In South Africa, as in England, the common law does not require an administrative authority to state the reasons for its decisions. There is also no general statutory duty to do so. In the British Commonwealth and the United States one law reform commission after another has recommended in favour of a general statutory duty to give reasons for administrative decisions (USA: Donoughmore report, Franks report, attorney general's report; Australia: Bland committee's final report, etc).

Despite there being no general duty to give reasons, our courts have held that a refusal to give reasons can itself count against the public authority because it might induce a court to draw an adverse inference. One of the strongest dicta in this regard is Sigaba v Minister of Defence and Police 1980 3 SA 535 (Tk) at 551G H.

The Lancashire County Council case discussed in this instalment is an excellent example of this practical approach and the decision fits in well with Baxter's comment (Administrative Law (1984) 748).

"Why should the public authority, which has a duty to act in the public interest, be permitted to sit back while the other party struggles to establish his case?"

The Association of Metropolitan Authorities case emphasizes the fine distinction that has to be made between a "legislative" administrative act and the "pure" administrative act. According to the court an ultra vires "legislative" administrative act is not necessarily of no legal effect. The effect of absolute nullity on the public interest must be taken into account and such public interest may influence the court not to grant a remedy. This case has dramatic consequences for the ultra vires doctrine.

The Charge Card Services case is an incisive legal exposition of the complex legal relationships arising out of what appears to be a familiar everyday credit card transaction. In appearance the transaction is deceptively simple - from a legal point of view it is everything but!

The precise contractual relationship which presents itself between doctor and patient in vasectomy/sterilization operations is dramatically set out in the two cases Thake v Maurice and Eyre v Measday. A legal question which emerges from these two cases concerns the extent of a doctor's duty to warn his patient of the risks inherent in such operations.

A brief reference is made to the new Criminal Justice Bill which will undoubtedly reform the English criminal justice system. South African criminal lawyers and administrators of the criminal justice system may find much food for thought in the Bill.

**Administrative law**

**Legislative administrative act - failure of consultation - ultra vires**

According to s 28(1) of the Social Security and Housing Benefits Act 1982 the secretary of state has power to make certain regulations, but only after consultation with certain housing authorities. The Act does not prescribe the effect of non-consultation. In R v Secretary of State for Social Services: Ex parte Association of Metropolitan Authorities (1986) 1 All ER 164 the court had to consider:

1. whether the consultation requirement (supra) was mandatory;
2. what constituted consultation; and
3. what the effect was of inadequate consultation.

The secretary of state had written a letter to the Association of Metropolitan Authorities outlining amendments to existing regulations and inviting its comments. The association alleged that the information given to it was inadequate and that insufficient time had been given to allow for consideration of the proposed changes.
Was the consultation mandatory? In accordance with previous guidelines (such as Coney v. Choyce (1975) 1 WLR 422) the court held that the whole scope and purpose of the enactment must be considered and one must assess the importance of the provision that has been disregarded and the relationship of that provision to the general object intended to be secured by the Act. Applying this approach to the facts of the case the court found that consultation was a mandatory requirement.

Had consultation been adequate in the circumstances? Webster J pointed out that there is no general principle to be extracted from the conduct law as to what kind of consultation is required:

"The minimum requirement is, however, the communication of a genuine invitation to give advice and a genuine receipt of that advice — sufficient information must be supplied to enable the consulted party to tender helpful advice. Sufficient time must be given..."

The court accepted that there was an urgent need to amend the regulations but found that the urgency was not such that a response had to be given so quickly as to lead to an ill-informed and ill-considered answer. It was also clear that the association had been given insufficient information as to the detailed changes proposed. Accordingly, the court found that consultation had been inadequate.

What then, was the effect of non-compliance with a mandatory procedural requirement? An ultra vires decision is normally set aside by way of certiorari or declared void. Webster J drew a distinction between ministerial decisions and regulations, stating that in the latter case it should not be normal practice to grant the relief sought. He argued that while ministerial decisions normally affect the rights of one person or of a class of persons and can be struck down usually without more than individual or local implications, regulations are part of the public law of the land. The regulation in question had been in operation for six months. To revoke it would cause considerable public inconvenience. He did, however, grant a declaration that before making the regulations, the secretary of state had failed to comply with the duty imposed on him by the Act.

