NOTICE AND ADMINISTRATIVE "PLEADINGS"

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Many administrative law texts subsume the importance of giving notice to that of affording a party an opportunity of being heard. Yet, if adequate notice is not given, this opportunity is rendered of little value. Hence greater attention should be directed toward the requirement of notice and to those situations in which a procedural irregularity in this respect has either been waived by the parties or has led to no prejudice.

In English and Commonwealth law notice is called for by the rules of natural justice and quite frequently by the procedural rules under which a tribunal functions.[1] From the case law available, Professor de Smith concluded that there were three purposes in the giving of notice: (i) to allow a party to make representations on his own behalf; (ii) to allow a party to appear at any possible hearing or inquiry; and (iii) to allow a party to effectively prepare his own case and to answer the case against him.[2] To satisfy these purposes fully it is submitted that a notice should include a statement of the time and place for a hearing, the statutory or other authority under which the hearing is held, the legal and factual issues which will be discussed,[3] and, most probably, the consequences which may follow from an adverse adjudication.

American law adheres closely to the above criteria and has codified them in section 5(a) of the Federal Administrative Procedure Act which provides in part:

> Persons entitled to notice of an agency hearing shall be timely informed of—
> (1) the time, place, and nature of the hearing;

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1 J. Garner, *Administrative Law* 117 (4th ed. 1974) [hereinafter cited as Garner]; D. Benjafield and H. Whitmore, *Principles of Australian Administrative Law* 146-47 (4th ed. 1971).

2 S. A. de Smith, *Judicial Review of Administrative Action* 172 (3rd ed. 1973) [hereinafter cited as deSmith].

3 Compare with Commonwealth Administrative Review Committee Report at para 328 (Aust. Parlt. Paper No. 144, 1971).

(2) the legal authority and jurisdiction under which the hearing is to be held; and
(3) the matters of fact and law asserted.[4]

The legislative history of this provision makes clear that the purpose of section 5(a) was to afford a party ample notice of the legal and factual issues with due time to examine, consider and prepare for them.[5] It was contemplated that the issues had to be specified with reasonable particularity, although evidentiary facts and legal argument were not called for.[6] Notice is also normally required by the Due Process clause of the Constitution,[7] but in some cases due process will not be violated by the absence of notice prior to agency action..[8]

Although it is commonly accepted that analogies to the procedures in a court of law are inappropriate,[9] one problem which is unique to the administrative process is that the class of people potentially affected by an agency determination may be large and difficut to determine. Furthermore, the range of alternative results may mean that those who do receive some sort of notice may not fully realise how the determination will affect their interests.[10] Added significance to this problem is caused in the United States when it is considered that under the rule-making provisions of the Administrative Procedure Act "interested persons" have a right to submit representations.[11] Indeed, this opportunity is said to be one of the substantial advantages claimed for rule-making over adjudication.[12]

REASONABLE NOTICE AND ITS SERVICE[13]

In the absence of some statutory or regulatory requirement specifying the amount of time which should be given, an administrative

4 I U.S.C. S. 544 (b). See also, 5 U.S.C. S. 558 (c) and Air Transport Associates v C.A.B., 91 U.S. App. D.C. 147, 153; 199 F. 2d 181, 186 (1952).
5 Sen. Doc. No. 248, 79th Cong., 2d Sess. at 202-03, 261 (1946).
6 *Attorney-General's Manual on the Administrative Procedure Act* 46-47 (1947).
7 Goldberg v Kelly, 397 U.S. 254 (1970).
8 Calero-Toledo v Pearson Yacht Leasing Co., 416 U.S. 663, 679-80 (1974).
9 Local Government Board v Arlidge, [1915] A.C. 120, 138; F.C.C. v Pottsville Broadcasting Co., 309 U.S. 134, 140-44 (1940).
10 Boyer, "Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic and Social Issues," 71 *Mich. L. Rev.* III, 125 (1972).
11 5 U.S.C. S. 553 (c).
12 Shapiro, "The Choice of Rule-Making or Adjudicaion in the Development of Administrative Policy," 78 *Harv. L. Rev.* 921, 930-32 (1965).
13 B. Schwartz, *Administrative Law* S. 96 (1976) [hereinafter cited as Schwartz]; F. Cooper, *State Administrative Law* 273-81 (1965) [hereinafter cited as Cooper].

notice must be served at a time sufficiently prior to the hearing to enable a party to prepare his case and to answer the case against him. A notice which will satisfy these requirements will obviously vary with the facts of each particular case but will involve a consideration of such factors as the need to secure legal representation, the ability of an unrepresented party to appreciate what action he must take to effectively answer the case against him, the complexity of the legal or policy issues involved, the amount of time needed to analyse the factual grounds of the case to be met, the availability of evidence and the need for prompt action. By way of example, the following amounts of time have been held to be insufficient: twenty minutes,[14] a few hours,[15] and a few days.[16] Hence a wife appearing as a witness in deportation proceedings framed exclusively against her husband cannot be asked on the spur of the moment why she should not also be included in a deportation order against her husband.[17] Of the cases cited, the decisions in *Lee v Department of Education and Science*[18] and *R. v Thames Magistrates' Court; Ex parte Polemis*[19] reflect most clearly the principles involved.

