sup>156</sup> Finally, a Ruling may be revoked prospectively by notice to the taxpayer concerned where it concerns a continuing action or series of actions, and it is determined that the Ruling is no longer in accord with Department practice, or is in error.<sup>157</sup>

The view of the Corporate Rulings Directorate is that the Advance Ruling procedure has been "an important and useful service to the business community."<sup>158</sup> It has certainly proved popular, although the function remains relatively small compared with the analagous private letter ruling procedure of the United States Internal Revenue Service. Thus in the 1981-82 tax year, the Department issued a total of 1,000 Advance Rulings.<sup>159</sup> The procedure has had beneficial spin-offs for the Department, in that it has increased uniformity and voluntary compliance, decreased the volume of tax litigation, informed the Department of issues of concern to taxpayers, and lightened the burden on examining officers, who need only verify that the facts of a consummated transaction correspond to those set out in the Ruling.<sup>160</sup> Nonetheless, the procedure has been subjected to criticism on a variety of grounds, including delay, the necessity for full disclosure, the number and scope of the exclusions, and cost.<sup>161</sup> Moreover, the availability of the procedure is limited by the fact that it applies exclusively to business transactions, so that transactions of other sorts fall outside its scope.

The second principal channel through which the Canadian citizen may obtain tax information is the collection of Interpretation Bulletins published by the Department to the public generally, and which contains the Department's interpretation of sections of the law which it administers.<sup>162</sup> If properly understood and applied, these Bulletins can be relied upon in virtually every case. The rare circumstances in which they cannot are when they become outdated by reason of a court decision, a change in the law or a change in the Department's

interpretation of the law. If a change does not favour the taxpayer, it will be applied from the effective date of the court decision or change in the law, or, when it is a change in the Department's interpretation of the law, from the date when it is made public. Revised Bulletins are issued, but the delay in publishing them has led to the interim issue of correction sheets and special releases. However, Bulletins occasionally become obsolete and due to an oversight are not corrected. Again, a Bulletin may cover a set of facts which it was never intended to cover; where this would lead to contrived or unreasonable results, the Department reserves the right to apply the law, even if contrary to the Bulletin.<sup>163</sup>

The final option open to the Canadian taxpayer is that of making an informal approach to the Department. When the Advance Ruling procedure was introduced, it was expressly stated that over-the-counter advice and assistance on routine or simple matters would continue to be given to taxpayers at district offices, and that limited informal discussions of proposed transactions of a more complicated nature might take place at district offices or at Head Office.<sup>164</sup> However, expressions of opinion arising out of such discussions or exchanges of correspondence are not treated by the Department as binding.<sup>165</sup> Of course, since the Advance Ruling procedure is confined to proposed transactions of a business nature, information concerning other transactions must of necessity be obtained informally.

The system of information-provision employed by Revenue Canada Taxation represents a practical compromise between the interests of the citizen and of the Department. By making Advance Rulings applicable only

to the particular taxpayer to whom they are addressed, so that the potential consequences of error are minimised, the Department is able to attach to them a high degree of reliability and specificity.

Interpretation Bulletins, which offer high reliability to taxpayers generally, are carefully formulated and subjected before publication to high-level review in order to minimise the risk that they may prove misleading. However, the restricted sphere of operation of Advance Rulings, together with the inherent limitations on the number<sup>166</sup> and the ambit of Interpretation Bulletins, inevitably compel the taxpayer to rely to a considerable degree on informal approaches - which means, on information which the Department does not regard as binding.

Nonetheless, the Canadian taxpayer is in this regard in a substantially better position than his United Kingdom counterpart. For the Inland Revenue has adopted no formal procedure for ruling on the tax consequences of proposed transactions, although when requested to do so it will generally express its view of the interpretation or application of tax law. Thus it has been stated in Parliament that, in certain cases, Inland Revenue officers will comment on draft documents or on the tax implications of proposed personal or family arrangements, although the comment will be restricted to a narrow area where all the facts are known and all draft documents are available.<sup>167</sup> Conflicting views have been expressed on the question whether an advance rulings procedure similar to that of Revenue Canada Taxation should be adopted.<sup>168</sup> The Inland Revenue does issue Statements of Practice where it wishes to make known generally how in its view the law should be interpreted or applied.<sup>169</sup> Otherwise, taxpayers wishing to obtain tax information

from the Inland Revenue and unable to find it in any of the Department's press statements, explanatory pamphlets or guidance notes issued with tax forms, must rely upon informal approaches. The information obtained by such approaches will not, of course, be treated as binding by the Department.

In fact, Inland Revenue practice with respect to the provision of information is far more representative of government practice generally than is the more sophisticated system of Revenue Canada Taxation. That Department has responded to the needs of citizens for certain and specific information on matters within its sphere of competence by establishing formal procedures designed to provide reliable information, but at the same time to preserve a substantial measure of departmental flexibility with respect to the application of the law. This is achieved either by ensuring that the information is formulated and reviewed at a high level, so as to minimise the risk that it will prove misleading, or by restricting its application to the citizen to whom it is provided, so as to minimise the consequences if it does prove misleading. The need for reliable and specific tax information may be assumed to be no less powerful in the United Kingdom than in Canada, and it is accordingly some other factor or factors - perhaps political, perhaps economic, perhaps generated by differences in departmental self-perception - which has led the Inland Revenue to steer its own course. Yet it is difficult to conceive of a situation where citizens are more likely to need reliable information, or are better able to impress that need upon government, than in the field of tax law.

However, the brief analysis undertaken in this section illustrates the point that even the more sophisticated systems of information-provision employed by government attempt merely to achieve a practical compromise between the interests of the citizen in acquiring reliable information and of the government in retaining its freedom of action. No system, however sophisticated, guarantees that the information provided to citizens will always be completely reliable. This is not least because informal approaches, which are likely to result in information inherently less reliable by far than are formal procedures, can never be entirely eradicated. Moreover, the more rudimentary systems do not attempt to guarantee even a measure of reliability. Accordingly, it remains necessary to consider what, if any, legal means exist to enable citizens to hold government to information which it has provided to them and which has since proved unreliable.

It is important to the outset of any such consideration to distinguish two situations in which the citizen may wish to hold government to its misleading information. The first is where the result of the information being misleading is to deprive the citizen of some benefit or inflict upon him some loss; the second is where it is to subject him to the risk of criminal liability. These two situations will be treated separately,<sup>170</sup> as they give rise to very different legal issues, the former being worked out through the machinery of the civil law and the latter through that of the criminal law.

FOOTNOTES

1. Cherry, C., On Human Communication (2nd ed.; MIT Press, 1966), p. 170.
2. Ibid., p. 244; cf. Horton, F.W. and Marchand, D.A. (eds.), Information Management in Public Administration (Arlington, Information Resources Press, 1982), p. 104.
3. Demsetz, H., Information and Efficiency: Another Viewpoint (1969) 12 J. Law & Ec. 1, 9; Mackaay, E., Economics of Information and Law (Montreal, Groupe de Recherche en Consommation, 1980), p. 187.
4. Mackaay, op. cit. note 3, p. 190 ff.
5. Or to limit the potential consequences of the risk: Mackaay, op. cit. note 3, p. 189.
6. Mackaay, op. cit. note 3, p. 188.
7. Demsetz, op. cit. note 3, p. 9.
8. Cf. Commission on Federal Paperwork, Information Resources Management (Washington, D.C., U.S. Govt. Printing Office, 1977), p. 445; Horton and Marchand (eds.), op. cit. note 2, pp. 30-31.
9. Mackaay, op. cit. note 3, p. 115.
10. Morss, E.R. and Rich, R.F., Government Information Management (Boulder Colorado, Westview Press, 1980), pp. 49, 189; Mackaay, op. cit. note 3, p. 116.
11. Cf. Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt (1968) 122 C.L.R. 556, at 572 per Barwick, C.J.; Shaddock (L) and Associates Pty. Ltd. v. Parramatta City Council (1981) 36 A.L.R. 385, at 390-91 per Gibbs, C.J.
12. Accordingly "information" as used hereafter should be taken to embrace both information and advice.
13. There is no attempt in this thesis to address the particular issues generated by reliance upon judicial decisions which are later overturned, overruled or supplanted by legislation.
14. See infra, section 4(a).
15. Rose, R., Understanding Big Government (London, Sage Publications Ltd., 1984), p. 14.
16. Canadian Tax Foundation, The National Finances 1983-84 (Toronto; C.T.F., 1984), p. 72.



17. Uncertainties as to the state or interpretation of the law present a hybrid case. In relation to laws enacted by the legislature, such uncertainties are strictly speaking generated by that body, and not by the executive; however, the executive provides large quantities of legal information to citizens, which information is generally conclusive unless challenged in legal proceedings.
18. Report of the Standing Senate Committee on National Finance on Information Canada (Ottawa, Information Canada, 1974), p. 8.
19. See infra, section 7.
20. This assumes that the adverse consequences flow directly from the inadequacy of the information; if they flow rather from a government decision made after and as a result of the discovery of that inaccuracy, it may be practicable for government to relieve the citizen of them simply by reversing the decision.
21. Again, this assumes that the adverse consequences flow directly from the inaccuracy of the health warning. See supra, note 20.
22. Ministry of Consumer and Corporate Affairs Act, R.S.B.C. 1979, c. 269, s. 4(d).
23. Mining Regulation Act, R.S.B.C. 1979, c. 265, s. 15.
24. Economic Council of Canada Act, R.S.C. 1970, c. E-1, s. 11(1)(a)(vi).
25. Ibid., s. 21(2).
26. Labour Code, R.S.C. 1970, c. L-1, s. 89(2).
27. A Crown corporation: Heritage Conservation Act, R.S.B.C. 1979, c. 165, s. 16(1),(2).
28. Ibid., s. 20(1)(c).
29. Ibid., ss. 20(1)(f), 18.
30. Cf. Interpretation Act, R.S.C. 1970, c. I-23, s. 27(2); Interpretation Act, R.S.B.C. 1979, c. 209, s. 16(2); Vic Restaurants Ltd. v. City of Montreal (1959) 17 D.L.R. (2d) 81, at 93 per Locke J. (S.C.C.); R. v. Pride Cleaners and Dyers Ltd. (1965) 49 D.L.R. (2d) 752 (B.C.S.C.).
31. Knight, F.H., Risk, Uncertainty and Profit (University of Chicago Press, 1971), p. 261, quoted in Mackaay, op. cit. note 3, p. 121. For information as a capital asset, see Mackaay, op. cit. note 3,

Ch. 7; for information as a currency, see Braunstein, Yale M., The Functioning of Information Markets in Yurow, Jane H. (project director), Issues in Information Policy (Washington, D.C., U.S. Department of Commerce National Telecommunications and Information Administration, 1981), p. 65.

32. Cf. Braunstein, Yale H. in Yurow, op. cit. note 31, p. 58; Mackaay, op. cit. note 3, pp. 121-23.
33. Braunstein, Yale H. in Yurow, op. cit. note 31, p. 58.
34. Ibid.
35. The following description owes a considerable debt to Mackaay, op. cit. note 3, ch. 2.
36. Ibid., p. 18.
37. Ibid., p. 20.
38. Becker, G.S., The Economic Approach to Human Behaviour (University of Chicago Press, 1976), p. 8, cited in Mackaay, op. cit. note 3, p. 20.
39. Supra, section 4(b).
40. Infra, section 5.
41. Coase, R.H., The Lighthouse in Economics (1974) 17 J. Law & Ec. 357.
42. Cp. the definition of a lighthouse by Ambrose Bierce, quoted by Coase, (op. cit. note 41, p. 376) as "A tall building on the seashore in which the government maintains a lamp and the friend of a politician."
43. Cf. Coase, op. cit. note 41, pp. 357-60, citing the works of Mill, Sidgwick, Pigou and Samuelson.
44. An Act for vesting Lighthouses, Lights and Sea Marks on the Coasts of England in the Corporation of Trinity House of Deptford Strond, 6 & 7 Will. 4, c. 79.
45. Cf. Gilbert v. Corporation of Trinity House (1886) 17 Q.B.D. 795.
46. Cf. Barry, J.F., The Economics of Outside Information and Rule 10b-5 (1981) 129 U. of Penns. L.R. 1307, 1327.
47. Cf. Demsetz, op. cit. note 2, pp. 9, 10.

48. Michelman, F.I. and Sandalow, T., Government in Urban Areas (St. Paul, West Publishing Co., 1970), p. 35.
49. Makuch, S.M., Municipal Immunity from Liability in Negligence in Steel, F.M. and Rodgers-Magnet, S. (eds.), Issues in Tort Law (Toronto, The Carswell Company Limited, 1983), p. 232.
50. Michelman and Sandalow, op. cit. note 48, pp. 35, 36.
51. Papandreou, A.G., Paternalistic Capitalism (Copp Clark Publishing Co., 1972), p. 19, quoted in Mackaay, op. cit. note 3, p. 25. Mackaay notes that Papandreou dissociates himself from that position.
52. Mackaay, op. cit. note 3, pp. 26-27.
53. Ibid., pp. 29-31.
54. Makuch, op. cit. note 49, pp. 232, 233.
55. Ibid., p. 232.
56. Ibid., p. 233.
57. Cf. Diversified Holdings Ltd. v. Queen In Right of British Columbia [1983] 23 C.C.L.T. 156.
58. Cf. Toronto's projected domed stadium, which has generated some controversy: The Globe and Mail, January 18th 1985.
59. Makuch, op. cit. note 49, p. 233.
60. Ibid., p. 232.
61. Ibid., pp. 233-39.
62. See further infra, Part IV.
63. Makuch, op. cit. note 49, p. 235.
64. Ibid.
65. Fuller, L.L., Collective Bargaining and the Arbitrator [1963] Wisconsin L. Rev. 3, 19.
66. Makuch, op. cit. note 49, p. 235.
67. Infra, Part IV.

68. The arguments made in this and in the following two paragraphs are elaborated infra, Part II. For consideration of misleading government information in the context of the criminal law, see infra, Part III.
69. Infra, Part II.
70. Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680; Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All E.R. 935 (H.L.).
71. De Smith, S.A., Judicial Review of Administrative Action (4th ed.; London, Stevens & Sons Limited, 1980), pp. 339-41.
72. Cp. R. v. Flintshire County Council County Licensing (Stage Plays) Committee, ex p. Barrett [1957] 1 Q.B. 350 (C.A.), discussed in Wade, H.W.R., Administrative Law (5th ed.; Oxford, Clarendon Press, 1982), pp. 382, 383.
73. Gouriet v. Union of Post Office Workers [1978] A.C. 435, at 524; [1971] 3 All E.R. 70, at 119-20 per Lord Fraser.
74. Makuch, op. cit. note 49, p. 230.
75. Gouriet v. Union of Post Office Workers, supra note 73, at 482, 484 per Lord Wilberforce.
76. Infra, Part II.
77. Alternatively, government may use the private sector, and typically the media, to disseminate information which it has itself produced.
78. Cf. Breyer, S., Regulation and Its Reform (Harvard University Press, 1982), p. 26 ff.
79. Cf. Priest, Margot, Provision of Information in the Context of Regulation (Economic Council of Canada, Technical Report No. 22, 1982), pp. 12, 16, citing CRTC policy of disclosing the financial statements of cable companies.
80. See infra, subs. (d).
81. Spencer Bower, G., and Turner, Sir A.K., The Law Relating to Estoppel by Representation (3rd ed.; London, Butterworths, 1977), pp. 46, 47.
82. Cf. e.g. Brown v. Heathcote County Council [1982] 2 N.Z.L.R. 584; Minister Administering the Environmental Planning and Assessment Act 1979 v. San Sebastian Pty. Ltd. [1983] 2 N.S.W.L.R. 268 (N.S.W.C.A.).
83. Cf. e.g. Gadutsis v. Milne [1973] 2 O.R. 503; H.L. & M. Shoppers Ltd. v. Town of Berwick (1978) 82 D.L.R. (3d) 23; Northrup, Graham

and Graham Realty Ltd. v. City of Fredericton (1980) 27 N.B.R. (2d) 373; Hull v. Canterbury Municipal Council [1974] 1 N.S.W.L.R. 300; G.J. Knight Holdings Pty. Ltd. v. Warringah Shire Council [1975] 2 N.S.W.L.R. 796; Port Underwood Forests Ltd. v. Marlborough County Council [1982] 1 N.Z.L.R. 343; Coats Patons (Retail) Ltd. v. Birmingham Corporation (1971) 69 L.G.R. 356.

84. Infra, Parts II, IV.
85. Infra, Part IV.
86. Infra, Part II.
87. Cp. R. v. Publicover [1940] 4 D.L.R. 43 (discretionary refusal of remedy); and cf. R. v. Paddington Valuation Officer, ex p. Peachey Property Corporation Ltd. [1966] 1 Q.B. 380, at 418 per Danckwerts L.J.; at 419 per Salmon L.J.
88. For example, it may be appropriate for the widespread dissemination of certain sorts of information to be achieved through use of television or radio, although the publication of such information will inevitably be transitory. It should also be borne in mind that information which is communicated orally or visually may take a permanent published form - e.g. a tape, or a film - even if its actual publication is momentary.
89. Of course, the advice may at the outset be wholly correct, and remain so thereafter.
90. Heckler v. Community Health Services of Crawford Cty. Inc. (1984) 104 S. Ct. 2218, at 2227 (U.S.S. Ct.).
91. Information communicated orally or visually may also take permanent form: see supra note 89.
92. Davis v. Regional Municipality of Haldimand-Norfolk (1980) 12 R.P.R. 1 (Ont. H.Ct.).
93. Shaddock (L) and Associates Pty. Ltd. v. Parramatta City Council (1981) 36 A.L.R. 385.
94. Cf. e.g. Windsor Motors Ltd. v. District of Powell River (1969) 4 D.L.R. (3d) 155; Gadutsis v. Milne, supra note 83; Jung v. District of Burnaby (1978) 92 D.L.R. (3d) 592; State of South Australia v. Johnson (1982) 42 A.L.R. 161; R.A. & T.J. Carll Ltd. v. Berry [1981] 2 N.Z.L.R. 76; Bivone v. City of Salisbury (1981) 50 L.G.R.A. 94.
95. Shaddock (L) and Associates Pty. Ltd. v. Parramatta City Council, supra note 93, in particular at 409 per Murphy J.
96. Town of the Pas v. Porky Packers [1977] 1 S.C.R. 51 (S.C.C.).

97. Ibid., at 63, 68.
98. Compare, for example, Davis v. Regional Municipality of Haldimand-Norfolk, supra note 92, and Shaddock (L) and Associates Pty. Ltd. v. Parramatta City Council, supra note 93, with State of South Australia v. Johnson and R.A. & T.J. Carl Ltd. v. Berry, supra note 94.
99. Spencer Bower and Turner, op. cit. note 81, pp. 92, 97; Heckler v. Community Health Services of Crawford Cty., Inc., supra note 90.
100. Rogers, W.V.H., Winfield and Jolowicz on Tort (12th ed.; London, Sweet & Maxwell, 1984), p. 286; Fleming J.G., Law of Tort (6th ed.; Sydney, The Law Book Company Limited, 1983), p. 611; J.E.B. Fasteners Ltd. v. Marks, Bloom & Co. [1981] 3 All E.R. 289, at 297 per Woolf J.
101. R. v. Flemming (1981) 43 N.S.R. (2d) 249; R. v. Carl Gruber [1982] 1 W.W.R. 197; and see further infra, Part III.
102. Supra.
103. Cf. Maritime Electric Co. Ltd. v. General Dairies Ltd. [1935] S.C.R. 519; [1935] 4 D.L.R. 196 (S.C.C.), point expressly left undecided by Privy Council [1937] A.C. 610; [1937] 1 W.W.R. 591; Taranaki Electric-Power Board v. Proprietors of Puketapu 3A Block Incorporated [1958] N.Z.L.R. 297 (N.Z.S.C., North J.).
104. Cf. e.g. Re Jauncey [1980] Q.R. 335.
105. Taranaki Electric-Power Board v. Proprietors of Puketapu 3A Block Incorporated, supra note 103, at 308.
106. Spencer Bower and Turner, op. cit. note 81, p. 97; Freeman v. Cooke (1848) 2 Exch. 654.
107. See the authorities cited supra note 100.
108. R. v. Carl Gruber, supra note 101, at 243 per Stuart Terr. Ct. J.
109. Holmes, O.W., The Common Law (Boston, Little, Brown and Company, 1881), p. 108.
110. Infra, Part III.
111. This evidential difficulty exists whether the proceedings concerned are civil or criminal, but it should be noted that where, in a criminal prosecution, the defendant raises the defence of officially induced error of law, it should be sufficient for him where the offence is one requiring proof of mens rea to raise a reasonable

doubt in the mind of the trier of fact; but cp. R. v. Carl Gruber, supra note 101. See further infra, Part III.

112. Cf. e.g. Re McDonogh (1978) 7 A.R. 412 (estoppel); Bedfordia Plant Ltd. v. Secretary of State for the Environment [1982] J.P.L. 122 (estoppel); Western Fish Products Ltd. v. Penwith District Council [1981] 2 All E.R. 204 (estoppel); and the authorities cited supra notes 82, 83.
113. Cf. e.g., Re Jauncey, supra note 104.
114. Cf. Bradley, A.W., Administrative Justice and the Binding Effect of Official Acts (1981) 34 C.L.P. 1, 10.
115. Cf. Meates v. Attorney-General [1983] N.Z.L.R. 308 (N.Z.C.A.).
116. Cf. Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 A.C. 629; [1983] 2 All E.R. 346 (P.C.).
117. Cf. R. v. Secretary of State for the Home Department, ex p. Khan [1985] 1 All E.R. 40 (C.A.).
118. Jorden v. Money (1854) 5 H.L. Cas. 185, at 214-216 per Lord Cranworth, L.C.; Louisiana v. First National Bank of New Orleans (1873) L.R. 6 H.L. 352, at 360 per Lord Selborne, L.C.; Nippon Menkwa Kabushiki Kaisha v. Dawson's Bank Ltd. (1935) 51 Ll. L. Rep. 147, at 151 per Lord Russell of Killowen.
119. Edgington v. Fitzmaurice (1885) 29 Ch. D. 459, at 483 per Bowen L.J.; Angus v. Clifford [1891] 2 Ch. 449, at 470 per Bowen L.J.
120. Spencer Bower and Turner, op. cit. note 81, p. 33.
121. [1947] K.B. 130.
122. Cf. e.g. Sohio Petroleum Co. v. Weyburn Security Co. Ltd. (1970) 74 W.W.R. 626 (S.C.C.); John Burrows Ltd. v. Subsurface Surveys Ltd. (1968) S.C.R. 607 (S.C.C.); Great Plains Development Co. of Canada Ltd. v. Hidrogas Ltd. [1982] 1 W.W.R. 1 (Alta. C.A.).
123. Cf. e.g. Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd. [1955] 2 All E.R. 657 (H.L.); Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd. [1972] 2 All E.R. 271 (H.L.).
124. Infra, Part II.
125. Infra, Part II.
126. Fleming, op. cit. note 100, p. 596; Combe v. Combe [1951] 2 K.B. 215.

127. Meates v. Attorney-General [1983] N.Z.L.R. 308.
128. Infra, Part IV.
129. Cf. The Globe and Mail, November 10th, 1984.
130. Supra, section 4(b).
131. Ibid.
132. Supra, section 4(c).
133. Ibid.
134. Cf. Mackaay, op. cit. note 3, p. 166.
135. See further infra, section 7.
136. Information Circular 70-6R (December 18th, 1978), para. 5, as amended by a Special Release of June 23rd, 1980.
137. Eckstein, O., Public Finance (3rd ed.; Englewood Cliffs, New Jersey, Prentice-Hall Inc., 1973), p. 26 ff.; Pechman, J.A., Federal Tax Policy (Washington, D.C., The Brookings Institution, 1966), pp. 147-48; Mercer, L.J. and Morgan, W.D., The Relative Efficiency and Revenue Potential of Local User Charges: The California Case (1983) 36 Nat. Tax. Jo. 203, pp. 203-04; and see Lindsay, R.F., Advance Tax Rulings - A Practitioner's Perspective (1973) Canadian Tax Foundation Report of Proceedings, 103, 115.
138. Brazer, H.E., User Charges in an Environment of Fiscal Limitation (1983) Procs. of Nat. Tax Assoc. 200, 203; Goetz, C.J., The Outlook for Fees and Service Charges as a Source of Revenue for State and Local Government, in Musgrave, R.A. (ed.), Broad Based Taxes (Baltimore, The John Hopkins University Press, 1973), pp. 125-26.
139. Cf. Asimow, M., Advice to the Public from Federal Administrative Agencies (New York, Matthew Bender, 1973), §7.06, p. 132.
140. Information Circular 70-6R, supra note 136, para. 5; cf. U.S. Bureau of the Budget (now Office of Management and Budget) Circular A-25 (September 23rd, 1959); Asimow, op. cit. note 139, §7.03[4], p. 129.
141. Cf. Asimow, op. cit. note 139, §7.07, pp. 132-33.
142. Information Circular 70-6R, supra note 136, para. 4.
143. Cf. supra, section 6(c).
144. Supra, section 3.



145. But see supra note 20.
146. For a survey of government practice in the United States, see Asimow, op. cit. note 139.
147. Information Circular 70-6R, supra note 136, para. 3.
148. Ibid., paras. 6, 14.
149. Ibid., para. 16.
150. Ibid., para. 5, as amended by a Special Release of June 23rd, 1980.
151. Cf. The Canadian Taxpayer, Vol. VI, No. 24, p. 193 (Dec. 18th, 1984).
152. Information Circular 70-6R, supra note 136, para. 8.
153. Ibid., para. 9.
154. Ibid., para. 10.
155. Ibid., para. 11.
156. Ibid., para. 12.
157. Ibid., para. 13.
158. Beith, R.M. Advance Rulings: Administration and Principles (1982) Canadian Tax Foundation Report of Proceedings, 456, 457.
159. Ibid. In 1983, the Internal Revenue Service received 35,000 requests for private letter rulings: 1983 Annual Report of the Commissioner of Internal Revenue.
160. Beith, op. cit. note 158, p. 457; and cf. Rogovin, M., The Four R's: Regulation, Rulings, Reliance and Retroactivity (1965) 43 Taxes 756, 767; Portney, G.G., Letter Rulings: An Endangered Species? (1982/83) Tax Lawyer 751, 754.
161. Cf. The Canadian Taxpayer, Vol. VI, No. 22, p. 181 (Nov. 20th, 1984); Lindsay, R.F., op. cit. note 137.
162. Information Circular 70-1 (August 25th, 1970), para. 3.
163. Davidson, D.L.H., Advance Rulings and Interpretation Bulletins (1983) Canadian Tax Foundation Report of Proceedings, 795, 798.
164. Information Circular 70-6R, supra note 136, para. 23.
165. Ibid., para. 24.

166. There are in the order of 500 published Interpretation Bulletins.
167. Adjournment Debate, Official Report, July 25th, 1972, col. 1787, quoted in Gammie, M., "Revenue Practice": A Suitable Case for Treatment? (1980) B.T.R. 304, 305-06.
168. Cf. Gammie, op. cit. note 167; Wheatcroft, G.S.A., Advance Rulings (1970) B.T.R. 281.
169. Cf. Inland Revenue Press Release, July 18th 1978.
170. The former in Part II, the latter in Part III.

PART II

HOLDING GOVERNMENT BOUND: MISLEADING  
GOVERNMENT INFORMATION AND DEPRIVATION  
OF BENEFIT OR INFLECTION OF LOSS

## A. ESTOPPEL BY REPRESENTATION

### 1. Introduction: The Doctrine Defined

The legal tool most often employed by citizens attempting to hold government to its information has historically been the doctrine of estoppel by representation.<sup>1</sup> This doctrine - hereafter referred to for convenience, if not for accuracy, simply as estoppel<sup>2</sup> - is properly regarded as a rule of evidence rather than of substantive law.<sup>3</sup> It operates to prevent one party to litigation from denying the existence of some fact essential to his opponent's case. "Its sole office is either to place an obstacle in the way of a case which might otherwise succeed, or to remove an impediment out of the way of a case which might otherwise fail."<sup>4</sup> In the field of misleading government information, the doctrine is commonly used to support a cause of action or a defence designed to establish that the citizen's legal rights or liabilities are as the information stated or indicated them to be. In such cases, estoppel is raised in an attempt to prevent government from introducing evidence which will contradict its earlier information by showing that it proceeded on the basis of an error of fact.

The essential tenor of the doctrine was succinctly stated by Lord Birkenhead in MacLaine v. Gatty:<sup>5</sup> "Where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time." More specifically, the elements of estoppel are:

- (i) a representation of fact - in words or by acts or conduct - made by one person (the representor) to another (the representee) with the actual or presumed intention of inducing the representee to undertake a course of conduct;

- (ii) an act or omission on the part of the representee which the representation was reasonably capable of inducing and which it actually induced; and
- (iii) detriment to the representee as a result of the act or omission.<sup>6</sup>

If these elements are made out in subsequent legal proceedings between the parties, the representor will be unable to introduce evidence to establish any fact substantially at variance with his former representation. It will be immediately apparent that estoppel has "no relation to absolute truth"<sup>7</sup>; its only aim is to maintain truth between the representor and the representee. This was made clear by Lord Blackburn in Burkinshaw v. Nicholls<sup>8</sup>: "When a person makes to another the representation, I take upon myself to say such and such things do exist, and you may act upon that basis, it seems to me of the very essence of justice that, between these two parties, their rights shall be regulated, not by the real state of facts, [but] by that conventional state of facts which the two parties agree to make the basis of their action." It is important to bear this justification in mind, as it indicates the narrow focus of estoppel, which in turn forms one of the fundamental objections to the use of the doctrine to hold government to its information.

## 2. Estoppel And The Crown

In England, the latter half of the last century witnessed the beginning of a dynamic expansion of government, the principal feature of which has been a vast increase in the number and powers of statutory

public authorities. Before this administrative explosion, by far the majority of government powers were vested in the Crown. It was early established against a background of absolutist theories that "fictions of law", including estoppel, were ineffective to bind the Crown in the exercise of its powers.<sup>9</sup> But as time passed, changed perceptions of the nature and role of monarchy began to undermine judicial acceptance of this sweeping immunity. The nineteenth and early twentieth centuries witnessed several encroachments,<sup>10</sup> which together created an atmosphere in which English courts felt able to question the very existence of a Crown immunity from estoppel. Thus in Attorney-General to the Prince of Wales v. Collom<sup>11</sup>, Atkin J. felt able to say, in response to the submission of the Attorney-General that estoppel could not bind the Crown, "There is authority for the general proposition so far as estoppel by deed is concerned. I know of no authority for the proposition as applied to estoppel in pais".<sup>12</sup> This development reached its apotheosis with the confident assertion of Denning J. (as he then was) in Robertson v. Minister of Pensions<sup>13</sup> that the idea that the Crown cannot be bound by estoppel "has long been exploded." Parts of the judgment in that case have been the subject of adverse comment in later cases,<sup>14</sup> but its authority on this point has since been acknowledged. Thus in Laker Airways Ltd. v. Department of Trade,<sup>15</sup> the Attorney-General conceded that estoppel may bind the Crown; and a similar concession made in Gowa v. Attorney-General<sup>16</sup> was discussed with approval by the court. Lloyd L.J. said<sup>17</sup>: "At the outset it is important to notice that there is no longer any general rule, if indeed there ever was such a rule, that an estoppel cannot bind the Crown."