It would appear that here the court exercised a discretion as to whether or not to grant a remedy. After taking into account the effect that absolute nullity would have on the public interest it decided not to grant a remedy. One can thus not, according to this decision, assume that if a minister makes a regulation which is ultra vires the regulation is necessarily of no legal effect.

It is of importance to note here that the minister's action was legislative rather than administrative and the effect of the ultra vires act was seen to depend on the nature of the function that was being exercised.

**Duty to give reasons - irrelevant considerations**

It is accepted in administrative law that in the absence of a statutory duty to do so, there is no inherent obligation upon a public body to provide reasons for its decisions. This does not of course mean that a failure on the part of a public body to provide reasons where there is no such statutory requirement may never result in a successful application for judicial review. As was declared in the well-known case of Padfield v. Minister of Agriculture, Fisheries and Food 1968 AC 997

"where no reason is given in certain circumstances the court may infer that there is no good reason and that the power given by parliament is not being used to carry out its intentions".

This approach fell for consideration by the court of appeal in Re Lancashire County Council: Ex parte Huddleston (1986) 2 All ER 941. The appeal concerned a refusal of relief on an application for judicial review of a determination made by the county council. One of the issues raised before the court was that the statement of reasons provided by the council did not show an adequate consideration of matters legally relevant to the making of its determination. Upon the facts of the case the court found that the council's statement of reasons was adequate, though Sir John Donaldson MR indicated (946) that he would have preferred "more reassurance". The point of present interest is, however, the consideration given both by Sir John and by Parker LJ to the general issue of the extent to which reasons as to the basis of a determination may be required of a public body. Sir John recognized that the making of an error by a public body in the exercise of its powers implied no inherent discredit upon that body but indicated that this might not be the case where such a body displayed a reluctance to explain its decision. Whilst Sir John accepted that the courts, in the light of the complex reality of decision-making by public bodies, are willing to assume that a body has acted in accordance with the law unless the contrary is shown to be the case, he also recognized that such bodies assist no-one if their only response to challenges as to the correctness of their decisions is a blanket assertion of legality. Sir John accepted that it might be a sufficient response to an issue as to whether a specific matter was taken into account to show that it was, but indicated that in respect of an allegation of prima facie irrationality, an investigation as to the consideration or non-consideration of legally relevant or irrelevant matters might be an inherent discredit upon that public body but indicated that this is the case where such a body displayed a reluctance to explain its decision.

Parker LJ in similar vein to Sir John, after accepting that a bland admission or denial might be an adequate response to an allegation of consideration or non-consideration of specific issues, indicated that, in certain circumstances, a public body might be required to go further. Specifically, his lordship referred to circumstances in which it is asserted that a particular factor was not taken into account and that had it been taken into account no reasonable body acting upon a correct application of the law could have reached the decision which was made. In such circumstances, his lordship indicated, a public body might be required to go further and indicate the nature of those matters upon which
Credit card

Credit card arrangements - nature of debt due

In Re Charge Card Services (1986) 3 All ER 289 the court was required to consider an issue which can be described as one which can arise whenever goods or services are obtained by the use of a charge or credit card, viz whether the supplier can call on the customer to pay him direct if the company which issued the card becomes insolvent before paying the supplier.

The case required a careful analysis of the complex legal relationships arising in a familiar and everyday transaction which is in appearance deceptively simple.