In the former case an education authority proposed a scheme for a grammar school, which had been in existence for over four hundred years, by which an unusual form of comprehensive intake was provided. The scheme was first mentioned on August 31 and the first attempt to implement it was blocked by an injunction issued on the basis that the scheme was not in accordance with one of the articles governing the school. Not to be deterred, the school governors by a vote of 8 to 6 then voted to ask the Secretary of State to amend the articles by deleting the quarrelsome article and the Secretary on Thursday September 14 sent notices to interested persons[20] inviting

14 Moore v Gaston County Board of Education, 357 F. Supp. 1037 (W.D.N.C. 1973).

15 R. v Thames Magistrates' Court; ex parte Polemis, [1974] 1 W.L.R. 1371; U.S., ex rel. Turner v Fisher, 222 U.S. 204 (1911).

16 Lee v Department of Education and Science, (1967) 66 L.G.R. 211; The Council of the City of South Brisbane v Jeune, [1925] Qd. S.R. 108; McCullough v Terzain, 2 Cal. 3d 647; 470 P. 2d 4; 87 Cal. Rptr. 195 (1970).

17 Re Rodney and Minister of Manpwoer and Immigration, (1972) 27 D.L.R. (3d) 756, 761-62. Compare, R. v Hendon Justices; ex parte Gorchein, [1973] 1 W.L.R. 1502.

18 (1967) 66 L.G.R. 211.

19 [1974] 1 W.L.R. 1371.

20 It was suggested that the class of persons to whom the Secretary was bound to give an opportunity to make representations was limited to those who had an active part to play in the government of the school. Compare, Waitemata County v Local Government Commission, [1964] N.Z.L.R. 689, 698-99.

submissions on either September 15 or by noon on Monday September 18. Under the Education Act 1944 the Secretary was obliged to afford "an opportunity of making representations". In support of such short notice it was argued that there was a matter of urgency involved and that the issue was a simple one and had been the subject of debate for a long time. Both arguments were rejected. Donaldson J. maintained that any urgency only arose out of two attempts by the local education authority to put into effect unlawful schemes. His Lordship answered the second argument by saying that, whilst the issue could be simply stated, he was not at all convinced that it could be answered by simple representations. The ramifications of the scheme were very complex. Considering that the scheme was first mentioned on August 31, sufficient notice would have been four weeks from September 14.

The need for time in which to prepare a defence is illustrated by the *Polemis* case. In that case the Greek master of a vessel was served at 10.30 a.m. with a summons for discharging oil in contravention of the Prevention of Oil Pollution Act 1971. The hearing was set for 2.00 p.m. the same day, and, although an adjournment was granted till 4.00 p.m., any further adjournment was refused. At the hearing a fine of £5,000 was imposed and, not surprisingly, certiorari was later granted. Lord Widgery C.J. pointed out that the mere allocation of court time was of no value if the party in question was deprived of the opportunity of getting his tackle in order and being able to present his case in the fullest sense. Here natural justice was violated as the master was given no opportunity to take oil samples, to look for witnesses, or to prepare his supporting evidence. It was no answer to say that had an adjournment been granted, the result would have been the same. Justice must not only be done, it must also be seen to be done.

Frequently the rules of procedure of a particular tribunal provide for a certain length of time to expire between the giving of notice and the tribunal hearing.[21] In such cases it must be considered whether the procedural rules impose mandatory or directory requirements. If it is a directory requirement, a breach of the condition will not of itself render the decision void, provided a party has not been deprived

21 U.K: Industrial Tribunals (Labour Relations) Regulations 1974, Schedule, r.5 (1) (Stat. Instr. 1974, No. 1386) ("not less than 14 days"); Town and Country Planning Appeals (Inquiries Procedure) Rules 1969, r.5 (1) (Stat. Instr. 1969, No. 1092) ("not less than 42 days' notice"); Commons Commissioners Regulations 1971, r.14 (1) (Stat. Instr. 1971, No. 1727) ("at least 28 days' notice"); Value Added Tax Tribunals Rules 1972, r.23 (1) (Stat. Instr. 1972, No. 1344) ("not less than 14 days").

of an opportunity of being heard.[22] It cannot be argued that if an original notice complies with the requirement, that notice can later be amended and the period of time shortened, because this would render nugatory the reason for providing a fixed period of time.[23]

By way of contrast to the above cases, it has been held in the United States that in situations involving the countless disciplinary proceedings against students the notice may in some cases be immediately followed by the hearing.[24] In such situations what is aimed at is a balance between legal formality and fairness, the need to allow a student a fair opportunity to present his side of the case and a "meaningful hedge against erroneous action".[25] In disciplinary proceedings against prison inmates it has been suggested that at least 24 hours notice should elapse between the notice and hearing.[26]

The place at which an administrative hearing is to be held may be a matter of considerable importance to a party[27] and English tribunals have taken care to ensure that the places at which they sit are reasonably convenient.[28] Whilst statutory provisions frequently allow a tribunal to sit at any place,[29] there is no general English equivalent to section 5(a) of the Administrative Procedure Act which provides in part:

> In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.[30]

This provision was intended to refer to an agency party as well as a private party, and while it was contemplated that due execution of an agency's functions was to be a paramount consideration, this consideration was not to operate so as to deprive private parties of their full opportunity for a hearing.[31] In the United States it is now recognized that an agency has a broad discretion in fixing the place at

22 R. v Devon and Cornwall Rent Tribunal; ex parte West, (1974) 29 P. & C.R. 316, 320-21.
23 Ibid.
24 Goss v Lopez, 419 U.S. 565, 582 (1975).
25 Id. at 583.
26 Wolff v McDonnell, 418 U.S. 539, 564 (1974).
27 R. M. Benjamin, *Administrative Adjudication in the State of New York* 124 (1942).
28 Garner at 209-10. See also, Presidential Statement, [1972] I.C.R. 1 at 2.
29 E.g., Administrative Appeals Tribunal Act 1975, s. 24 (Aust.); Consumer Claims Tribunal Act 1974, s. 10 (N.S.W.); Small Claims Tribunals Act 1973, s. 10 (Vict.); Trade Practices Act 1958, s. 29 (N.Z.).
30 5 U.S.C. S. 555 (b).
31 Sen. Doc. No. 248, 79th Cong., 2d Sess. at 203 (1941).

