did not amount to a repudiation of the entire agreement. Nor did his actions disclose an intention to waive the requirement of notice.[29]

In the end, the case was remitted to the District Court for determination of damages for failure to repair the minor defects listed on 22 April 1969. The most striking feature of the case is that it would seem litigation could have been avoided had the parties obtained proper legal advice in the first place. For instance, many difficulties could have been avoided had the parties adopted the wording of the repair clause normally found in standard form building contracts.[30] The net result of the litigation was, as Gibbs J. pointed out,[31] the Edwards still had the right to give the necessary notice, and to demand that repairs be carried out. He advised that the case could more easily be dealt with by settlement out of court, than by further expensive litigation. The writer fervently agrees.

JANET N. WALKER

COLEEN PROPERTIES LTD v. MINISTER OF HOUSING AND LOCAL GOVERNMENT[1]

Administrative Law — Compulsory Acquisition — Minister's Decision Ultra Vires.

The elimination of the many horrendous obstacles that have hampered judicial review of administrative action has been almost totally dependent upon the *ad hoc* development of case law. The Court of Appeal decision in *Coleen Properties Ltd* v. *Minister of Housing and Local Government*[2] represents a significant step forward in judicial attempts to gain effective supervision and control over arbitrary government. However, while it can be conceded that the difficulty and polycentricity of administrative decision-making alone requires its review,[3] the scope of such review as was purported to have been exercised in this case may give rise to controversy.

Described as 'an interesting case' by Lord Denning M.R.,[4] the Court of Appeal's decision concerned the problems inherent in the compulsory acquisition of private property. The local council concerned declared two rows of dilapidated houses to be clearance areas and proposed to acquire them under a

[29] *Ibid.* 515.

[30] A standard form of repair clause states, 'Any defects or faults in the works arising out of any omissions of the Builder or his use of defective or improper materials or faulty workmanship shall without delay be made good by the Builder at his own cost and if he shall fail to do so the Owner after seven days' notice of his intention so to do may cause those defects or faults to be remedied and charge the Builder with the cost thereof.'

[31] (1974) 1 A.L.R. 497, 509.

[1] [1971] 1 W.L.R. 433; [1971] 1 All E.R. 1049. Court of Appeal; Lord Denning M.R., Sachs and Buckley L.JJ.

[2] *Ibid.*

[3] Some argue that judicial review is not only necessary from this point of view, but is also a necessary premise of legal validity. See Jaffee, *Judicial Control of Administrative Action* (1965) 336 *et. seq.*; Jaffee and Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345.

[4] [1971] 1 W.L.R. 433, 435; [1971] 1 All E.R. 1049, 1051.

compulsory purchase order. The council also desired to acquire one, Clarke House, a first class modern property, and included it within such order under the provisions of section 43(2) of the Housing Act 1957 (Eng.), as being 'adjoining land the acquisition of which is reasonably necessary for the satisfactory development or use of the cleared area'. At the public local inquiry the inspector recommended that the acquisition of Clark House was not reasonably necessary for the satisfactory development or use of the clearance area, and that it should be excluded from the compulsory purchase order. However, the Minister rejected the inspector's recommendation and chose to follow the local council's own *ipse dixit* that the acquisition of Clark House was necessary, although no evidence of a planning nature was disclosed to support this assertion.[5] The owners of Clark House applied for a statutory order to quash the Minister's decision.

Consideration of the question of whether the council was entitled to acquire Clark House was to be based upon section 43(2) of the Housing Act 1957 (Eng.), which provides:

> Where the local authority determine to purchase any land compromised in the area declared by them to be a clearance area, they may purchase also any land which is surrounded by the clearance area and the acquisition of which is reasonably necessary for the purpose of securing a cleared area of convenient shape and dimensions, and any adjoining land the acquisition of which is reasonably necessary for the satisfactory development or use of the cleared area.

As a preliminary point of law, the submission that section 43(2) did not authorize the acquisition of all property in the vicinity of the proposed clearance area, but only the clearance area and those surrounding properties were discussed. While no concluded view was expressed, Lord Denning M.R. and Sachs L.J. relied upon *Sheffield Burgesses* v. *Minister of Health*[6] for the proposition that the 'cleared area' not only includes the clearance area itself but also other clearance areas and any land linking the same. However, characteristically Lord Denning M.R. added that section 43(2) of the Housing Act 1957 (Eng.), did not give the local council unlimited power to take in any adjoining land which it desired to acquire.