On this issue, England and Canada could not be further apart. A long succession of Canadian cases has consistently applied the principle that estoppels, of whatever kind, cannot bind the Crown.<sup>18</sup> Isolated dicta supporting an exception in the case of estoppel by representation<sup>19</sup> have had little effect, beyond provoking an aggressive piece of research intended to establish the inviolability of the principle.<sup>20</sup> But it is one thing to promote the principle of Crown immunity from estoppels, and quite another to justify it. The cases usually cited in support of its application tend to rely for their authority either on ancient texts<sup>21</sup> or on the bald assertions of earlier courts<sup>22</sup>; in no case is any basis for the principle advanced which might withstand a twentieth century analysis.

However, while the approach of Canadian courts is unsatisfactory, its practical implications are not of overwhelming significance. For the apparent liberality of the English position compared with the Canadian is deceptive. The reason lies in the fact that the great majority of the powers of the Crown in both jurisdictions are now statutory<sup>23</sup>, the prerogative being of comparatively small importance in the everyday contacts between government and citizens. As will be demonstrated in the following subsection, courts in both England and Canada apply principles which effectively prevent estoppel from hindering the exercise of statutory powers or the performance of statutory duties. The result is that the willingness of English courts and the refusal of Canadians to accept that in principle estoppel can

bind the Crown leads in practice to no substantial divergence between the caselaw of the two jurisdictions.

### 3. Estoppel And Statutory Powers and Duties

It is generally stated by English academic writers to be a basic rule that all statutory public authorities may become bound by estoppel.<sup>24</sup> As a statement of principle, this is unexceptionable; but the impression which it gives is misleading. For the rule is subject to two major limitations which severely restrict its application, namely the jurisdictional and duty/discretion principles.

#### (a) The Jurisdictional Principle

The essential purpose of the jurisdictional principle is to ensure that estoppel cannot operate so as to violate the doctrine of ultra vires<sup>25</sup>, by effectively fixing government with a decision which it was beyond its powers to make. The principle finds its theoretical justification in the idea that the courts should not allow estoppel to operate in such a way as to override the limitations placed by the legislature upon government power. Its beneficiaries are the public generally, that is all those whose interests might be adversely affected by the overriding of those limitations.<sup>26</sup>

The operation of the principle, which is applied widely throughout the Commonwealth<sup>27</sup>, is exemplified by the English case, Minister of Agriculture and Fisheries v. Matthews<sup>28</sup>. The Minister, acting in pursuance of the powers conferred upon him by reg. 51 of the



Defence of the Realm Regulations 1939, had taken possession of certain farm land which had not been cultivated in accordance with the principles of good husbandry. Subsequently, he entered into an agreement with the defendant under which the defendant took possession of the land. The agreement described the defendant as "the tenant" and contained many of the terms found in an ordinary tenancy agreement of agricultural land. On the expiry of the agreement the defendant refused to vacate the land, and in subsequent proceedings for possession claimed inter alia that the Minister was estopped by the act of entering into the agreement from denying that he had thereby created a tenancy. This argument failed. Cassels J. said: "It may well be that if it had been a private individual who had entered into this contract, he would have been estopped from denying that a tenancy had been created,...but the plaintiff is a statutory body and not an actual person and can, therefore, only perform the acts which he is empowered to perform."<sup>29</sup> He went on to hold that the Minister had no power to grant a tenancy of land of which he had taken possession under reg. 51 of the 1939 Regulations, and quoted the statement of Lord Greene M.R. in the unreported case Minister of Agriculture and Fisheries v. Hulkin that "It would entirely destroy the whole doctrine of ultra vires if it was possible for the donee of a statutory power to extend his power by creating an estoppel."

However, the jurisdictional principle has not been applied without exception. Thus there are cases where the courts have allowed estoppel to operate against government, although by so doing they have

effectively imposed upon government a decision that was procedurally ultra vires. This was the effect of the decision of the English Court of Appeal in Wells v. Minister of Housing and Local Government<sup>30</sup>, in which a company wishing to expand its business of making concrete blocks applied for planning permission for a batching plant, only to be told in a letter from the local planning authority that the plant could be regarded as permitted development. The Court of Appeal held by a majority that the letter bound the authority as a statutory determination that planning permission was not necessary, although the company had not asked for such a determination. Wells was followed in Re L(A.C.) An Infant<sup>31</sup>, in which a solicitor failed to comply with the statutory time-limit for stating objections to a local authority's assumption of parental rights over his client's child, having been led by the authority's officials to believe that it was unnecessary for him to do so. Cumming Bruce J. held the authority estopped from relying on the time-limit.

It is clear from the cases that this exception to the jurisdictional principle is intended to apply only in relation to procedural "technicalities".<sup>32</sup> Bradley has written that "estoppel on procedural matters...should present very much less of a problem than estoppel on a matter concerning substantive powers...[N]o harm to the legal order seems to be caused if a party is estopped from relying on a procedural point of advantage to himself, where it would be unjust for him to do so in view of his earlier conduct towards the other side."<sup>33</sup> However, it is far from clear that the exception is limited to procedural points which are of advantage only to the representor. Thus in Re L,

where the child had been made a ward of court, the effect of allowing estoppel to operate was to ensure that, at the hearing which was necessary before the child could be de-warded, the mother would be required to satisfy a lower standard of proof. It is impossible to ascertain what impact that decision may have had on the interests of the child; but it is far from self-evident that the procedural point raised by the local authority was of advantage only to itself. Again, the litigation in Wells arose precisely because of the vigorous objections of local residents to the batching plant erected by the company, with the result that the "technicality" raised in the case was of advantage primarily to those residents, and not to the local planning authority. Decisions such as Wells and Re L. may not prejudice the maintenance of the "legal order", but they may certainly prejudice the interests of those who are the beneficiaries of the jurisdictional principle, namely the public generally or particular members thereof. This consideration was the basis of Russell L.J.'s dissent in Wells, where he stated that the local planning authority was not free "to waive statutory requirements in favour of (so to speak) an adversary; it is the guardian of the planning system."<sup>34</sup>

Perhaps the true explanation of decisions such as Wells and Re L is that the courts have sometimes been prepared to allow estoppel to override the jurisdictional principle, where the potential prejudice thereby caused to the interests of third parties has appeared to them to be minimal or nebulous compared with the injustice otherwise done to the representee.<sup>35</sup> That this flexibility of approach has not been confined to cases of procedural ultra vires is demonstrated by Robertson v. Minister of Pensions<sup>36</sup>, a decision of Denning J. described by Bradley<sup>37</sup>

as an example of the "persistent currents" which have sought to underminethe "hard rock" of the jurisdictional principle. Some years before the Second World War, the appellant, an army officer, suffered an injury which left him with a permanent back condition. His back was again injured while he was on military service in December 1939, and he was later found unfit to serve. In 1941 he wrote to the War Office requesting a decision on whether his disability was attributable to his military service, so as to entitle him to a pension under the war pensions scheme. He received a reply from the Director of Personal Services at the War Office, stating that his case had been duly considered and his disability accepted as attributable to military service. Relying on this assurance, the appellant omitted to obtain an independent medical opinion. Subsequently, the appellant was informed that the administration of disablement claims arising after the outbreak of the war had been transferred in 1939 to the Minister of Pensions, and that the Minister had decided that the appellant's disability was not attributable to military service. On appeal from the pensions appeal tribunal, Denning J. held the Minister of Pensions bound by the War Office letter. The novel basis on which he did so was soon disapproved by the House of Lords<sup>38</sup>, but the decision itself has received little adverse criticism. Bradley has written: "It is not difficult to demonstrate that the War Office letter could have been regarded as as ultra vires and thus a nullity, since the powers of the Ministry of Pensions were not in law exercisable by the War Office...But I am in no doubt that a strict reliance on the ultra vires doctrine in Robertson's case would have given rise to manifest injustice."<sup>39</sup> Craig notes<sup>40</sup> that the choice before Denning J. was either to reject the estoppel, thereby

leaving the loss with the appellant, or to hold the department bound, and so spread the loss in minute portions throughout society at large. The learned judge's decision embodied a value judgment, with which it is easy to sympathise, to the effect that the manifest injustice that would be done to the appellant if he adopted the first course outweighed the minimal impact on third party interests that would follow from the second.

These cases illustrate the potential which the jurisdictional principle has in particular cases to work injustice, and the reluctance of certain courts to allow it to do so. But Robertson is treated as a "rogue" decision, while Wells and Re L are explained as examples of a minor exception to the principle.<sup>41</sup> The basic rule remains that estoppel cannot operate so as to bind government to misleading information, where a government decision to honour that information would be ultra vires. Craig is unhappy with this state of affairs, and is led by his analysis of Robertson to question "[t]he validity of the presumption that the detriment to the public, who are the beneficiaries of the ultra vires doctrine, will always outweigh the harsh effect upon the individual."<sup>42</sup> He concedes that there are many situations where this presumption will be borne out by the facts. "This will be dependent upon the context, planning, social security or tax, in which the representation occurs."<sup>43</sup> But in other cases, as in Robertson, the balance of harm will tilt the other way. Craig accordingly argues that "[w]hen...an individual has detrimentally relied upon an ultra vires representation, and the harm to the public would be minimal compared to that of the individual, there would seem every reason to allow estoppel to apply."<sup>44</sup> In the absence of a legislative solution, it would fall to the courts to conduct in every

case a balancing test, weighing the injustice to the individual from refusing estoppel with the injustice to third parties from allowing it.

The difficulty with this approach, as Craig accepts, is political. "If Parliament has laid down certain limits to the powers of a body or imposed certain duties upon it, are the courts the correct bodies to decide that these limits can be exceeded, or that a statutory duty be not performed, by determining that the detriment to the public interest is minimal compared with that of an individual?"<sup>45</sup> In the result, Craig's analysis requires a political value judgment. "The severity of the jurisdictional principle must be balanced against the increased judicial discretion."<sup>46</sup> This encapsulates the central difficulty inherent in the jurisdictional principle. On the one hand, to apply it inflexibly may harm important interests of the individual citizen. On the other, a flexible approach to its application, involving a balancing test, would allow the courts to undermine the protection afforded to third party interests by statutory limitations on government power. No exception can be taken to cases such as Robertson, in which the overriding of the jurisdictional principle allowed the court to avoid a manifest injustice without adversely affecting any other significant interest. But, taken beyond the clearest cases, this approach threatens an unacceptable extension of the role of the courts. It is the burden of this thesis that the courts lack both the mandate and the competence to make choices between the competing interests represented in society. Yet that is precisely what the balancing test would involve.

Other academic writers, equally unhappy with the jurisdictional principle, have sought to limit its impact by placing restrictions upon its scope.<sup>47</sup> This approach is facilitated by the fact that the principle

can be defined with different degrees of breadth. At its narrowest, it is concerned simply to ensure that public authorities are kept within the four corners of their statutory powers; at its broadest, it is a convenient way of referring compendiously to the grounds on which the courts may review the decisions of public authorities. Bradley asserts that the use of the broad version of the jurisdictional principle to prevent the operation of estoppel against government would be "harmful".<sup>48</sup> This is difficult to follow. If only a narrow version of the principle is applied, estoppel may be used effectively to impose upon government decisions which, if it had actually made them, would have been amenable to challenge in accordance with the principles of judicial review: for example, a decision which apparently falls within the four corners of a statutory discretion, but which is manifestly unreasonable. At first sight, this would appear to be a most unsatisfactory result. Unfortunately no attempt is made by Bradley to provide a reasoned justification for it.

An attempt to limit the scope of the jurisdictional principle by another means was made by the English Court of Appeal in Gowa v. Attorney-General<sup>49</sup>, which concerned an application by the seven children of one Gowa for a declaration that they were Citizens of the United Kingdom and Colonies (CUKCs). Gowa was himself a CUKC, and the applicants, who were all born before 1947, became British subjects at birth. On January 1st 1949, the British Nationality Act 1948 came into force. Under that Act, the Secretary of State was empowered to cause the minor child of a CUKC to be itself registered as a CUKC, upon application made in the prescribed manner by a parent of the child. In 1951, Gowa approached the Secretariat in Dar-es-Salaam, where the family was then

living, and applied for the applicants to be registered pursuant to the Act. The Member for Law and Order<sup>50</sup> wrote in reply that no further action would be taken on the application, as "you and your family are already Citizens of the United Kingdom and Colonies." As a result of this letter, Gowa took no further steps in the matter. In 1979, the applicants sought from the Foreign and Commonwealth Office confirmation that they were CUKCs. In response, the Foreign Office drew attention to the error contained in the Member's letter, and informed the applicants that they were not CUKCs, and could no longer be regarded as eligible for registration as such. The applicants sought a declaration as to their status, arguing inter alia that the Secretary of State was estopped from denying that they were CUKCs. This argument was accepted by a majority of the Court of Appeal. The central issue was whether the application of estoppel would contravene the jurisdictional principle. The Attorney-General contended that the power of the Member for Law and Order, acting as agent of the Governor, had been limited to granting the status of CUKC by one method only, namely by registration; if he purported to employ any other method, he acted ultra vires. Stephenson and Lloyd L.JJ. rejected this argument; the important consideration was that the Member had power to grant the status of CUKC, and it mattered not whether he did so by registration or by declaring that an applicant for registration already possessed that status.

The decision is difficult to justify. It is impossible to dismiss it simply as an example of estoppel being permitted to give rise to procedural ultra vires, for the case turned, not on the procedure followed by the Member, but on the extent of his powers. Thus Sir David Cairns dissented on the ground that "in relation to the applicants, who



were not CUKCs, [the Member's] duty was to exercise his discretion...to decide whether or not they should be registered as such. If, instead of performing that duty, he could by giving a wrong reason for not effecting the registration indirectly make them CUKCs, it would offend against the [jurisdictional] principle."<sup>51</sup> The Member was empowered to register applicants as CUKCs or to reject their applications, and not simply to grant the status of CUKC by a particular procedure. Accordingly, the Court of Appeal's decision had the effect of imposing upon the Secretary of State, as the successor authority, a decision which was substantively ultra vires.

The implication to be drawn from the reasoning adopted by the majority is that the jurisdictional principle will not prevent estoppel from effectively fixing government with an ultra vires decision where the state of affairs thereby established could have been brought about by an intra vires decision. In other words, the jurisdictional principle will not be offended where the effect of estoppel is to allow government to make a decision which it has no power to make, provided that it could have achieved the same result by a decision which it does have power to make. It is interesting to speculate how far this approach may be taken. One area in which it has the potential to operate is in relation to government information which misleads the citizen into expecting to receive a financial benefit, or to avoid or be relieved of a financial liability or penalty. It is not uncommon for government to be granted or to assume concessionary powers enabling it to honour the expectations created by such information. Thus s. 34A(1) of the Australian Audit Act 1901<sup>52</sup> empowers the Minister of Finance, where he is satisfied that, by reason of special circumstances, it is reasonable to do so, to direct

that an amount up to Aust. \$2500 proposed to be paid to a person by the Commonwealth, or amounts proposed to be paid periodically up to Aust. \$5000 per payment, be treated as properly payable notwithstanding that the amount is, or the amounts are, not legally payable. One case where this power is used is where an official, in the exercise of his duties, has given incorrect information which has led a claimant to take a course of action to his financial detriment.<sup>53</sup> Similarly, under s. 70C(2) of the Act the Minister is empowered to waive the payment of any amount up to Aust. \$25,000. Again, extra-statutory concessions made by the Inland Revenue and by Customs and Excise in the United Kingdom permit the remission or waiver of taxes or duties legally due, on grounds including equity and poverty.<sup>54</sup> The reasoning of the majority in Gowa suggests that, where such powers exist, the citizen may use estoppel to bind government to information as to his financial entitlements or liabilities, although a decision in accordance with that information would ordinarily be ultra vires. The jurisdictional principle cannot be offended in such a case, as the result brought about by estoppel could be achieved by use of the concessionary power.

But the reasoning in Gowa is not applicable solely to cases of financial information, where the effect of allowing estoppel to operate will generally be to distribute the loss in small portions among society at large. It may also be employed in circumstances where estoppel will have a far greater impact upon third party interests. Take the case where a certain type of enterprise is subject for the protection of the public generally to certain statutory restrictions, which government is empowered to remove in particular cases after first according a hearing to all interested persons. The reasoning in Gowa would enable the courts

to hold government bound by an incorrect representation that a particular enterprise is not subject to the restrictions, on the basis that estoppel would merely achieve a result which could have been achieved in any event under the dispensing power. It would be impossible to explain such a decision as an example of the exception in favour of procedural ultra vires, for the omission to accord a hearing to interested persons could not be described as a procedural "technicality".

The potential impact of the reasoning in Gowa is limited by the consideration that it is presumably inapplicable unless the power to which the citizen points as justifying an estoppel is vested in the very body against which the estoppel is raised.<sup>55</sup> However, the case is unsatisfactory. It manages to avoid a clear injustice, but in a manner which may create injustice in future cases. For by enabling the courts, albeit in restricted circumstances, effectively to disregard statutory limitations on the powers of government in the interests of a particular citizen, it puts in jeopardy the protection which those limitations afford to other interests. Ultimately, like Craig's proposed balancing test, the reasoning in Gowa threatens an unacceptable extension of the role of the courts, by allowing them to make choices between competing interests represented within society. Moreover, the case is an unsatisfactory response to the central difficulty inherent in the jurisdictional principle, which it attempts to address merely by limiting the scope of the principle in a more or less arbitrary way. It is possible to justify the decision in Gowa on the same ground as that in Robertson, namely, that by allowing estoppel to operate the court managed to avoid a manifest injustice without doing harm to any other significant

interest.<sup>56</sup> Unfortunately, the court strove to find a different justification, with a result which it is hoped will not commend itself to later courts.

**(b) The Duty/Discretion Principle**

The duty/discretion principle essentially has two separate but connected purposes. The first is to ensure that estoppel will not be allowed to operate where it would prevent the performance of a statutory duty.<sup>57</sup> The classic example of this aspect of the principle in action is Maritime Electric Co. Ltd. v. General Dairies Ltd.<sup>58</sup>, a decision of the Privy Council on appeal from the Supreme Court of Canada. The appellant was a private company which generated and supplied electricity in Fredericton, New Brunswick. As a "public utility" company, it was under a statutory duty to furnish reasonably adequate service and facilities, and to charge at specified rates. The respondent, which carried on a dairy business in Fredericton, was supplied by the appellant with electricity, which it used in the manufacture of butter and dairy products. Owing to a mistake on the part of the appellant, the electricity meter at the respondent's premises was misread over a period of two years, with the result that during that period the respondent was charged for only one-tenth of the electricity which it consumed. On a claim by the appellant to recover the balance, the respondent contended that the appellant was estopped from denying that the correct amount had been collected. This argument failed. The statute imposed a duty upon the appellant to charge and upon the respondent to pay at a specified rate for all electricity consumed by the latter, which duty could not be defeated or avoided by a mere mistake in computation of the accounts.

Lord Maugham, delivering the judgment of the Board, held that "The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy in a general sense. In such a case - and their Lordships to not propose to express any opinion as to statutes which are not within this category - where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it."<sup>59</sup> Although the statutory duty in the Maritime Electric case was imposed upon both the appellant and the respondent, it is clear that the principle enunciated in the case applies with equal force where the duty is imposed upon the representor or the representee alone.<sup>60</sup>

The second purpose of the duty/discretion principle is to ensure that estoppel is not allowed to fetter the exercise of a statutory discretion. This aspect of the principle is illustrated by Southend-On-Sea Corporation v. Hodgson (Wickford) Ltd.<sup>61</sup>, a decision of the English Divisional Court. The respondent company wished to establish a builder's yard and, having found premises suitable to its needs, wrote to the borough engineer asking whether the premises could be used for that purpose. The borough engineer replied that they could, and that no planning permission was necessary. Relying upon his reply, the respondent began to use the premises as a builder's yard. Later, the local authority formed the view that the borough engineer had been wrong, and that in fact planning permission was necessary for that use. When the respondent declined to discontinue the use, it was served by the local authority with an enforcement notice requiring it to do so. The

respondent appealed against the notice and, at the hearing of the appeal, sought to argue that the borough engineer's letter estopped the local authority from contending that planning permission was required, and so from exercising its enforcement powers. This argument was rejected by the Divisional Court. Lord Parker C.J. said: "I can see no logical distinction between a case such as that of an estoppel being sought to be raised to prevent the performance of a statutory duty and one where it is sought to be raised to hinder the exercise of a statutory discretion. After all, in a case of discretion there is a duty under the statute to exercise a free and unhindered discretion."<sup>62</sup>

Like the jurisdictional principle, the duty/discretion principle is rooted in the doctrine of the separation of powers. Its theoretical justification lies in the idea that it is not for the courts to relieve government of duties or rob it of powers imposed or conferred upon it by the legislature. Once again, the beneficiaries are those whose interests might be adversely affected if government could be prevented from performing its statutory duties or from exercising its statutory powers.<sup>63</sup> The effect of the principle is that citizens cannot prevent government from acting upon decisions which are inconsistent with its earlier statements of fact, where those decisions fall within the bounds of some statutory duty or discretion. In other words, government may be held to a statement of fact only where it would be ultra vires for it to disregard that statement. This is effectively an inverse application of the jurisdictional principle. The combined result of the jurisdictional and duty/discretion principles is that estoppel may be used to prevent government from acting upon a decision inconsistent with information earlier provided to the citizen only where that decision is

ultra vires<sup>64</sup>, and a decision in accordance with the information would be intra vires.<sup>65</sup>

Both logic and consistency favour the adoption in relation to the duty/discretion principle, as well as the jurisdictional principle<sup>66</sup>, of a broad definition of ultra vires. However, it should be noted that, while that broad definition maximises the inhibiting effect of the jurisdictional principle, it minimizes that of the duty/discretion principle. For a wide concept of ultra vires makes it harder to satisfy the jurisdictional principle, but correspondingly easier to satisfy the duty/discretion principle. In this context, it is important to bear in mind the implications of the decision of the English House of Lords in R. v. Inland Revenue Commissioners, ex p. Preston<sup>67</sup>, in which it was held that it may be an abuse of power, and so ultra vires, for a statutory public authority to act inconsistently and unfairly in its dealings with citizens. In the context of estoppel, this expansion of the concept of ultra vires has the potential to render the duty/discretion principle redundant, by ensuring that it is always satisfied.<sup>68</sup> But the importance of Preston lies rather in another direction. For if the concept of ultra vires covers inconsistency on the part of government, it may be expected that a citizen adversely affected by a government decision inconsistent with earlier government information will eschew estoppel altogether in favour of an application for judicial review of the decision itself. This point is elaborated below.<sup>69</sup>

However, there are suggestions in the authorities that in certain circumstances estoppel may be able to prevent government from

acting upon even an intra vires decision inconsistent with earlier information. Thus in the Maritime Electric case, the Privy Council emphasized that the statutory duty with which it was concerned had been imposed for the benefit of a section of the public, and expressed no opinion on whether the duty/discretion principle would extend to duties of other sorts.<sup>70</sup> In other words, the Board held that the duty had been imposed by the legislature in the interests of all customers of the appellant, and that it would be wrong for it to permit estoppel to sacrifice those statutorily-protected interests to those of the respondent dairy company. The decision accordingly supports the argument made earlier<sup>71</sup>, to the effect that where particular interests are secured or promoted by a government decision taken in accordance with a statutory duty, or in the lawful exercise of a statutory discretion, the courts should not apply principles which override those interests in order to advance others. This argument, like the decision of the Board in the Maritime Electric case, leaves open the possibility that estoppel may be allowed to operate where no third party interest is secured or promoted by the imposition of the duty or by the lawful exercise of the discretion, so that no other interest stands to be adversely affected. This approach has not yet been applied in any reported case, but it has been implicitly endorsed in the South African case Durban City Council v. Glenore Supermarket and Cafe<sup>72</sup>, the facts of which were closely similar to those of the Maritime Electric case. The defendant was supplied by the plaintiff with electricity, but was undercharged for the amount consumed as a result of the incorrect adjustment of the electricity meter at its premises. In an action by the plaintiff to recover the amounts



undercharged, the defendant sought to raise an estoppel to prevent the plaintiff from contending that there had been any error. In response, the plaintiff pointed to a duty placed upon it by statute to supply electricity to persons within the jurisdiction on the same terms and to accord "no preference or privilege" to any of them, and argued that estoppel could not operate to prevent the performance of such a duty, which was intended to be performed for the benefit of the public generally, or of a section thereof. Thirion J. analysed the South African and English authorities, and concluded that in South African law, estoppel is prevented from applying to hinder the performance of a statutory duty only where that duty is "peremptory" and imposed in the public interest. He went on to hold that the statutory duty in the instant case satisfied both criteria, so that estoppel could not operate: "The object of the section is to provide for equal treatment of all consumers in the same part of the borough where circumstances are similar...If plaintiff were to be estopped from claiming from defendant the amount by which defendant has been undercharged the effect would be that defendant would receive a preference over other users of electricity in the same part of the borough and under similar circumstances. It would also mean that plaintiff would be prevented from recovering revenue which it is by law obliged in the interests of ratepayers to recover."<sup>73</sup>

The clear implication of this judgment is that estoppel may operate to prevent the performance of statutory duties - and, by extension, lawful exercises of statutory discretion - which do not protect third party interests.

#### 4. The Elements Of Estoppel

The jurisdictional and duty/discretion principles, and the rule applied in Canada that estoppel cannot fetter the Crown, are not the only obstacles to the operation of estoppel against government. Major difficulties are also presented by the requirements of the doctrine itself. In some cases, the courts have relied upon the failure of the citizen to make out these elements in order to avoid the necessity of deciding whether in principle the claim to raise an estoppel is well-founded.<sup>74</sup> But in most cases, they have preferred to meet issues of principle head on; and since those issues have usually been decided in favour of government, the courts have often found it unnecessary to determine whether the elements of estoppel could in any event be made out. This concentration on matters of principle has tended to obscure the fact that estoppel is a doctrine applicable in fairly limited circumstances, and is therefore highly unlikely to provide a panacea for all the problems which may be generated by misleading government information.

In the first place, the citizen seeking to raise an estoppel against government may experience difficulty in proving that the representation upon which he relies was actually made. This is most likely to happen where the alleged representation was oral. The evidential difficulties which may face a citizen seeking to hold government bound by or responsible in damages for oral information have already been considered.<sup>75</sup> In the particular case of estoppel, these difficulties are sometimes compounded by a pronounced judicial fear of false claims. Indeed, in the United States this fear has led the Supreme Court to draw a distinction between the legal effects of oral and written

representations, the former being generally unable to found an estoppel.<sup>76</sup> But evidential difficulties may occur even where the alleged representation was made in writing, as where the citizen is unable to persuade the court to imply into or infer from the relevant document the representation upon which his case is founded.<sup>77</sup>

Secondly, the citizen must be able to establish that he was the recipient of the representation; that is, that he was the representee. The effect of this requirement is illustrated by Montana v. Kennedy<sup>78</sup>, a decision of the Supreme Court of the United States in which a representation made by a consular official to the petitioner's mother was held unable to found an estoppel in favour of the petitioner. In that case, it was the reliance of the representee herself upon the representation which adversely affected the citizen's interests, but the result would be no different if the citizen suffered detriment by reason of his own reliance upon a representation passed on to him by the representee.

Even if it is accepted or proved that the representation relied upon as creating an estoppel was actually made to the citizen, he may fail to satisfy the court that the sense in which he understood that representation is the sense properly to be assigned to it as a matter of law. This is demonstrated by Bedfordia Plant Limited v. Secretary of State for the Environment and North Bedfordshire District Council<sup>79</sup>, a decision of the English Divisional Court. The case resulted from the service by the District Council of enforcement notices requiring the appellant to cease the unlawful use of certain land as a depot for the hiring of plant and equipment. On its appeal against the notices, the

appellant contended inter alia that, by virtue of a minute of the rural district council which was the predecessor of the District Council, the District Council was estopped from enforcing against that use. This argument was dismissed by the Secretary of State for the Environment, and, on a further appeal on a matter of law, by the Divisional Court. The court noted that the minute was capable of two interpretations, only one of which would accord with the appellant's contentions. On the appeal, the Secretary of State had favoured the other interpretation, and he could not be said to have erred in law by so doing.

A fourth potential obstacle is that estoppel may not be founded upon a representation of law. "[A] statement of a rule, principle, or proposition of the general law, or a statement of the legal effect of facts which form the subject of another and a distinct and severable statement, or which are within the common knowledge of the parties...is not a statement of the fact of the law being thus, or thus, and there is no estoppel against a subsequent assertion that the law is otherwise."<sup>80</sup> This point defeated the attempt to raise an estoppel in Gillies Bros. Ltd. v. The King<sup>81</sup>, which arose from a request by the Department of Mines and Resources for tenders to cut and remove jack pine on one of its stations. The suppliant submitted a tender, which was duly accepted. However, before cutting began, the Crown expropriated the suppliant's right to enter and cut the timber, and later awarded it to another firm. The suppliant claimed compensation for the expropriation, contending that the commencement of expropriation proceedings amounted to a representation, which the Crown was estopped from denying, that it was entitled to an interest in the land sufficient to attract a right to

compensation under the Expropriation Act. Cameron J. rejected this argument, on the ground that the representation was as to the legal inference to be drawn from facts known equally to both parties, and was therefore unable to found an estoppel. Again, the Supreme Court of South Australia held in Wormald v. Gioia<sup>82</sup> that an estoppel could not be based upon a representation that a licence was necessary to sell fruit and vegetables from a kerb-side stall, as that representation was one of law.

This limitation on the operation of estoppel is potentially of great importance in relation to government information, for, although the distinction between fact and law is sometimes nebulous, it is clear that government is a major supplier of legal information to citizens. Whether a proposed transaction is liable to tax; whether certain circumstances generate an entitlement to a grant or benefit; whether a particular course of conduct is prohibited: all are questions of law, and the answers to them are accordingly unable to found an estoppel. It has been pointed out<sup>83</sup> that estoppel can be of value in relation to government information only where that information was provided in response to a government-controlled uncertainty; the instances where such uncertainties relate purely to matters of fact, or to matters of mixed fact and law, may be expected to be relatively few, and perhaps confined largely to the realm of procedure.

However, the effect of the exclusion of representations of law is more overwhelming in theory than it has proved in practice. In the first place, its impact is mitigated by the fact that information provided in response to government-controlled uncertainty often takes the

form of an undertaking or assurance.<sup>84</sup> In such cases, the citizen may be able to call in aid the doctrine of promissory estoppel, which may apply to representations both of fact and of law.<sup>85</sup> Secondly, the courts are in other cases sometimes prepared to gloss over the problem. This is illustrated by Wells v. Minister of Housing and Local Government<sup>86</sup>, which concerned a letter from a local planning authority to the effect that no planning permission was required for a particular development. Although the letter contained an express representation on a matter of law, the majority of the Court of Appeal<sup>87</sup> held it binding by the expedient of treating it as containing an implied representation to the effect that it was a formal determination made pursuant to statute. Estoppel therefore operated, not to hold the local planning authority to its express representation that no planning permission was required, but to prevent it from contending that the letter was not a statutory determination to that effect. However, it is difficult to see any material distinction in this respect between an express representation on a matter of law, and an implied representation as to the legal status and effect of such a representation. Both are surely representations of law.