which it sits and courts are reluctant to interfere on the ground that this discretion has been abused,[32] although recent authority suggests that a court will intervene if an agency acts arbitrarily.[33]

English and Commonwealth courts have very rarely been called upon to specify the means by which a notice may be served. However, in one New Zealand case involving local government reorganization matters, the Supreme Court held that advertisements in local news papers were sufficient compliance with the obligation to give notice of a public inquiry.[34] In another case, an English court was able to imply that postal service was contemplated.[35] More frequently, tribunals provide in their rules of procedure a method of service[36] and some tribunals provide for substituted service.[37] Provided a tribunal has no indicatioin that a notice has in fact gone astray,[38] where a rule provides that service may be effected by posting a notice to a party's last known address, a determination reached after such notice will be a regular and proper determination despite the fact that the party never received the notice.[39] If notice can be effected by post, a party cannot complain of not receiving a notice if he negligently fails to advise the tribunal of a change in his address and the tribunal forwards the notice to his last known address.[40] If a party is evading service one case suggests that service may be dispensed with[41] and yet

32 K. C. Davis, *Administrative Law Treatise* S. 8.08 at 544 (1958, Supp. 1970) [hereinafter cited as Davis]. See also, White v State Industrial Accident Commission, 227 Ore. 306; 362 P. 2d 302 (1961); Burri v Campbell, 102 Ariz. 541; 434 P. 2d 627 (1967).

33 Schwartz S. 99 at 280-81.

34 Waitmata County v Local Government Commission, [1964] N.Z.L.R. 689. See also, Dwyer v Hunter, [1951] *N.Z.L.R.* 177.

35 James v Institute of Chartered Accountants, (1907) 98 L.T. 225.

36 E.g., U.K: Town and Country Planning (Inquiries Procedure) Rules 1969, rr.5 (2), 14 (Stat. Instr. 1969 No. 1092). Compare S.E.C. 17 C.F.R. S.201.6 (b).

37 E.g., U.K: Commons Commissioners Regulations 1971, r.4 (Stat. Instr. 1971, No. 1727); Industrial Tribunals (Labour Relations) Regulations 1974, Sch., r.14 (State. Instr. 1974, No. 1386), as amended by the Industrial Tribunals (Labour Relations) (Amendment) Regulations 1976 (Stat. Instr. 1976, No. 661)). See also, M. Goodman, *Industrial Tribunals' Procedure* 30-31 (1976) [hereinafter cited as Goodman).

38 R. v London County Quarter Sessions Appeals Committee; ex parte Rossi, [1956] 1 Q.B. 682; R. v The Industrial Tribunal; ex parte George Green and Thompson Limited, (1967) 2 I.T.R. 360.

39 R. v Kensington and Chelsea Rent Tribunal; ex parte Macfarlane, [1974] 1 W.L.R. 1486, 1493.

40 James v Institute of Chartered Accountants, (1907) 98 L.T. 225.

41 De Verteuil v Knaggs, [1918] A.C. 557, 560-61.

another maintains that the solution is to obtain an order for substituted service.[42] In addition, it would seem that a notice must be issued by somebody that a party would expect to have authority to carry out the action contemplated.[43]

Cases arising in the United States support the view that in order for a notice to ensure a fair hearing it must be served in accordance with any applicable statutory provisions and in a manner reasonably calculated to ensure actual notice.[44] For this reason, where other and superior means of notification are reasonably practicable under the circumstances, notice by publication has been held to be inadequate.[45] Thus, if a state constitution requires written notice, oral notice is not sufficient[46] but, if a statute requires personal service for only a specified class of people, notice as published in the Federal Register may be sufficient for other classes of interested persons.[47] A notice mailed to an incorrect address is not sufficient,[48] nor is a notice served on a branch officer of a defendant-company sufficient where a registered address has to be filed with an agency.[49]

Professor de Smith correctly observed that in a large majority of the reported cases where a breach of the audi alteram partem rule had been alleged, no notice whatsoever of the action to be taken had been given to the person claiming to be aggrieved and that failure to give prior notice had been tantamount to a denial of an opportunity to be heard.[50] The question which arises from these observations is in what circumstances a lack of prior notice may be excused. It is at this point that a distinction must be drawn between the purpose of notice in informing a party of the time and place of a hearing, and the purpose of informing a party of the legal and factual issues to be discussed. If a party is not notified a hearing is to take place he is *a fortiori* denied any opportunity to either meet the case against him or to

42 R. v London County Quarter Sessions Appeals Committee; ex parte Rossi, [1956] 5 Q.B. 682, 693.
43 Urban Housing Co. Ltd. v City of Oxford, [1940] Ch. 70.
44 Cooper at 276; Weaver v O'Grady, 350 F. Supp. 403 (S. D. Ohio 1972).
45 Id. at 411.
46 Young v Charity Hospital of Louisiana, 226 La 708; 77 So. 2d 13 (1954).
47 North American Pharmacal. Inc. v Dept. of H.E.W., 491 F. 2d 546 (8th Cir. 1973).
48 Tafaros' Investment Co. v Division of Housing Improvement, 261 La. 183; 259 So. 2d 57 (1972); Elliott v City of Indianapolis, 237 Ind. 287; 142 N.E. 2d 911 (1957). See also, R. v The Industrial Tribunal; ex parte George Green and Thompson Limited, (1967) 2 I.T.R. 360.
49 Air-Way Branches, Inc. v Board of Review, 10 N.J. 609; 92 A. Td 771 (1952).
50 de Smith at 172-73.