> One has to start with the clearance area of the bad old houses, because they have got to come down anyway. Then one takes in such adjoining land which is reasonably necessary.[7]

With regard to the main question of whether the Minister's decision as one of fact could be quashed on the ground of insufficient evidence, the decision in *Ashbridge Investments Ltd* v. *Minister of Housing and Local Government*[8] was upheld and applied. In that case it was stated that on an application for a statutory remedy

> the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which, on the evidence, he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or vice versa; or has otherwise gone wrong in law.[9]

[5] The only evidence available was the plan of the site originally presented by the local council's officers to the inspector.
[6] [1935] All E.R. 703.
[7] [1971] 1 W.L.R. 433, 438; [1971] 1 All E.R. 1049, 1053.
[8] [1965] 3 All E.R. 371.
[9] *Ibid.* 374.

It would appear that Sachs L.J. in *Coleen's* case[10] went further to formulate a stricter test by stating the principle in the following terms:

> When seeking to deprive the subject of his property and cause him to move himself, his belongings and perhaps his business to another area, the onus lies squarely on the local council to show by clear and unambiguous evidence that the order sought for should be made.[11]

As indicated in a previous note on this case,[12] evidence may well be of a kind which would justify a reasonable man in reaching the conclusion which the Minister reached, and yet be far from clear and unambiguous.[13]

However, it is important to realize that the court was considering an application for a statutory order to quash the Minister's decision under the Fourth Schedule to the Housing Act 1957 (Eng.), where it is provided, *inter alia,* that

> an application may be made to the court within six weeks after the publication of the notice of the confirmation of the order on the ground that it is not within the powers of the Act.

While under both planning and housing legislation provision is made for appeals against certain administrative decisions on questions of law, and for applications to quash various other decisions and orders on the ground that they are beyond power, in this context little or no attention is paid to this distinction.[14] Thus, Professor de Smith has ventured to comment that

> [t]he scope of judicial review on a statutory application to quash an order on the ground that it is outside the powers of the relevant Act may be thought to be essentially the same as on an application for certiorari to quash for excess of jurisdiction.[15]

Amongst the judgments in *Coleen's* case[16] there can be found some support for this opinion. Sachs L.J. appeared to advert to the doctrine of jurisdiction when he said that 'it was in essence a question of fact that had to be established as a condition precedent to the exercise of the powers to take away the subject's property'.[17] Buckley L.J. went further to hold that as the Minister had insufficient material upon which to reach a decision 'it follows that he acted *ultra vires* the section and that his decision is one which should not be permitted to stand'.[18] Though *ultra vires* is more commonly associated with legislative power, it is equally appropriate to describe an abuse of judicial or administrative power. In fact, it is advantageous to adhere to a single concept and thereby avoid unprofitable semantic discussion of the meaning of 'jurisdiction'.[19] Further, it is arguable that since the decision of the House of Lords in *Anisminic Ltd* v. *Foreign Compensation Commission*[20] the broad doctrine of

[10] [1971] 1 W.L.R. 433; [1971] 1 All E.R. 1049.
[11] [1971] 1 W.L.R. 433, 439-40; [1971] 1 All E.R. 1049, 1054-5.
[12] Evans, (1971) 34 *Modern Law Review* 561, 562.
[13] Note that Buckley L.J. adopted the test of whether the conclusion reached could be justified in the mind of a reasonable man. See [1971] 1 W.L.R. 433, 441; [1971] 1 All E.R. 1049, 1055.
[14] *Quiltotex Ltd* v. *Minister of Housing and Local Government* [1966] 1 Q.B. 704; *Howard* v. *Ministry of Housing and Local Government* (1967) 65 L.G.R. 257.
[15] de Smith, *Judicial Review of Administrative Action* (1973) 121.
[16] [1971] 1 W.L.R. 433; [1971] 1 All E.R. 1049.
[17] [1971] 1 W.L.R. 433, 439; [1971] 1 All E.R. 1049, 1054.
[18] [1971] 1 W.L.R. 433, 442; [1971] 1 All E.R. 1049, 1056.
[19] Rubinstein, *Jurisdiction and Illegality* (1965) Ch. 7 pt. 3.
[20] [1969] 2 A.C. 147.