A fifth difficulty facing the citizen seeking to raise an estoppel against government lies in the requirement that the representation upon which he relies must have been made with the intention of inducing him to adopt a course of conduct.<sup>88</sup> The effect of this requirement is moderated by the fact that an intention to induce may be presumed. This is illustrated by the decision of the Supreme Court of Canada in General Dairies Ltd. v. Maritime Electric Co. Ltd.<sup>89</sup>, where it

was held that the respondent electricity supply company must be taken to have intended the appellant dairy company to act in the ordinary course of its business upon the representations made to it regarding the amount of its electricity charges. However, that the requirement may still have a significant impact is demonstrated by Stairs v. Province of New Brunswick<sup>90</sup>, in which it was held that representations made by the Province to the effect that building permits would be forthcoming for the construction of a restaurant-service station adjacent to the Trans-Canada Highway could not found an estoppel. The plaintiff's argument that the representations were made with the intention of inducing him to purchase the relevant land was rejected by the court, on the ground that the plaintiff had led provincial officials to believe that he was already the land's owner.

Sixthly, the citizen must establish that the representation actually induced an act or omission on his part. Thus a second ground on which the claim to raise an estoppel was defeated in Stairs v. Province of New Brunswick was that, subsequent to his receipt of the relevant representations, the citizen had abandoned his plans for a restaurant-service station in favour of a new project, wholly uninduced by what he had earlier been told by the Province. Furthermore, the representation must have been reasonably capable of inducing the citizen's act or omission. This requirement is illustrated by the decision of the High Court of Southern Rhodesia in Salisbury City Council v. Donner<sup>91</sup>, in which it was held that estoppel could not prevent the Council from contending that a particular use of land contravened the zoning plan, when the only representations relied upon were approvals

given by the City Architect and City Engineer pursuant to the building bylaws. However, it appears from other cases, and notably from the decision of the Supreme Court of Canada in the Maritime Electric case,<sup>92</sup> that if the representation was reasonably capable of inducing the citizen to act as he did, it does not matter that it was intended to induce him to act in some other way.

Finally, there is a potential difficulty for the citizen in the requirement that he must have incurred some detriment as a result of his act or omission.<sup>93</sup> As a general rule, only a loss quantifiable in financial terms will qualify as a detriment for the purposes of estoppel.<sup>94</sup> The restrictive effect which this has on the operation of the doctrine against government is illustrated by Rootkin v. Kent County Council,<sup>95</sup> a decision of the English Court of Appeal. The plaintiff's daughter was allocated a place at a secondary school which the Council accepted was over three miles from her home. In such a case, the local authority is obliged by statute to provide transport for the child to and from school, or alternatively to reimburse the child's travelling expenses; the Council chose to provide the plaintiff's daughter with a bus pass. Shortly thereafter, the distance between the plaintiff's home and the school was measured, and found to be under three miles. As a result, the Council decided that the bus pass should be withdrawn. The plaintiff sought leave to apply for judicial review of this decision, contending that the Council was estopped from asserting an entitlement to withdraw the pass. The detriment alleged was the abandonment by the plaintiff, upon receipt of an assurance from the Council that a bus pass would be provided, of her right of appeal to the Secretary of State for



Education against the school place allocated to her daughter; and the starting of the daughter at school, from which it would have been unreasonable for her to be uprooted in order to attend a nearer school. The Court of Appeal held that this was a long way from amounting to sufficient detriment for the purposes of estoppel, and dismissed the plaintiff's application.

The important point to be gleaned from this brief consideration of the elements of estoppel is that the citizen is likely to find the doctrine at best an arbitrary means of ensuring that government honours its information. This arbitrariness may be further increased, in the eyes at least of the aggrieved citizen, by the operation of the rules of agency.

## 5. Estoppel And Agency

Where a citizen wishes to employ estoppel to hold government to a representation made to him by a government officer, a critical question will be whether the representation may properly be regarded as made by government itself. This question resolves itself through the rules of agency. The situation will be straightforward where the officer had actual authority, express or implied, to provide the information. Far greater difficulty will be caused where the officer assumed authority on a matter falling outside the scope of his actual authority. This is a common source of misleading information, as information provided in such circumstances is more likely to be wrong at the outset, or later disowned by government. If in such a case the citizen is unable to raise an

estoppel, the effectiveness of that doctrine as a protection against government inconsistency is yet further reduced.

In Robertson v. Minister of Pensions<sup>96</sup>, Denning J. offered a possible means of evading this difficulty, in the shape of the principle that "if a government department in its dealings with a subject takes it on itself to assume authority on a matter with which he is concerned, he is entitled to rely on it having the authority which it assumes."<sup>97</sup> But this principle was soon disapproved by the House of Lords.<sup>98</sup> As a result, a citizen wishing to use estoppel to hold government to information provided by a government officer lacking actual authority to provide it is thrown back upon the rules of agency, and specifically upon the doctrine of ostensible (or apparent) authority.

This doctrine, which operates to prevent one person from denying that another acted in a particular matter as his agent<sup>99</sup>, is itself founded upon the doctrine of estoppel. All government bodies may be subject to it; it is reasonably clear that the doctrine constitutes an exception to the sweeping immunity from estoppel conferred in Canada upon the Crown.<sup>100</sup> No case in the field of public law has yet definitively stated the elements of ostensible authority, but there is no reason to suppose that they differ from the elements of the doctrine in private law.<sup>101</sup> Those elements are, in essence, a representation; reliance upon that representation; and an alteration of position resulting from that reliance.<sup>102</sup> The more detailed formulation of Diplock L.J. (as he then was) in Freeman & Lockyer (A Firm) v. Buckhurst Park Properties (Mangal) Ltd.,<sup>103</sup> in relation to the making of contracts on behalf of private

companies, can be adopted to the provision of information by government officers so as to require:

- (i) a representation that the officer had authority to provide information of the sort concerned in the case, made to the citizen by a person with actual authority to manage the affairs of government in relation to the matter with which the information was concerned, or in relation to the provision of information generally;
- (ii) an act or omission on the part of the citizen induced by the representation; and
- (iii) satisfactory evidence that the provision to citizens of information of the sort concerned in the case is intra vires government.

The first element, that of a "holding out," may prove extremely difficult to satisfy. This is not least because a government officer cannot acquire authority by holding himself out as having it;<sup>104</sup> the representation upon which ostensible authority is founded must emanate from the principal, not from the agent. However, it is clear that the representation may be made through conduct. This is illustrated by Lever (Finance) Ltd. v. Westminster Corporation,<sup>105</sup> a decision of the English Court of Appeal, in which Lord Denning M.R. and Megaw L.J. held that a representation by a planning officer, to the effect that an approved plan could be modified in certain respects without the need for a fresh planning permission, had been made within the scope of his ostensible authority. There was evidence of a widespread practice amongst planning authorities of allowing their officers to make immaterial modifications to the plans produced when planning permission was given; the architect

for Lever (Finance) Ltd. could be presumed to know of that practice, and was accordingly entitled to assume that it had been authorised by authorities in whose areas it was followed. In short, by adopting the widespread practice, Westminster Corporation effectively held out its planning officers as having authority to act in accordance with it.

The second element, whereby the citizen must have been induced by the holding out to rely upon the officer's information, may also present problems. For the citizen may be expected in many cases to rely rather on the apparent reliability of the information itself than on a prior representation that the officer was authorised to provide it. Yet unless he can satisfy the court that the latter is true then, at least in theory, there can be no ostensible authority.

The final element, which requires that the provision of information of the sort concerned in the case must be intra vires government, is unlikely to cause any difficulty. However, it should be noted that on a claim to bind government by estoppel to information provided by an officer within his ostensible authority, the jurisdictional principle will be relevant twice: to ensure first, that the estoppel on which the claim of ostensible authority is founded will not have the effect of conferring on the officer authority to provide information which government is not empowered to provide; and secondly, that allowing estoppel to bind government to the information provided by the officer will not have the effect of conferring on government power to do something which otherwise it is not empowered to do.

## 6. Assessment

It is apparent from the preceding discussion that there are serious limitations on the ability of estoppel to hold government to its information. Just how serious these limitations are is disguised by the fact that in a not insignificant number of cases the courts have chosen to ignore them. Thus the authorities cited by Wade<sup>106</sup> for the proposition that "legal rules about...estoppel are applicable to public authorities as well as to other persons"<sup>107</sup> actually display a disregard of the duty/discretion principle. The same is true of those cases in which proprietary estoppel has been permitted to operate against a public authority.<sup>108</sup>

The most important limitations are the jurisdictional and duty/discretion principles, and the rule still applied in Canada that estoppel cannot bind the Crown. The combined effect of the jurisdictional and duty/discretion principles, in particular, is that estoppel cannot operate to prevent government from acting upon a decision which is inconsistent with information earlier provided to the citizen, unless that decision is ultra vires and a decision in accordance with the information would have been intra vires. The result is that estoppel may be used effectively to overturn such government decisions only where they could in any event be overturned on an application for judicial review. This approach is consistent with the arguments made earlier<sup>109</sup>, to the effect that it is the legitimate and proper function of government, acting within the scope of the powers and duties conferred and imposed upon it by the legislature, but not of the courts, to determine which of the interests and values represented in society should be promoted, and to what extent. The performance of this function may lead government to

make decisions which are inconsistent with information earlier provided to citizens. Accordingly, the unrestricted application of estoppel to bind government to its information would have the potential to impede the governmental function by involving the courts in a review of lawful government decisions as to the promotion of particular interests and values. As it is, the jurisdictional and duty/discretion principles together ensure that estoppel may operate only where its effect is to substitute a lawful government decision for one that is unlawful.

That a reluctance to usurp the role of government underlies the jurisdictional and duty/discretion principles, and the Canadian rule that estoppel cannot fetter the Crown, is apparent even from the earliest authorities. In Giles v. Grover<sup>110</sup>, Alderson J. asserted that one of the pillars of the rule of the prerogative whereby, in cases of conflict, the right of the Crown was to be preferred to that of the subject, was that "by the King is in reality to be understood the nation at large, to whose interest that of any private individual ought to give way."<sup>111</sup> The same political constraint was succinctly stated by Lindley M.R. in Vestry of the Parish of St. Mary, Islington v. Hornsey Urban District Council<sup>112</sup>, in which the defendants sought to raise an estoppel against the plaintiff: "This is not a question affecting the plaintiffs as private individuals. They are a public body, with public duties, and with rights and powers conferred upon them for the purpose of enabling them to discharge their duties. This must be borne in mind in considering the effect of their past conduct, when that is relied upon as estopping them from asserting a right to put an end to what they have permitted, and even encouraged and agreed to allow."<sup>113</sup> For the courts to permit estoppel to operate in such a case would be for them to risk sacrificing

third party interests, secured or advanced by a government decision made in performance of a statutory duty or in the lawful exercise of a statutory discretion, to the interests of the individual citizen raising the estoppel.<sup>114</sup> This they have generally striven to avoid.

However, certain courts have also displayed a willingness to allow estoppel to operate where the refusal to do so would work injustice. No exception can be taken to this flexibility where the injustice so avoided is manifest and no third party interest is prejudiced, at least more than minimally. But, taken beyond the clearest cases, this approach could undermine the jurisdictional and duty/discretion principles, and so allow the courts to usurp the role of the legislature or of government. Thus Bradley has written, in relation to the use of estoppel to prevent the exercise of statutory powers, that "the operation of estoppel may involve a departure from strict rules of legality in favour of a more equitable and just solution between the parties. When a court exercises a function of this kind, it is important that additional injustice is not created in the process. Where, as in Robertson v. Minister of Pensions, the only parties to the dispute are a public authority and the citizen, and the court by use of estoppel requires a pension to be paid to the citizen, this financial outcome creates no injustice. But when, as in Lever (Finance) Ltd. v. Westminster Corporation, environmental issues and the interests of third parties are involved, should the court decide to bar the planning authority from taking enforcement action, without first taking into account the harm to others that may be caused by a decision in favour of the developer?"<sup>116</sup> [my emphasis]. It is the final part of this extract

which is unacceptable: it is not for the courts to weigh and make choices between conflicting interests.

This is not simply because the courts are without a mandate to undertake that task; they also lack the tools by which to perform it. Estoppel is certainly a wholly inappropriate vehicle for the consideration of third party interests. The doctrine receives its justification from the perceived need to maintain truth inter partes<sup>117</sup>, and accordingly focusses narrowly upon the parties to the litigation, their respective legal rights and conduct. It cannot facilitate an appreciation of the third party interests which frequently exist when the alleged representor is government, burdened with the duty of shaping its conduct with due regard to all the interests represented in society, and not merely those of the citizen with whom it happens to be involved in litigation. Far from enabling the courts to weigh conflicting interests, estoppel is in fact capable only of allowing one citizen to assert his own interests at the expense of all others. This was made clear in Western Fish Products Ltd. v. Penwith District Council<sup>118</sup>, where, in discussing Lever (Finance) Ltd. v. Westminster Corporation, Megaw L.J. said: "To permit the estoppel no doubt avoided an injustice to the plaintiffs. But it may also be fairly regarded as having caused an injustice to one or more members of the public, the owners of adjacent houses who would be adversely affected by this wrong and careless decision of the planning officer that the modifications were not material. Yet they were not, and it would seem could not, be heard. How, in their absence, could the court balance the respective injustices according as the court did or did not hold that there was an estoppel in favour of the plaintiffs? What "equity" is there in holding, if such be



the effect of the decision, that the potential injustice to a third party, as a result of the granting of the estoppel, is irrelevant?"<sup>119</sup> That potential injustice is highly relevant, but the raising of an estoppel does not allow the court to take it into account.

In other ways, too, estoppel is an instrument singularly ill suited to resolve all the problems to which misleading government information may give rise. First, the elements of the doctrine ensure that it is properly applicable only in fairly restricted circumstances. In particular, the requirements that the representation upon which an estoppel is founded must be one of fact and that the detriment incurred by the representee must be quantifiable in financial terms are both capable of presenting the citizen with serious difficulties. There may be good reason for these requirements when both representor and representee are private persons, but where the representor is government, they produce results which are both arbitrary and difficult to justify. In particular, the result of the rule that an estoppel cannot be founded upon a representation of law is that the significant quantities of legal information provided by government fall entirely outside the doctrine's scope. Secondly, the application of estoppel is further restricted, in a manner which will appear to the aggrieved citizen to be equally arbitrary, by the operation of the rules of agency, whereby a representation will be able to found an estoppel against government only if it was made by a government officer acting within the scope of his actual or ostensible authority.

Lord Scarman has said that "it is wrong to introduce into public administrative law concepts such as equitable estoppel which are essentially aids to the doing of justice in private law."<sup>120</sup> The

discussion in this section has attempted to demonstrate that the doctrine is certainly an unsatisfactory and inappropriate means of protecting the interests of citizens misled by government information. It remains to be considered whether administrative law is capable by itself of providing a more acceptable resolution of the problems to which misleading government information may give rise.

## **B. JUDICIAL REVIEW**

### **1. Introduction: The Promise Of Judicial Review**

The typical situation with which this Part is concerned is that in which government wishes to disclaim information previously provided to a citizen and the citizen wishes to hold government bound by that information. It might appear at first sight that proceedings for judicial review could contribute little to a resolution of that situation. The essential function of judicial review is to enable citizens to attack decisions of government which adversely affect them, on the ground that those decisions are legally defective. It involves the challenging of positions adopted by government, not the establishment of their immutability. Thus Bradley, at the outset of his analysis of the legal issues generated by misleading government information, is led to consider "how the present subject differs from the general law of judicial review of administrative action."<sup>121</sup>

However, the inflexibility of this approach is unfortunate. It is certainly true that estoppel by representation has historically been perceived as offering the most promising, if not the only, means of holding government by law to its information, but that perception now

requires reconsideration in the light of the continuing development of the principles of judicial review.<sup>122</sup> The hope of estoppel is that it may operate to prevent government in subsequent legal proceedings with the citizen from denying that the information which it originally provided to him was correct. Its focus is the initial position adopted by government, the issue being whether fairness should preclude the abandonment of that position. Judicial review has the potential to attack the problem from the opposite direction. It enables the citizen to focus on the new position which government has purported to adopt and to assert that, in the light inter alia of the inconsistent information earlier provided to him, that new position is one which it is not lawful for government to adopt, at least by the procedure by which it has purported to do so.

The promise of judicial review as a means of dealing with the problems generated by misleading government information has been recognised only recently, largely as a result of judicial activity in England. The authorities, which are on the cutting edge of the law, form part of the resurgence of judicial review experienced in England in the last twenty years. They probably owe something to the Parliamentary Commissioner for Administration - the Ombudsman - whose office was created in 1967<sup>123</sup>, when the law seemed to be failing to protect the citizen against "maladministration"<sup>124</sup> by government. That term is not defined in the Parliamentary Commissioner Act, but "the Ombudsman's reports leave us in no doubt that he is astute to look out for instances where incorrect information, inadequate advice or misleading assurances have been given by officials to individuals, who thereafter suffer loss

or other injustice through reliance on these statements."<sup>125</sup> The Ombudsman's willingness to classify as maladministration cases where government disowns information earlier provided by it to citizens has helped to define acceptable and unacceptable government conduct. Indeed, some writers, acknowledging the weakness of estoppel in this field, have been content to leave the problem exclusively to the Ombudsman.<sup>126</sup> This is an unsatisfactory solution, involving as it does a partial abdication of the rule of law in favour of an unstructured system of administrative discretion<sup>127</sup>, the "twilight world"<sup>128</sup> of maladministration. For Bradley, the essential question is "how do we graft on to the law the essential principles of administrative justice accepted and applied by the Ombudsman?"<sup>129</sup> The following discussion indicates that, in relation to government inconsistency, grafting may be unnecessary and that administrative justice may be capable of achievement through use of the principles of judicial review.

The cases in which the courts have overturned government decisions inconsistent with earlier government information fall into two broad categories, namely those in which the unlawfulness of the decision lay in a breach of the duty to act fairly and those in which it comprised an abuse of discretion.

## **2. The Duty To Act Fairly: Procedural Fairness**

The important element of the duty to act fairly is for present purposes that which requires decisions affecting the interests of an individual to be taken only after the individual has been given an opportunity to be heard on the matter. No attempt will be made here to

elaborate the precise content of this requirement or the circumstances in which it applies.<sup>130</sup> The object of the following discussion is rather to consider the cases in which the duty to act fairly has been used to control government inconsistency and to assess its value for that purpose.

The foundation of the use of the duty to act fairly in this field is R. v. Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association<sup>131</sup>, hereafter referred to as the Liverpool Corporation case, which concerned information in the form of an undertaking provided by a statutory public authority to a group of citizens. The Corporation, as licensing authority, had in 1948 limited the number of taxi cab licences in the city of Liverpool to 300, but in 1970 it proposed substantially to increase their number. This proposal was opposed by the operators' association, which was informed by letters from the Town Clerk that it would be given an opportunity to make representations before any decision was made. In July 1971 the matter was considered by a sub-committee of the city council, before which the association was legally represented. The sub-committee proposed a staggered increase, and the full council later approved that proposal. However, at a meeting of the council held the following month, the chairman of the sub-committee gave an undertaking that no licences additional to the 300 existing ones would be issued until proposed legislation to control private hire cars had come into force. This undertaking was later put into writing in a letter to the association from the Town Clerk. Subsequently, in November, the sub-committee met again, and without informing the association and despite the fact that

the proposed legislation was not yet in force, put forward new proposals for an increase in the number of licences. These proposals were adopted by the council. The association applied for an order quashing the Corporation's decision, and succeeded before the Court of Appeal.

It was held that, in exercising its function of deciding future policy as to the number of taxi cab licences in the city, the Corporation was under a duty to act fairly. That duty meant that it could depart from the undertaking given by the chairman of the sub-committee in August 1971 only if it first gave due and proper consideration to any representations which persons or bodies whose interests were affected, including the association, might wish to make. Even then, according to Lord Denning M.R.<sup>132</sup>, the undertaking could be disregarded only if the Corporation was satisfied that the "overriding public interest" required it. In the event, the Corporation had failed to act fairly in dealing with the conflicting interests on which it had to decide, and its decision was accordingly quashed.

The Liverpool Corporation case has been characterised by Wade<sup>133</sup> as one where a public authority was held bound by a non-contractual undertaking, and he questions the legal validity of that result. However, Wade inadequately summarises the basis of the decision. The court did not deny the right of the Corporation to depart from its undertaking, but rather sought to prevent it from so doing without first according to affected citizens an opportunity to make representations as to why the undertaking should continue to be observed. This falls far short of bestowing upon the undertaking any binding quality. It was not the intention of the court to dictate policy to the Corporation, but

rather "to see that whatever policy [it] adopts is adopted after due and fair regard to all the conflicting interests."<sup>134</sup> The comments of Lord Denning M.R. to the effect that the Corporation was obliged to honour its undertaking unless the "overriding public interest" required otherwise were not adopted by the other members of the court, and accordingly can be regarded only as dicta.<sup>135</sup> Certainly later decisions<sup>136</sup> have treated the Liverpool Corporation case as turning on the duty to act fairly rather than on any inherent binding quality of the undertaking itself. In those decisions, the courts have identified the critical issue as being whether the citizen had a legitimate expectation of being accorded a hearing before government made the decision about which he complains, it being made clear that the importance of earlier government information inconsistent with that decision, such as the undertaking in the Liverpool Corporation case, lies in its ability to give rise to such expectations.<sup>137</sup>

The clearest circumstance in which government information may give rise to a legitimate expectation of a hearing is where the information takes the form of an express undertaking actually to grant a hearing. That was the basis of the decision of the Privy Council in Attorney General of Hong Kong v. Ng Yuen Shiu<sup>138</sup>, an appeal from the Court of Appeal of Hong Kong. The respondent had entered Hong Kong illegally from Macau in 1976 and had remained there undetected, becoming part-owner of a small factory. In October 1980 a change of immigration policy was announced by the Hong Kong government, to the effect that illegal immigrants would be interviewed in due course and, while no guarantees could be given that they would not subsequently be removed

from the colony, each case would be treated on its merits. As a result of this announcement the respondent reported on the following day to an immigration officer and, after being interviewed, was detained until a removal order was made against him by the Director of Immigration. The immigration tribunal having dismissed his appeal against the order, the respondent sought judicial review of the Director's decision to remove him, and succeeded before the Privy Council. Lord Fraser, delivering the judgment of the Board, held that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body if he has a legitimate expectation of being accorded such a hearing. A legitimate expectation might be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry. His lordship cited the Liverpool Corporation case as an illustration of that principle, which he justified on the basis that "when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."<sup>139</sup> In the instant case, the undertaking given by the Hong Kong government had not been implemented because the respondent had not been given an opportunity to put his case for a favourable exercise of discretion by the Director. Accordingly, the Privy Council granted an order of certiorari to quash the removal order.



Attorney General of Hong Kong v. Ng Yuen Shiu has since been applied by the Federal Court of Australia in Cole v. Cunningham<sup>140</sup>, the circumstances of which were most closely analagous to the Liverpool Corporation case in that it concerned an express undertaking as to a matter other than procedure. The respondent had been an officer in the Department of Immigration and Ethnic Affairs, but had resigned when threatened with a criminal prosecution for harbouring an illegal immigrant, a Fijian woman with whom he had formed an attachment. Before resigning, he was informed by a superior that "if you leave now it will be a normal resignation and you will leave with a clear record." Some eighteen months later the respondent sought reappointment to the Public Service, and was informed by an interviewing clerk that he would be offered a position subject to appropriate clearances. The following day the clerk informed him that the Department of Immigration had given an unsatisfactory report, relating to the circumstances of his earlier resignation. He was refused a copy of the report, but was invited to give his version of the facts, which he did. He was not reappointed. The Federal Court granted his application for judicial review of the decision not to reappoint him. The court cited Attorney General of Hong Kong v. Ng Yuen Shiu with approval, and went on to consider whether there was in the instant case any statement or undertaking sufficient to found a legitimate expectation. In this respect, the representation made to the respondent before his resignation was "of particular importance."<sup>141</sup> It was "a clear representation to the respondent that if he resigned he would leave the Department with an unblemished record...In those circumstances we think the respondent was entitled to hold the reasonable

expectation that he would be afforded a reasonable opportunity of answering the allegations should the department change its attitude towards him and assert (contrary to the representation made to him) that he had left the Department with a blemished record."<sup>142</sup>

But it is clear that it is not only an express statement or undertaking which may give rise to a legitimate expectation of being accorded a hearing. That such an expectation may be founded upon an undertaking implied into or inferred from a statement of government is demonstrated by the judgment of Parker L.J. in R. v. Secretary of State for the Home Department, ex p. Khan,<sup>143</sup> which concerned information provided to citizens generally by means of a Home Office circular letter. The circular was published in order to offer guidance to persons in the United Kingdom who wished to adopt a child from abroad, and stated that, although the immigration rules did not permit a foreign child to enter the United Kingdom for the purposes of adoption, the Secretary of State might in exceptional circumstances exercise a discretion to allow a child to enter for that purpose where certain specified criteria were met. The applicant, who was settled in England, wished to adopt a relative's child, who lived in Pakistan. He obtained a copy of the circular and applied for an entry clearance certificate for the child. The application and the entry clearance officer's report were referred to the Secretary of State, who declined to apply the criteria set out in the circular and instead decided the application by different criteria. The child was accordingly refused leave to enter. The applicant sought to have the Secretary of State's decision quashed, contending that he had a legitimate expectation arising out of the terms of the circular that the

criteria there set out would be applied. His application was granted by a majority of the Court of Appeal.<sup>144</sup> Parker L.J. based his judgment squarely on the argument raised by the applicant. Although the circular did not say that, on the Secretary of State being satisfied that the specified criteria had been met, the child would be allowed in, "a reader might well infer that this would be the likely result"<sup>145</sup>, and the learned judge proceeded on the basis that the circular contained an implied or inferred undertaking to that effect. He cited the Liverpool Corporation case with approval, and went on to consider and apply the reasoning of Attorney General of Hong Kong v. Ng Yuen Shiu, holding that the applicant had a reasonable expectation<sup>146</sup> that his application would be decided according to the criteria set out in the circular, and that if the Secretary of State was to adopt different criteria he could do so only after according a hearing to interested persons.

Furthermore, a legitimate expectation entailing the right to a hearing may be generated by the conduct of government. Thus if government follows a regular practice in a particular matter, it may be legitimate for a person affected to expect that practice to continue; and if so, then before the practice is departed from in his case he will be entitled to an opportunity to make representations as to why it should be adhered to. In such a case the government practice has informational aspects: the uncertainty facing the citizen as to what practice will be followed is reduced, if not eliminated, by the inferences which he legitimately draws from previous government conduct. Such a legitimate expectation is particularly likely to arise where the regular practice is actually the giving of a hearing. That was the case in Council of Civil

Service Unions v. Minister for the Civil Service<sup>147</sup>, which concerned a government decision, made without consultation of the staff concerned, to exclude staff at Government Communications Headquarters (G.C.H.Q.) from membership of any trade union other than a departmental staff association approved by the G.C.H.Q. director. On an application to quash the exclusion, it was found that there was an established practice at G.C.H.Q. of consultation between management and unions about important alterations in the terms and conditions of employment of staff. The House of Lords held that this practice gave rise to an obligation on the part of government to act fairly by consulting G.C.H.Q. staff before withdrawing the benefit of trade union membership.<sup>148</sup>

It is apparent from these cases that the duty to act fairly is capable in certain circumstances of providing a means whereby the citizen may compel government take into account in its decision-making the expectations generated by information with which it has previously supplied him. If that information led him legitimately to expect that he would be either entitled to a particular advantage or free from a particular disadvantage, the citizen will be able to require government to accord him a hearing before it adopts a position which will deprive him of that advantage or subject him to that disadvantage.<sup>149</sup> However, the effect of overturning a government decision for failure to accord a hearing may be limited. Government is obliged to allow the citizen an opportunity to make representations, but it is not precluded from reaching a decision inconsistent with its original information once it has done so. It "must make up its own mind what policy it wishes to

follow; but before doing so it must act fairly to all concerned."<sup>150</sup> Where government disclaims information earlier provided to a citizen after according him a hearing and considering his representations, the citizen must rely upon a challenge to the fairness or reasonableness of the inconsistent decision.<sup>151</sup> Even where a hearing is granted, there may be little that the citizen can say to persuade government that, in relation to him, it should adhere to its original information. This is demonstrated with stark clarity by Attorney General of Hong Kong v. Ng Yuen Shiu, the decision in which rested upon an extremely narrow factual basis. As Baber J. emphasised in the court below, the unlawfulness of the removal order in that case lay simply in the fact "that [the respondent] was not expressly asked at his interview...'have you anything to say as to why you should be allowed to remain in Hong Kong?' and his answer recorded. This would have been an adequate opportunity to state his case and had this been done these proceedings would have been unnecessary."<sup>152</sup> Yet it was accepted that the only matter in his favour which the respondent had been prevented from bringing to the Director's attention by the failure to ask that question was the fact that he was part-owner of a small factory. In other words, if the respondent, having succeeded in quashing the initial decision to remove him, subsequently failed to impress the Director of Immigration with the information that he was an employer rather than an employee, he could expect to be made the subject of a second, and this time unimpeachable, removal order. Consequently, successful use of the duty to act fairly by citizens misled by government information may buy them time, and an opportunity to argue against a

departure from that information, but ultimately may secure them no lasting benefit.

From the point of view of the citizen who has been misled, this may appear to be a grave weakness. But this is not the most disinterested perspective. It has been argued<sup>153</sup> that the task of determining which interests and values are to be promoted by or reflected in government decisions is a task for government alone, and not for the courts. The great merit of the use of the duty to act fairly to control departures from government information is that it is entirely compatible with that argument. To attack a government decision on the basis of an alleged breach of that duty is to attack the manner in which the decision was made, not its content. The duty to act fairly is concerned with procedure, not substance. Its essential purpose is to ensure that a statutory decision-maker permits those whose interests may be affected by its decision to make representations in support of their interests before a decision is reached; it is for the decision-maker, having heard those representations, to make what it considers to be an appropriate decision.