present his own case. Neither natural justice nor due process is normally satisfied by a subsequent opportunity to be heard. A party should not be confronted with a *fait accompli* and have to bear the burden of convincing an agency to change its mind.[51] On the other hand, a party is not necessarily prejudiced by a notice that informs him that a hearing is to take place but omits to specify one of the issues to be discussed, provided he is given an adequate opportunity to answer this issue either at the scheduled hearing or at an adjourned hearing. It follows, that apart from very clear examples of either actual notice or waiver, the only situations in which a lack of notice that a hearing is to take place should be accepted are those in which a prior hearing need not be granted.

Consistent with these views, it follows that when a party knows the time and place of a hearing in which he has fully participated, then despite the absence of a formal notice, little prejudice can be shown.[52] Similarly, where a party has actual knowledge of the time and place of a hearing either because these facts are specified in the rules of the association of which it is a member,[53] or because they are specified by statute,[54] lack of an individual notice being served on the party may be excused. But "some inkling" that a hearing is to take place is not sufficient.[55] Cases of waiver are exceedingly rare in English law,[56] but illustrations can be drawn from the American experiences. It has been held that a party cannot challenge for the first time a lack of notice at the appellate court level,[57] a party can waive a right to a hearing by simply neglecting, without good reason, to appear on the scheduled day,[58] and a party can waive a right to a hearing by agreeing to arbitration procedures.[59]

51 Wagner v Little Rock School District, 373 F. Supp. 876, 882 (E. D. Ark. 1973).

52 City of New Haven v Indiana Suburban Sewers, 277 N.E. 2d. 361 (Ind. 1972); McLay v Maryland Assemblies, Inc., 306 A. 2d 524 (Md. Ct. App. 1973).

53 Sharp v Brown, [1918] V.L.R. 678.

54 Cleveland, Cincinnati, Chicago and St. Louis Ry. Co. v Bakus, 133 Ind. 513; 33 N.E. 421 (1893).

55 Re Gregson and Armstrong, (1894) 70 L.T. 106, 107.

56 Cf. Noakes v Smith, (1942) 107 J.P. 101.

57 Winnick v Manning, 460 F. 2d 545 (2nd Cir. 1972).

58 Earnshaw v U.S., 146 U.S. 60 (1892). But see Hill v Hill; ex parte Hill, [1964] W.N. (Qd.) No. 12 in which certiorari was refused where a party was validly served in mainteinance proceedings but was prevented from appearing at the hearing due to floods. Often the rules of a tribunal will provide for the procedure to be followed where a party fails to appear.

59 Antimore v State, 49 App. Div. 2d 6; 371 N.Y.S. 2d 213 (1975). See Note, "Public Sector Grievance Procedures, Due Process, and the Duty of Fair Representation," 89 *Harv. L. Rev.* 752, 777-92 (1976).

The situations in English law in which a prior hearing may be dispensed with depend to too great an extent on classifications divorced from the merits of any individual case.[60] For example, it may depend upon whether a tribunal's functions are judicial rather than administrative, whether a right as distinct from a privilege is in issue, or whether the tribunal has a wide discretion.[61] No easy solution to the problem can be promulgated, but at least it should be recognized that in those situations where no material facts are in issue an adjudicative trial-type hearing may be dispensed with and a form of summary judgment procedure utilized.[62] In the vast majority of other situations, where a hearing is normally called for, only a clearly defined and predominant public interest should be permitted to override an individual's right to a prior hearing.[63]

ADMINISTRATIVE "PLEADINGS"

As noted previously, in addition to providing a party with notice of the time and place of a hearing, notices serve the important functions of specifying the legal and factual issues to be discussed. They should also specify the legal basis upon which a tribunal is exercising its jurisdiction and the consequences which may follow from an adverse determination. In this way the relevant issues are isolated and the potential length of the hearing shortened.

However, in both England and the United States one of the most important characteristics of administrative pleadings is their comparative unimportance[64] and it is recognized that they need not follow the niceties of common law pleadings.[65] Similar considerations apply when a determination has been made and a party wishes to object. Wraith and Hutchesson have noted that the dilemma is to retain simple forms of appeal so that legal advice is not essential and, at

60 de Smith at 161-71.

61 Ibid.

62 Gellhorn and Robinson, "Summary Judgment in Administrative Adjudication," 84 *Harv. L. Rev.* 612 (1971).

63 E.g., Bishop v Ontario Securities Commission, (1964) 41 D.L.R. (2d) 24; R. v Randolph and World Wide Mail Services Corporation, (1966) 56 D.L.R. (2d) 283. See also, Freedman, "Summary Action by Administrative Agencies," 40 *U. Chi. L. Rev.* 1 (1972).

64 Davis, S. 804 at 523; R. Wraith and P. Hutchesson, *Administrative Tribunals* at 135-39; 260-61 (1973) [hereinafter cited as Wraith and Hutchesson].