ultra vires and that of jurisdictional error have been assimilated to be employed in controlling the abuse of discretionary powers.[21]

While the decision in *Coleen's* case[22] was based upon the characterization of the question before the Minister as one of fact, Lord Denning M.R. took the position to be identical with that arising in deciding when the court has the power to interfere with the decision of an inferior tribunal which has erred in point of law.[23] However, under normal circumstances even where there is an error of law, an order will not necessarily be rendered *ultra vires* or outside jurisdiction. Nevertheless, in the context of planning and housing legislation the courts have tended to proceed on the assumption that any decision by the Minister which is held to be erroneous in law renders his determination *ultra vires* and therefore liable to be quashed.[24] By adopting the analogy of Lord Denning M.R. it is arguable that there is hardly any room for the concept of error within jurisdiction, at least on questions of planning and housing.

It is suggested that the lack of conceptualism on jurisdiction and non-jurisdictional error does not necessarily indicate that the principles outlined in this case are to be confined to instances where there is an application for a statutory order to quash a Minister's decision. The very question that arose was whether the Minister had acted 'within the powers' of the Housing Act 1957 (Eng.). Do not the concepts of *ultra vires* and jurisdiction traditionally deal with this very point?[25] It is then arguable that the Court of Appeal intended to formulate a broad principle applicable where the authority or power of a Minister or public body to make a decision is called for review. If this is correct, the Court of Appeal comes perilously close to affirming a court's capability to substitute its own discretion for that of the person in whom it has been confided. The court would thus be appointing itself to the position of a hierarchical superior, dealing with more than the *detournement de pouvoir*.[26] In future, the courts would be afforded justification for exercising still broader powers of review when they consider that the competent authority has fallen into error.

However, it is significant that some form of restraint has been demonstrated by the Court of Appeal. There has been a distinct disinclination on the part of the court to determine facts *de novo* and to search beyond reports and correspondence already tendered in evidence.[27] This is not to say that there is an inflexible rule of law that restricts a court from determining the matter afresh or admitting additional evidence. In fact, the Court of Appeal has held that it

[21] Benjafield and Whitmore, *Principles of Australian Administrative Law* (1971) 180-1.

[22] [1971] 1 W.L.R. 433; [1971] 1 All E.R. 1049.

[23] As stated in *Ashbridge Investments Ltd* v. *Minister of Housing and Local Government* [1965] 3 All E.R. 371, 374. Note that no reliance was placed upon the proposition that an error of law exists where the finding is based upon a view of the facts which could not be reasonably taken: *Edwards* v. *Bairstow* [1956] A.C. 14, *Lake* v. *Bennett* [1970] 1 Q.B. 663.

[24] The point that an error of law does not necessarily make an order *ultra vires* was taken in *Brookdene Investments Ltd* v. *Minister of Housing and Local Government* (1970) 21 P. & C.R. 545, 553 but only by way of observation.

[25] On this question generally see de Smith, *Judicial Review of Administrative Action* (1973) 96-9.

[26] '*detournement de pouvoir*' means 'misapplication of power': Port, *Administrative Law* (1927) 315.

[27] *Ashbridge Investments Ltd* v. *Minister of Housing and Local Government* [1965] 3 All E.R. 371; *Continental Sprays Ltd.* v. *Minister of Housing and Local Government* (1968) 19 P. & C.R. 774.

has the jurisdiction to review *de novo* a finding of fact on which the power of the competent authority to make the order depends.[28]

Generally, this more recent problem of the admissibility of evidence arises from the trend to require from administrators some justification for their decision, that is on matters apart from law or policy.. The rule that there is no duty to state reasons for judicial or administrative decisions may no longer be universally accepted.[29] Buckley L.J. was clearly influenced by the fact that 'the Minister [had] not expressed any particular reason for his decision.'[30] While there is no doubt that the absence of a general duty to state reasons for decisions represents a serious gap in the law, this area is perhaps more adequately suited for further legislative intervention.[31]

