

The Contemporary Approach to Jurisdictional Error

Justice Alan Robertson

It is no more possible to define jurisdictional error than it is to define negligence. Both are conclusions born of an evaluation, a legal conclusion by the court of what is said to have gone wrong in a legal sense.

Given the theme of the conference is federal administrative law, one may gratefully put aside jurisdictional error by courts (judges as officers of the Commonwealth within s 75(v) of the Constitution or judges of State inferior courts exercising federal jurisdiction) so as to concentrate on administrative decision-makers.

Once you put out of your mind that an error going to jurisdiction is not limited to the threshold, that is, *embarking* on the exercise of administrative power, done in England no later than 1968 in *Anisminic Ltd v Foreign Compensation Commission*,¹ and once you bear in mind that jurisdictional error is now most often to be seen in a failure (often constructive) of the decision-maker to carry out his or her task laid down by the statute (as construed by the court) then the essential questions may become:

- What is the task that the Parliament has given to the decision-maker, including procedural imperatives? The answer to that often difficult question is to be found so far as possible in construing the statute.
- What is said, in broad terms, to have gone wrong in a legal sense, whether by way of misconstruction of a statute or other error, including error in fact-finding? This will have been shaped, but perhaps no more than shaped, by the available grounds for judicial review. It is, I think, to put things back to front for advocates to *begin* analysis with the grounds.
- Has anything gone wrong, the judge having at the forefront of his or her mind that except in the case of a claimed misconstruction of a

¹ [1969] 2 AC 147.

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