65 Local Government Board v Arlidge, [1915] A.C. 120, 138; Banks v Transport Regulation Board, (1968) 119 C.L.R. 222, 247; Adam v Conneticut Medical Examining Board, 137 Conn. 535; 79 A. 2d 350 (1951); Cooper at 135.

the same time, to discourage frivolous, vexations, or hopeless appeals.[66] However, when an appeal is being considered the goal of the agency or governmental efficiency should not be paramount.[67] Thus, in the United States, a form to welfare recipients informing them that they could request a hearing by contacting a local welfare agency has been attacked.[68] The agency wanted to settle disputes locally and feared that automatically sending a form for a request of a hearing to an affected party would result in hearings being requested as a matter of course. But a form referring a recipient to the very agency whose decision was in question was objectionable, especially when consideration was given to the low intellectual attainments of the recipients and their inability to allow for any potential bias.[69]

(i) *Flexibility of Administrative "Pleadings"*

One obvious restriction on the flexibility of administrative pleadings is that a party must be charged with an offence within the jurisdiction of the tribunal.[70] Thus, in a very early English case, it was held that a prostitute could not be imprisoned by the Vice-Chancellor's court in Cambridge for "walking with a member of the University" because the offence over which the Vice-Chancellor had jurisdiction was made out only if the prostitute could be "suspected of evil". It made no difference that everyone knew what the charge involved and what the facts concerned.[71] Similarly, in the United States a party could not have his license to practise medicine and surgery revoked by a medical examining board for "wanton negligence" when such an offence was not within the jurisdiction of the board and the board consequently acted illegally in using findings of negligence to support another authorized charge.[72]

66 Wraith and Hutchesson at 135.

67 Weaver v O'Grady, 350 F. Supp. 403 (S.D. Ohio 1972).

68 Burgoyne v Lukhard, 363 F. Supp. 831 (E.D. Va. 1973).

69 The problem of welfare recipients pervades the entire hearing system. See Handler and Hollingsworth, *The Deserving Poor* 199 (1971): "In general the fair hearing process, as a method of control, is almost a complete failure. The vast majority of clients are ignorant of their rights, or do not know how to exercise their rights, or do not have the resources (including access to lawyers), or are not willing to challenge the case worker and the agency."

70 Becker Transp. Co. Inc. v Department of Public Utilities, 314 Mass. 522; 50 N.E. 2d 817 (1943); Reed-Gautier Funeral Home Inc. v State Board of Funeral Directors & Embalmers, 295 So. 2d 366 (Dist. Ct. App. Fla. 1974).

71 Ex parte Daisey Hopkins, (1891) L.J.Q.B. 240.

72 Adam v Conneticut Medical Examining Board, 137 Conn. 535; 79 A. 2d. 350 (1951).

Within this framework the question is: how particular or how general must administrative notices or pleadings be? Ideally a notice should provide a party with a sufficient indication of the issues involved as will enable him to prepare his case,[73] but, provided the administrative determination is based upon legal and factual issues presented to the parties and upon which they have had a meaningful opportunity of being heard, departures from the standards necessary for pleadings in a court of law are irrelevant.[74] One consequence is that facts subsquent to the filing of the complaint may well be in issue.[75] A review of the cases reveals that the question is seldom one as to adequacy of pleadings, but more frequently one as to an adequate opportunity to be heard. Hence, an agency order may be enforceable against a party despite the fact that the findings do not follow from the pleadings[76] and an agency may not be able to deny a valid claim on the basis of a technical rule of pleading.[77]

It is clear, therefore, that a tribunal cannot proceed upon any basis of liability which has not been brought to the attention of the parties.[78] Similarly, a tribunal cannot specify one charge and then proceed under another,[79] or proceed to hear other charges of which a party has received no notice, unless an adjournment is granted to enable the party to prepare his defence. But no objection can be taken if a tribunal specifies one or more heads of action and then proceeds only on one head and this is so even if one of the heads not pursued is unjustified.[80] Again, a charge should not be worded so that a party is found guilty no matter which way he pleads—such a charge is a "trap charge".[81] By way of illustration, in a recent decision of the

73 Schwartz at S. 97.

74 New York C. & H.R.R. v I.C.C., 168 F. 131, 138-39 (C.C.S. D.N.Y. 1909); Swift & Co. v Rolling, 252 Ala, 536; 42 So. 2d 6 (1949).

75 Curtis-Wright Corporation v N.L.R.B., 347 F. 2d 61 (3rd Cir. 1968).

76 REA Trucking Company v N.L.R.B., 439 F. 2d 1065 (9th Cir. 1971); Golden Grain Macaroni Co. v F.T.C., 472 F. 2d 882 (9th Cir. 1972); N.L.R.B. v Mackay Radio and Telegraph Co., 304 U.S. 333 (1938).

77 Sisia v Flemming, 183 F. Supp. 194 (E.D.N.Y. 1960).

78 Lau Liat Meng v Disciplinary Committee, [1968] A.C. 391; Dunlop v Woollahra Municipal Council, [1975] 2 N.S.W.L.R. 446; R. v Small Claims Tribunal and Homewood; ex parte Cameron, [1976] V.R. 427.

79 Annamunthodo v Oilfields Workers' Trade Union, [1961] A.C. 945; N.R.L.B. v Johnson, 322 F. 2d 216 (6th Cir. 1963); Northeastern Indiana Building and Construction Trades Council v N.L.R.B., 122 U.S. App. D.C. 220; 352 F. 2d 696 (1965); Cruz v Lavine, 45 App. Div. 2d 720; 356 N.Y.S. 2d 334 (1974)

80 Norman and Moran v National Dock Labour Board, [1957] 1 Lloyd's Rep. 455.

81 Sloan v General Medical Council, [1970] 1 W.L.R. 1130.

Supreme Court of New South Wales a council resolution imposing a building line on the proposed construction of a block of residential flats was held invalid for want of notice.[82] The development company had discussed the possibility of the imposition of an order regulating the number of storeys to the building, but the possibility of a building line had not been discussed.