But, once again, decision-makers cannot be allowed to exceed the scope of their powers. Accordingly, there is a second limitation on the ability of the duty to act fairly to assist a citizen misled by government information, in the shape of the jurisdictional principle. The effect of that principle in this context is to prevent the court from compelling government to grant a hearing before departing from information previously provided to citizens, where to do so would override the limitations on government's power. Where the information takes the form of an undertaking - express, implied or inferred -

actually to grant a hearing, the operation of the jurisdictional principle will be of limited importance. Cases will be few in which no discretion to hold a hearing exists. Thus it is clear that a legitimate expectation of being accorded a hearing may arise even when the power or duty concerned is not in ordinary circumstances required to be exercised in accordance with the duty to act fairly.<sup>154</sup> The principle will accordingly be of greatest importance in relation to information in the form of a statement or undertaking concerning a matter other than procedure. It would be strange if government were obliged to hold a hearing before departing from information which it cannot lawfully honour. If the jurisdictional principle operates effectively to prevent government from being bound by estoppel to information which it lies outside the scope of its powers to implement,<sup>155</sup> it must operate also to prevent government from being required by the duty to act fairly to accord a hearing to affected persons before departing from such information.

A further factor which must be considered is the potential impact of the doctrine of agency. The value of the duty to act fairly to a citizen misled by information from a government source may be dependent upon his ability to demonstrate that the information was provided by someone authorised by government to provide it. No argument has been raised in any of the cases decided to date that the information was provided by an officer acting outside the scope of his authority, and it remains to be seen what attitude the courts will adopt when such an argument is raised. It would certainly be possible for them to permit unauthorised information in certain circumstances to generate a

legitimate expectation of a hearing; a strong candidate might be where an express undertaking to grant a hearing is given by an officer of some seniority, who in fact lacks authority to give it. But strong counter-arguments can be raised. Thus there is authority that if a government officer wrongly assumes authority to perform a particular act, the citizen is not thereby entitled to assume that he possesses that authority.<sup>156</sup> Again, if government is not in ordinary circumstances obliged to consider the representations of those whose interests are potentially affected before making a decision on a particular matter, it may be thought unjustifiable to subject it to an obligation to consider the representations of a particular citizen merely because of the unauthorised actions of its officers. However, the difficulty with these arguments is that they have the potential to create hardship. The concept of a legitimate expectation is a flexible one, and it is to be hoped that the courts will adopt a flexible approach to its application where by so doing they can afford a measure of protection to reasonable expectations generated by unauthorised government information.

Finally, the citizen must in every case be able to establish that, as a result of the information provided to him, he enjoyed a legitimate expectation of being accorded a hearing. That this may be difficult is demonstrated by R. v. Secretary of State for the Home Department, ex p. Khan, where Watkins L.J. dissented on the ground that the circular published by the Home Office was intended merely as a "helpful guide"<sup>157</sup> to prospective adopters, and contained nothing sufficient to ground a legitimate expectation that a hearing would be accorded before the Secretary of State adopted any criteria other than those there set out.



**3. Abuse Of Discretion: Substantive Fairness, Relevant Considerations And Reasonableness**

The possibility of overturning for abuse of discretion government decisions which depart from information earlier provided to citizens has received greater academic recognition than has the use for the same purpose of the duty to act fairly.<sup>158</sup> However, the cases in which this possibility has received judicial approval have been remarkably few. All are English, and all are recent.

The first indication that inconsistency on the part of government might in itself amount to an abuse of discretion came in the decision of the Court of Appeal in H.T.V. Ltd. v. Price Commission.<sup>159</sup> The plaintiff, which was a television programme contractor, was obliged under contracts with the Independent Broadcasting Authority (IBA) to make payments called the Exchequer levy, which the IBA passed on to the Exchequer. In its returns of profit margin to the Price Commission under the Counter-Inflation Act 1973, the plaintiff treated this levy as part of its costs and deducted it in order to arrive at a final profit figure. By letter of June 1973 the Price Commission informed the plaintiff that it was of the opinion that the plaintiff was right to treat the levy in this way. From June 1974 the plaintiff also took the levy into account in calculating its total costs per unit of output, for the purpose of determining the permitted level of its advertising charges. The Commission took the view that the levy was not a cost for that purpose. The plaintiff sought a declaration that it was, and the declaration was granted by the Court of Appeal. All three members of the court held that it was the duty of the Commission to act consistently and fairly in its

dealings with manufacturers and traders.<sup>160</sup> Lord Denning M.R. acknowledged the principle that a statutory public authority cannot be estopped from doing its statutory duty. "But that is subject to the qualification that it must not misuse its powers: and it is a misuse of power for it to act unfairly or unjustly towards a private citizen when there is no pressing public interest to warrant it."<sup>161</sup> Since the Commission had previously and as a matter of regularity treated the Exchequer levy as properly included in the plaintiff's costs, it had acted inconsistently and unfairly in refusing to treat the levy as a cost for the purpose of calculating total costs per unit of output.

The importance of the H.T.V. case lay in its elevation of the duty to act fairly from a procedural to a substantive requirement. Inconsistency leading to unfairness could, like unreasonableness, failure to take into account all relevant considerations and improper purpose, form a ground of judicial review for abuse of discretion. The implications of the case for the present discussion are clear: a government decision inconsistent with information earlier provided by government to a citizen is potentially open to challenge by way of judicial review simply by virtue of its inconsistency with that information. The effects of a successful challenge would of course be far more extensive than those of overturning a decision for breach of the duty to act fairly, for the unlawfulness would lie not merely in the failure to accord a hearing to interested persons, but in the very departure by government from its own information. Used in this way, the duty to act fairly would truly have the effect of holding government to its information.

However, the decision failed to generate an explosion of litigation, its impact being at first confined largely to the realm of academic speculation. Lord Denning M.R. himself followed it in R. v. Basildon District Council, ex p. Brown.<sup>162</sup> But in Laker Airways Ltd. v. Department of Trade<sup>163</sup>, both Roskill L.J.<sup>164</sup> and Lawton L.J.<sup>165</sup> made it clear that the law will normally not operate to place substantive restrictions upon the ability of government to formulate and change its policy. That was precisely what the H.T.V. case appeared to threaten. The novel version of the duty to act fairly there employed would potentially be able, like estoppel, actually to remove from government its powers of decision. It was perhaps for this reason that later courts showed little inclination to invest the duty to act fairly with a substantive application, preferring instead to concentrate on its procedural aspects.

This situation may be expected to change as a result of the decision of the House of Lords in R. v. Inland Revenue Commissioners, ex p. Preston<sup>166</sup>, in which the H.T.V. case was approved and applied. The case arose out of a request made in 1978 by an inspector of the Special Investigation Section of the Inland Revenue for a meeting with the applicant in order to discuss his tax returns for two earlier years. Of particular concern to the inspector were the claims for tax relief made in those returns, which arose from certain transactions in the shares of a company in which the applicant had held half of the share capital. There was an exchange of correspondence, and eventually it was agreed that the applicant, after furnishing certain relevant information required by the Inland Revenue, would withdraw his claims for relief in return for the settlement by the Inland Revenue of his tax liability for

the relevant years and its agreement to raise no further inquiries into the share transactions. In reliance upon that agreement the taxpayer withdrew his claims for relief. In 1979 the Inland Revenue received information which led it to suspect that the share transactions had been part of a tax avoidance scheme and that the information provided by the taxpayer in 1978 had been less than full and frank. In 1982, by which time it was too late for the applicant to make his claims for tax relief, it issued a notice under s. 460 of the Income and Corporation Taxes Act 1970<sup>167</sup> cancelling the tax advantage gained by the applicant. The applicant sought judicial review of this decision, seeking inter alia a declaration that the Inland Revenue was not entitled to assess him further in respect of the shares.

He succeeded before Woolf J.<sup>168</sup>, who held that in deciding whether or not to issue a notice under s. 460 the Inland Revenue was obliged to have regard to the fairness of taking that course. On the material before the court, the decision to issue the s. 460 notice had been made without regard to the events of 1978, which the Inland Revenue had treated as irrelevant. This amounted to a failure to take into account all relevant considerations. "Whereas it is not open to an officer of the Revenue to make it impossible at a later date for a statutory discretion to be exercised, what it is possible for the Revenue to do is to behave in such a manner that the results of their conduct at one stage have to be taken into account at a later stage when it becomes necessary to assess whether or not to take a particular course of conduct."<sup>169</sup>

This is a much more orthodox application of the principles governing abuse of discretion than that represented by the H.T.V. case.

It does not elevate fairness to the level of a substantive duty, so that inconsistency on the part of government automatically constitutes an abuse of discretion, but rather treats fairness as a factor which government is bound to take into account during its decision-making. Its omission to do so - whatever the content of the resulting decision - will amount to a failure to take into account a relevant consideration, and so to an abuse of discretion. In other words, the concept of abuse of discretion is able in this context, like the duty to act fairly, to ensure that the interests of the particular citizen are taken into account before a decision is made; but it stops short of asserting the interests of that citizen over all others.

But Woolf J. was prepared to go further. If he was wrong on his first point, he nonetheless felt able to overturn the Inland Revenue's decision to issue the s. 460 notice on the ground that the discretion to issue it had been exercised unreasonably, nothing in the circumstances of 1982 justifying a decision to initiate further inquiries. This approach represents a deeper penetration into the substance of the Inland Revenue's decision, but one which still respects the Revenue's decision-making role. For it has already been pointed out that the requirement of reasonableness exerts a relatively low degree of control over the content of government decisions. Unreasonableness is synonymous with "irrationality"<sup>170</sup>, and applies to a decision "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."<sup>171</sup> There is, of course, scope for differences in judicial assessments of the irrationality or outrageousness of

particular government decisions, but not such as to turn the concept of reasonableness into a means of passing judgment on the merits of those decisions. Moreover, such differences are an inevitable attribute of the judicial process. Even allowing for divergent judicial approaches, the requirement of reasonableness poses no threat to the decision-making role of government, and is capable of providing a coherent standard for the review by the courts of government decisions. As such, its application in this context is compatible with the argument<sup>172</sup> that the courts should refrain from reviewing such decisions - whether through estoppel, judicial review or otherwise - in the absence of an objective or accepted standard of assessment.

The careful decision of Woolf J. was successfully appealed by the Inland Revenue to the Court of Appeal,<sup>173</sup> where Lawton L.J.<sup>174</sup> dismissed in a brief paragraph the arguments raised by the applicant. It was held that the decision of the Inland Revenue to issue a s. 460 notice was reasonable in light of the applicant's omission in 1978 to make a full disclosure of the relevant facts.<sup>175</sup> The court did not address the argument that the failure of the Inland Revenue to take into account the events of 1978 itself amounted to an abuse of discretion.

Dissatisfied with the decision of the Court of Appeal, the applicant appealed the matter further, to the House of Lords.<sup>176</sup> His appeal was dismissed, but not before their Lordships had dealt at some length with important matters of principle. Lord Templeman, in the leading speech<sup>177</sup>, held that the Inland Revenue owes to each individual taxpayer a duty of fairness.<sup>178</sup> But no taxpayer can complain of a breach of that duty merely because the Revenue decides to perform a statutory

duty or to exercise a statutory discretion; the courts can intervene by way of judicial review only if satisfied that the unfairness of which the applicant complains amounts to an abuse of power.<sup>179</sup> His Lordship went on to consider in some detail the H.T.V. case, which he explained as turning upon an error of law whereby the Price Commission misconstrued the code which they were intending to enforce. "If the Price Commission had not misconstrued the code, they would not have acted 'inconsistently and unfairly'."<sup>180</sup> However, his Lordship also interpreted the H.T.V. case as suggesting that the Inland Revenue was "guilty of 'unfairness' amounting to an abuse of power if... [its] conduct would, in the case of an authority other than a Crown authority, entitle the appellant to an injunction or damages based on breach of contract or estoppel by representation."<sup>181</sup> He continued: "In principle I see no reason why the appellant should not be entitled to judicial review of a decision taken by the [Inland Revenue] if that decision is unfair to the appellant because the conduct of the [Inland Revenue] is equivalent to a breach of contract or a breach of representation. Such a decision falls within the ambit of an abuse of power for which in the present case judicial review is the sole remedy and an appropriate remedy. There may be cases in which conduct which savours of breach of conduct [sic] or breach of representation does not constitute an abuse of power; there may be circumstances in which the court in its discretion might not grant relief by judicial review notwithstanding conduct which savours of breach of contract or breach of representation. In the present case, however, I consider that the appellant is entitled to relief by way of judicial review for 'unfairness' amounting to abuse of power if the [Inland

Revenue has] been guilty of conduct equivalent to a breach of contract or breach of representations on [its] part."<sup>182</sup> His Lordship then analysed the relevant correspondence, concluding that on its true construction it contained no agreement or representation which made it unfair for the Inland Revenue subsequently to issue a s. 460 notice.<sup>183</sup>

The importance of the decision of the House of Lords in Preston is that it establishes beyond doubt for English law the proposition first stated in the H.T.V. case, namely that unfairness in the performance of a statutory duty or in the exercise of a statutory discretion is capable of constituting an abuse of power and so of providing a ground for judicial review. The decision also makes it clear that it is possible to offend against the duty of fairness by conduct constituting or equivalent to breach of a representation.<sup>184</sup> Indeed, at one point in his speech Lord Templeman appears to relate the requirements for a breach of the duty to the concepts familiar from private law of breach of contract and estoppel by representation.<sup>185</sup> This is unsatisfactory. If the availability of judicial review for substantive unfairness is made dependent upon the satisfaction of intricate concepts of private law, the potential flexibility of the duty of fairness as an instrument for administrative control will be lost. In particular, to tie the duty to the doctrine of estoppel would be unnecessarily to perpetuate the technicalities which restrict the use of that doctrine against government. However, the remainder of his Lordship's speech, including his analysis of the relevant correspondence, happily fails to follow up his earlier suggestion.

Lord Templeman took care to indicate that there may arise cases



in which conduct savouring of a breach of contract or of a breach of representation is held not to amount to unfairness, and so to an abuse of power, or in which the court in its discretion refuses relief notwithstanding conduct constituting such unfairness.<sup>187</sup> His Lordship gave no indication of when these discretionary limitations of the duty of fairness might apply, but it is likely that they will prove of greatest significance in cases where the applicant complains of a decision which is value-laden. It has already been pointed out<sup>188</sup> that the courts pitch at a relatively low level the control which they exercise over the content of government decisions through the medium of judicial review, in order to ensure that they do not rob government of its powers of decision. There is no reason to suppose that the recognition by the House of Lords of the duty of fairness represents or will lead to a dramatic reappraisal of the boundaries of judicial control. If this is so, then the courts will need to develop a means of ensuring that the duty of fairness does not operate effectively to deprive government of its decision-making role. This it might do where the decision of which the applicant complains is designed to promote or secure interests which conflict with his own. In such a case, for the courts to overturn the decision on the ground of unfairness would be for them effectively to usurp the role of government, by determining the priority of competing interests represented in society. This is precisely the difficulty which the courts encountered when faced with attempts by citizens to hold government bound by estoppel, and in response to which they developed the duty/discretion principle.<sup>189</sup> In the case of the duty of fairness, it appears that the safeguard will lie in the discretion of the courts to

refuse to classify a breach of representation as unfair, or to refuse relief for acknowledged unfairness.<sup>190</sup> On its facts, Preston itself gave rise to no such problem. The effect of quashing the Inland Revenue's decision would have been similar to that of allowing the estoppel in Robertson v. Minister of Pensions; that is, the loss would have been spread in minute proportions over the taxpayers in general, as opposed to being borne by the applicant alone.<sup>191</sup> In the absence of more than minimal harm to interests which conflicted with those of the applicant, there was no reason for the court to feel anxiety about usurping the Revenue's decision-making role.

The decision of the House of Lords concentrates on the duty of fairness, and contains no consideration of the arguments founded upon more orthodox heads of review that were raised at first instance and accepted by Woolf J. However, it is important that these heads of review are not overlooked, as they are capable of providing alternative grounds upon which government inconsistency may be challenged. Thus it is conceivable that the courts might refuse to overturn for unfairness a government decision which is inconsistent with a representation earlier made to the applicant, but might be prepared to overturn the same decision on the ground that the representation was a material consideration which was not taken into account in the decision-making process. The potential in this context of the sorts of argument which succeeded before Woolf J. is further illustrated by the judgment of Dunn L.J. in R. v. Secretary of State for the Home Department, ex p. Khan<sup>192</sup>, the facts of which have already been set out. Although that case was

treated both by the applicant and Watkins L.J.J. as turning on the issue of procedural fairness, Dunn L.J. concentrated rather on the substantive content of the Secretary of State's decision. The learned judge held that, in refusing the child leave to enter the United Kingdom, the Secretary of State had exercised a discretion which was subject to judicial review, and his exercise of that discretion had been unreasonable. "Although the circular letter did not create an estoppel, the Home Secretary set out therein for the benefit of applicants the matters to be taken into consideration, and then reached his decision on a consideration which on his own showing was irrelevant. In so doing in my judgment he... acted unreasonably."<sup>193</sup>

However, the impact in this area of the requirement of reasonableness is likely to be considerably diminished, after Preston, as a result of the recognition of the duty of fairness. For it will be otiose for a citizen to argue that a government decision is unreasonable which is inconsistent with information earlier provided to him, when that very inconsistency is itself sufficient to render the decision unfair. Moreover, the ground of review based upon the requirement that all relevant considerations be taken into account may be expected to play a role subsidiary to that of the duty of fairness in the arguments of those misled by government information. The reason is that the protection which it is able to afford, like that afforded by the duty to act fairly, is not absolute. It may at most require government to take into account in its decision-making the fact that information has already been provided to the citizen; provided it does so, government is free to reach what it regards as an appropriate decision, even one which is inconsistent with that information.

It is important to bear in mind that, whatever the ground of review upon which the aggrieved citizen relies, he will be unable merely by using the medium of judicial review rather than that of estoppel to escape the operation of the jurisdictional principle. In this context, too, that principle has a role to play. That is, the fact that certain information has previously been provided to a citizen cannot render an inconsistent government decision unfair or contribute to a finding that that decision is unreasonable, nor can it be a relevant consideration during the decision-making process, where a decision in accordance with the information would itself be ultra vires. To hold otherwise would be effectively to substitute one ultra vires decision for another.

Furthermore, the operation of the doctrine of agency may create difficulties in this context, too. It would of course be possible for information provided without authority by a government officer to be treated by the courts as rendering an inconsistent later decision unfair or unreasonable, or as constituting a relevant consideration to be taken into account during the decision-making process. The arguments on either side will be similar to those considered above in relation to the impact of the doctrine of agency on the use to control government inconsistency of the duty to act fairly.<sup>194</sup> However, it is likely to prove extremely difficult to persuade the courts to overturn a government decision on the ground that it is unfair or unreasonable, simply because it is inconsistent with unauthorized information earlier provided to the citizen. Moreover, the weight to be attached to the provision of such information as a relevant consideration would be a matter for government.

#### 4. Assessment

The authorities discussed in the two preceding sections evidence a welcome willingness on the part of English courts to expand the principles of Administrative law, so as to provide a solution to the problems generated by misleading government information. In particular, the evolving duties of procedural and substantive fairness appear capable of offering a far more satisfactory means than estoppel of dealing with government inconsistency. The impact of these duties is still to be fully felt, but already it is clear that they have a potential width and flexibility not possessed by the doctrine of estoppel, subject as it is to rigid and detailed requirements. Thus there is every reason to suppose that the duty to act fairly and the duty of fairness will be called into play even by government information in the form of a representation of law. Again, the rules of standing will ensure that the benefit of the duties is not confined only to those who suffer as a result of their breach a detriment which is quantifiable in financial terms. Furthermore, the development of the two duties offers the prospect that Canadian citizens may ultimately be able to evade the effect of the rule applied in Canada that estoppel cannot bind the Crown.

However, the principles of judicial review fall far short of allowing an unrestricted attack on government decisions which are inconsistent with information earlier provided to citizens. The jurisdictional principle will apply in this context, too. In the case of the duty of fairness, the courts may be expected to develop principles to perform the role, performed in relation to estoppel by the

duty/discretion principle, of ensuring that they do not "second-guess" government decisions. Finally, the use of judicial review may not supply an answer to the difficulties associated with the unauthorized provision of information by government officers. It is clear that the duty to act fairly, the duty of fairness, and the requirements of reasonableness and that all relevant considerations be taken into account are unable, together or individually, to provide a universal panacea for the problem of government inconsistency. But it is also clear that each has the potential in an appropriate case to achieve results far more consonant with fundamental notions of administrative justice than does the doctrine of estoppel. Estoppel is a child of private law, designed to regulate the rights of individual litigants and applicable only in closely defined circumstances. It is unable to adapt itself satisfactorily to the situation where the alleged representor is government, a body with dual roles as the provider of information to citizens on an immense variety of subjects and as the maker of decisions as to the priority of competing interests within society. The inconsistencies which result from the performance of these roles, when a government decision conflicts with information earlier provided to the citizen, present a problem of administrative justice, which requires resolution through legal principles specifically developed for that purpose. English courts are currently answering that challenge; it is to be hoped that their lead will be followed elsewhere in the Commonwealth.

FOOTNOTES

1. Also known as estoppel in pais: Spencer Bower, G., and Turner, Sir A.K., The Law Relating to Estoppel by Representation (3rd ed.; London, Butterworths, 1977), pp. 1, 2.
2. Estoppel by representation is merely one form of estoppel. See further Spencer Bower and Turner, op. cit. note 1, pp. 1, 2, 26, 27.
3. Ibid., pp. 7-10.
4. Ibid., p. 7.
5. [1921] 1 A.C. 376, at 386.
6. Spencer Bower and Turner, op. cit. note 1, pp. 4-6; Greenwood v. Martins Bank Limited [1933] A.C. 51, at 57 per Lord Tomlin.
7. Spencer Bower and Turner, op. cit. note 1, p. 20.
8. (1878) 3 App. Cas. 1004, at 1026.
9. Sir Edward Coke's Case (1624) Godb. 289, at 299; Lord Sheffield v. Ratcliffe (1624) Hob. 333, at 339; R. v. Delme (1714) 10 Mod. 199, at 200.
10. Cf. Bridges v. Longman (1857) 24 Beav. 27; 53 E.R. 267; Attorney-General of Victoria v. Ettershank (1875) L.R. 6 P.C. 354 (P.C.); Davenport v. The Queen (1877) 3 A.C. 115 (P.C.); Peterson v. The Queen [1889] 2 Ex. C.R. 67; R. v. Paulson [1921] 1 A.C. 271 (P.C.) (Crown subject to doctrine of waiver in relation to forfeiture of leases); Plimmer v. Wellington Corporation (1884) 9 App. Cas. 699; 53 L.J.P.C. 105 (P.C.); Attorney-General to the Prince of Wales v. Collom [1916] 2 K.B. 193 (Crown subject to doctrine of proprietary estoppel); Attorney-General for Trinidad and Tobago v. Bourne [1895] A.C. 83 (P.C.) (Crown subject to equitable defence based on existence of equitable rights under a contract for sale of property); cf. also Attorney-General for Ceylon v. de Silva [1953] A.C. 461 (Crown may acquire agents by estoppel, through doctrine of ostensible authority).
11. [1916] 2 K.B. 193.
12. Ibid., at 204.
13. [1949] 1 K.B. 227, at 231; [1948] 2 All E.R. 767, at 770.
14. Cf. Howell v. Falmouth Boat Construction Co. Ltd. [1951] A.C. 837, at 845 per Lord Simonds; at 849 per Lord Normand.

15. [1977] 1 Q.B. 643.
16. Unrep., December 20th, 1984 (C.A.).
17. Transcript, p. 22.
18. Cf. The Queen v. Victoria Lumber & Manufacturing Co. (1897) 5 B.C.R. 288, at 304 per Walkem J.; The Queen v. St. Louis (1897) 5 Ex. C.R. 330, at 351 per Burbidge J.; Bank of Montreal v. The King (1907) 38 S.C.R. 258; May v. The King (1913) 14 Ex. C.R. 341, at 348 per Audette J.; Western Vinegars Ltd. v. Minister of National Revenue [1938] Ex. C.R. 39; Attorney-General of Canada v. C.C. Fields & Co. [1943] 1 D.L.R. 434; No. 358 and Minister of National Revenue (1956) 16 Tax A.B.C. 14; Gamble v. The Queen [1960] Ex. C.R. 138; Re Director of Soldier Settlement of Canada (1971) 18 D.L.R. (3d) 94; Provincial Bank of Canada v. Daigle (1980) 31 N.B.R. (2d) 236.
19. R. v. Gooderham & Worts Ltd. [1928] 3 D.L.R. 109, at 133 per Grant J.A.; Queen Victoria Niagara Falls Park Commissioners v. International Railway Co. [1928] 4 D.L.R. 755, at 769 per Grant J.A.; The King v. Canadian Pacific Railway Co. [1930] Ex. C.R. 26, at 37 per Audette J.
20. Lyman, S., Estoppel and the Crown (1978) 9 Man. L.J. 15.
21. E.g. Western Vinegars Ltd. v. Minister of National Revenue, supra note 18.
22. E.g. Attorney-General of Canada v. C.C. Fields & Co. and Re Director of Soldier Settlement of Canada, supra note 18.
23. Cf. Foulkes, D., Administrative Law (5th ed.; London, Butterworths, 1982), p. 11.
24. Cf. Wade, H.W.R., Administrative Law (5th ed.; Oxford, Clarendon Press, 1982), p. 219; Foulkes, op. cit. note 23, p. 173; Bradley, A.W., Administrative Justice and the Binding Effect of Official Acts (1981) 34 C.L.P. 1, 12.
25. Cf. Wade, op. cit. note 24, pp. 38, 39.
26. Cf. Craig, P.P., Administrative Law (London, Sweet & Maxwell, 1983), p. 568; Attorney-General for Ceylon v. de Silva [1953] A.C. 461, at 481.
27. Cf. Kennedy v. Minister of National Revenue [1929] Ex. C.R. 36 (Can.); Gillies Bros. Ltd. v. The King [1947] 2 D.L.R. 769 (Can.); Attorney-General v. Municipal Council of Sydney (1920) 20 S.R. (N.S.W.) 46 (Aust.); Re Jauncey [1980] Q.R. 335 (Aust.); Wormald v. Gioia [1981] 26 S.A.S.R. 237 (Aust.); Salisbury City Council v. Donner, 1958 (2) S.A. 368 (S. Rhodesia).



28. [1950] 1 K.B. 148.
29. Ibid., at 153.
30. [1967] 2 All E.R. 1041.
31. [1971] 3 All E.R. 743.
32. Cf. Wells v. Minister of Housing and Local Government, supra note 30, at 1044 per Lord Denning M.R.
33. Op. cit. note 24, p. 13.
34. Wells v. Minister of Housing and Local Government, supra note 30, at 1050.
35. Cp. Andrews, J.A., Estoppels Against Statutes (1966) 29 M.L.R. 1, 8; Laker Airways Ltd. v. Department of Trade, supra note 15, at 707 per Lord Denning M.R.
36. Supra note 13. See also Crabb v. Arun District Council [1976] Ch. 179; Laker Airways Ltd. v. Department of Trade, supra note 15, at 707 per Lord Denning M.R.
37. Op. cit. note 24, p. 3.
38. Supra note 14.
39. Op. cit. note 24, p. 4.
40. Craig, op. cit. note 26, p. 570.
41. Western Fish Products Ltd. v. Penwith District Council [1981] 2 All E.R. 204, 221.
42. Craig, op. cit. note 26, p. 570.
43. Ibid.
44. Ibid., p. 572.
45. Ibid., p. 575.
46. Craig, P.P., Representations By Public Bodies (1977) 93 L.Q.R. 398, 417.
47. Cf. Bradley, op. cit. note 24, p. 13; Fazal, M.A., Reliability of Official Acts and Advice [1972] P.L. 43, 55-57.
48. Op. cit. note 24, p. 13; and see Fazal, op. cit. note 47.

49. Supra note 16. The decision is being appealed to the House of Lords.
50. The official at the Secretariat who dealt with such applications on behalf of the Governor.
51. Transcript, p. 16.
52. Act No. 4, 1901, as amended.
53. Report of Commonwealth Ombudsman 1979 (Canberra, Australian Government Publishing Service, 1979), p. 4.
54. Gregory, R., and Hutcheson, P., The Parliamentary Ombudsman: A Study In The Control of Administrative Action (London, G. Allen & Unwin, 1975), pp. 197-200; Gammie, M., Revenue Practice: A Suitable Case for Treatment? [1980] B.T.R. 304, 308.
55. Estoppel acts in personam: Spencer Bower and Turner, op. cit. note 1, pp. 16-19.
56. It is not suggested that any third party interests were adversely affected by the actual decision in Gowa.
57. Or where it would effectively dispense with a statutory requirement: Millett v. The Queen [1954] Ex. C.R. 562; Gamble v. The Queen [1960] Ex. C.R. 138.
58. [1937] A.C. 610; [1937] 1 W.W.R. 591. See also Woon v. Minister of National Revenue [1951] Ex. C.R. 18 (Can.); Joseph v. Minister of Manpower and Immigration, unrep., July 11th, 1983 (Fed. C.A.) (Can.); Sunderland Corporation v. Priestman [1927] 2 Ch. 107 (E.); State of South Australia v. A.T.S.A. Pty. Ltd. (1980) 29 A.L.R. 367 (Aust.); Coffs Harbour Shire Council v. Ben Hall Industries Pty. Ltd. (1983) 48 L.G.R.A. 391 (Aust.); Taranaki Electric-Power Board v. Proprietors of Puketapu 3A Block Incorporated [1958] N.Z.L.R. 297 (N.Z.); Durban City Council v. Glenore Supermarket and Cafe, 1981 (1) S.A. 470 (S.A.).
59. [1937] A.C. 610, at 620; [1937] 1 W.W.R. 591, at 596.
60. Millett v. The Queen, supra note 57; Grevas v. The Queen (1957) 10 D.L.R. (2d) 500; Howell v. Falmouth Boat Construction Co. Ltd., supra note 14.
61. [1962] 1 Q.B. 416. See also Re Chenoweth (1963) 45 W.W.R. 364 (Can.); Re McDonogh (1978) 7 A.R. 412 (Can.); Rootkin v. Kent County Council [1981] 2 All E.R. 227 (E.); Sunderland Corporation v. Priestman, supra note 58 (E.); N.S.W. Trotting Club v. Glebe Municipal Council (1937) L.G.R. (N.S.W.) 121 (Aust.); Jurkovic v. Corporation of the City of Port Adelaide (1979) 41 L.G.R.A. 71 (Aust.); Union S.S. Co. of New Zealand Ltd. v. Commissioner of Inland Revenue [1962] N.Z.L.R. 656 (N.Z.).