The case concerned a charge card scheme operated by Charge Card Services Ltd (C Ltd) under which cards were issued to applicants for use at specified garages which had an agreement with C Ltd. Cardholders were entitled to obtain petrol and certain other items from such garages by use of their cards. The procedure was, when purchasing by means of a card, a cardholder signed a voucher, copies of which were, respectively, handed to the cardholder, retained by the garage and forwarded to C Ltd. Thereafter C Ltd paid the garage the amount indicated on the voucher, less commission, and the cardholder paid the full amount to C Ltd. Because C Ltd normally made payments to garages prior to receiving them from cardholders, its activities were financed by means of the factoring of its receivables under an agreement whereby all debts owing to it become owing from cardholders to C Ltd were assigned to Commercial Credit Services Ltd (CCS Ltd). C Ltd went into voluntary liquidation. The issue which the court was required to decide was whether where, at the time of liquidation, a cardholder had not paid C Ltd, and C Ltd had not paid the relevant garage, the nature of the debt due from the cardholder was that of a debt due to a card scheme or a debt due to the garage.

Millet J recognized that, upon use of a charge card under the relevant scheme, three separate contracts came into operation:
1. A contract of supply between garage and cardholder.
2. A contract between garage and C Ltd (whereby the latter undertook to pay the supplier upon presentation of a voucher).
3. A contract between C Ltd and the cardholder (whereby the cardholder undertook to reimburse C Ltd).

His lordship acknowledged that the legal consequences of such arrangements were dependent upon the terms of the particular contracts concerned. His lordship's opinion, however, that the following might normally be expected namely: each contract is separate and independent; the card-issuing company acts as a principal and not as an agent for the other parties; the supplier is entitled to be paid whether or not the card-issuing company obtains reimbursement from the cardholder, and the card-issuing company is entitled to be paid whether or not the garage is reimbursed by the cardholder balanced the logical point of discharge in the hands of the cardholder. Where the cardholder was an individual, his lordship found, on a balance of probabilities, that the cardholder had discharged his obligation to the garage. However, in the case of a cardholder who was a company, his lordship refused to recognize the existence of a principle that, whenever a method of payment is adopted which involves a risk of non-payment, there is a rebuttable presumption that payment is conditional, placing the risk of default on to the cardholder.

His lordship indicated that the essence of a credit or charge card arrangement is that the supplier and customer arrange, for mutual convenience, to open accounts with a card-issuing company, agreeing that any account between themselves may, if the customer so wishes, be settled by crediting the supplier's account and debiting the customer's account. Accordingly, the cardholder is discharged, at the earliest, when the supplier's account with the card-issuing company is credited, the logical point of discharge being the customer's signing of the voucher. Consequently his lordship found that the nature of this process supported presumption of absolute payment. Upon the facts of the case, no special features appeared so as to support a finding of conditional payment. Indeed, the existence of an undertaking in the franchise agreement to establish, for the benefit of member garages, a guarantee of its obligation to reimburse tended to support the opposite view. Thus his lordship found that once a cardholder signed a voucher, he discharged his obligation to the garage. Finally, his lordship found, on a construction of the subscription agreement, that C Ltd was expressly made payments prior to the making of the contract of supply or subsequent to its making. The extent of the obligation upon the cardholder, whether it is absolute or conditional in nature, is, it was indicated, dependent upon the terms of the contract of supply, construed in the light of the franchise agreement and the subscriber's agreement. On the facts, his lordship found no expressed intention as to the absolute or conditional nature of payment. Further, his lordship refused to recognize the existence of a principle that, whenever a method of payment is adopted which involves a risk of non-payment, there is a rebuttable presumption that payment is conditional, placing the risk of default on to the cardholder.

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In his review of this book, David Zeffertt, Professor of Law at the University of the Witwatersrand states that, ‘The book is of a high technical standard. The printing is elegant; the many illustrations are beautifully reproduced; the maps are excellent.’

(South African Law Journal)

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authorized to pay for and, by implication, to debit the cardholder's account with the cost incurred under the contract of supply. Consequently, the cardholder's liability to pay C Ltd arose prior to the time of payment of the garage by the supplier.