Administrative notices must also set forth the factual issues to the extent necessary to enable a party to effectively prepare his case. Hence, in *Baker v Gough*[83] a reviewing court quashed a decision of the school council to dismiss Baker from his position as chaplain, a post to which he had been appointed in 1937, when he was not told that anything personal to himself was involved in the attitude of the council. Baker was aware that the theoretical position of an old chaplain and a new or younger headmaster was being considered but was unaware that his particular character, conduct, and personality had influenced the minds of the council members. Jacobs J. said:

> I do not think it can be said that a man has the opportunity of showing cause in respect of matters related to his character, or his conduct, or his personality unless he is told that the action proposed to be taken against him is based to a greater or less extent on those aspects.[84]

An old Californian case also illustrates the principle.[85] There one Abrams had a certificate to act as a broker under the Corporate Securities Act and was given notice of a hearing "to show cause why your broker's certificate should not be revoked". When the Commissioner of corporations proceeded to suspend Abram's certificate his decision was annulled. It was held that the only conceivable ground of revocation was based upon fraud and misrepresentation and Abrams should have been notified of the facts constituting such fraud or misrepresentation.

Obviously an administrative notice need not set forth the evidence relied upon to support the factual allegations made,[86] although such evidence must be disclosed to a party at some stage during the hearing and an opportunity afforded to him to comment on or contradict the evidence.[87] One consideration which is relevant in determining whether

82 Dunlop v Woolahra Municipal Council, [1975] 2 N.S.W.L.R. 446.
83 [1963] N.S.W.R. 1345; 80 W.N. (N.S.W.) 1263.
84 80 W.N. (N.S.W.) at 1274.
85 Abrams v Daugherty, 60 Cal. App. 297; 212 P. 942 (1922).
86 White v University of Manchester, (1976) 11 I.T.R. 143, 145.
87 Kanda v Government of Malaya, [1962] A.C. 322; Shareef v Commissioner for Registration of Indian and Pakistani Residents, [1966] A.C. 47.

a party has been fully heard is whether he can point to any evidence which he would have introduced had the pleadings been drafted with greater clarity.[88] In the absence of such a showing a defect in the pleadings may well be held to have led to no prejudice.

Administrative notices should also specify the consequences that may follow from an adverse agency adjudication. An agency cannot impose more severe penalties or a different penalty from that contemplated in its notice. Consequently, a distributor of cigarettes cannot be fined for failing to affix tax stamps to packages of cigarettes when the notice specified forfeiture as the only possible consequence of the hearing.[89] Equally objectionable is a procedure whereby a party is told only that "legal action" will be taken and then is finally notified that in two weeks repairs will be effected on his property and that the costs of such repairs will be a lien on the property.[90] In the leading English case on point[91] one Annamunthodo was charged with stated offences against union rules the consequence of which could be a fine but not expulsion. Annamunthodo attended the first hearing when evidence was taken but failed to attend a second hearing. At this second hearing the union purported to rely upon another rule which permitted the expulsion of members. The Privy Council held that this second charge should have been brought to the attention of Annamunthodo. In delivering the judgment of their Lordships, Lord Denning commented:

> [Counsel] sought to treat the specific formulation of charges as immaterial. The substance of the matter lay, he said in the facts alleged in the letter as to the meetings which Walter Annamunthodo had attended and the allegations he had made. Their Lordships cannot accede to this view. If a domestic tribunal formulates specific charges, which lead only to a fine, it cannot without notice resort to other charges, which lead to far more severe penalties.[92]

Although their Lordships rejected the argument that a man could not complain of a failure of natural justice unless he could show prejudice, it is submitted that the major factor in this case was that

88 Tasof v F.T.C., 141 U.S. App. D.C. 274, 280; 437 F. 2d 707, 713 (1970).

89 Department of Revenue v Jamb Discount, 13 111. App. 3d 430; 301 N.E. 2d 23 (1973).

90 Tafaros' Investment Co. v Division of Housing Improvement, 361 La. 183; 259 So. 2d 57 (1972).

91 Annamunthodo v Oilfields Workers' Trade Union, [1961] A.C. 945.

92 Id. at 955. But see, Sharp v Brown, [1918] V.L.R. 678, 686; Re Jain and Council of British Columbia College of Physicians and Surgeons, (1974) 52 D.L.R. (3d) 616.

the consequences of the new charge were different from the one of which Annamunthodo had been advised.

It follows, that although a notice need not in all cases quote chapter and verse,[93] it must be formulated with sufficient precision to inform the ordinary reasonable man as to what is being complained of and what he is required to do.[94] A notice is not deficient if, with some ingenuity, some other meaning than that intended can be wrestled from it or if the notice is contained in separate pieces of paper if they as a whole convey all that is required.[95] But it will be deficient if a party is left guessing as to what the charge actually is[96] or if he only knows one out of many charges.[97] No doubt, in some situations difficutly will be experienced in reducing a charge to some degree of specificity and in such cases the agency will have to justify the charge as framed and ensure that it is not being used as a cloak for arbitrariness.[98] The test which has to be satisfied in such cases is whether the charge is sufficiently framed to enable a party to prepare his defence.[99] In the United States the following charges have been held to lack the required degree of specificity: a notice calling upon a broker "to show cause why your broker's certificate should not be revoked,[100] a notice specifying a "violation of the public Utility Law",[101] and a notice specifying a "violation of the Ordinances".[102]

One consequence of pleading flexibility is that often little light is shed on the real issues by the complaint. The answer to this is not to be found in more stringent pleading requirements. Indeed, it would be a retrograde step if the agencies insisted on more stringent requirements than the very courts which advocates in support of the agency system once chided for their inflexibility and rigidity. Perhaps the answer is to be found in greater control over and greater use of discovery and pre-hearing conferences.[103] In this regard it should be