62. [1962] 1 Q.B. 416, at 423, 424.
63. Cf. Wade, op. cit. note 24, pp. 344-46.
64. The effect of the duty/discretion principle.
65. The effect of the jurisdictional principle.
66. Supra section A3.
67. [1985] 2 W.L.R. 836.
68. But note the discretionary limitations on unfairness as a ground of substantive review, indicated by Lord Templeman ibid., at 852, and discussed infra, section B3.
69. Infra, sections B1-B4.
70. Cf. [1937] A.C. 610, at 620; [1937] 1 W.W.R. 591, at 596.
71. Supra Part I, section 4(d).
72. 1981 (1) S.A. 470 (Thirion J.).
73. Ibid., at 479.
74. Cf. Gillies Bros. Ltd. v. The King [1947] 2 D.L.R. 769 (Can.); Kogarah Municipal Council v. Johnstone (1979) 41 L.G.R.A. 366 (Aust.); F.N. Eckold Pty. Ltd. v. Auburn Municipal Council (1975) 34 L.G.R.A. 114 (Aust.).
75. Supra, Part I, section 6(c).
76. Cf. Schweiker v. Hansen (1981) 101 S. Ct. 1468, at 1470; Heckler v. Community Health Services of Crawford Cty. Inc. (1984) 104 S. Ct. 2218, at 2227; cp. Schweiker v. Hansen at 1473 per Justices Marshall and Brennan (diss.).
77. Cf. Salisbury City Council v. Donner, 1958 (2) S.A. 368 (S. Rhodesia); F.N. Eckold Pty. Ltd. v. Auburn Municipal Council (1975) 34 L.G.R.A. 114 (N.S.W.).
78. (1961) 81 S. Ct. 1336.
79. [1982] J.P.L. 122. Cf. also Re McDonogh (1978) 7 A.R. 412 (Can.); Western Fish Products Ltd. v. Penwith District Council [1981] 2 All E.R. 204 (E.); State of South Australia v. A.T.S.A. Pty. Ltd. (1980) 29 A.L.R. 367, at 396, 397 per Williams A.J. (Aust.).
80. Spencer Bower and Turner, op. cit. note 1, pp. 38, 39.
81. [1947] 2 D.L.R. 769.

82. [1981] 26 S.A.S.R. 237. Cf. also Southend-On-Sea Corporation v. Hodgson (Wickford) Ltd., supra note 61 (E).
83. Supra, Part I, section 3.
84. Supra, Part I, section 6(d).
85. Spencer Bower and Turner, op. cit. note 1, p. 375.
86. Supra note 30 (E).
87. Cp. ibid., at 1050 per Russell L.J. (diss.).
88. Spencer Bower and Turner, op. cit. note 1, pp. 94, 95.
89. [1935] S.C.R. 519; [1935] 4 D.L.R. 196; reversed on other grounds by the Privy Council, [1937] A.C. 610; [1937] 1 W.W.R. 591.
90. (1977) 20 N.B.R. (2d) 553 (N.B.S.C.).
91. 1958 (2) S.A. 368.
92. Cf. also Taranaki Electric-Power Board v. Proprietors of Puketapu 3A Block Incorporated [1958] N.Z.L.R. 297 (N.Z.).
93. Spencer Bower and Turner, op. cit. note 1, pp. 28, 101.
94. Ibid., p. 104.
95. [1981] 2 All E.R. 227.
96. [1949] 1 K.B. 227; [1948] 2 All E.R. 767.
97. Ibid., at 232, 770.
98. See references supra note 14; and see Attorney-General for Ceylon v. de Silva, supra note 10.
99. Spencer Bower and Turner, op. cit. note 1, p. 182 et seq.
100. Cf. Attorney-General for Ceylon v. de Silva, supra note 10; J.E. Verreault Fils Ltée v. Attorney-General for Quebec (1976) 57 D.L.R. (3d) 403; Meates v. Attorney-General [1979] 1 N.Z.L.R. 415, at 462 per Davison C.J.
101. Cf. Craig, op. cit. note 26, p. 561.
102. Cf. Rama Corp. Ltd. v. Proved Tin & General Investments Ltd. [1952] 1 All E.R. 554, at 556 per Slade J.

103. [1964] 2 Q.B. 481, at 505.
104. See cases cited supra note 98.
105. [1971] 1 Q.B. 222; [1970] 3 All E.R. 496. This case must be read in the light of the subsequent decision of the Court of Appeal in Western Fish Products Ltd. v. Penwith District Council, supra note 41.
106. Op. cit. note 24, pp. 231, 232.
107. Namely North Western Gas Board v. Manchester Corporation [1964] 1 W.L.R. 64; Algar v. Middlesex County Council [1945] 2 All E.R. 243.
108. Cf. e.g. Crabb v. Arun District Council [1976] Ch. 179, discussed by Bradley, op. cit. note 24, pp. 7, 8; and cp. Attorney-General v. Municipal Council of Sydney (1920) 20 S.R. (N.S.W.) 46; New South Wales Trotting Club v. Glebe Municipal Council (1937) L.G.R. (N.S.W.) 121; Gillies Bros. Ltd. v. The King [1947] 2 D.L.R. 769.
109. Supra, Part I, section 4(d).
110. (1832) 131 E.R. 563.
111. Ibid., at 574.
112. [1900] 1 Ch. 695 (C.A.).
113. Ibid., at 705.
114. Cf. Wade, op. cit. note 24, p. 344; Attorney-General for Ceylon v. de Silva, supra note 10, at 480.
115. Supra, section A3(a).
116. Op. cit. note 24, p. 15.
117. Supra, section A1.
118. Supra note 41.
119. Ibid., at 221.
120. Newbury District Council v. Secretary of State for the Environment [1980] 1 All E.R. 731, at 752, 753; cf. also ibid., at 744 per Lord Fraser.
121. Bradley, op. cit. note 24, p. 1.
122. To be fair to Bradley, he does in fact devote some consideration to the duty to act fairly: ibid., pp. 18, 19.

123. Parliamentary Commissioner Act 1967 (c. 13).
124. Ibid., s. 5.
125. Bradley, op. cit. note 24, p. 9.
126. Cf. De Smith, S.A., Judicial Review of Administrative Action (4th ed.; London, Stevens & Sons Limited, 1980), p. 105; Wade, op. cit. note 24, pp. 83-86, 345, 346.
127. Cf. Bradley, op. cit. note 24, p. 11.
128. Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd. [1982] A.C. 617, at 652; [1981] 2 All E.R. 93, at 112 per Lord Scarman.
129. Op. cit. note 24, p. 11.
130. For detailed discussion, see De Smith, op. cit. note 126, pp. 238-40; Wade, op. cit. note 24, pp. 465-68.
131. [1972] 2 Q.B. 299; [1972] 2 All E.R. 589 (C.A.).
132. Ibid., at 308, 594.
133. Op. cit. note 24, p. 340.
134. Supra note 131, at 310, 596 per Roskill L.J.
135. Cf. the more moderate formulation of Lord Denning M.R. himself in Laker Airways Ltd. v. Department of Trade, supra note 15, at 707. Cp. however R. v. Secretary of State for the Home Department, ex p. Khan [1985] 1 All E.R. 40, at 46, 48 per Parker L.J.
136. Discussed infra.
137. Cf. Attorney-General of Hong Kong v. Ng Yuen Shiu [1983] 2 A.C. 629, at 637; [1983] 2 All E.R. 346, at 350; Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All E.R. 935, at 944 per Lord Fraser.
138. [1983] 2 A.C. 629; [1983] 2 All E.R. 346.
139. Ibid., at 638, 351.
140. (1983) 49 A.L.R. 123, distinguished in Minister for Immigration and Ethnic Affairs v. Arslan (1984) 55 A.L.R. 361 (F.C.A.).
141. Ibid., at 133.

142. Ibid.
143. [1985] 1 All E.R. 40 (C.A.).
144. Parker and Dunn L.J.J., Watkins L.J. dissenting.
145. Supra note 143, at 42.
146. The phrase "legitimate expectation" is to be preferred to "reasonable expectation": Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All E.R. 935, at 944 per Lord Fraser; at 949 per Lord Diplock.
147. [1984] 3 All E.R. 935 (H.L.).
148. Ibid., at 943-44 per Lord Fraser; at 952 per Lord Diplock; at 957 per Lord Roskill.
149. There is an ambiguity inherent in the concept of the "legitimate expectation", which is sometimes used to refer to the expectation of a hearing, and sometimes to the expectation of a benefit or advantage which has been taken away without a hearing: Wade, op. cit. note 24, p. 465. Where the benefit or advantage is itself a hearing, as in Attorney-General of Hong Kong v. Ng Yuen Shiu and Cole v. Cunningham, there is no material distinction between the two uses of the concept.
150. R. v. Liverpool Corporation, ex p. Liverpool Taxi Fleet Operators' Association, supra note 131, at 311, 597 per Roskill L.J.
151. Cf. infra, section B3.
152. Quoted in the judgment of the Privy Council, supra note 138, at 639, 352.
153. Supra, Part I, section 4(d).
154. Cf. Attorney-General of Hong Kong v. Ng Yuen Shiu, supra note 138, at 636, 349-50.
155. Supra, section A3(a).
156. Howell v. Falmouth Boat Construction Co. Ltd. [1951] A.C. 837 (H.L.); Attorney-General for Ceylon v. A.D. Silva, supra note 10 (P.C.); cp. Robertson v. Minister of Pensions [1949] 1 K.B. 227; [1948] 2 All E.R. 767.
157. Supra note 143, at 51. Cf. Wade, op. cit. note 24, p. 506.
158. Cf. Wade, op. cit. note 24, pp. 346, 377.

159. [1976] I.C.R. 170 (C.A.).
160. Ibid., at 185 per Lord Denning M.R., at 192 per Scarman L.J.; at 195 per Goff L.J.
161. Ibid., at 185 per Lord Denning M.R.
162. (1981) 79 L.G.R. 655.
163. Supra note 15.
164. Ibid., at 708-09.
165. Ibid., at 728.
166. Supra note 67.
167. 1970 c. 10.
168. [1983] 2 All E.R. 300.
169. Ibid., at 306-307.
170. Council of Civil Service Unions v. Minister for the Civil Service, supra note 147, at 951 per Lord Diplock.
171. Ibid.
172. Supra, Part I, section 4(d).
173. [1984] 3 All E.R. 625.
174. With whom Griffiths and Dillon L.J.J. agreed.
175. Supra note 173, at 631.
176. Supra note 67.
177. With which Lords Scarman, Edmund-Davies, Keith and Brightman agreed, only Lord Scarman delivering separate reasons.
178. Supra note 67, at 850.
179. Ibid.
180. Ibid., at 852.
181. Ibid.
182. Ibid.
183. Ibid., at 854.



184. Ibid., at 852, per Lord Templeman. His Lordship gave no indication of what conduct falling short of an actual breach of a representation will be treated as equivalent thereto for the purposes of the duty of fairness. It may be that the phrase "equivalent to" was intended merely to confirm that the duty embraces implied and inferred, as well as express, representations.
185. Ibid., at 852.
186. Also unsatisfactory is his Lordship's reference to conduct which would, "in the case of an authority other than a Crown authority", found an estoppel by representation (ibid., at 852). It is clear that, in England, estoppel by representation may operate against the Crown: supra, section A2.
187. Ibid., at 852.
188. Supra, Part I, section 4(d).
189. Supra, section A3(b).
190. It would be possible for the courts so to use their discretion as effectively to introduce a balancing test into this area of the law, whereby the unlawfulness of an inconsistent government decision or the availability of relief would depend upon the balance of harm to affected interests. Any such development would be open to the same objection as the balancing test proposed in relation to the jurisdictional principle: supra, section A3(a). However, such a dramatic extension of the control exerted over government through the medium of judicial review is most unlikely to occur.
191. Supra, section A3(a).
192. Supra note 143.
193. Ibid., at 52.
194. Supra, section 82.

PART III

HOLDING GOVERNMENT BOUND: MISLEADING  
GOVERNMENT INFORMATION AND CRIMINAL  
LIABILITY

## 1. Introduction

There is a considerable body of reported criminal cases in which the defendant (D) faced a criminal charge as a result of his reliance upon misleading government information. An issue which has frequently arisen in such cases, and which is the subject of this Part, is whether his misguided reliance affords D, or should afford him, a defence to the charge. In a consideration of that issue, it is first necessary to distinguish two situations, namely that in which the information misled D as to a matter of fact, and that in which it misled him as to a matter of law.

## 2. Mistake Of Fact

Cases in which D was misled by government information as to a matter of fact give rise to fewer difficulties than those involving misleading information as to the law, because of the doctrine of mistake of fact. The traditional view, still maintained in England,<sup>1</sup> was that a mistake of fact provided a defence to a criminal charge where it prevented D from having the requisite mens rea. On this basis, the mistake operated not so much as a "defence", but rather as an application of the normal rules respecting the burden and standard of proof: if mens rea was an ingredient of the offence charged, D could escape conviction by producing evidence sufficient to raise a reasonable doubt whether he committed the actus reus with the necessary state of mind.

The traditional view still holds good in Canada in relation to mens rea offences,<sup>2</sup> but since R. v. City of Sault Ste. Marie<sup>3</sup> it no longer provides a complete explanation of the mistake of fact

doctrine. In that case, Dickson J. rejected the traditional division of offences into those requiring full mens rea and those of absolute liability and introduced a third, intermediate, category of strict liability offences. These "public welfare" offences are subject to no formal mens rea requirement, but D may avoid conviction by proving "due diligence" - either that he reasonably but mistakenly believed in a set of facts which, if true, would have rendered his act or omission innocent, or that he took all reasonable steps to avoid committing the offence.<sup>4</sup> It is clear that D must have been diligent actually in fulfilling the duty owed by law, and not merely in ascertaining its existence.<sup>5</sup> Accordingly, a reasonable mistake as to the facts will operate as a defence, in the true sense of the word, to a charge of committing a strict liability offence if, and only if, it led D to believe that he was actually complying with the relevant law. The defence is applicable whether the mistake is the result of misleading government information or whether it proceeds from some other cause.

However, it follows from the traditional view of mistake of fact, whereby it is a "defence" only if it negatives mens rea, that it cannot operate in relation to offences of absolute liability, the law governing which was left unaffected by R. v. City of Sault Ste. Marie.<sup>6</sup> This is exemplified in the field of misleading government information by R. v. R.R. Clark Associates Ltd.,<sup>7</sup> in which D was charged with failure to file income tax returns contrary to s. 150(2) of the Income Tax Act.<sup>8</sup> Evidence was led of a conversation between Clark, the president of the accused company, and a Department auditor, in which Clark was informed that time would be allowed for late filing. The

court concluded that the offence was one of absolute liability, and accordingly that the conversation could not save D from conviction.

Moreover, mistake of fact is no defence where misleading government information had the result that D was mistaken, not as to the ingredients of the offence, but as to the consequences of committing it. In relation to strict liability offences, this follows from the definition of the due diligence defence whereby D must have believed himself to be complying with the relevant law.<sup>9</sup> It is demonstrated in relation to mens rea offences by the English case R. v. Arrowsmith,<sup>10</sup> where D was arrested while distributing leaflets to British troops urging them to desert or to disobey orders should they be posted to Northern Ireland. A report was submitted to the Director of Public Prosecutions with a view to obtaining his consent to a prosecution under the Incitement to Disaffection Act.<sup>11</sup> No consent was forthcoming, and D's solicitor was informed of that fact. No indication was given of what action the DPP would take should D distribute more leaflets. She did so, and this time the DPP consented to a prosecution. D was convicted, and her appeal was dismissed on the ground that a belief that she would not be prosecuted, even if it had been engendered by the conduct of the DPP, could provide no defence in law.

But the doctrine of mistake of fact enables the courts to deal with only some of the difficulties engendered by misleading government information in the area of the criminal law. More intractable is the situation where D is misled by such information into a mistake of law.

### 3. Mistake Of Law

It is often stated to be a rule of the common law that a mistake of law provides no defence to a criminal charge.<sup>12</sup> This general rule is codified in Canada in relation to Criminal Code<sup>13</sup> offences by s. 19 of that statute, as applied to offences under other federal enactments by s. 27(2) of the Interpretation Act,<sup>14</sup> and to offences under British Columbia statutes by s. 122 of the Offence Act (B.C.).<sup>15</sup> Canadian courts have developed limited exceptions to s. 19, to deal with cases where it was impossible for D to know the law,<sup>16</sup> or where he acted under "colour of right."<sup>17</sup> However, there has been no explicit recognition of the English exception whereby a mistake of law may save D from conviction if it relates to some legal concept involved in the mens rea requisite for the offence.<sup>18</sup>

The wide applicability of s. 19 has led the courts to perform logical contortions in cases involving misleading government information. One such was R. v. MacPhee,<sup>19</sup> where D was charged with being the occupant of a motor vehicle in which he knew there was a restricted weapon, namely a carbine rifle, contrary to s. 94(b) of the Criminal Code.<sup>20</sup> It was held that, as the result of a conversation with an RCMP officer and of his successful application for a firearm registration certificate, D had mistakenly believed that the rifle was not a restricted weapon, and that this was a mistake of fact sufficient to prevent him from having the required mens rea. However, the classification of the mistake as one of fact is extremely dubious, the only question as to which D was mistaken being whether the rifle, whose characteristics were clearly known to him,<sup>21</sup> fell within the definition of "restricted weapon" in s. 82(1) of the Code. Although the

distinction between fact and law is sometimes extremely nebulous,<sup>22</sup> this is surely a question of law. Interestingly, the decision could be justified under the English exception whereby a mistake of law may provide a defence where the mistake is as to a legal concept involved in the requisite mens rea: in R. v. MacPhee, the relevant legal concept was that of a "restricted weapon", for unless it could prove that D knew the rifle to be restricted the Crown could not secure a conviction. Another decision, strange in Canadian terms but justifiable under the English exception, is R. v. Seemar Mines Ltd.,<sup>23</sup> where D was charged with making a false or misleading statement in a certificate required to be filed in connection with a prospectus pursuant to s. 52 of the Securities Act 1966 (Ont.).<sup>24</sup> The prosecution was based upon D's failure to disclose in the prospectus those "persons" who were promoters, but it was proved that D's directors believed, on the basis of an advice letter from the Ontario Securities Commission, that there were no "persons" who qualified as promoters. The charge was dismissed, on the ground that the Crown had failed to show that D knew the statement to be false or misleading, there being no evidence of a lack of reasonable diligence that could have enabled it to acquire that knowledge. The court did not attempt to classify D's mistake, but it is clearly a mistake of law. The mens rea for the offence required D to know that its statement was false or misleading, and therefore required knowledge of the meaning of "promoter" under the relevant legislation; a mistake as to that legal concept was sufficient to prevent D from having the requisite mens rea.

But while some courts have been willing expressly or impliedly to classify mistakes of law as mistakes of fact in order to avoid the strict application of s. 19 of the Code, others have been less flexible.

Thus in R. v. Gallinger<sup>25</sup> it was held to be no defence to a charge of driving a motor vehicle while disqualified that D had obtained advice from the Highway Traffic Board to the effect that his disqualification did not prevent him from driving a motor-cycle. Moreover, even under the English exception, a mistake of law can be a defence only if it negatives mens rea. Just how harsh the law can be in other cases is demonstrated by the older English decision Dennis & Sons Ltd. v. Good,<sup>26</sup> in which D was convicted of having wilfully destroyed the surface of certain public footways in two fields by ploughing them up, contrary to s. 72 of the Highway Act 1835.<sup>27</sup> D had ploughed the footways in compliance with a notice served by the Board of Agriculture, purportedly under the Defence of the Realm Regulations. In fact, the Board had no power to require footways to be ploughed up, and the Divisional Court accordingly dismissed D's appeal on the ground that his mistaken reliance upon the notice could provide no defence.

#### 4. Estoppel

In an attempt to circumvent the limitations on mistake of law as a defence to a criminal charge, practitioners dealing with cases of misleading government information have occasionally resorted to the doctrine of estoppel.<sup>28</sup> Moreover, academic writers have sometimes referred to the possible existence or desirability of a defence of "criminal estoppel" in such cases.<sup>29</sup> But while the phrase is convenient, it is itself misleading, for estoppel has no useful role to play in this area.

The reason most often advanced is that to allow estoppel to



operate in this way would contravene the jurisdictional principle.<sup>30</sup> As has already been pointed out,<sup>31</sup> it is a fundamental limitation on the application of estoppel in civil cases that the doctrine cannot be allowed to operate so as effectively to fix government with an ultra vires decision.<sup>32</sup> The principle is rooted in the doctrine of the separation of powers, which involves the idea that the judiciary should not, through the medium of estoppel or otherwise, allow to be overridden the limitations placed by the legislature on the powers of government.<sup>33</sup> It follows that the principle must apply with equal force in criminal proceedings<sup>34</sup>; indeed, circumstances may readily be envisaged in which the same piece of misleading information might conceivably found a plea of estoppel in both sorts of proceedings,<sup>35</sup> and it would be intolerable for the plea to be rejected in one but allowed in the other. To allow an estoppel defence in criminal proceedings would be to allow the criminal law to be violated; or, to put it another way, to be changed in its application to D by those from whom he received his information.

A second reason why there can be no defence of "criminal estoppel" lies in the proposition that an estoppel cannot be founded upon a statement of law.<sup>36</sup> Thus "a statement of a rule, principle or proposition of the general law, or a statement of the legal effects of facts which form the subject of another and a distinct and severable statement, or which are within the common knowledge of the parties, is...not a statement of the fact of the law being thus, or thus, and there is no estoppel against a subsequent assertion that the law is otherwise."<sup>37</sup> This principle would operate effectively to prevent the estoppel defence from ever applying.<sup>38</sup>

A third difficulty lies in the maxim that estoppel acts only in personam, not in rem; that is, in the case of estoppel by representation, against the representor or the person required by law to stand in his place, but not against the rest of the world.<sup>39</sup> Thus in Wormald v. Gioia<sup>40</sup> one ground upon which the estoppel defence was rejected was that the health and building surveyor who allegedly provided D with incorrect advice had no authority, actual or ostensible, to bind the prosecuting municipality in relation to planning matters. In short, the prosecutor could not be identified with or bound by the statements of the representor. Since the great bulk of criminal prosecutions in Canada are undertaken by the provincial Crown<sup>41</sup>, an estoppel defence could succeed, for the most part, only where the information was provided within the scope of his or its authority by a Crown servant or agent.

These three difficulties effectively ensure that attempts to raise an estoppel defence to criminal charges resulting from reliance upon misleading government information are doomed to failure. But even if they could be overcome, estoppel would be a fundamentally unsatisfactory means for D to raise the issue of his misguided reliance. For the essential purpose of estoppel is to deal with the situation where one person who has made statements to another ought in fairness to be prevented in later litigation with that other from contradicting those statements. The doctrine operates to regulate the rights of the parties to litigation so as to ensure that justice is done between them. This form of analysis fits most uncomfortably into the criminal process, where the court is concerned to determine, not the respective rights of the parties, but the incidence of criminal liability. There is a wider interest in ensuring the proper imposition of such liability which has

nothing to do with justice inter partes. A criminal prosecution is "instituted in the interests of the public in the name of the [Queen] and not to gratify the objects of an individual".<sup>42</sup> The important question in such proceedings is not whether the prosecutor should be held bound by statements made to the defendant, but rather whether the defendant should be held responsible for committing the offence charged. Estoppel has too particular a focus to be helpful or appropriate in such an inquiry.

#### 5. Justifications For Refusal Of A Mistake Of Law Defence

The refusal of a mistake of law defence in cases of misleading government information can produce results which are not only harsh but also positively unjust. It is difficult to conceive what more could reasonably be expected of a citizen than that he shape his conduct in good faith according to "the law" as stated to him, whether individually or as a member of the public, by a public authority or official whom he reasonably believes to be expert in the field.<sup>43</sup> If more is to be expected of the "model citizen", convincing grounds should exist for so doing. Three justifications are usually advanced.

##### (a) Efficiency

Austin believed that "if ignorance of the law were admitted as a ground of exemption, the Courts would be involved in questions which were scarcely possible to solve, and which would render the administration of justice next to impracticable."<sup>44</sup> In other words, to allow a defence of ignorance or mistake of law would place an

impossible burden on the prosecution and present the courts with "interminable and insoluble"<sup>45</sup> evidential problems.

It is important to note that this view was first propounded at a time when the defendant could not himself give evidence.<sup>46</sup> In any event, the apprehended evidential difficulties would appear no greater than those which may currently be engendered by the mistake of fact doctrine. "If the Courts harbor few doubts about proving or disproving the honesty of a defendant who pleads ignorance of fact, then there are no independent reasons to fear the stigma of dishonesty when the plea is one of ignorance of law. If C fires at D at point-blank range, then his defence that he did not know that D was standing in front of him would be received with incredulity, and so would a defence that he did not know murder to be a crime. On the other hand, if C shoots D when hunting at dusk, his defence that he did not intend to kill D might be believed; and, in the same way, his belief that he is entitled by law to shoot a thief might be believed, whether it represents the true legal position or not."<sup>47</sup> Again, defences involving the mistaken belief that revolvers work by revolving after a bullet is fired, rather than when the trigger is pulled and before the bullet is fired,<sup>48</sup> or that white-spirit is not inflammable,<sup>49</sup> to take from the cases just two plausible examples, are capable of presenting the courts with evidential difficulties as great as any that might be engendered by a mistake of law defence. This is particularly true if the defence is limited to cases of mistake based upon misleading government information, for then the court is required to assess the honesty of D's belief by investigating, not the whole of his past life, but a particular event or sequence of events.<sup>50</sup>

In the light of these considerations, and of the fact that other legal systems have seen no insurmountable obstacles in allowing at least a limited mistake of law defence,<sup>51</sup> the "efficiency" justification for refusing such a defence in cases of mistake based upon misleading government information appears insubstantial.

**(b) Effectiveness**

According to Holmes, to admit ignorance of the law as a defence "would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales".<sup>52</sup> This robust approach is founded upon the belief that to encourage knowledge of the law is socially desirable, even where to do so necessitates the sacrifice of individualised justice. It is essentially utilitarian, having as its rationale the maximising of the welfare of society as a whole, and reflects a deterrent approach to criminal punishment.

The "effectiveness" justification has appealed to the courts,<sup>53</sup> but not to academic writers. Fletcher asks, "Surely Holmes would not favour sacrificing the individual, however innocent, for the sake of the general good, however minimal?"<sup>54</sup> Brett accuses Holmes of "social Darwinism".<sup>55</sup> Ryu and Silving propose an alternative philosophical approach: "Any restraint imposed upon men is, in a sense, offensive to human dignity. The aim of a free society is hence to reduce legal restraint to the minimum required in a given situation. Restraint is less undignified when imposed upon conscious

non-conformance [sic] with law. Subjection of man to sanctions under a law which is unknown and unknowable to him and which he has no opportunity to accept or to reject expresses the view that he is a mere object of the law. We believe, however, that in a democratic society man is the ultimate end of the law".<sup>56</sup>

This is a persuasive formulation of a retributive approach to criminal punishment, and one which argues strongly in favour of allowing a defence to a citizen who has unwittingly contravened the law by acting in reliance upon misleading government information. Of course, it may be proper for the criminal law to give precedence to a particular social or policy objective over the principle, fundamental to a retributive approach, that there should be no penal liability without fault. But that objective should be clearly defined, readily attainable and demonstrably necessary,<sup>57</sup> requirements which the "effectiveness" justification fails to satisfy. Respect for and obedience to the law are hardly likely to be enhanced if citizens are told that they must disregard the considered advice of those charged with its administration,<sup>58</sup> in circumstances where a means of obtaining more authoritative advice is neither readily apparent nor realistically available.

### (c) Legality

Hall argues that to allow a defence of mistake of law would contradict the essential requirements of a legal system, signified by the principle of legality, namely that rules of law express objective

meanings; that certain persons (the authorised "competent officials"), after a prescribed procedure, declare what those meanings are; and that those, and only those, interpretations are binding.<sup>59</sup> A mistake of law defence would allow every individual to become a law unto himself;<sup>60</sup> or, if the defence were limited to cases of misleading government information, would allow every government officer to become a law-maker.

This justification bears a close similarity to the "ultra vires" objection to allowing a defence of criminal estoppel.<sup>61</sup> However, the difference between the two contexts illuminates the flaw in Hall's argument. For to allow estoppel to bind a prosecutor to his earlier statements would indeed have the effect of allowing him to change the law: the court would be compelled to the conclusion that D had acted legally, because he had acted in accordance with a mistaken view of the law communicated to him by the prosecutor. On the other hand, a defence of mistake of law would operate, in cases of misleading government information, not to allow the government officer concerned to change the law, but rather to relieve D from responsibility for having contravened it. The flaw in Hall's argument lies in his failure to distinguish legality and culpability: it is one thing to conclude that D acted legally, but quite another to decide that he should not be held culpable for his illegal act.<sup>62</sup> For the courts to make decisions on the latter issue involves the application, rather than the disregard, of the doctrine of the separation of powers, for in determining the proper incidence of criminal liability the courts fulfil one of their most important constitutional functions.

## 6. Mitigation Of Sentence

The weakness of the justifications for refusing a defence of mistake of law based upon misleading government information is further illuminated by the willingness of the courts to take D's reliance upon such information into account when passing sentence. It is not uncommon for D to be denied a defence, only to be granted an absolute discharge.<sup>63</sup> This represents an "easy" solution to a difficult problem, but one that is entirely unsatisfactory, as it manages to undermine the acknowledged law without achieving justice. For a conviction, even when it results in an absolute discharge, can never be equivalent to an acquittal.<sup>64</sup> More convincing is the reasoning of the Supreme Court of Delaware in Long v. State<sup>65</sup>: "We are not impressed with the suggestion that a mistake under such circumstances should aid the defendant only in inducing more lenient punishment by a court, or executive clemency after conviction. The circumstances seem so directly related to the defendant's behaviour upon which the criminal charge is based as to constitute an integral part of that behaviour, for purposes of evaluating it. No excuse appears for dealing with it piecemeal. We think such circumstances should entitle a defendant to full exoneration as a matter of right, rather than to something less, as a matter of grace."

## 7. A Step Forward: "Officially Induced Error Of Law"

Courts in the United States have periodically rendered decisions which expressly<sup>66</sup> or indirectly<sup>67</sup> recognise a defence



of mistake of law in cases of misleading government information, and in this respect have been far more liberal than their Commonwealth counterparts. However, after a late start, the Canadian courts have recently shown a welcome willingness to sanction a specific defence of "officially-induced error of law". Both the name and the inspiration for the new development derive from O Hearn C.J., who rendered the "trail-blazing and innovative"<sup>68</sup> decision in R. v. Maclean.<sup>69</sup>

In that case D, whose driving licence had been revoked, was charged with driving a motor vehicle while disqualified, contrary to s. 238(3) of the Criminal Code. His defence was that he had been advised over the telephone by an employee of the Registrar of Motor Vehicles that it was not necessary to have a licence in order to drive on Government property, and that when apprehended he had been driving on such property, namely the driveway at Halifax International Airport. Although this was in essence a defence of mistake of law, it succeeded. O Hearn C.J. held that s. 19 of the Criminal Code is "not absolute"<sup>70</sup> and that mistake of law may operate as a defence where, before engaging in the conduct, the defendant made a bona fide, diligent effort, adopting a course and resorting to sources and means at least as appropriate as any afforded under the legal system, to ascertain and abide by the law, and where he acted good faith reliance upon the results of such effort.<sup>71</sup> D had satisfied these requirements, having approached an appropriate source of information which people would ordinarily consult.<sup>72</sup>

The learned judge was careful to restrict the ambit of the defence to offences under delegated legislation,<sup>73</sup> but it seems clear that this was in order to avoid the implications of his earlier

decision in R. v. Villeneuve,<sup>74</sup> where a mistake as to the operation of a statutory provision had been insufficient to save D from conviction. In any event, the distinction between statutory offences and those under delegated legislation was dropped in R. v. Flemming,<sup>75</sup> where O Hearn C.J. again applied the R. v. Maclean defence, which he now termed the defence of officially induced error of law. D had again been charged under s. 238(3) of the Criminal Code, having steered his car while it was being towed, something for which he had been informed by inspectors of the Motor Vehicle Branch that he did not need a licence. The learned judge held that his mistake of law afforded D a defence. In so doing he emphasised that the defence is subject to two important qualifications,<sup>76</sup> namely that the officer who provides the information must be involved in the administration of the law in question, so that it is reasonable in the circumstances to rely upon his opinion, and that the information itself must appear to be reasonable in the circumstances. But it is debatable whether these qualifications need function independently; there is a danger of hedging the defence around too closely with overlapping limitations. Once it is established that D was provided with misleading information by a government officer, it should be sufficient for the court to consider simply whether, taking into account all the circumstances, it was reasonable for D to rely upon what he had been told. Among the most important circumstances to be taken into account during that inquiry would be the nature of the information, the manner and form of its expression, the position and function of the officer who provided it, and the nature and seriousness of the offence charged.