Also of importance is the brief reference by Sachs L.J. to the requirement of natural justice. If the Minister disagrees with the inspector's recommendation, the Minister is then required to notify all interested parties of this fact, and *semble*, to notify the same of the reasons for his disagreement.[32] On matters of planning policy, as distinguished from questions of fact, it was decided in *Luke (Lord) of Pavenham* v. *Minister of Housing and Local Government*[33] that a Minister may without notification overrule an inspector. The distinction between policy and fact was not examined, yet there is already an indication that such terms may be as intangible and as difficult to define as are the terms 'law' and 'fact'.[34]

It is of interest to note that no mention was made of the decision in *R.* v. *Deputy Industrial Injuries Commissioner, ex parte Moore*[35], where it was said that a statutory tribunal must base its decision on some substantial evidence to meet the requirements of natural justice. Now that the myth that executive discretions may be exercised arbitrarily or capriciously has been destroyed,[36] it is necessary that the basic requirements of natural justice be outlined in the case of 'institutional decisions'.[37] This is not to say that the general principles of fairness should be allowed to 'degenerate into a series of hard-and-fast rules',[38] for clearly their ambit must vary according to the context. Yet, while strict adherence to precedent is not always to the advancement of the public good, and while paradoxically characterization of administrative functions has left the law excessively vague, the law cannot develop or improve in content

[28] *White and Collins* v. *Minister of Health* [1939] 2 K.B. 838.

[29] Rule recently stated in *R.* v. *Gaming Board for Great Britain; ex parte Benaim and Khaida* [1970] 2 Q.B. 417; but Windeyer J. in *Giris Pty Ltd* v. *Commission of Taxation* (1969) 43 A.L.J.R. 99, 106 would not adhere to the rule categorically.

[30] [1971] 1 W.L.R. 433, 442; [1971] 1 All E.R. 1049, 1056.

[31] See generally, Akehurst, 'Statements of Reasons for Judicial and Administrative Decisions' (1970) 33 *Modern Law Review* 154.

[32] The case law on this area is somewhat sparse: see de Smith, *op. cit.* 178 ff.

[33] [1967] 2 All E.R. 1066. It was also decided in *Nelsovil Ltd* v. *Minister of Housing and Local Government* [1962] 1 W.L.R. 404 that the Minister is not bound by the inspector's findings.

[34] See the problem confronted in *Vale Estates (Action) Ltd* v. *Secretary of State for the Environment* (1971) 69 L.G.R. 543.

[35] [1965] 1 Q.B. 456, 476, 488-9.

[36] *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] A.C. 997.

[37] As to what is encompassed within the term 'institutional decision' see de Smith, *Judicial Review of Administrative Action*, (1973) 182.

[38] *Wiseman* v. *Borneman* [1971] A.C. 297, 308. Similarly, *Ridge* v. *Baldwin* [1964] A.C. 40, 85-86; *R.* v. *Local Government Board* [1914] 1 K.B. 160, 199-201; *Ex parte The Angliss Group* (1969) 43 A.L.J.R. 150, 152; *Russell* v. *Duke of Norfolk* [1949] 1 All E.R. 109, 118.

unless assistance can be derived from prior legal principle and judicial precedent.[39]

If the decision in *Coleen's* case[40] is representative of a future trend in the nature and scope of judicial review, their lordships' judgments are not altogether then free from difficulty. The apparent generality of the decision and the adoption of a practical pragmatic approach by the Court of Appeal, though commendable in some instances, may give rise to doubt and confusion. Justice demands certainty and predictability, but this decision fails to produce a rational legal principle with some overall purpose and coherence. The situation has arisen where the courts have a growing discretion of their own as to whether to intervene, and in many cases the choice will depend upon the prevailing climate of judicial opinion.

J. E. MIDDLETON

CATERSON v. COMMISSIONER FOR RAILWAYS[1]

Negligence — Duty of Care — Causation — Remoteness — Novus Actus Interveniens — Contributory Negligence.

This recent case, although not adding significantly to existing learning, is worthy of note as it provides a clear exposition of the law in relation to the tort of negligence.