93 R. v Gaming Board for Great Britain; ex parte Benaim, [1970] 2 Q.B. 417, 430 per Lord Denning, M.R.

94 Munnich v Godstone Rural District Council, [1966] 1 W.L.R. 427.

95 Ibid.

96 Carbines v Pittock, [1908] V.L.R. 292.

97 Stevenson v United Road Transport Union, [1976] 3 All E.R. 29, 40.

98 Wagner v Little Rock School District, 373 F. Supp. 876, 883 (E. D. Ark. 1973).

99 Wolfenbarger v Hennessee, 520 P. 2d 809 (Okl. 1974).

100 Abrams v Daugherty, 60 Cal. App. 297; 212 P. 942 (1922).

101 Armour v Transportation Co. v Pennsylvania Public Utility Commission, 138 Pa. Super. 243; 10 A. 2d 86 (1939).

102 Wolfenbarger v Hennessee, 520 P. 2d 809 (Okl. 1974).

103 Kaufman, "Have Administrative Agencies Kept Pace with Modern Court-Developed Techniques Against Delay?—A Judge's View," 12 *Ad. L. Bull.* 103 (1959-60).

recalled that section 7(b) of the Administrative Procedure Act expressly authorizes hearing officers to "hold conferences for the settlement or simplification of the issues by consent of the parties".[104]

(ii) *Situations Involving Lack of Prejudice*

Although it is always desirable that an administrative notice should fully set forth all the legal and factual issues to be discussed at the hearing and state any possible consequences which may flow from an adverse agency adjudication, the flexibility of administrative pleadings is seen in the situations in which a formal or technical defect has not led to prejudice. In the situations in which a party has received no notice that a hearing is to take place, prejudice can be readily assumed, but in those cases where a party has attended a hearing, and all the issues have been fully discussed, prejudice is less likely to occur.

Consequently, where a party has actual knowledge of the legal and factual issues involved at the hearing and those issues are fully litigated, a party suffers no real harm.[103] For example, in the case of *Davis v Carew-Pole*[106] Davis had been declared a "disqualified person" by the National Hunt Committee and sought relief upon the basis that the Committee considered three charges of which he had been uninformed. The facts in regard to these three issues were not in dispute and Davis had a "shrewd suspicion" that they would be inquired into. Relief was denied and in the course of his judgment Pilcher J. remarked:

> The mere fact, however, that the accused person has not in a particular case been given formal notice of all the matters in which his conduct is to be called in question does not, in my view, necessarily entitle him to contend successfully that the proceedings of a tribunal consisting of fair-minded and honest laymen were not conducted in accordance with the principles of natural justice. . . . I am not prepared to hold, as a matter of law . . . , that the plaintiff is entitled to succeed in his contention that the inquiry was not held in accordance with the principles of natural justice, because I do not think that the plaintiff was, on the facts of the case, prejudiced by the lack of notice.[107]

104 5 U.S.C. S. 556 (c) (6).
105 Russell v Duke of Norfolk, [1949] 1 All E.R. 109; Byrne v Kinematograph Renters Society Ltd., [1958] 1 W.L.R. 762; Coad v Lee Steere, (1937) 40 W.A.L.R. 70, 76-77.
106 [1956] 1 W.L.R. 833.
107 Id. at 839-40.

Even though no prejudice can be shown if a tribunal's decision can be rested on any one of a number of individual issues, only some of which have been put to a party,[108] such a practice should be discouraged.

American precedent is to the same effect.[109] Hence, no objection could be taken to the order of the Secretary of Agriculture prohibiting packers from using unfair practices in commerce despite the fact that the order was based on unfair buying practices and the complaint attacked an agreement not to compete when the answers and briefs filed by the packers indicated that they knew the buying agreemnts to be an issue;[110] and an order of the National Labor Relations Board based on the discharge of employees in an attempt to discourage union activity can be supported even if the complaint alleged an unfair labour practice on account of the discharge of employees because of their activities on behalf of the union if the issues on which the findings were based had been fully litigated.[111]

Similarly, no prejudice can be shown when the ambit of what would otherwise be vague pleadings has been clarified at an early date. Thus a psychologist facing disciplinary action for conduct involving the illegal prescription of drugs and charges of sexual intimacies with three female patients could not complain that a notice specifying the charges against him as "including but not limited to the following" was so vague as to preclude him from preparing his defence when it was made clear at the commencement of the hearing that only the charges specifically pleaded would be in issue. This was all that was required of the liberal rules of administrative pleadings.[112]

Vague pleadings may also be cured by acceding to a request for further and better particulars.[113] Here a balance must be struck between the need to advise a party in advance of the hearing of the allegations which have to be met and the need to avoid any unnecessary legalisms which may flow from too readily permitting a request for further and

108 Ex parte Bowen, (1917) 17 S.R. (N.S.W.) 291. Compare, Stevenson v United Road Transport Union, supra note 97.

109 A. E. Stanley Mfg. Co. v F.T.C., 135 F. 2d 453, 454-55 (7th Cir. 1943).

110 Swift & Company v U.S., 393 F. 2d 247 (7th Cir. 1968). See also, Kuhn v C.A.B., 183 F. 2d 839, 841-42 (D.C. Cir. 1950).

111 REA Trucking Company v N.L.R.B., 439 F. 2d 1065 (9th Cir. 1971); Golden Grain Macaroni Company v F.T.C., 472 F. 2d 882 (9th Cir. 1972).