Contract

Vasectomy operation contract - nature of

In the recent case of Thake v Maurice (1984) 2 All ER 513 it was decided that a contract to carry out a vasectomy operation, or that there was a contract to produce a result (ie make Mr Thake irreversibly sterile) and not just to perform the operation skilfully. This part of the decision has now been reversed (Kerr LJ dissenting) by the court of appeal in Thake v Maurice (1986) 1 All ER 497.

In the court of appeal the discussion centred on the question as to what terms, on the facts, a reasonable person would conclude the parties had contracted upon. Neill and Nourse LJ thought that from this objective standpoint, although as a result of the operation sterility was expected by Thake, this did not mean that a reasonable person would have understood the defendant to be giving a binding undertaking that that result would be achieved. Furthermore, because medicine is not generally regarded as an exact science, and the results of medical treatment are to some extent unpredictable as a result of peculiarities in individual patients, the reasonable man would expect the defendant to exercise reasonable care and skill, but not expect an absolute guarantee of success. On this basis the duty imposed on the defendant was only to exercise care and skill. Kerr LJ, however, felt on the particular facts, having regard to everything that had passed between the plaintiff and defendant at their meeting, coupled with the absence of any warning that the plaintiff may after the operation again become fertile, it was reasonable for the plaintiff to conclude that the defendant was guaranteeing the outcome of the operation. The judge concluded that "on an objective analysis" the defendant had undertaken to make the plaintiff permanently sterile.

Sterilization operation - contract - nature of

In Eyre v Measday (1986) 1 All ER 488 the court of appeal was asked to decide upon the contractual consequences of a failure by a gynaecologist to successfully sterilize the female plaintiff. The facts were that the plaintiff underwent a sterilization operation in 1978. Prior to the operation the gynaecologist had emphasized that the result of the operation would be irreversible and the plaintiff and her husband believed, in consequence, that she would be sterile. The fact that there was a slight risk of pregnancy even after the performance of the operation was not pointed out to the plaintiff by the defendant. The action resulted from the plaintiff giving birth to a son and hinged on whether it was a term of the contract that the defendant would render the plaintiff irreversibly sterile that is, did the surgeon guarantee a result?

Slade LJ sought first to distinguish Thake v Maurice (1985) 2 All ER 513 (at the time of the hearing) from the facts of that case. The action resulted from the plaintiff having a child. Slade LJ thought that even though the defendant in cross-examination had said that "the operation was not pointed out to the plaintiff by the defendant," it would have been entitled to claim a guarantee from an absolute standpoint that the operation would be irreversible and the plaintiff would be sterile.

It was stated that from an objective standpoint, the plaintiff would have been entitled to reasonably assume that the defendant was warranting that the operation would be performed with reasonable care and skill. The plaintiff, to argue successfully for an implied term guaranteeing sterility, would have had to show that such term arose by necessary implication. On the facts, Slade LJ thought that even though the defendant in cross-examination had admitted that

"it would have been reasonable for the plaintiff to have gone away from his consulting rooms thinking that she would be sterilized"

it would have been unreasonable for her to have left his consulting rooms thinking that he had given her a guarantee after the operation she would be absolutely sterile. Objectively, the court of appeal thought that such a guarantee was not intended.

Slade LJ concluded that in his view

"if the plaintiff had wanted a guarantee of the nature which she now asserts, she should have specifically asked for it".

All three judges concurred in dismissing the plaintiff's appeal. It would appear that in essence, issues of this nature hinge upon a detailed investigation of the contractual undertaking involved. Whilst those undertaking to provide a service must act with reasonable care and skill, it must always be ascertained what the precise nature is of the task which is to be performed with reasonable care and skill. So if, for example, a surgeon says that he will remove a person's appendix, he may be taken to guarantee a result that is, the removal of the appendix. However, in performing that operation, he will still be under a duty to exercise reasonable care and skill in achieving that result.

"I take the reference to irreversibility as simply meaning that the operative procedure in question is incapable of being reversed, and what is done cannot be undone. I do not think it can reasonably be construed as a representation that the operation is bound to achieve its acknowledged object, which is a different matter altogether."
of these last two cases is concerned, the decisions of the court are unexceptionable. A more difficult question which poses itself concerns the extent of the medical practitioner's duty to warn his patient of the known risks inherent in the proposed treatment.