Despite the warm reception given to the new defence by academic writers,<sup>77</sup> the lower courts have been somewhat slow to espouse it. In R. v. Potter,<sup>78</sup> McQuaid J. declined to apply it in a case where D had relied upon the failure of a Customs official to answer directly the question whether certain punchboards which he proposed to import into Canada were illegal. The learned judge reached his decision with "some reluctance", but felt unable to follow R. v. Maclean until it had been "tested in the crucible of higher scrutiny and acceptance".<sup>79</sup> In other cases, the courts have coupled adherence to the traditional denial of a mistake of law defence with a finding that in any event the defence of officially induced error has not been made out.<sup>80</sup>

However, a modified version of the defence was recognised and considered at some length by Stuart Terr. Ct. J. in R. v. Carl Gruber,<sup>81</sup> where D was charged under s. 320(1)(c) of the Criminal Code<sup>82</sup> with making false statements in writing, namely statutory declarations forming part of government contracts held by D's gravel-crushing company. After referring to the tradition and policy of the "ancient rule" that mistake or ignorance of law is no defence, the learned judge concluded that on balance he favoured "the creation of a carefully carved, minor exception to the rule".<sup>83</sup> He went on to hold the defence inapplicable on the facts, but his judgment contains a valuable consideration of what he considered to be its requirements. First, it can apply only where the offence is not commonly known. "Most of the common law offences now incorporated into the Criminal Code...are so deeply immersed as a part of the body of common knowledge that no one can be reasonably mistaken about the criminality of such conduct. The

accused must prove on a balance of probabilities<sup>84</sup> that no reasonable person in his position would be aware of the offence. Thus primarily the defence applies only to regulatory offences".<sup>85</sup> However, it is perfectly possible to be reasonably mistaken as to the scope or application of even the most well-known offences.<sup>86</sup> It accordingly places an unjustifiable limitation on the defence to require as a separate and distinct condition that D was ignorant, and reasonably so, of the very existence of the offence charged. It would surely be more appropriate simply to require that D must reasonably have believed his conduct to be lawful, an issue which must in any event be investigated in relation to the learned judge's third requirement, that of reasonable reliance. The sole effect of the first requirement is unnecessarily to limit and complicate the defence, and it is heartening that to date no other court has shown an inclination to adopt it.

Secondly, the defence can apply only where D's conduct involved no risk to public safety or the environment, the reason being that "Policy considerations underlying creation of a defence of mistake of law are less demanding than considerations for public safety and environmental protection".<sup>87</sup> The learned judge gave no indication of what constitutes conduct involving such a risk, but it is clear that many forms of human conduct in some degree threaten public safety, the environment or both. R. v. Maclean itself came before the courts only because D was involved in a collision the subsequent investigation of which revealed that he had been disqualified from driving. If the degree of risk to public safety or the environment may vary with the nature and

circumstances of D's conduct, it would seem sensible to adopt an approach to the officially induced error defence which recognises that fact.

Again, the requirement of reasonable reliance provides the means, enabling the degree of risk to be reflected in the standard which D must attain if his reliance upon the government information is to be adjudged reasonable. The greater the risk posed by his conduct to public safety or to the environment or to other matters important to society, the more steps he must take and the more assiduous he must be in order to satisfy the requirement of reasonableness. It must be remembered that, by the time the defence is raised, the offending course of conduct has been concluded: if the risk involved in it did not materialise, there is no good reason for denying D a defence simply because it might have done; while if it did materialise, it is both arbitrary and harsh to hold D criminally liable if, taking into account both the degree of risk and the information received, he acted entirely reasonably.

Thirdly, even Stuart Terr. Ct. J. accepted that the "crux"<sup>88</sup> of the defence lay in the requirement of reasonable reliance. This he identified as involving four sub-requirements. First, it must have been reasonable for D to believe in both the authority of the officer to give the information and the validity of the information itself.<sup>89</sup> Secondly, D must have made a diligent effort to seek clear information from the appropriate official.<sup>90</sup> Thirdly, that information must clearly cover basis of D's mistake of law.<sup>91</sup> Finally, there must have been no reason either before or after the information was provided for D to question its validity.<sup>92</sup> In

addition, of course, D must actually and honestly have relied upon the information.<sup>93</sup>

It is difficult to see what the second sub-requirement adds to the first and third. In so far as it suggests that the defence can apply only where D has actively sought out the information, it is contradicted implicitly by R. v. MacDougall<sup>94</sup> and is in any event a wholly unwarranted limitation: it cannot be relevant whether the information was provided to D at his own request or not, provided he reasonably relied upon it. As for the third sub-requirement, namely that the information must precisely cover D's mistake, it is unduly restrictive if it is intended to indicate that the defence is inapplicable where the meaning given to the information by D was as a matter of construction wrong, even though wholly reasonable. Since the crux of the defence is reasonable reliance, it should apply where D's interpretation of the information is reasonable but wrong; to hold otherwise would be to punish D for making a reasonable mistake as to the meaning of words or conduct. The fourth sub-requirement, too, is unduly restrictive in so far as it suggests that the defence may not apply if some ground existed for questioning the validity of the information even though D reasonably believed it to be valid. If some such ground existed, its effect will be taken into account in assessing the reasonableness or otherwise of D's belief<sup>95</sup>; if, notwithstanding its existence, that belief was reasonable, it would be unjustifiable nonetheless to deny D a defence.

The important elements of Stuart Terr. Ct. J.'s analysis of the reasonable reliance requirement are those which demand that D reasonably believed that the information emanated from an appropriate officer and

was valid. But it may be questioned whether it is necessary or desirable to treat even these elements as distinct sub-requirements. They refer compendiously to just some of the circumstances which must be taken into account as going to the overall reasonableness of D's reliance, of which among the most important are the nature of the information, the manner and form of its expression, the position and function of the officer who provided it, and the nature and seriousness of the offence charged. To what extent D's personal circumstances will also be relevant depends upon whether the standard of reasonableness adopted is objective or subjective. Certain members of the community may, by reason of intelligence and temperament, be less discerning in their reliance upon government information than would be a "model citizen", and it would be possible for the law to reflect this fact by allowing D the defence of officially induced error if he acted reasonably according to his own lights. However, the difficulty with the adoption of a subjective standard is that it would involve the abandonment of the underlying justification of the defence, which is precisely that it operates to protect those who have achieved the standard of conduct of the "model citizen". The better view is accordingly that the standard of reasonableness should be objective, so that the court will be concerned to apply the standards to be expected, not of D himself, but of a reasonable person functioning in the same circumstances. This was the view of Stuart Terr. Ct. J. in R. v. Carl Gruber.<sup>96</sup> The result is that idiosyncracies of intelligence or temperament will not be relevant in assessing the reasonableness of D's reliance.

Fourthly, Stuart Terr. Ct. J. indicated that it is for D to establish the mistake of law defence on a balance of probabilities, on an

analogy with the "due diligence" defence to strict liability offences contained in R. v. City of Sault Ste. Marie.<sup>97</sup> However, there is no suggestion in the cases that the defence of officially induced error is applicable only to strict liability offences. In its application to offences of mens rea it should be sufficient for D to raise a reasonable doubt whether his conduct was the result of an officially induced error of law, in accordance with the normal rules governing the burden of proof in relation to common law defences.<sup>98</sup> In any event, there is an evidential burden on D to raise evidence sufficient to put the matter in issue.<sup>99</sup>

The tenor of R. v. Carl Gruber is clearly restrictive, and it is to be hoped that other courts will be willing, not merely to recognise the new defence, but also to give it a more liberal application. Much must depend upon the attitude of appellate courts, which, with one exception, have so far been denied the opportunity to consider the matter. The exception, important because it is a decision of the Supreme Court rather than for the scope of its analysis, is R. v. MacDougall.<sup>100</sup> D was convicted of failing to stop at the scene of an accident contrary to s. 233(2) of the Criminal Code.<sup>101</sup> Shortly thereafter, he received an "Order of Revocation of License" from the Registrar of Motor Vehicles. D appealed against his conviction, and received from the Registrar a "Notice of Reinstatement". Subsequently, and to D's knowledge, his appeal was dismissed. The Registrar some time later sent a second "Order of Revocation of License", but this was received by D only after he was charged with driving a motor vehicle while his license to do so was cancelled, contrary to s. 258(2) of the



Motor Vehicle Act (N.S.).<sup>102</sup> Section 250(3) of that Act provides that where an appeal is dismissed, the driver's licence "shall be thereupon and hereby revoked and shall remain revoked". D gave evidence that he believed he could drive until notified by the Registrar that his licence had been revoked, which evidence the trial judge accepted. D was acquitted, and the appeal by the Crown was dismissed by a majority of the Appeal Division of the Nova Scotia Supreme Court".<sup>103</sup> Macdonald J.A., with whom Hart J.A. concurred, held that the offence charged was one of strict liability, so that it was open to D to avoid conviction by proving "due diligence".<sup>104</sup> He found that D's mistake was one of fact, or of mixed fact and law, sufficient to satisfy that defence. But he went on to hold that, even if D's mistake was one of law, he could rely upon the defence of officially induced error. "In this day of intense involvement in a complex society by all levels of Government with a corresponding reliance by people on officials of such Government, there is, in my opinion, a place and need for the defence of officially induced error, at least so long as a mistake of law, regardless how reasonable, cannot be raised as a defence to a criminal charge".<sup>105</sup> Here, D's conduct was based upon a previous course of conduct on the part of the Registrar, and his mistake was in all the circumstances reasonable, so that the defence was made out.

The Crown appealed again, to the Supreme Court, which allowed the appeal and ordered a new trial.<sup>106</sup> It was held that, in view of the provisions of s. 250(3) of the Motor Vehicle Act, D's belief that he was entitled to continue to drive was a mistake of law, and in view of s. 19 of the Criminal Code could not provide a defence.<sup>107</sup> However,

Ritchie J., delivering the judgment of the Court, went on<sup>108</sup> to deal with the "new concept in the law of mistake" applied by the Appeal Division. "It is not difficult to envisage a situation in which an offence could be committed under mistake of law arising because of, and therefore induced by, 'officially induced error' and if there was evidence in the present case to support such a situation existing it might well be an appropriate vehicle for applying the reasoning adopted by Mr. Justice Macdonald. In the present case, however, there is no evidence that the accused was misled by an error on the part of the registrar".<sup>109</sup> This treatment is brief and obiter, but it clearly leaves open the door to the application of the new defence in appropriate cases. The task before the courts now is to elaborate its requirements, building upon the work of O'Hearn C.J. in R. v. Maclean and R. v. Fleming and of Stuart C.J. in R. v. Carl Gruber.

## 8. Assessment

This Part has attempted to address the question whether reliance upon misleading government information does or should provide a defence to a criminal charge. Where that information led D into a mistake of fact, the answer is that it may, in relation to mens rea and strict liability offences. The more difficult situation is that in which the information led D into a mistake of law. Traditionally, and subject to only limited exceptions, such mistakes have been treated as incapable of founding a defence. Nor is estoppel a useful or appropriate means of avoiding this limitation. However, the justifications for the

traditional rule are weak where the mistake is based upon misleading government information, a consideration underlined by the willingness of the courts to treat such information as an important mitigating factor during sentencing. Academic writers have called for a limited exception to the traditional rule to deal with such cases, and the Canadian courts have taken up this challenge by recognising the defence of officially induced error of law. The precise requirements of that defence remains to be worked out, but it is submitted that they should be threefold. First, D must have been provided by a government officer with misleading information as to the law. It should not be relevant whether or not D actively sought out the information. Nor should the defence be limited to cases where the information was in oral or written form; conduct tantamount to the provision of information should be capable of supporting the defence. However, cases such as R. v. MacDougall,<sup>110</sup> where D relied, not upon the conduct of the Registrar, but upon his own assumptions drawn from that conduct, are rightly excluded. Secondly, D must have acted in honest reliance upon the misleading information. It would not be sufficient, for example, for him to have shaped his conduct in order to establish which of two conflicting pieces of legal information was correct.<sup>111</sup> Thirdly, and crucially, D's reliance must have been reasonable.<sup>112</sup> Of the factors to be considered in relation to this issue, among the most important will be the nature of the information, the manner and form of its expression, the position and function of the officer who provided it, and the nature and seriousness of the offence charged. The test of reasonableness should be objective: was D's reliance reasonable for a person in his precise position? In any

event, D bears an evidential burden before the defence can be put in issue.<sup>113</sup> Once it is in issue, it should be made out by proof sufficient to raise a reasonable doubt in relation to mens rea offences and on a balance of probabilities in relation to offences of strict liability.

Whether or not the new defence develops along these lines remains to be seen, but in any event it provides an important addition to Canadian criminal law. The only caveat relates to the requirement that D's reliance be reasonable, which, although wholly desirable, does require the courts to continue to grapple with the often nebulous distinction between mistakes of fact and law. But this is a distinction which pervades the law, and its retention in this field is a small price to pay for the greater justice introduced by the new defence.

FOOTNOTES

1. Director of Public Prosecutions v. Morgan [1976] A.C. 182; [1975] 2 All E.R. 347; Smith, J.C., and Hogan, B., Criminal Law (5th ed.; London, Butterworths, 1983), p. 188.
2. Stuart, D., Canadian Criminal Law (Toronto, The Carswell Company Limited, 1982), pp. 231-32.
3. (1978) 40 C.C.C. (2d) 353; [1978] 2 S.C.R. 1299 (S.C.C.).
4. Ibid., at 373-74.
5. Molis v. The Queen (1980) 55 C.C.C. (2d) 558, at 564 per Lamer J. (S.C.C.); R. v. MacDougall (1982) 1 C.C.C. (3d) 65 (S.C.C.); R. v. MacDonald (1983) 3 C.C.C. (3d) 419 (Alta. C.A.).
6. Supra note 3, at 374, 1326 per Dickson J.
7. (1976) 32 C.C.C. (2d) 351 (N.S.Co.Ct.). Quaere whether the classification of the offence as one of absolute liability has survived R. v. City of Sault Ste. Marie, supra note 3.
8. R.S.C. 1952, c. 148, as amended by 1971-72-73, c. 63.
9. Supra note 5.
10. [1975] Q.B. 678.
11. 24 & 25 Geo. 5, c. 56.
12. Stephen, Sir J.F., A History of the Criminal Law of England (London, MacMillan & Co., 1883), ii, 114; R. v. MacDougall, supra note 5, at 71 per Ritchie J.
13. R.S.C. 1970, c. C-34, as amended.
14. R.S.C. 1970, c. I-23.
15. R.S.B.C. 1979, c. 305.
16. Stuart, op. cit. note 2, pp. 268-73. The exception is "largely confined to situations of non-publication of subordinate legislation": ibid., p. 273.
17. Ibid., pp. 273-79. The exception covers the case where D honestly believed that he had a legal right to act as he did: ibid., p. 275.

18. Cf. Smith and Hogan, op. cit. note 1, pp. 71-72; Stuart, op. cit. note 2, p. 273. The development in Canada of a third exception, that of "officially-induced error of law," is discussed infra, p. 16 ff.
19. (1975) 24 C.C.C. (2d) 229 (N.S. Prov. Mag. Ct.); cp. R. v. Sigreid Blohm (1981) 7 W.C.B. 233; R. v. Hiebert [1984] N.W.T.R. 196.
20. R.S.C. 1970, c. C-34, as amended.
21. Compare Beaver v. The Queen (1957) 118 C.C.C. 129; [1957] S.C.R. 531, upon which Nichols Mag. Ct. J. relied in R. v. MacPhee, with R. v. Baxter (1982) 6 C.C.C. (3d) 447 (Alta. C.A.).
22. Stuart, op. cit. note 2, p. 288 and references cited therein.
23. (1974) 23 C.C.C. (2d) 54 (Ont. Prov. Ct.).
24. S.O. 1966, c. 142; see now R.S.O. 1980, c. 466.
25. (1980) 5 W.C.B. 140 (Sask. Prov. Ct.).
26. (1919) 88 L.J.K.B. 388; and see R. v. Bather (1950) 94 S.J. 582 (C.C.A.).
27. See now s. 131(1)(b) of the Highways Act 1980, c. 66.
28. Cf. Wormald v. Gioia [1981] 26 S.A.S.R. 237 (S. Aust. S.C.); and see R. v. Placer Developments Ltd. [1983] N.W.T.R. 329 (N.W.T.S.C.); R. v. Laister [1969] 1 O.R. 580 (Ont. H.Ct.).
29. Cf. Arnold, T., State-Induced Error of Law, Criminal Liability and Dunn v. The Queen: A Recent Non-Development in Criminal Law (1978) 4 Dal. L.J. 559, 577; Ashworth, A.J., Excusable Mistake of Law [1974] Crim. L.R. 652, 657-61; Anon, Applying Estoppel Principles in Criminal Cases (1969) 78 Yale L.J. 1046.
30. Cf. Barton, P.G., Officially Induced Error as a Criminal Defence: A Preliminary Look (1979-80) 22 C.L.Q. 314, 329-31; Stuart, op. cit. note 2, p. 284.
31. Supra, Part II, section A3(a).
32. Cf. Kennedy v. Minister of National Revenue [1929] Ex. C.R. 36; Gillies Bros. Ltd. v. The King [1947] 2 D.L.R. 769; Attorney-General v. Municipal Council of Sydney (1920) 20 S.R. (N.S.W.) 46; Re Jauncey [1980] Q.R. 335; Hoisain v. Town Clerk, Wynberg [1916] A.D. 236; Minister of Agriculture and Fisheries v. Matthews [1950] 1 K.B. 148; Rhyl Urban District Council v. Rhyl Amusements Ltd. [1959] 1 W.L.R. 465.

33. Cf. Note, op. cit. note 29 and see supra, Part II, section A3(a).
34. Cf. Barton, op. cit. note 30; Wormald v. Gioia, supra note 28.
35. Take the case where D is advised by municipal officials that no building permit is necessary for a particular development, and accordingly commences the work. He is later informed by the municipality that a mistake was made and that a permit must be obtained. D then seeks a declaration that he may lawfully carry out the development without a permit, relying upon estoppel to bind the municipality to the advice of its officials. The court, applying accepted principles, refuses to countenance the plea of estoppel and dismisses the application. D nevertheless refuses to discontinue the development and is prosecuted for breach of the relevant by-law. He again raises estoppel in order to bind the municipality to the advice of its officials.
36. Cf. Wormald v. Gioia, supra note 28, at 242 per Mitchell J.
37. Spencer Bower, G., and Turner, Sir A.K., The Law Relating to Estoppel by Representation (3rd ed.; London, Butterworths, 1977), p. 39.
38. Cp. ibid., pp. 41-42.
39. Ibid., p. 120.
40. Supra note 28.
41. Grosman, Brian A., The Prosecutor (Toronto, University of Toronto Press, 1969), pp. 17-18.
42. R. v. Brice (1819) 2 B.& Ald. 606; 106 E.R. 487.
43. Cp. Long v. State (1949) 65 A. 2d 489, at 498 (Del. S.C.).
44. Austin, J., Jurisprudence (1869), p. 498. No legal significance lies in the distinction between ignorance and mistake of law: Stuart, op. cit. note 2, pp. 232-34.
45. People v. O'Brien (1892) 31 Pac. 45, 47.
46. Cf. Stuart, op. cit. note 2, p. 263; R. v. Tennant and Naccarato (1975) 23 C.C.C. (2d) 80, at 90-91 (Ont. C.A.).
47. Houlgate, Ignorantia Juris: A Plea for Justice (1967-68) 78 Ethics 32, 37-38, quoted by Arnold, op. cit. note 29; and see R. v. Carl Gruber [1982] 1 W.W.R. 197, at 244 per Stuart Terr. Ct. J. (Y.T.T.C.).
48. Cp. R. v. Lamb [1967] 2 Q.B. 981.

49. Cp. Elliott v. C, The Times, May 25th 1983.
50. Cp. Weiler, P., The Supreme Court of Canada and the Doctrines of Mens Rea (1971) 49 Can. Bar Rev. 281, 317; Hall, J., General Principles of Criminal Law (2nd ed.; Indianapolis, The Bobbs-Merrill Co. Inc., 1960), pp. 378-79. However, a wider inquiry could be necessitated by the requirement that D's belief be reasonable: infra, p. 16 ff.
51. Cf. Williams, G., Textbook of Criminal Law (2nd ed.; London, Stevens & Sons, 1983), p. 452.
52. Holmes, O.W., The Common Law (Boston, Little, Brown & Company, 1881), p. 41.
53. Cf. R. v. Villeneuve [1968] 1 C.C.C. 267, at 276 per O Hearn Co. Ct. J. (N.S.Co.Ct.); R. v. Campbell and Mlyarchuk (1973) 10 C.C.C. (2d) 26, at 31 (Alta. Dist. Ct.); R. v. Flemming (1981) 43 N.S.R. (2d) 249, at 262 per O Hearn Co. Ct. J. (N.S.Co.Ct.).
54. Fletcher, G.P., Rethinking Criminal Law (Boston, Little, Brown and Co., 1978), p. 732.
55. Brett, P., Mistake of Law as a Criminal Defence (1966) 5 Melb. U.L. Rev. 179, 195.
56. Ryu, P.K., and Silving, H., Error Juris: A Comparative Study (1957) 24 U. of Chic. L. Rev. 421, 471.
57. C. Arnold, op. cit. note 29, p. 571.
58. Cf. Brett, op. cit. note 55, p. 203; and see R. v. Carl Gruber [1982] 1 W.W.R. 197, at 244 per Stuart Terr. Ct. J. (Y.T.T.C.).
59. Hall, op. cit. note 50, pp. 382-86.
60. Cf. Cooper v. Simmons (1862) 7 H.& N. 707, at 717 per Martin B.
61. Supra, section 4.
62. Cf. Arnold, op. cit. note 29, p. 575; Stuart, op. cit. note 2, pp. 264-65.
63. Cf. R. v. Potter (1978) 3 C.R. (3d) 154 (P.E.I.S.C.); R. v. Gary Oliver Wilson (1984) 12 W.C.B. 471 (Ont. Prov. Ct.); R. v. Bather (1950) 94 S.J. 582 (C.C.A.); Surrey County Council v. Battersby [1965] 2 Q.B. 194 (Div. Ct.).
64. Cf. R. v. Flemming (1981) 43 N.S.R. (2d) 249, at 262-63 per O Hearn Cty. Ct. J.



65. (1949) 65 A. 2d 489, at 498 (Del. S.C.); and see R. v. Carl Gruber [1982] 1 W.W.R. 197, at 244 per Stuart Terr. Ct. J. (Y.T.T.C.).
66. Cf. People v. Ferguson (1933) 134 Cal. App. 41; Long v. State, supra note 65 (advice of lawyer).
67. Cf. Raley v. Ohio (1959) 360 U.S. 423; Cox v. Louisiana (1965) 379 U.S. 559.
68. Stuart, op. cit. note 2, p. 281 .
69. (1974) 17 C.C.C. (2d) 84 (N.S.Co.Ct.).
70. Ibid., at 100.
71. Ibid., at 104, 106.
72. Ibid., at 107.
73. The case turned upon D's ignorance of the Airport Vehicle Control Regulations (P.C. 1964-1326, SOR/64-354), which incorporated the relevant provisions of the Motor Vehicle Act (R.S.N.S. 1967 c. 191) relating to drivers' licences.
74. [1968] 1 C.C.C. 267.
75. (1981) 43 N.S.R. (2d) 249.
76. Ibid., at 272-73.
77. Cf. Arnold, op. cit. note 29; Barton, op. cit. note 30; Stuart, op. cit. note 2, pp. 281-88.
78. (1978) 3 C.R. (3d) 154 (P.E.I.S.C.), followed in R. v. Gary Oliver Wilson, supra note 63.
79. Ibid., at 165.
80. Cf. R. v. Norman J. Dowler (1980) 5 W.C.B. 32 (B.C.Co.Ct.); R. v. Dan Gene Pollock (1980) 5 W.C.B. 102 (B.C.Co.Ct.); R. v. Kathleen Elizabeth Robertson (1984) 13 W.C.B. 154 (Ont. Prov. Ct.).
81. [1982] 1 W.W.R. 197 (Y.T.T.C.).
82. R.S.C. 1970, c. C-34, as amended.
83. Supra note 81, at 242.
84. The issue of what burden of proof should be placed on a defendant wishing to rely upon the defence of officially induced error is considered infra.

85. Supra note 81, at 246.
86. This point is demonstrated by R. v. Gruber itself, where Stuart Terr. Ct. J. held (at 246) that if D's mistake had been merely as to the criminality of falsely signing a statutory declaration then it could not found the mistake of law defence, but that since he had been mistaken rather as to the scope of such declarations the defence was potentially applicable.
87. Supra note 81, at 246.
88. Ibid.
89. Ibid., at 247. Cp. the "qualifications" attached to the defence by O Hearn Co. Ct. J. in R. v. Flemming, supra note 75, at 272-73.
90. Supra note 81, at 247.
91. Ibid.
92. Ibid.
93. Ibid., at 247, 248; R. v. MacLean, supra note 69, at 104 per O Hearn Co. Ct. J., quoting Long v. State, supra note 65, at 498.
94. (1983) 1 C.C.C. (3d) 65 (S.C.C.), discussed infra.
95. Which would meet the fear of Stuart Terr. Ct. J. that a defendant might "stretch or distort the advice to suit his convenience": [1982] 1 W.W.R. 197, at 247.
96. Ibid., at 243; Cp. R. v. Maclean, supra note 69, at 107 per O Hearn Co. Ct. J.; R. v. Flemming, supra note 75, at 273 per O Hearn Co. Ct. J.
97. Supra note 3.
98. Cf. Smith and Hogan, op. cit. note 1, p. 29.
99. Cf. R. v. Kathleen Elizabeth Robertson, supra note 80.
100. Supra note 94; and cf. R. v. Walker and Somma (1980) 51 C.C.C. (2d) 427, at 429 per Martin J.A. (Ont. C.A.).
101. R.S.C. 1970, c. C-34, as amended.

102. R.S.N.S. 1967, c. 191.
103. (1981) 60 C.C.C. (2d) 137.
104. Ibid. at 152, 158.
105. Ibid., at 160.
106. Supra note 94.
107. Ibid. at 70, 71.
108. Ibid., at 71.
109. Ibid.
110. Supra note 94.
111. Cp. R. v. Bohman (1974) 20 C.C.C. (2d) 117.
112. Cf. Stuart, op. cit. note 2, p. 286; cp. Arnold, op. cit. note 29, p. 583.
113. Cf. R. v. Kathleen Elizabeth Robertson, supra note 80.

P A R T I V

HOLDING GOVERNMENT RESPONSIBLE IN DAMAGES  
FOR MISLEADING INFORMATION

## 1. Negligent Misstatement And Government

As a practical matter, there can be little advantage to the citizen in seeking to hold government bound by misleading information provided to him in response to a government-uncontrolled uncertainty.<sup>1</sup> Even where the uncertainty to which the information related is government-controlled, external considerations may lead the citizen, given a free choice, to prefer a compensatory remedy. This Part addresses the questions whether and, if so, in what circumstances a citizen is entitled to recover damages to compensate him for loss suffered as a result of his reliance upon misleading government information. Its subject is the tort of negligent misstatement.

It has already been noted that not only the express statements but also the very acts and decisions of government have informational aspects.<sup>2</sup> Moreover, the distinction between words and acts may be fine. Nonetheless, that distinction is at the root of the common law tort of negligence. Originally, the common law allowed recovery only for those negligent words reliance upon which resulted in physical injury or damage to property.<sup>3</sup> This approach failed to acknowledge the fact that most losses caused as a result of reliance upon negligent misstatements are economic, although it did ensure that negligent words and negligent acts were treated alike. Symmetry was eventually sacrificed in the interests of an expansion of liability by the decision of the House of Lords in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., ("Hedley Byrne")<sup>4</sup> in which it was accepted that a person who reasonably relies upon a negligent misstatement, spoken or written, made to him by another, may in

certain circumstances be entitled to recover damages for economic loss suffered thereby. The court declined to apply as the test of the existence of a duty of care the neighbour principle of Lord Atkin in Donoghue v. Stevenson.<sup>5</sup> The reason lay in the peculiar characteristics of information, which threatened the possibility of indeterminate liability for careless statements: "Words may receive - and foreseeably receive - so wide a circulation that the application of the principle in Donoghue v. Stevenson might open the door to a multiplicity of claims for very large amounts of damages."<sup>6</sup> As an alternative, and in order to restrict the ambit of potential liability, the court held that a duty of care is owed by the makers of negligent misstatements only to the limited class of persons with whom they are in a "special relationship."<sup>7</sup> Some confusion has surrounded this concept, largely because their Lordships laid down no precise criteria for the existence of such a relationship, preparing to rely upon statements of general principle. The emphasis of the speeches in Hedley Byrne is on the foreseeability and the reasonableness of the inquirer's reliance as the keys to the existence of a duty of care. Thus Lord Reid envisaged the imposition of liability "where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him."<sup>8</sup> However, a more restrictive approach was adopted by the Privy Council in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt<sup>9</sup>, where a majority of the Board held that a Hedley Byrne duty of care could be case only upon a person who carries on a business

or profession which involves the giving of information of a kind which calls for special skill or competence, or upon a person who, although not carrying on such a profession or business generally, has let it be known that he claims to possess skill and competence in the subject-matter of the particular inquiry.<sup>10</sup> Lords Reid and Morris, who dissented, took a broader view: "We can see no ground for the distinction that a specially skilled man must exercise care but a less skilled man need not do so. We are unable to accept the argument that a duty to take care is the same as a duty to conform to a particular standard of skill."<sup>11</sup>

The majority judgment in Evatt has been much criticised for its narrowness<sup>12</sup>, and judges in two subsequent cases in the English Court of Appeal have expressed a preference for the minority view<sup>13</sup>, as have both the High Court of Australia<sup>14</sup> and, by implication, the New Zealand Court of Appeal.<sup>15</sup> The controversy is of some importance for the present discussion, as it may be questioned first, whether government can be said to provide information in the course of a business or profession; and secondly, whether the provision by government of information other than advice is an activity calling for special skill or competence. The High Court of Australia in Shaddock (L) & Associates Pty. Ltd. v. Parramatta City Council<sup>16</sup> disposed shortly of both of these issues. Gibbs C.J. said that "[f]rom the standpoint of principle there is no difference between a person who carries on the business of supplying information and a public body which in the exercise of its public functions follows the practice of supplying information which is available to it more readily than to other persons....In either case, the person giving the information to

another whom he knows will rely upon it in circumstances in which it is reasonable for him to do so, is under a duty to exercise reasonable care that the information given is correct. A public body, by following the practice of supplying information upon which the recipients are likely to rely for serious purposes, lets it be known that it is willing to exercise reasonable skill and diligence in ensuring that the information supplied is accurate. In the circumstances, diligence might be more important than skill, although competence in searching for and transmitting the information must play a part. However, even if diligence only and not skill were required, a public body might be specially competent to supply material which it had in its possession for the purposes of its public functions."<sup>17</sup> Shaddock contains the fullest discussion of these issues reported in the Commonwealth; courts in other jurisdictions, and particularly in Canada, have been little troubled by them. Thus in Gadutsis v. Milne,<sup>18</sup> the Ontario High Court based its finding of a duty of care simply on the facts that the employees in the municipality's zoning department were there to give out information as to zoning, and must have known that persons making inquiries of them would place reliance upon what they were told. It may accordingly be regarded as settled that the Hedley Byrne principle is as applicable to government as to other legal persons.