112 Cooper v Board of Medical Examiners, 49 Cal. App. 3d 931; 123 Cal. Rptr. 563, 570 (1975).

113 Schwartz, S. 98 at 277-78; R. Rideout, *The Practice and Procedure of the National Industrial Relations Court* at 34 (1973); Goodman at 35-36 (1976).

better particulars.[114] Where pleadings are not formulated with sufficient specificity, the means by which prejudice to a party may be avoided may well be found in providing further particulars and granting any necessary adjournment.

In order to avoid prejudice to a party, a tribunal may exercise its undoubted discretion to adjourn a hearing to a date more convenient to the party if that party wishes to attend but is unable, for one reason or another, to attend upon the scheduled hearing date,[115] or by adjourning a hearing so as to allow a party further time in which to produce material evidence[116] or to prepare for the legal and factual issues to be discussed.[117] It would seem that the purpose of an adjournment is limited to allowing a party a reasonable opportunity to answer the case that is being put against him and not to allow him time in which to prepare a case questioning the general policy being implemented by the tribunal.[118] An administrative tribunal, however, is the master of its own proceedings and has a very wide discretion to decide if a properly convened hearing will be adjourned and, if adjourned, for how long.[119] Like all administrative discretion, the discretion to grant an adjournment must be exercised on the basis of relevant considerations and must not be exercised so as to adjourn a hearing for an unreasonable length of time and hence amount to a refusal to exercise a jurisdiction.[120] Whether an express statutory provision[121] or procedural rule[122] allowing a tribunal to adjourn a hearing for such purposes as it thinks desirable effects more than a codification of the common law is questionable.

114 See, Stevenson v United Road Transport Union [1976] 3 All E.R. 29, 33-34; White v University of Manchester, (1976) 11 I.T.R. 143, 144-46.

115 In re M. (An Infant), [1968] 1 W.L.R. 1897; Rose v Humbles, [1972] 1 W.L.R. 33.

116 Ex parte McQuellin, (1929) 29 S.R. (N.S.W.) 346. Compare, Re Jain and Council of British Columbia College of Physicians and Surgeons, (1974) 52 D.L.R. (3d) 616, 622.

117 Stevenson v United Road Transport Union, [1976] 3 All E.R. 29, 38-41; White v University of Manchester, (1976) II I.T.R. 143, 144-45.

118 Burnbrae Farms Ltd. v Canadian Egg Marketing Agency, (1976) 65 D.L.R. (3d) 705, 714.

119 Id. at 713.

120 de Smith at 107-08, citing inter alia: R. v Southampton Justices; ex parte Lebern, (1907) 96 L.T. 697; ex parte Jarrett, (1946) 62 T.L.R. 230.

121 E.g., Consumer Claims Tribunals Act 1974, s. 29 (1) (N.S.W.); Small Claims Tribunals Act 1973, s. 29 (1) (Vict.); Administrative Appeals Tribunal Act 1975, s. 40 (1) (c) (Aust.).

122 E.g., Town and Country Planning (Inquiries Procedure) Rules 1969, r.10 (8) (Stat. Instr. 1969, No. 1092).

The leading English case on adjournments is *Priddle v Fisher and Sons.*[123] In that case Priddle had been dismissed from his employment and applied to an industrial tribunal for a redundancy payment. The tribunal knew that Priddle wished to attend the hearing but five minutes after the hearing had commenced it received a telephone call to the effect that the trade union representative who was to appear for Priddle was too ill to attend and that Priddle was unable to get to the hearing room because of a snow fall. Proceeding on the basis that no adjournment had in fact been asked for, the tribunal continued with the hearing and dismissed the application. An appeal to the Queen's Bench Division was allowed. Lord Parker C.J. maintained that a tribunal is acting wrongly in law if, knowing that an appellant has all along intended to attend and give evidence in support of his claim, and being satisfied that he was unable for one reason or another to attend, it refused an adjournment merely because the party had not expressly asked for one. Before deciding to continue, the tribunal should be satisfied that the party was inviting them to continue in his absence.[124]

A refusal to grant an adjournment may, therefore, in some cases be tantamount to a denial of natural justice[125] and where a party is denied the right of legal representation and is confronted at the hearing with a basis of liability as to which he has received no prior notice, a tribunal should offer such a party an adjournment.[126] Yet it should always be remembered that an adjournment will lead to a protracted hearing, increased delay, and increased costs and expenditure.[127] In addition, an adjournment may also involve the consequence that evidence tendered at one hearing may in fact be forgotten by a tribunal at the time of the adjourned hearing.[128]

CONCLUSIONS

Defects in any administrative notice should not be lightly disregarded but the key issue is whether a party has been prejudiced by any procedural irregularity in the giving of notice. Without attempting

123 [1968] 1 W.L.R. 1478. See also, Murrays (Turf Accountants) v Laurie, (1972) 7 I.T.R. 22.
124 [1968] 1 W.L.R. at 1481.
125 de Smith at 186-87.
126 R. v Small Claims Tribunal and Homewood; ex parte Cameron, [1976] V.R. 427, 431.
127 White v University of Manchester, (1976) 11 I.T.R. 143, 144-45.
128 Barnes v BPC (Business Forms) Ltd., [1976] 1 All E.R. 237, 238.

an exhaustive list, the following three situations immediately suggest that prejudice is likely:

(i) where a party is not informed of the time and place of a hearing;
(ii) where legal or factual issues provide the basis for a tribunal's determination and a party is denied the opportunity to comment on one or more of those issues; and
(iii) where, even if the facts remain the same and are fully discussed, a party has a penalty or a consequence imposed upon him which was not contemplated in the original notice.