The action was initially brought in the Supreme Court of New South Wales by the plaintiff (Caterson) seeking damages for personal injuries sustained by him by reason of the negligence of the defendant Commissioner. The action was tried by a judge sitting with a jury and a verdict was entered for the plaintiff. On appeal the Court of Appeal ordered that the verdict be set aside. The plaintiff successfully appealed to the High Court of Australia. Gibbs J. delivered the leading judgment[2] and the facts presented hereunder are drawn from His Honour's judgment.

The plaintiff had driven forty miles to a railway station. He was accompanied by his son and a friend. The friend intended to, and did, catch an express train due to depart from the station. It was on departure of the train that the plaintiff was injured. The train was to arrive at 7.44 p.m. and depart at 7.51 p.m. and did arrive on or ahead of time. Because its length was greater than that of the platform it made two stops to allow people to enter their carriages. The first stop was twice as long as the second and it was during the second stop that the plaintiff entered a carriage with his friend. The plaintiff placed his friend's luggage on a rack, shook hands and without wasting time commenced to walk out of the carriage to rejoin his son who was waiting on the platform. When he got to the door he noticed that the train had started to move. The next station at which the train would stop was about eighty miles

[39] Dixon, 'Concerning Judicial Method' (1956) 29 *Australian Law Journal*, 468, 472.

[40] [1971] 1 W.L.R. 433; [1971] 1 All E.R. 1049.

[1] [1972-3] A.L.R. 1393; (1973) 47 A.L.J.R. 249, High Court of Australia, Full Court, Barwick C.J., McTiernan, Menzies, Gibbs and Stephen JJ.

[2] Barwick C.J., Menzies and Stephen JJ. specifically concurring.

away. The plaintiff thought of his son on the platform, forty miles from home, and 'instinctively' and without giving any thought to the risk involved tried to alight from the carriage by jumping onto the platform and running with the train while holding a vertical bar placed near to the door of the carriage. There was a minor conflict of evidence as to the speed of the train but the jury had evidence before it allowing a conclusion that the train was not travelling fast. The plaintiff fell between the train and the platform and sustained injuries. Whilst on the train with his friend the plaintiff did not look at his watch to check the time nor did he or other witnesses hear any warning that the train was about to depart. On discovering that the train was moving it did not occur to him to find a communication cord which, if pulled, would stop the train.

THE DUTY TO TAKE CARE

> Liability was placed on a general duty of care—
> arising out of the circumstances that the defendant had the management of the train; that the appellant was properly upon it; that he was of a class of persons of whose presence on the train the respondent must be taken to have been aware; and that such persons would require adequate time to leave the train whilst it was stationary.[3]

The jury was entitled to conclude from the evidence that the respondent should have foreseen that some people, other than passengers, would board the train while it was halted and would seek to alight from it before it resumed its journey. It was not contested that it was foreseeable that if such a person, finding himself on the train when it started to move, tried to get back onto the platform, he would be likely to suffer injury. *Prima facie,* one would think that a duty to take care of the people temporarily on the train existed. The New South Wales Court of Appeal thought differently however. It was there held that it was not foreseeable that a man would do anything so dangerous as to jump from a moving train except to protect himself from a danger on the train itself and that the act of jumping was not a likely result of any earlier act or omission of the respondent. The Court of Appeal thus held that there was no duty to take care in the circumstances and alternatively if a relevant duty be assumed there was no breach of that duty which caused the plaintiff's injuries. The High Court, and with respect correctly, disagreed. The majority of the court[4] concurred in the view that it was foreseeable that a person, other than a passenger, who found himself on an express train which started to move without warning, might jump from it even though he was in no danger in remaining on the train. The inconvenience of being carried on to another station, definite reasons for wanting to get off (such as a child on the platform forty miles from home), the initial slow speed of the train, the 'heat' of the moment and the avoidance of embarrassment which might result from pulling the communication cord were reasons given to make the plaintiff's actions foreseeable.[5]

[3] [1972-3] A.L.R. 1393, 1395; (1973) 47 A.L.J.R. 249, 250 *per* Barwick C.J. *cf. Commissioner for Railways* v. *McDermott* [1967] 1 A.C. 169 (P.C.).