Some commentators have distilled from the speeches in Hedley Byrne a test for the existence of a duty of care based upon the "voluntary assumption of responsibility" by the maker of the negligent



statement.<sup>19</sup> The concept of a voluntary undertaking to exercise care does indeed play a prominent part in the decision, but not as a distinct test. Rather, it is made clear that such an undertaking is to be implied into or inferred from the making of a statement in the context of a special relationship.<sup>20</sup> However, the emphasis on voluntariness gives rise to the question, of great importance where the maker of the statement is government, whether the provision of information pursuant to a statutory duty can give rise to a duty of care. Can a person who is obliged to make a statement be held voluntarily to have assumed a duty of care to ensure its accuracy? The answer generally given is either that, if Hedley Byrne itself does not apply in such a situation, then something "very like it" does<sup>21</sup>, or that a "broad view" of Hedley Byrne is sufficient to extend its application to such a case.<sup>22</sup> The important authorities are Minister of Housing and Local Government v. Sharp<sup>23</sup>, a decision of the English Court of Appeal in which the issue was first addressed, and Hull v. Canterbury Municipal Council<sup>24</sup>, a decision of the Supreme Court of New South Wales. In Minister of Housing and Local Government v. Sharp, a clerk employed by a local authority negligently searched the register of local land charges, with the result that a "clear certificate" was issued to the prospective purchaser of certain land. In fact, the land was subject to a charge in favour of the Minister, from which charge the purchaser took the land free as a result of the clear certificate. In an action by the Minister to recover as damages the sum thereby lost, the Court of Appeal held the local authority vicariously liable for the negligent misstatement embodied in

the certificate issued by its clerk. The local authority had argued that the Hedley Byrne principle could not apply where, as in the instant case, the statement was made pursuant to a statutory duty. This argument was rejected, their Lordships asserting that the existence of a duty of care is not dependent upon the implication of a voluntary assumption of responsibility.<sup>25</sup> In fact, the better view is that such an implication follows automatically from the provision of information in the context of a special relationship. Nonetheless, Minister of Housing and Local Government v. Sharp was followed by the Supreme Court of New South Wales in Hall v. Canterbury Municipal Council, in which the council issued a consent to develop land as a motel without first consulting with the State Planning Authority, as required by the County of Cumberland Planning Scheme Ordinance. The result under the Ordinance was that the consent was void. The developers sued the council in damages, inter alia for negligent misstatement. The action succeeded, Nagle J. holding that the existence of a Hedley Byrne duty of care is not confined to cases in which there has been a voluntary assumption of responsibility, but may extend to circumstances in which a party is obliged to make the statement which proves misleading.

There is a clear distinction between the facts of these two cases. In the former, the local authority was obliged by statute to issue a certificate, and the loss inflicted on the Minister was the result of a mistake negligently made as to the certificate's contents. In the latter, on the other hand, the council was obliged to issue a consent only if all relevant conditions were met, and the loss suffered

by the developers flowed directly from the issue itself. Where a consent is required to be issued only upon the satisfaction of certain conditions, there is little conceptual difficulty in regarding as a "voluntary" act the issue of a consent in circumstances in which one or more of those conditions is not met. But the point is perhaps of theoretical rather than of practical significance, because such authority as exists on the issue is in favour of the view that a Hedley Byrne duty of care may exist even in relation to the provision of information pursuant to a statutory duty.

## 2. Information Provided To Citizens Generally Or To A Group Thereof

This section is concerned with the situation in which government provides information to citizens generally or to a group thereof, for example in the form of an advisory bulletin, an interpretative statement or an information circular. Such information raises two problems: first, it is generally volunteered, rather than requested; and secondly, it is disseminated generally, and not to specific individuals.

It is sometimes said to be easier to establish a "special relationship" for the purposes of the Hedley Byrne principle where the misleading information was requested.<sup>26</sup> The reason lies in the perennial fear surrounding the tort of negligent misstatement, namely that of an excessively wide ambit of potential liability: one solution is to restrict the existence of a duty of care to cases where the negligent

statement was made in response to a request or inquiry. This issue has been discussed in three reported cases, one of which concerned information provided by government. The first is the decision of the High Court of Australia in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt<sup>27</sup>, in which Barwick C.J. stated his understanding of the Hedley Byrne principle and continued: "I have used throughout the description 'recipient' to cover both the cases where the incorrect utterance is sought by a question or inquiry and the case where it is volunteered by the speaker. Though it must be relatively rare that the latter case will give rise to a cause of action, the possibility cannot, in my opinion, be ruled out."<sup>28</sup> Although the decision of the High Court of Australia was later overturned by the Privy Council<sup>29</sup>, the majority judgment of the Board has been much criticised for its narrowness and the judgment of Barwick C.J. has since been preferred in Australia.<sup>30</sup> But despite its relative liberality in other aspects, that judgment adopts a restrictive approach to actions for negligent misstatement based upon the provision of volunteered information. So too does the decision of the English Court of Appeal in Lambert v. Lewis<sup>31</sup> where, in fourth party proceedings, the retailer of a defective towing-hitch attempted to recover from the manufacturer an indemnity, being damages for negligent misstatement. The misstatement alleged was that, by selling towing-hitches on a world-wide scale, by promotion and otherwise, the manufacturer represented itself as being an experienced and competent manufacturer of towing-hitches which were safely fitted to vehicles and which were suitable to be used when so fitted for the purpose of safely towing a trailer. Stephenson L.J.,

delivering the judgment of the court, said: "[Counsel for the retailer] concedes...that it is easier to prove [a special] relationship and the consequent duty of care if the information or advice contained in the statement is asked for. But he submits that if the statement is made seriously, not casually, and is intended to be acted upon and is in fact acted upon and it is negligent, it is actionable at the suit of him who acts upon it notwithstanding that the maker has forestalled an inquiry for the information or advice it contains by volunteering one or the other. This may sometimes be so...But one cannot regard the manufacturer and supplier of an article as putting himself into a special relationship with every distributor who obtains his product and sees what he says or prints about it and so owing him a duty to take reasonable care to give him true information and advice...[We] consider that cases of liability for statements volunteered negligently must be rare."<sup>32</sup> Lambert v. Lewis is entirely understandable as a decision on particular facts, but once again it adopts a restrictive approach to volunteered information. However, that in certain, albeit rare, circumstances an action may be founded upon the negligent provision of such information is indicated by the third reported case in which the issue has been discussed, namely the decision of the New South Wales Court of Appeal in The Minister Administering the Environment Planning and Assessment Act v. San Sebastian Pty. Ltd.<sup>33</sup> The San Sebastian case involved an attempt by certain developers to recover damages for the negligent misrepresentation that the redevelopment plan study for the suburb of Sydney named Woolloomooloo was feasible of implementation, it being argued that a representation to that effect was to be implied into or inferred from the

study itself. The action ultimately failed, but one of the issues before the court was whether a special relationship for the purposes of the Hedley Byrne principle was excluded because the information contained in the study was not sought by, but was volunteered to, the class of developers to which the plaintiffs belonged. This question was expressly addressed only by Glass J.A., who said: "I take it...that a Hedley Byrne special relationship may exceptionally be established where the information and advice is volunteered without inquiry...[T]he circumstances here disclose one of the rare cases where a special relationship is established since the defendants intended that developers should act on the study and their publication of it to them was governed by a serious purpose."<sup>34</sup>

That the judgments of the English Court of Appeal in Lambert v. Lewis and of Glass J.A. in the San Sebastian case reach different results, despite adopting a similarly restrictive approach to volunteered information, is explicable by reference to the ambit of potential liability in the two cases. For the Court of Appeal in the former case to have imposed upon the manufacturer a duty of care owed to all those who obtained its product and read its promotional literature would have involved potential liability to a class so extensive that Donoghue v. Stevenson in its application to manufacturers would tend to be swallowed up, with the result that recovery for economic loss caused by negligent acts or omissions would be allowed in by the "back door." On the other hand, the potential liability created by the judgment of Glass J.A. in the latter case was relatively restricted, the class of developers to

whom the Woolloomooloo study was directed being narrow and capable of definition with some precision.

The same desire on the part of the courts to avoid indeterminate liability for negligent misstatements governs their approach to information provided for general consumption, as opposed to consumption by specific individuals. The fullest consideration yet given to this issue in a reported case is contained in the judgments of Hutley and Glass J.J.A. in the San Sebastian case, in relation to the plaintiffs' contention that a duty to take care in relation to statements made in the Woolloomooloo study was owed to them as members of the class of developers interested in the redevelopment. Hutley J.A. cited<sup>35</sup> that part of the judgment of Barwick C.J. in Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt in which he expressed the view that the Hedley Byrne principle applies only where "[t]he information or advice is sought or accepted by a person on his own behalf or on behalf of another identified or identifiable person or on behalf of an identified or identifiable class of persons."<sup>36</sup> According to Hutley J.A., there was no reported case in which the information complained of had been given to a class.<sup>37</sup> In fact, that was not so; the matter had already arisen several times. To take just one of the more prominent examples, in Scott Group Ltd. v. McFalane<sup>38</sup> the New Zealand Court of Appeal found that, in preparing financial information relating to a particular company, a firm of accountants owed a duty of care to those who might be induced by the information to make a take-over bid, although there were at the time no share dealings in prospect. In any event, Hutley J.A. felt able in the San Sebastian case to hold that the "private developers" whom the study

invited to participate in the redevelopment of Woolloomooloo formed an identified or identifiable class of which the plaintiffs were members, so that the test of Barwick C.J. in Evatt was satisfied.<sup>39</sup> The same conclusion was reached by Glass J.A., who accepted the findings of Ash J. at first instance that the study was directed to developers as a class whose co-operation was being sought, and held that the plaintiffs were members of that class.<sup>40</sup> He also referred to Scott Group Ltd. v. McFarlane, and noted that in the instant case the defendants knew that developers would rely on the proposals in the study for the purpose of future transactions, namely investment in the area. Accordingly, he held that a special relationship for the purposes of Hedley Byrne was not excluded merely because the plaintiffs were personally unidentified, since they were members of an identifiable class.<sup>41</sup>

The implication to be drawn from these authorities is that government will normally be under no duty of care in the provision of information which is published for general consumption. It is clear that a duty of care cannot be founded on the mere fact that a citizen relying in some way upon government information might suffer some reasonably foreseeable loss: the requirement of a "special relationship" effectively eliminates that possibility. Thus, to use again the familiar example given by Denning L.J. in Candler v. Crane, Christmas & Co.<sup>42</sup>, no duty of care is owed by a marine hydrographer who omits a rock from his chart and so causes the wreck of an ocean liner. Similarly, where government publishes information to citizens generally there is no identified or identifiable class with whom government might be in a special relationship, and so there can be no duty of care.



But this statement is subject to an important gloss, suggested by the San Sebastian case. The redevelopment study with which that case was concerned was a public document, placed on public exhibition in the Sydney Town Hall, but a majority of the New South Wales Court of Appeal held that the information contained in it was directed to an identified or identifiable class of developers whose co-operation in the redevelopment was being solicited. There was accordingly a special relationship between the defendants and those developers. This indicates that the Hedley Byrne principle may be applicable to any item of government information, published howsoever widely, which it is possible to construe as directed to a specific or identifiable group for a specific purpose or, conceivably<sup>43</sup>, for a spectrum of possible purposes. On this analysis, it will be a question of fact in each case to which persons the information is directed, and whether they form an identifiable class: the more specific the direction, the more likely it is that a duty of care will be found.

However, though important, this gloss is not such as to subvert the basic principle. Thus if citizen A approaches a government department and obtains considered but non-binding advice as to the availability of a particular grant or benefit, he will be prima facie in a special relationship with the department and able to claim damages for any financial loss which he suffers as a result of the advice having been provided negligently. But if, after and as a result of A's inquiry, the department publishes a pamphlet or other document containing general information as to the availability of the same grant or benefit, the Hedley Byrne principle will not avail citizen B who relies upon that document in the same way as A, and again to his financial detriment. The

case is analagous to that of the marine hydrographer: the information is addressed not to an identified or identifiable class, but to citizens generally.

### 3. Statements Of Law, Assurances And Implied Or Inferred Statements

There is some doubt as to what constitutes a "statement" for the purposes of the Hedley Byrne principle. The assertion sometimes made in the authorities<sup>44</sup> that the principle is concerned with information and advice is insufficiently specific to be of great assistance. More helpful are those cases in which it has been held that the principle deals with representations of fact or opinion.<sup>45</sup> However, the authorities are in some confusion as to whether the principle extends to cover statements of law, assurances and implied or inferred statements.

#### (a) Statements of Law

Whether or not the Hedley Byrne principle covers negligent statements of law is an issue of great importance to any discussion of the liability of government for misleading information, for it has already been noted that government provides citizens with large quantities of legal information.<sup>46</sup> At first sight, a formulation which restricts the operation of the principle to representations of fact and opinion would seem to preclude the possibility that it may cover statements of law. However, there is no reported case in which an express determination to that effect has been made. Moreover, there are

cases in which the courts have imposed liability for such statements. Thus in Whittingham v. Crease & Co.<sup>47</sup>, a solicitor was held liable for a representation that a will would be valid and effective if witnessed by the principal beneficiary. Again, in Windsor Motors v. District of Powell River<sup>48</sup>, liability was founded upon a representation by a licence inspector employed by the defendant municipality that a certain location could be used in accordance with zoning by-laws for the sale of second-hand cars. The representations in these cases were clearly statements of law, although the judgments unfortunately fail to record that fact. Further support for the view that the Hedley Byrne principle may cover such statements may be gleaned from academic commentators. Thus Cheshire and Fifoot note that there is nothing in the speeches in Hedley Byrne to suggest that liability is confined to statements of fact, and assert that it can extend "to other forms of negligent advice, such as the expression of an opinion about the law."<sup>49</sup> It is to be hoped that if and when the issue is squarely raised before the courts, they will be prepared to adopt a similar approach.

(b) Assurances

It appears from the important decision of the New Zealand Court of Appeal in Meates v. Attorney-General<sup>50</sup> that the Hedley Byrne principle may extend to negligent assurances or undertakings. The case concerned Matai Industries Ltd. ("Matai"), an industrial concern incorporated after the 1972 general election as a result of discussions and an exchange of correspondence between one Kevin Meates and the Prime Minister, the Minister of Trade and Industry, and the Minister of Finance, regarding

the newly-elected government's policy of regional development. One Matai factory commenced operations before the company was incorporated, and four others were later officially opened by the Prime Minister. By the time of the official opening Matai was already experiencing a serious problem with cash-flow. The government had guaranteed the company's bank account and financial assistance had been provided through the Development Finance Corporation, but government subsidies which Matai had expected were not forthcoming. The government was adamant that there would be no retrenchment, and appointed a receiver. Later, a decision was made to sell off Matai's assets. The shareholders brought an action against the government, claiming damages for negligent misstatement on the ground that, once the company fell into financial difficulties, the Minister of Trade and Industry had assured them that, if they acceded to the appointment of a receiver, their interests would be safeguarded and they would be indemnified, in reliance upon which assurance they had omitted to take normal commercial steps to protect their position, with the result that the value of their holdings had been lost. At first instance, Davison C.J. rejected the plaintiffs' claims and dismissed the action.<sup>51</sup> On appeal, it was held that the government owed a duty of care to the shareholders in relation to advice given or statements made to them.<sup>52</sup> Woodhouse P. and Ongley J. went on to hold that the government had broken that duty of care by assuring the shareholders that they would be indemnified, and in particular by issuing jointly with the directors of Matai a press statement stating that the interests of employees, creditors and shareholders would be safeguarded.<sup>53</sup> The encouragement thus offered by the government was misleading and negligent, and the reliance of the shareholders upon it was an effective cause of their loss

of the value of their equity. Their Lordships dealt summarily with the contention that the Hedley Byrne principle does not extend to assurances or undertakings with respect to future action, stating that "although a promise may fall short of a contractual commitment nonetheless if it is provided by somebody who intends it to be acted upon and who is in an exclusive position to give effect to it, let alone the central Government, then surely it is likely to be received as a far more powerful piece of information than mere opinion whether supplied by a man in a professional capacity or by some other person sufficiently equipped and interested enough in the subject matter to express a serious view upon it."<sup>54</sup> They went on to hold that the particular strength of the claim of negligence lay in the fact that "unqualified representations were not discharged in a situation where the Government had exclusive control and could decide whether and in what fashion they would be met."<sup>55</sup> Cooke J. dissented, on the basis that no breach of the government's duty of care had, on the facts, been established.<sup>56</sup> However, on the issue of whether the Hedley Byrne principle extends to assurances and undertakings, he was in broad agreement with the majority: "I think that there can be occasions when a reasonable person, on receiving...a request, promise or assurance from someone acting within the particular sphere of his authority, is entitled to assume that the speaker has taken and will take reasonable care to safeguard the interests of the person he has sought to influence, if that person acts as suggested. And if the speaker in authority has indicated that certain assistance or other benefits will follow, he will be bound to do what is reasonably within his power, consistently with his other responsibilities, to bring about that result. The duty....extended

here...to taking reasonable steps to carry out as far as reasonably possible any assurances given to the shareholders, even though they had not crystallised into precisely defined contractual obligations."<sup>57</sup>

The importance of Meates v. Attorney-General is that it extends the Hedley Byrne principle in such a way as effectively to create an action for breach of promise. The decision invites parallels with the judgment of Denning J. in Central London Property Trust Ltd. v. High Trees House Ltd.<sup>58</sup>, in which the learned judge first formulated the doctrine of promissory estoppel. But Meates v. Attorney-General goes considerably further than did the High Trees case, in which Denning J. emphasized that a breach of promise was not actionable in damages on any other basis than contract.<sup>59</sup> Subsequent decisions have confirmed that the doctrine of promissory estoppel has created no new cause of action, such as would abolish the doctrine of consideration by a sidewind.<sup>60</sup> Of course, every promise contains an implied or inferred statement of fact, namely that the promise truly represents the promisor's present intention as to the future.<sup>61</sup> If a promise is made without any intention of fulfilling it, the promisor may be made liable in damages for deceit.<sup>62</sup> But by far the commonest case is that in which the promisor intends to fulfil his promise at the time he makes it, but for some reason subsequently fails to do so.<sup>63</sup> In such a case, there can be no liability for deceit.<sup>64</sup> In Meates v. Attorney-General, Woodhouse P. and Ongley J. at one point stated that "the representations [of the government] were certainly made negligently if they were made at a time when there was no fixed intention to meet the commitment and a fortiori if there had been no intention at all."<sup>65</sup> But their Lordships did not base their judgment upon a finding that, at the time the representations were made, the

government had no intention, or no fixed intention, of honouring them. Their imposition of liability was founded rather on the fact "that unqualified representations were not discharged in a situation where the Government had exclusive control and could decide whether and in what fashion they would be met."<sup>66</sup> This is in essence to allow Hedley Byrne to be used to provide a remedy in damages for broken promises. The point is made clear in the assertion of Cooke J. that the receipt of a promise entitles the recipient "to assume that the speaker has taken and will take reasonable care to safeguard the interests of the person he has sought to influence, if that person acts as suggested."<sup>67</sup> This goes far beyond the natural limits of the Hedley Byrne principle, the essential purpose of which is to place on a person who provides information to another with whom he is in a special relationship a duty to exercise reasonable care in providing the information, a breach of that duty being actionable in damages. The effect of Meates v. Attorney-General is to place upon a person who makes a promise to another with whom he is in a special relationship a duty, also actionable in damages, to exercise reasonable care to fulfil that promise. This is a distortion of Hedley Byrne<sup>68</sup>. The common law has traditionally refused to permit the breach of an assurance or undertaking to be actionable in damages, other than in contract, and it is unsatisfactory for that refusal to be undermined by a sidewind. The formulation of the doctrine of promissory estoppel did not have the effect of creating an action for breach of promise; it strains principle and authority to allow Hedley Byrne to be used to achieve the same result.

(c) Implied or Inferred Statements

It is clear that the Hedley Byrne principle applies to express statements, whether oral<sup>69</sup> or written.<sup>70</sup> But there is some doubt as to the extent to which, if at all, the principle covers statements which are implied into or inferred from words or conduct. Some courts, notably in Canada, have been prepared to recognize representations implied into or inferred from licences, consents or permits. Thus such documents have been held to contain representations that the application pursuant to which they were issued was properly processed<sup>71</sup>, or complied with the relevant statutory or other scheme.<sup>72</sup> However, in none of these cases was there any discussion of the nature of the statement upon which liability was founded. Moreover, the courts have been reluctant to go beyond a relatively low level of implication or inference. Thus, in Welbridge Holdings Ltd. v. Winnipeg<sup>73</sup>, the Supreme Court of Canada held that the enactment of a municipal by-law did not involve a representation that the enactment was valid. Again, in Bowen v. City of Edmonton<sup>74</sup>, the Alberta Supreme Court refused to treat a council resolution to approve a replot plan as containing a representation that adequate consideration had been given to all matters to which a subdivision plan is directed, including soil stability.

The fullest discussion of this issue yet reported in the Commonwealth occurred in the San Sebastian case, a decision of the Court of Appeal of New South Wales the brief facts of which have already been



rehearsed. All of the judgments in that case adopted a restrictive view of the nature of the representations to which the Hedley Byrne principle may apply. According to Hutley J.A.<sup>75</sup>, there is only one case in which recovery for an inferred statement has been allowed, namely Shaddock (L) & Associates Pty. Ltd. v. Parramatta City Council<sup>76</sup>, in which the failure of the council to draw attention to a particular fact was treated as equivalent to a positive denial of its existence. That case, said the learned judge, "represents the outer limit of inference."<sup>77</sup> The most which he was prepared to imply into the Woolloomooloo study was a representation by the defendant to the effect "we believe this is feasible now."<sup>78</sup> Glass J.A. was more expansive, stating that in "many branches of the law there is a distinction between express statement and implications and inferences not included in what is expressed...I consider that a similar demarcation line between what is expressed and what may be inferred from the express language has an important part in the law of negligent misrepresentation as a direct consequence of the way the liability has been formulated. I would take it to be fundamental that a defendant, being aware that the plaintiff intends to rely on the accuracy of information given, cannot assume responsibility for its accuracy, cannot know that he is being trusted to give accurate information and cannot let it be known that he is willing to exercise reasonable care that his information is accurate except with respect to information expressly imparted by him to the plaintiff. Conduct which is tantamount to the giving of express information, [such as that in] Shaddock..., will suffice but movement beyond that point will not, I

believe, satisfy the requirements of principle."<sup>79</sup> Similarly, Mahoney J.A. held that a statement for the purposes of Hedley Byrne "is a statement actually made by the defendant. It does not include an implication which the plaintiff may, albeit reasonably, draw from the addition to what is said of facts or assumptions supplied by the plaintiff."<sup>80</sup>

The judgments in the San Sebastian case on this issue are open to criticism on several grounds. First, there is nothing in Hedley Byrne itself which rules out the imposition of liability for implied or inferred statements. The emphasis placed by Glass J.A. upon the need for a voluntary assumption of responsibility by the maker of the negligent statement is unwarranted, as it is clear from the speeches in Hedley Byrne that such an assumption of responsibility is itself to be implied into or inferred from the making of a statement within the context of a special relationship.<sup>81</sup> In view of the fact that such authority as presently exists indicates that the Hedley Byrne principle may apply to statements made in pursuance of a statutory duty<sup>82</sup>, although there is in such cases no element of voluntariness, there should be little difficulty in implying or inferring a voluntary assumption of responsibility in relation to statements which are themselves implied or inferred. Indeed, this is borne out by the "licence" cases already mentioned<sup>83</sup>, none of which were drawn to the attention of the New South Wales Court of Appeal. Secondly, it is beyond dispute that other branches of the law accept that statements may be implied or inferred. This is the case with respect to estoppel<sup>84</sup>, contract<sup>85</sup>, and even deceit<sup>86</sup>, which is first cousin to, if not father of, the Hedley Byrne principle. Thirdly, all of their

Lordships approved Shaddock, as they were bound to do. Yet Shaddock is itself an example of liability founded upon an inferred statement. If that case is correct, it is difficult to discern an appropriate dividing line between implied or inferred statements which are acceptable and those which are not. To assert that Shaddock concerned a statement tantamount or equivalent to an express statement is merely to recast the problem, not to solve it.

There is no justification for the restrictive approach of the Court of Appeal of New South Wales in the San Sebastian case to implied and inferred statements. The matter is of particular importance to a discussion of the remedies for misleading government information, because all acts, omissions and decisions of government have informational aspects, upon which citizens may rely. A citizen should not be denied a remedy where he has suffered a loss as a result of his reliance upon a statement of government, merely because the statement is one which he implied into or inferred from government conduct. But such is the effect of the San Sebastian case. The efforts of the courts should be directed to ensuring that only those statements which may reasonably be so implied or inferred are allowed to attract the application of the Hedley Byrne principle, rather than to excluding from the scope of that principle all such statements, however reasonable the implication or inference.

#### 4. Competence And Expertise

Liability in accordance with the Hedley Byrne principle will not be imposed for a statement made by a government officer where that

statement falls outside the area of competence or expertise of the officer concerned, and the citizen either knew or should have known that fact.<sup>87</sup> The authorities which exemplify this general rule proceed on either or both of two bases: namely, that the "special relationship" between the officer and the citizen was limited to matters within the competence of the officer, so that he was under no duty of care in relation to statements concerning other matters;<sup>88</sup> or that the citizen did not rely, or did not reasonably rely, upon the officer's statements in respect of matters falling outside the officer's sphere of competence.<sup>89</sup> In every case, the important question will be whether, in the light of all the circumstances, and in particular of the content of the statement and the position and function of the officer who made it, the citizen knew or should have known that the statement exceeded the officer's competence or expertise. The general rule is illustrated by the decision of the High Court of New Zealand in Brown v. Heathcote County Council<sup>90</sup>, in which Hardie Boys J. declined to hold the council liable in damages for advice provided to the plaintiffs by its building inspector to the effect that there was no reason why they should not build a house on a site which was in fact susceptible to flooding. The council kept no records with respect to flooding, and relied in that regard on the area Drainage Board. In giving his advice, the inspector "clearly directed his mind to the location of the building in relation to the boundaries...[which] was his area of expertise"<sup>91</sup>, and there was "no assumption of responsibility on his part to advise about flooding."<sup>92</sup> Furthermore, there was no evidence that the plaintiffs actually relied on

the inspector to advise them in relation to flooding, and indeed there was evidence to the contrary, for Mr. Brown admitted at trial that he was aware that any expertise in the matter of flooding resided in the Drainage Board and not in the council. A further example is provided by Sharadan Builders Inc. v. Mahler<sup>93</sup>, in which, prior to completion by the plaintiff of the purchase of certain land, the plaintiff's solicitor inquired of officers of the municipality whether building permits would be available in accordance with the zoning and building by-laws. He was informed by the municipal clerk and the municipal building inspector that such permits would be available. After purchasing the land, the plaintiff applied for building permits and was refused them by reason of restrictions imposed by the regional conservation authority. The Ontario Court of Appeal dismissed the plaintiff's action for negligent misstatement, on the ground that the inquiries made by his solicitor related only to municipal by-laws, and therefore the replies of the municipal officers were similarly so limited. The officers had professed no competence or expertise to advise upon requirements for building permits other than those imposed by the municipality.

Furthermore, liability under the Hedley Byrne principle will not be imposed where the officer has no greater knowledge of or expertise in the matter to which the information relates than does the citizen himself. Thus one of the issues before the Supreme Court of Canada in Town of the Pas v. Porky Packers<sup>94</sup> was whether the secretary-treasurer of the municipality had negligently represented to T, as trustee for a meat processing company, that certain land within the municipality was

available and suitable for a meat processing plant. T was not only experienced in the meat trade, but was also a local councillor and a member of the municipal planning commission. The court declined to hold the municipality liable, on the ground that the real inquiry which T had made of the secretary-treasurer was whether the municipality owned any land in the municipality's light industrial zone; T had already determined, on the basis of his own knowledge and experience, that the proposed plant was a permitted use in that zone and was aware that the Planning Scheme By-law prohibited the carrying on of noxious or offensive uses in such zones. As T himself had expert knowledge of these matters, and did not wish to avail himself of any particular skill or judgment possessed by the secretary-treasurer, no duty of care arose.

## 5. Standard Of Care

The Hedley Byrne duty of care is not a duty to take every possible care; still less is it a duty to be right. It is rather the duty, familiar from other branches of the law of negligence, to take such care as is, in all the circumstances, reasonable.<sup>95</sup> It is unclear whether a higher standard of care will be imposed where information is provided for a fee than when it is provided gratuitously.<sup>96</sup> The matter is of considerable importance in relation to the provision of information by government, since, as has already been noted<sup>97</sup>, there is currently a movement in Canada towards the imposition of fees for such information.

In principle, it would be invidious to impose a more exacting standard of care merely because a charge is levied, or to make the duty less exacting because no charge is levied. Government decisions as to the levying of charges for information cannot be analysed purely in accordance with notions of allocative efficiency, as they are frequently motivated, wholly or in part, by distributional considerations. It would be quite unsatisfactory for the law to impose upon government a lower standard of care in the preparation and dissemination of information so important to citizens that the provision of it is heavily, or even fully, subsidized.