**New Criminal Justice Bill**

Readers of "Recent English cases" should take note that the procedure in the criminal courts in England is on the verge of being substantially refashioned. The new Criminal Justice Bill will completely reform the criminal justice system.

The Bill's scope is extremely wide and deals with fraud, juries, confiscation of property, compensation, extradition, evidence, search and even has implications for land law.

A large proportion of the Bill is devoted to property orders in criminal proceedings. Although less controversial, it is these provisions which represent the most far-reaching change. In recent years there has been a significant but almost unnoticed shift in the declared purpose of criminal proceedings. One of their major aims must now be seen to be the enforcement of the victim's rights. The Criminal Justice Act 1982 recognized this by giving priority to compensation orders over fines. The Bill takes this further by requiring a court to state the reasons in any case in which it fails to make a compensation order after conviction. In other words, there is now virtually a presumption that the normal outcome of a prosecution will be compensation for the victim.

In addition, the non-statutory scheme of ex gratia payments administered by the criminal injuries compensation boards is to be put on a statutory basis. At the same time the extent of compensation under the scheme is to be extended, for instance to funeral expenses incurred by a victim's dependants and to compensation on the birth of a child conceived as a result of rape.

The Drug Trafficking Offences Act 1986 broke new ground in providing a mechanism whereby offenders could be deprived of the fruits of this profitable crime and this approach is substantially extended to other offences in the confiscation provisions of the Bill. Although less draconian than the powers in drug offences (where a presumption operates unless proved to the contrary that all the offender's assets were derived from trafficking), the provisions are nevertheless far-reaching. The courts will have the power to order the confiscation and realization of assets in offences where the offender profited by more than £10,000. The high court will be granted the power effectively to freeze a person's assets pending trial (a restraint order). Clearly the whole question of confiscation raises serious philosophical issues about the nature of punishment which transcend the debate between retributivists, reformists and those who advocate deterrence. Perhaps, like many recent innovations in sentencing, the attraction of confiscation is its apparent appeal to the proponents of a number of different theories of punishment — it marks society's abhorrence of the crime, it removes the profit motive, it cancels out the offence and so on.

The law of evidence will also be considerably amended in criminal trials if the Bill becomes law. Broadly speaking, the effect is to bring the rules more into line with those in civil trials, especially with regard to documentary evidence. However, the march of technology is also apparent in provisions allowing for victims and witnesses, in cases where sexual offences on children are alleged, to give evidence by live video link. The aim is to prevent the child in question being confronted by his or her alleged attacker in court.

The provisions in relation to fraud trials substantially implement the proposals of the Roskill committee on fraud trials, with the notable exception of its recommendation that the trial in some complicated fraud cases should take place before a judge sitting with assessors, in place of a jury. The main changes are the creation of a serious fraud office to be responsible for the investigation and prosecution of serious frauds and the introduction of procedural innovations at the pretrial stage in fraud cases. One serious implication for the defence in such cases is that it may be ordered to disclose its defence in advance, hitherto advance disclosure by the defence has only been obligatory where an alibi is to be adduced. Finally, the Bill will radically amend the law of extradition. The intention is to relax the rules by abolishing the requirement that before extradition will be ordered, a United Kingdom court must be satisfied that there is a prima facie case against the defendant. The law will, however, preserve the safeguards for the defendant in preventing double criminal liability in two jurisdictions and in preventing extradition for political crimes. These changes come as a response to the changing nature of international crime, especially drug trafficking.

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**STREET LAW**

Imagine the chaos in a large city if there were no laws!

1. If cities did not have traffic lights what would happen? What if they had traffic lights but no laws against going through a red light? What would happen?
2. What would happen if there were no laws against littering?
3. Do you think people always need laws to make them do what is moral or fair?

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404 AUGUSTUS 1987