[4] Barwick C.J., Gibbs, Stephen and Menzies JJ. The remaining judge, McTiernan J., placed liability on the defendant by simply applying Lord Atkin's famous 'neighbour' test and the indisputable law that it is not necessary to show that the particular accident which occurred was foreseeable; it is enough if it was reasonable in a general way to foresee the kind of thing that occurred.

[5] See [1972-3] A.L.R. 1399; (1973) 47 A.L.J.R. 252-3 *per* Gibbs J.

The Chief Justice, in his judgment, gave good warning that when reading cases care must be taken not to erect a particular expression in a judgment (which may be apposite to the facts resulting in *that* judgment) into a formula or part of a formula unless such expression is designed accurately to formulate a general principle. He then stated his opinion[6] that liability in tort (*i.e.* the tort of negligence) will be possible if the event which has occurred and the damage therefrom were both foreseeable by the person sought to be made liable and of such a kind as he ought to have realized were *not unlikely* to occur, subject only to the exception constituted by the decision in *Bolton* v. *Stone*.[7]

THE BREACH OF DUTY

It was for the jury at trial to decide (a) if the defendant had breached its duty or (b) if the defendant was entitled to disregard as a small risk not calling for precautionary measures the possibility that a person such as the plaintiff would not use the communication cord and would run the risk of trying to leave the train when he found it was moving off.[8] The jury found the defendant to be negligent. The High Court supported the verdict explaining that *Bolton* v. *Stone* applied only where there was a valid reason for neglecting a risk.[9] The gravity of the consequences and the expense or inconvenience incurred in eliminating a risk were factors to be 'weighed' by a reasonable man when deciding what action (if any) was necessary to avert the risk. In the present case, the jury, having decided there was a risk, was entitled to (i) weigh the inconvenience to the defendant of allowing the train to stop a little longer at the platform or (ii) the expense of providing a warning to the plaintiff of the train's departure, against that risk. The jury was entitled to find the defendant to be in breach of the duty owed to the plaintiff.

CAUSATION OF DAMAGE

Did the defendant's breach of duty cause the injuries to the plaintiff? The defendant contended that although it could be foreseen that the plaintiff might jump from the train nevertheless his actions amounted to a *novus actus interveniens*.[10] The contention, although appropriate in some circumstances, did not find support in this case. There is cogent authority for the proposition that if a plaintiff suffers injury by a defendant's default damages may be recovered despite the fact that the injury would not have been sustained but for some action of the plaintiff's. However, the plaintiff's action must be in the ordinary course of things, the natural and probable result of the defendant's breach and generally speaking not blameworthy.[11] The High Court considered that the jury was entitled to consider that the plaintiff's actions were 'in the ordinary course of things' and 'the very kind of thing' likely to happen as a result of the defendant's negligence.

[6] Stephen J. concurring.

[7] [1951] A.C. 850; adopting Lord Reid's formula in *C. Czarnikow Ltd* v. *Koufos* [1969] 1 A.C. 350, 385-6.

[8] *I.e.* the *Bolton* v. *Stone* [1951] A.C. 850 situation.

[9] See [1972-3] A.L.R. 1399-400; (1973) 47 A.L.J.R. 253, Gibbs J. citing Lord Reid in *Overseas Tankship (U.K.) Ltd* v. *Miller Steamship Co. Pty Ltd* [1967] 1 A.C. 617, 642-3.

[10] Relying on *Chapman* v. *Hearse* (1961) 106 C.L.R. 112 and *McKew* v. *Holland & Hannan & Cubitts (Scotland) Ltd* [1969] 3 All E.R. 1621, 1623 where Lord Reid said 'it is often easy to foresee unreasonable conduct or some other novus actus interveniens as being quite likely. But that does not mean that the defender must pay for damage caused by the novus actus.'

[11] *Summer* v. *Salford Corporation* [1943] A.C. 283; *Haynes* v. *Harwood* [1935] 1 K.B. 146 and *Dorset Yacht Co. Ltd* v. *Home Office* [1970] A.C. 1004.

unless assistance can be derived from prior legal principle and judicial precedent.[39]

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