## 6. Disclaimer Of Responsibility

The decision in Hedley Byrne in fact went in favour of the defendants, on the basis that they had made the negligent statements "without responsibility."<sup>98</sup> It accordingly appears that the emphasis placed in their Lordships' speeches upon the need for a voluntary assumption of responsibility was intended to indicate that there can be no duty of care where responsibility is expressly disclaimed. There is no reason in principle why government should not be able to avail itself of this means of avoiding liability, and indeed it is not uncommon for it to do so. Thus the United Kingdom Land Registry has for many years placed notices in its waiting rooms disclaiming responsibility for answers given in response to inquiries.<sup>99</sup> However, to be fully effective such disclaimers should apply both to government itself and to its

officers; if only government is covered, the officers could be sued individually.<sup>100</sup> Moreover, it has been held in England that an officer of an organization who makes a prediction as to a future decision of the organization may be under a duty of care in so doing, and does not disclaim responsibility simply by indicating that the decision will be made at a higher level in the organization's structure.<sup>101</sup> This decision is potentially of importance in relation to misleading information provided by a government officer in response to a government-controlled uncertainty. In such a case, the mere statement or indication by the officer that the uncertainty will be resolved at a higher level of government will not be sufficient for him to disclaim responsibility, and so to avoid a duty of care. Finally, there is some support for the view that there can be no disclaimer of responsibility in the case of information provided pursuant to a statutory duty. Thus in Minister of Housing and Local Government v. Sharp<sup>102</sup>, both Lord Denning M.R.<sup>103</sup> and Salmon L.J.<sup>104</sup> appeared to adopt the view that a disclaimer can be effective only where the defendant would otherwise voluntarily have assumed, whether expressly or impliedly, an obligation to take care, which would not include the case where he was obliged by statute to make the statement. If this is so, a citizen seeking to hold government liable in damages for the negligent provision of information which was provided in accordance with a statutory duty will not be defeated merely because the information was accompanied by a disclaimer of responsibility.



## 7. Vicarious Liability

The liability of government under the Hedley Byrne principle for the negligent provision by its officers of misleading information is limited by the common law rule that a master is liable only for the torts of his servants committed in the course of their employment.<sup>105</sup> A tort falls within the scope of a servant's employment if it is expressly or impliedly authorised by the master, or is an unauthorised manner of doing something which is authorised, or is necessarily incidental to something which the servant is employed to do.<sup>106</sup> The difficulties which this may pose for a citizen seeking to recover damages from government for the negligent provision of misleading information are similar to those presented by the operation of the rules of agency in relation to attempts to hold the government to such information by means of the doctrine of estoppel<sup>107</sup>, and it is not intended to discuss them in depth in this section. However, one particular situation deserves consideration, namely that in which two or more government officers are involved in the provision of the misleading information. If officer A negligently prepares the information, which is communicated (accurately) to the citizen by officer B, the citizen must establish that either A or B has committed the tort of negligent misstatement before he can make government vicariously liable for that negligence. Yet officer A has made no statement to the citizen, while officer B is guilty of no negligence. On orthodox principles, it would be possible to treat A as having committed a tort only if he was aware that the information was to

be communicated to the citizen<sup>108</sup>, which will not always be the case. A potential means of resolving this difficulty is provided by the analysis which treats the liability of an employer not as vicarious, but as separate and independent, resulting from the attribution to the employer of the conduct of the employee, so that the employer answers for the acts of his servant as if they were his own. On this basis, government would be responsible for the negligence of officer A and the statement of officer B, a combination sufficient to attract liability under the Hedley Byrne principle. However, although this analysis is not without judicial support<sup>109</sup>, the weight of authority favours the traditional doctrine of vicarious liability.<sup>110</sup>

## 8. Hedley Byrne And Standards

Actions in negligence can be used as a means of obtaining a review of government decisions. It was argued earlier<sup>111</sup> that the courts are not an appropriate forum for the review of government decisions which are value-laden, in the sense that they represent a choice or form an inextricable part of a series of choices between competing values and interests represented in society. It is a desire to avoid the use of negligence as a tool to review such decisions that underlies the ultra vires test adopted by Lord Wilberforce in Anns v. London Borough of Merton<sup>112</sup>, the essence of which is conveyed by his statement that "A plaintiff complaining of negligence must prove, the burden being on him,

that the action was not taken within the limits of a discretion bona fide exercised before he can begin to rely upon a common law duty of care."<sup>113</sup> This rule presents a striking parallel with the duty/discretion principle applied in attempts to hold the government bound by estoppel<sup>114</sup>, and indeed they are intended to perform a similar function: namely, to protect from review government decisions made within the scope of a statutory discretion. "Most, indeed probably all, statutes relating to public authorities or public bodies, contain in them a large area of policy. The courts call this 'discretion' meaning that the decision 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."<sup>115</sup> Makuch points out that "[in] suggesting that the more a matter is operational the more likely that liability can be found, this passage seems to be based on the view that operational decisions involve less discretion and, since the basic test for liability rests on whether an act is ultra vires the discretion granted, the narrower the discretion granted, the easier it is to find an act ultra vires that discretion and to impose liability. The converse of

course follows; the wider the discretion, the more a decision can be characterised as a planning decision. More importantly, the more difficult it is for the courts to find a decision to be ultra vires a broad discretion."<sup>116</sup> The ultra vires test is analysed by Makuch in the light of his argument, discussed and adopted earlier<sup>117</sup>, that the purpose of government immunity from review through negligence is to ensure that the courts do not substitute their values for those of elected or appointed government decision-makers, something which is less likely to happen where objective or accepted standards exist by which the government decision may be assessed. His conclusion is that the ultra vires test may have "the beneficial effect of directing the courts to search for legal limits or standards";<sup>118</sup> but he is clear that it is the presence or absence of standards for review which must ultimately determine the extent of government immunity.

It is clear that the political considerations which spawned the ultra vires test, and also the test itself, apply with equal force to actions for negligent misstatement as to other negligence actions. This is illustrated by the decision of the Court of Appeal of New South Wales in Wollongong City Council v. Fregnan<sup>119</sup>, in which the respondents contracted to purchase a vacant lot in the city of Wollongong, intending to build a cottage thereon. Prior to completion of the purchase, Mrs. Fregnan asked a council officer whether there was anything wrong with the land and received the reply "not that I know of." After completion, the respondents submitted a building application, whereupon council officers inspected the lot and advised relocation of the cottage. The respondents complied, their application was approved, and the cottage was

constructed. Shortly afterwards, heavy rainfall in the area caused a land slip, as a result of which the cottage was damaged. It subsequently emerged that the council kept a land slippage register and that the portion of the respondents' lot in the general vicinity of the relocated cottage was marked as an affected area. The respondents sued for damages, contending inter alia that misleading information had been negligently provided to Mrs. Fregnan prior to the purchase. This claim failed, the court holding that the officer had only provided information of his own knowledge and had not purported to make any statement on behalf of the council. Moreover, the council was under no duty to warn the respondents prior to completion of the likelihood of land slippage. Hutley J.A. said: "A council is...entitled to decide whether or not it will put itself in the position of being an adviser to intending purchasers of land. If it does...it is responsible for negligence in performing a role which is assumed, but it can decline to enter upon the task of advising intending purchasers....This council had so declined."<sup>120</sup> In other words, there would be no review of the council's omission to provide intending purchasers with information as to the risk of land slippage, as a decision not to supply such information fell within the bounds of the council's discretion. More importantly, no appropriate standard existed by which the court could assess and characterize as negligent or otherwise the council's refusal to assume that task.

The issue also arose in the San Sebastian case, in which the plaintiff developers sought damages under the Hedley Byrne principle for loss suffered by reason of their reliance upon the Woolloomooloo

redevelopment plan study, which had been published and exhibited to the public but which they alleged was by reason of negligent planning in fact not feasible of implementation. The defendant contended that, in deciding to publish and exhibit the study, the council had made a discretionary or policy decision in respect of which it owed no duty of care. Hutley and Glass J.J.A. adopted conflicting views on this issue. Hutley J.A. said: "Though the law of damages in tort for providing negligently false information has its own special aspects, it is part of the law of negligence. As a developing field of negligence, public policy considerations cannot be ignored...Public policy requires...that social planners should be free from liability for negligence while devising their plans...[A]n unpublished policy decision is unthinkable in a democratic society outside the area of State security. In my opinion, the formulation and the publication are part of the one exercise and should carry with them the same immunities."<sup>121</sup> Glass J.A. disagreed. Although the council had in one sense a discretion whether or not to publish the study, the decision to publish was not "a discretionary or policy decision within the meaning of Lord Wilberforce's propositions. I understand his observations to be limited to those Council actions which are not operational because they involve the exercise of a discretion reposed in it by statute. It is not contended that in publishing the study the council was exercising a discretion of that kind."<sup>122</sup> Nor was the learned judge persuaded that there were any broader policy considerations which should protect the council from liability.<sup>123</sup>

This divergence of judicial opinion is important as illustrating the difficulties which the ultra vires test may generate where it is applied without any regard to the issue of whether standards exist according to which the particular government decision may be reviewed. It is clear, at least as a theoretical matter, that actions for the negligent provision of misleading information may proceed on either or both of two bases, namely that the information concerned was negligently prepared, or that it was negligently communicated. Communication of information will rarely, if ever, be other than an "operational" task; that is, standards will generally exist by which the adequacy of the performance of the task may be assessed. Far greater problems are likely where the alleged negligence occurred at the preparatory or planning stage, as in the San Sebastian case, where it was alleged that the proposed redevelopment was unworkable because of negligence on the part of its compilers. For Hutley J.A., the plaintiffs' claim entailed an attack on just the sort of decision which the courts should decline to review by means of a finding of negligence. "A plan for the redevelopment of an area which is already developed, such as this, involves the displacement of many interests...The planner in working out his plan is unlike the draftsman of a will, who has only to consider the wishes of a testator and perhaps a designated beneficiary. It would place an intolerable burden on planners if having been asked to devise a development control plan for an area on the basis that the whole area will be developed for business purposes, they could be sued for negligently planning because they gave no attention to the rehousing of existing residents."<sup>124</sup> This is surely correct, but it was not the case

before the learned judge. The allegations of negligence made by the plaintiff developers related, not to the system of values embodied in the study, but to the methods employed actually in preparing it. The plaintiffs pointed to external standards against which the preparatory work could be assessed, namely the accepted town planning standards of investigation, research and calculation. This should have been sufficient to bring the preparation of the study within the "operational" area, and so to justify the court in entertaining the plaintiffs' claim. It is easy to agree with Hutley J.A. that "social planners should be free from liability for negligence while devising their plans"<sup>125</sup>; but where, as in the case before him, they are not determining the values to be embodied in their plans, but rather implementing those values by methods capable of assessment in accordance with external standards, there can be no objection to a claim in negligence. That was the conclusion reached by Glass J.A., but his judgment on this issue is little more satisfactory than that of Hutley J.A., for he contented himself with a mechanical application of the ultra vires test, involving no consideration of the issue of standards for review.

An important decision in this context is Meates v. Attorney-General<sup>126</sup>, the facts of which have already been set out. In that case, the New Zealand Court of Appeal was faced with the argument on behalf of the respondent that the matter was not one suitable for the imposition of a duty of care, as it involved the political interests of government. This argument was rejected on the ground that the claim of negligent misstatement related to the future application of government



policy, and was not directed to challenging the formation of that policy. Thus Cooke J. said: "If [Ministers] undertake to give specific advice regarding the application of Government policy in given cases, in circumstances where they should know that their advice will be relied on...they are bound to be reasonably careful...[although] obviously the Courts must be alert not to pitch the standard so high as to interfere in policy-making."<sup>127</sup> This reasoning is disingenuous. The remedy provided in Meates v. Attorney-General was not for the making of negligent misstatements as to the future application of government policy, but for the failure of government to apply its policy in accordance with its statements. In short, the government was held liable, not for making statements, but for failing to honour them. It is difficult to see how a decision of government not to honour its undertakings can be amenable to review through an action in negligence. It is easy to sympathize with the desire of the court to compensate the shareholders for their losses suffered as a result of government inconsistency, but, as ever, hard cases make bad law.

The classic example of a government decision which may require immunity from an action in negligent misstatement is a decision as to whether information should be provided in response to a particular uncertainty. That was the basis of the decision in Wollongong City Council v. Fregnan<sup>128</sup>, in which it was held that the council was under no duty to take care to warn intending purchasers of likely land slippage. A contrasting case is Hendrick v. De Marsh<sup>129</sup>, in which a senior parole

officer had arranged for De Marsh to be accommodated at the plaintiffs' guest house, telling them that he was ending a prison sentence for break-and-enter and had personality disorders, but not that those disorders manifested themselves in a propensity to set fires. Shortly after being accepted as a boarder at the premises, De Marsh set fire to them, killing another resident and causing extensive damage. The claim brought by the plaintiff against De Marsh, the parole officer and his employer, the Minister of Correction and Services, was held statute-barred. However, Pennell J. stated obiter that, although in deciding not to disclose De Marsh's fire-raising proclivities the officer had exercised a kind of discretion, nonetheless that decision operated at the "operational" level and was capable of attracting liability under the Hedley Byrne principle.<sup>130</sup> Again, it is the issue of standards for review which underlies the different approaches in Wollongong City Council v. Fregnan and Hendrick v. De Marsh. In the former, the council's policy not to warn of likely land slippage was part of a network of decisions allocating the council's financial and human resources between various competing interests, and for that reason was not susceptible of assessment by reference to any external standard. But in the latter, the parole officer's decision not to inform the plaintiffs of the nature of De Marsh's personality disorders was concerned with the allocation, not of resources, but of risk, its effect being to require the plaintiffs to act as insurers for society as a whole against the possibility that De Marsh would once again set fires; in relation to this decision, the learned judge felt able to make a value-judgment to the

effect that the parole officer had failed to meet the standard to be expected of a reasonable man.

Standards for review may also be provided by government's own practice. This is illustrated by the decision of the High Court of Australia in Shaddock (L) & Associates Pty. Ltd. v. Parramatta City Council<sup>131</sup>, in which the appellants, in contemplation of the purchase of certain land, applied to the council for a statutory certificate relating to zoning and town planning matters. One of the questions put to the council was whether the land was affected by any road-widening proposals. In response, the council issued a certificate referring exclusively to those matters in respect of which it was authorised by statute to issue such a certificate, which did not include certain local road-widening proposals affecting the land. The appellants believed that the absence from the certificate of any reference to such proposals indicated that none existed, for it was the council's practice to endorse such references on certificates, the application for which inquired generally about road-widening proposals. The appellants purchased the land in reliance upon the certificate, and subsequently suffered loss by reason of the road-widening. Their action for negligent misstatement succeeded before the High Court. Gibbs C.J. said: "[H]aving regard to the practice of the council to endorse information as to road widening proposals at the foot of the certificates, its failure to do so when it had been asked, by the use of the form commonly employed, to supply the information for conveyancing purposes could reasonably have been understood by the recipient of the certificate as information that no

proposal existed, and the council ought to have known...that it would probably be so understood...; clearly it was careless to give such a certificate."<sup>132</sup> In other words, the council's practice of supplying in a particular manner information of the sort requested provided the standard against which its failure to supply that information in the present case could be judged.

Another important category of government decisions which may require immunity from an action in negligent misstatement is that which comprises decisions as to the amount of human, financial or other resources which should be devoted to the production and dissemination of information in response to a particular uncertainty. Take the case of a wholly erroneous weather forecast, which results in the loss of the boat of a fisherman who ventures out. It would be one thing for the fisherman to sue the government under the Hedley Byrne principle on the basis that the readings upon which the forecast were based were incorrectly taken or interpreted, or that the forecast itself was incorrectly transmitted: these allegations are capable of assessment according to an external standard. It would be another matter altogether if the allegation of negligence related to the allocation of resources to the production of weather forecasts, for instance by criticising the nature or amount of the equipment devoted to their preparation. It will generally be inappropriate to review government decisions of that sort by way of an action in negligence.

In every case in which a citizen seeks to hold government liable under the Hedley Byrne principle, his success should depend upon his ability to point to some external standard which the court may use to

assess the negligence or otherwise of the statement complained of. Such standards will generally be available where the complaint relates to the actual communication of the statement. The preparatory level is likely to present greater difficulties, but even there standards may exist. The San Sebastian case provides one example; another can be found in those cases in which citizens have been misled by inaccurate electricity bills resulting from the incorrect adjustment or reading of an electricity meter by employees of the supplying authority.<sup>133</sup> Standards may be provided by government's own practice or routine. But only where such standards exist should the courts be prepared to allow government decisions to be reviewed by means of an action for negligent misstatement.

## 9. Assessment

Clearly, the Hedley Byrne principle is unable to provide in every case a means of obtaining compensation for loss suffered as a result of reliance upon misleading government information. Its operation is substantially restricted where that information was volunteered and/or provided to citizens generally. While the principle may apply to statements of law, and perhaps even to assurances, as well as to statements of fact or opinion, it is unclear whether it will extend to cases in which those statements are implied or inferred, rather than express. Further potential difficulties for the citizen are created by the possibility of disclaimer of responsibility, and by the doctrine of

vicarious liability. Above all, the principle is subject to the limitation of the ultra vires test, whereby there can be no review of a government decision as to the provision of information by way of an action for negligent misstatement, where the decision fell within the boundaries of a statutory discretion. This test is open to a mechanical applicaiton, but its value lies in its ability to focus on the need for external standards by reference to which the particular decision can be assessed as negligent or otherwise. Standards for review are less likely to be available where the decision fell within the boundaries of a statutory discretion, but without such standards the courts cannot and should not intervene.

FOOTNOTES

1. Supra, Part I, section 3.
2. Supra, Part I, section 6(a).
3. Street, H., The Law of Torts (6th ed.; London, Butterworths, 1976), p. 207; Fleming, J.G., The Law of Torts (6th ed.; Sydney, The Law Book Company Ltd., 1983), pp. 160-61.
4. [1964] A.C. 465.
5. [1932] A.C. 562.
6. Shaddock (L) & Associates Pty. Ltd. v. Parramatta City Council (1981) 36 A.L.R. 385, at 389 per Gibbs C.J.; and see Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., supra note 4, at 483 per Lord Reid; at 534 per Lord Pearce; Ultramares Corp. v. Touche (1931) 174 N.E. 441, at 444 per Cardozo C.J. (C.A. of N.Y.).
7. Supra note 4, at 486 per Lord Reid; at 502 per Lord Morris; at 511 per Lord Hodson; at 529 per Lord Devlin; at 539 per Lord Pearce.
8. Ibid., at 486; and see ibid., at 502-03 per Lord Morris; at 514 per Lord Hodson; at 539 per Lord Pearce.
9. [1971] A.C. 793.
10. Ibid., at 805-06 per Lord Diplock.
11. Ibid., at 812.
12. E.g. Stevens, L.L., Two Steps Forward And Three Back! Liability for Negligent Words (1972) 5 N.Z.U.L.R. 39; Rickford, J.B.K., A Mirage in the Wilderness: Hedley Byrne Considered (1971) 34 M.L.R. 328; P.G., (1971) 45 A.L.J. 261; Harvey, C., Negligent Statements - The Wilderness Revisited (1970) 120 N.L.J. 1155.
13. Esso Petroleum Co. Ltd. v. Mardon [1976] Q.B. 801, at 827 per Ormrod L.J.; Howard Marine and Dredging Co. Ltd. v. A. Ogden & Sons (Excavations) Ltd. [1978] Q.B. 574, at 591 per Lord Denning M.R.; at 600 per Shaw L.J.
14. Shaddock (L) & Associates Pty. Ltd. v. Parramatta City Council, supra note 6.
15. Scott Group Ltd. v. McFarlane [1978] 1 N.Z.L.R. 553; Meates v. Attorney-General [1983] N.Z.L.R. 308.
16. Supra note 6.

17. Ibid., at 392 per Gibbs C.J.; and see ibid., at 397-99 per Stephen J.; at 405-07 per Mason J.
18. [1973] 2 O.R. 503; and see Windsor Motors Ltd. v. District of Powell River (1969) 4 D.L.R. (3d) 155; H.L. & M. Shoppers Ltd. v. Town of Berwick (1978) 82 D.L.R. (3d) 23; Jung v. District of Burnaby (1978) 92 D.L.R. (3d) 592.
19. Cf. Honore, A.M., Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] J.S.P.T.L. 284; Symmons, C.R., The Problem of the Applicability of Tort Liability to Negligent Misstatements in Contractual Situations (1975) 21 McGill L.J. 79; Stevens, op. cit. note 12.
20. Supra note 4, at 486 per Lord Reid; at 502 per Lord Morris; at 529 per Lord Devlin; and see Rogers, W.V.H., Winfield and Jolowicz on Tort (12th ed.; London, Sweet & Maxwell, 1984), p. 276.
21. Rogers, op. cit. note 20, p. 276, note 12.
22. Heuston, R.V.F., and Chambers, R.S., Salmond and Heuston on the Law of Torts (18th ed.; London, Sweet & Maxwell, 1981), p. 194.
23. [1970] 2 Q.B. 223. The decision antedated Evatt's case, but was mentioned without disapproval in Moorgate Ltd. v. Twitchings [1977] A.C. 890, at 920 per Lord Edmund-Davies and in Ross v. Caunters [1980] Ch. 297, at 316-18 per Megarry V.C.
24. [1974] 1 N.S.W.L.R. 300, followed in G.J. Knight Holdings Pty. Ltd. v. Warringah Shire Council [1975] 2 N.S.W.L.R. 796; Port Underwood Forests Ltd. v. Marlborough County Council [1982] 1 N.Z.L.R. 343.
25. Supra note 23, at 268 per Lord Denning M.R.; at 279 per Salmon L.J.; at 291 per Cross L.J.
26. Cf. Fleming, op. cit. note 3, p. 605.
27. (1968) 122 C.L.R. 556.
28. Ibid., at 571-72.
29. Supra note 9.
30. See supra notes 12, 14.
31. [1982] A.C. 225.
32. Ibid., at 264.
33. [1983] 2 N.S.W.L.R. 268.
34. Ibid., at 305.



35. Ibid., at 288.
36. Supra note 27, at 570.
37. Supra note 33, at 288.
38. Supra note 15; and see Haig v. Bamford (1976) 72 D.L.R. (3d) 68 (S.C.C.); J.E.B. Fasteners Ltd. v. Marks, Bloom & Co. [1981] 3 All E.R. 289.
39. Supra note 33, at 288.
40. Ibid., at 304-05.
41. Ibid.
42. [1951] 2 K.B. 164, at 182-83.
43. Cf. Scott v. McFarlane, supra note 15, and J.E.B. Fasteners Ltd. v. Marks, Bloom & Co., supra note 38.
44. E.g. Shaddock (L) & Associates Pty. Ltd. v. Parramatta City Council, supra note 6, at 390-91 per Gibbs C.J.; at 396 per Stephen J.; at 403-04 per Mason J.; at 409 per Murphy J.; Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt, supra note 27, at 572 per Barwick C.J.
45. E.g. Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt, supra note 9, at 801 per Lord Diplock; Ross v. Caunters, supra note 23, at 314 per Megarry V.C.; Brown v. Heathcote County Council [1982] 2 N.Z.L.R. 584, at 600 per Hardie Boys J.
46. Supra, Part II, section A4.
47. [1978] 5 W.W.R. 45.
48. Supra note 18; and see Gadutsis v. Milne, ibid.; Davis v. Regional Municipality of Haldimand-Norfolk (1980) 12 R.P.R. 1.
49. Furmston, M.P., Cheshire and Fifoot's Law of Contract (10th ed.; London, Butterworths, 1981), p. 247; and see Heuston and Chambers, op. cit. note 22, p. 196; Saif Ali v. Sydney, Mitchell & Co. [1980] A.C. 198, at 230 per Lord Salmon; cp. Sebastian v. Government of Saskatchewan (1979) 7 C.C.L.T. 236.
50. Supra note 15.
51. [1979] 1 N.Z.L.R. 415.
52. Supra note 15, at 334 per Woodhouse P. and Ongley J.; at 378 per Cooke J.
53. Ibid., at 345-46.

54. Ibid., at 335.
55. Ibid., at 345-46.
56. Ibid., at 353, 384.
57. Ibid., at 379-80.
58. [1947] K.B. 130.
59. Ibid., at 134.
60. Cf. Combe v. Combe [1951] 2 K.B. 215; Argy Trading Development Co. Ltd. v. Lapid Developments Ltd. [1977] 1 W.L.R. 444; and see Fleming, op. cit. note 3, p. 596.
61. Edgington v. Fitzmaurice (1885) 29 Ch. D. 459, at 483 per Bowen L.J.; Angus v. Clifford [1891] 2 Ch. 449, at 470 per Bowen L.J.
62. Edgington v. Fitzmaurice, supra note 61; and see Heuston and Chambers, op. cit. note 22, p. 367.
63. Spencer Bower, G., and Turner, Sir A.K., The Law Relating to Estoppel by Representation (3rd ed.; London, Butterworths, 1977), p. 33.
64. Fleming, op. cit. note 3, p. 596; Heuston and Chambers, op. cit. note 22, p. 366.
65. Supra note 15, at 345.
66. Ibid., at 345-46.
67. Ibid., at 379.
68. Cf. Stevens, R., Hedley Byrne v. Heller: Judicial Creativity and Doctrinal Possibility (1964) 27 M.L.R. 121, 158-59.
69. E.g. Gadutsis v. Milne, Windsor Motors Ltd. v. District of Powell River, Jung v. District of Burnaby, supra note 18; State of South Australia v. Johnson (1982) 42 A.L.R. 161; R.A. & T.J. Carl Ltd. v. Berry [1981] 2 N.Z.L.R. 76.
70. E.g. Grand Restaurants of Canada Ltd. v. City of Toronto (1981) 123 D.L.R. (3d) 349; (1983) 140 D.L.R. (3d) 191; H.L. & M. Shoppers Ltd. v. Town of Berwick, supra note 18; Minister of Housing and Local Government v. Sharp, supra note 23.
71. Hull v. Canterbury Municipal Council, Port Underwood Forests Ltd. v. Marlborough County Council, supra note 24.

72. Gadutsis v. Milne, Windsor Motors Ltd. v. District of Powell River, H.L. & M. Shoppers Ltd. v. Town of Berwick, supra note 18; G.J. Knight Holdings Pty. Ltd. v. Warringah Shire Council, supra note 24.
73. [1971] S.C.R. 957.
74. (1978) 80 D.L.R. (3d) 501.
75. Supra note 33, at 281.
76. Supra note 6.
77. Supra note 33, at 281.
78. Ibid., at 285.
79. Ibid., at 308-09.
80. Ibid., at 338.
81. See references cited supra note 20.
82. Supra, section 1.
83. See references cited supra notes 71, 72.
84. Spencer Bower and Turner, op. cit. note 63, ch. 3.
85. Furmston, op. cit. note 49, p. 240.
86. Fleming, op. cit. note 3, p. 595; Heuston and Chambers, op. cit. note 22, p. 365.
87. This is quite apart from the issue of vicarious liability, discussed infra, section 7.
88. Brown v. Heathcote County Council [1982] 2 N.Z.L.R. 584; Sharadan Builders Inc. v. Mahler (1979) 93 D.L.R. (3d) 480; Town of the Pas v. Porky Packers [1977] 1 S.C.R. 51, at 67 per Spence J. (S.C.C.).
89. Brown v. Heathcote County Council, supra note 88.
90. Supra note 88.
91. Ibid. at 602.
92. Ibid.
93. Supra note 88.

94. Supra note 88. See also John Bosworth Ltd. v. Professional Syndicated Developments Ltd. (1979) 24 O.R. (2d) 97, at 107 per Robins J.; Brown v. Heathcote County Council, supra note 88, at 604 per Hardie Boys J.
95. Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt, supra note 9, at 812 per Lords Reid and Morris; Fleming, op. cit. note 3, p. 611.
96. Rogers, op. cit. note 20, pp. 285-86.
97. Supra, Part I, section 6(e).
98. Supra note 4, at 492-93 per Lord Reid; at 533 per Lord Devlin; at 539-40 per Lord Pearce.
99. Cf. Heuston and Chambers, op. cit. note 22, p. 197.
100. Ibid.; and note second disclaimer in Hedley Byrne itself, which covered bank officials.
101. Box v. Midland Bank [1979] 2 Ll. Rep. 391.
102. Supra note 23.
103. Ibid., at 268.
104. Ibid., at 279.
105. Heuston and Chambers, op. cit. note 22, pp. 425-41.
106. Ibid., pp. 437-40.
107. Cf. Lloyd v. Grace, Smith & Co. [1912] A.C. 716, at 736 per Lord Macnaghten.
108. Cf. Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., supra note 4, at 503 per Lord Morris; at 514 per Lord Hodson.
109. Cf. Twine v. Bean's Express Ltd. [1946] 1 All E.R. 202; Conway v. Geo. Wimpey & Co. Ltd. [1953] 2 K.B. 66; Broom v. Morgan [1953] 1 Q.B. 597; Darling Island Stevedoring and Lighterage Co. Ltd. v. Long (1957) 97 C.L.R. 36, at 54 per Webb J.; at 60-5 per Kitto J.; at 66-70 per Taylor J.; Shaddock (L) & Associates Pty. Ltd. v. Parramatta City Council, supra note 6, at 405 per Mason J.
110. Cf. Staveley Iron and Chemical Co. Ltd. v. Jones [1956] A.C. 627, at 639 per Lord Morton; I.C.I. v. Shatwell [1965] A.C. 656; Heuston and Chambers, op. cit. note 22, pp. 427-28.
111. Supra, Part I, section 4(d).

112. [1978] A.C. 728, applied in Barratt v. District of North Vancouver (1980) 114 D.L.R. (3d) 577 (S.C.C.); City of Kamloops v. Nielsen (1984) 10 D.L.R. (4th) 641 (S.C.C.).
113. Supra note 112, at 755.
114. Supra, Part II, section A3(b).
115. Supra note 115, at 754 per Lord Wilberforce.
116. Makuch, S.M., Municipal Immunity from Liability in Negligence, in Steel, F.M. and Rodgers-Magnet, S. (eds.), Issues in Tort Law (Toronto, The Carswell Company Limited, 1983), p. 224.
117. Supra, Part I, section 4(d).
118. Makuch, op. cit. note 116, p. 239.
119. (1980-82) 46 L.G.R.A. 391.
120. Ibid., at 394.
121. Supra note 33, at 288.
122. Ibid., at 306.
123. Ibid.
124. Ibid., at 288.
125. Ibid.
126. Supra note 15.
127. Ibid., at 379; and see ibid., at 335 per Woodhouse P. and Ongley J.
128. Supra note 119.
129. (1984) 28 C.C.L.T. 207.
130. Ibid., at 229.
131. Supra note 6; see Brown v. Heathcote County Council, supra note 88.
132. Supra note 6, at 388-89.
133. E.g. Maritime Electric Co. Ltd. v. General Dairies Ltd. [1937] A.C. 610; Taranaki Electric-Power Board v. Proprietors of Puketapu 3A Block Incorporated [1958] N.Z.L.R. 297; Roma Electric Light and Power Co. Ltd. v. Hair [1955] Q.S.R. 311; Prospect County Council

v. Australian Blue Metal Ltd. (1965) 11 L.G.R.A. 331; Northwest County Council v. J.I. Case (Australia) Pty. Ltd. (1975) 34 L.G.R.A. 138. In these cases, the citizen sought to set up an estoppel in order to prevent collection of the amount undercharged. Since Hedley Byrne, it would be possible for him to set up a cross-claim in the same amount for negligent misstatement: cf. Post Office v. Hampshire County Council [1980] Q.B. 124.

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