NEGLIGENCE IN THE EXERCISE OF STATUTORY FUNCTIONS : MENGEL'S CASE AND THE BASIC RULE

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Introduction

We have met here tonight to discuss the effect of the recent decision of the High Court in *Northern Territory v Mengel*[1] under the title *Public Torts / Private Liability*? As one American writer has said:[2]

> A system of administrative law is not adequate merely because it furnishes individual citizens adversely affected by administrative action with the right to judicial review. ... A system of administrative law that fails to provide the citizen with an action in damages to make him whole ... is actually but a skeletonized system.

On the other hand how does this sit with the idea that '[i]nvalidity is not the test of fault and should not be the test of liability'?[3]

Let us focus on the particular statement about negligence in the joint judgment in *Mengel* which has excited attention. I shall first put that statement into the context of what I call 'the basic rule' about tort liability of public authorities. Next I will show how that basic rule was important in the joint judgment under all the heads of liability raised in *Mengel*, and in so doing point out the essentially different focus of Brennan J's judgment. Finally I will assess the impact of *Mengel* in the context of previous decisions and comment upon the scope of Crown liability in Victoria.

The controversy about Mengel

Attention has been focused in particular upon the statement in the joint judgment led by Mason CJ[4] in *Mengel*. It was said:[5]

> Governments and public officers are liable for their negligent acts in accordance with the same general principles that apply to private individuals and, thus, there may be many circumstances, perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power. And if the circumstances give rise to a duty of care of that kind, they will usually give rise to a duty on the part of the officer or employee concerned to ascertain the limits of his or her power.

The question that this statement raises is whether it is intended to impose liability in negligence for ultra vires acts as such?

That statement refers very clearly to what I call the basic rule which applies to determine the tort liability of public authorities, namely that liability is determined by the same principles and under the same headings which apply to private individuals. So for example in negligence, a plaintiff must establish that a duty of care owed by the defendant was breached causing damage to the plaintiff.

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This rule is consistent with a Diceyan approach which denies 'special' treatment to public authorities when their tort liability is in issue.[6] Although the tort liability of public authorities arises at the intersection of tort and administrative law, the basic rule emphasises private law tort principles and operates to marginalise public law ideas.

The basic rule is recognised in the formula of the legislation which applies to the Crown in tort proceedings at the Commonwealth level and in most States[7] that 'the rights of the parties ... shall as nearly as possible be the same ... as in proceedings ... between subjects'. It is significant that in *Mengel*, the joint judgment expressly recognised that the basic rule was embodied in s.64 of the Judiciary Act 1903 (Cth), which contains that formula. One issue that concerns us in Victoria, which I will touch upon and which Ron Beazley will develop is how that basic rule stands with s23 (1)(b) of the Crown Proceedings Act 1958 (Vic) which contains the 'as nearly as possible formula' but provides that the Crown's liability is only vicarious.

You may ask why I assume so blithely that tort liability arises at the intersection of public (administrative) law and private (tort) law, and what do I mean by 'public authorities'? Questions about the tort liability of public authorities arise at the intersection of public and private law because public authorities can be described as bodies which exercise public (usually statutory), functions the very nature of which requires them to be exercised in the public interest.[8] As Lord Wilberforce pointed out in *Anns v Merton London Borough Council*[9], public powers have to be exercised in accordance with statutory purposes or goals. Similarly Mason J in *Council of the Shire of Sutherland v Heyman* said:[10]

> ...[S]tatutory powers are not in general mere powers which the authority has an option to exercise or not according to its unfettered choice. They are powers conferred for the purpose of attaining the statutory objects ...

Furthermore, acknowledging that there is an intersection between public and private law in this context is consistent with the way the courts have adjusted the basic tort rule. Although the basic rule means that in tort actions the courts have refrained from developing special approaches or directly examining the exercise of statutory or public powers as in administrative law, in practice the courts recognise the special position of public authorities *indirectly*. This has been done by adjusting the basic rule by the use of three particular distinctions: the misfeasance-nonfeasance,[11] duty-discretion[12] and policy-operational distinctions. These distinctions indirectly recognise a distinction between public and private law. Mason J in *Heyman* for example rejected the direct relevance of public law principles but he did acknowledge that negligence principles needed to be modified when applied to a 'public authority ... entrusted by statute with functions to be performed in the public interest or for public purposes.'[13] He said that the need for adjustment raised the following issues:[14]

> In what circumstances, if at all, does a public authority come under a common law duty in relation to the performance or non-performance of its statutory functions? ... To what extent are these questions affected by the circumstance that a public authority exercises policy-making and discretionary functions?

In *Heyman* itself which, like *Anns*, concerned the effect of a failure to inspect foundations, the High Court other than Brennan J accepted the relevance of the policy-operational distinction which had been applied by Lord Wilberforce in *Anns*, and three members of the court[15] applied a reliance concept as an aspect of the proximity question. In particular, Mason J distinguished general and specific reliance. Although it is difficult to extract a ratio from *Heyman*,[16] it is a fact that the Australian courts have applied the policy-

operational distinction and the reliance idea in later cases which have concerned the exercise of statutory functions. These adjustments, in particular the policy-operational and reliance ideas, are ways of determining how the intersection between tort and public law operates. In effect they determine the justiciability of issues in a way which mirrors the public law.

So does the statement in the joint judgment in *Mengel* engage in 'double-talk' when it spoke (clearly) about the basic rule and in the same breath (possibly) about liability in negligence for an ultra vires exercise of power? And how does it sit with the trend of the very many cases where the courts have basically said that if a negligence claim raises issues which are more appropriately reviewable under the public law, the parties should be left to that remedy?[17]

Moreover how does this statement reconcile with the rejection by a majority of the High Court in *Heyman* (the last major decision in this area) of the analysis of Lord Wilberforce in *Anns*? In that case Lord Wilberforce had suggested that a local government authority had a duty enforceable in negligence to consider the extent of its statutory powers to inspect and to ensure that inspections were carried out.

The effect of the statement in the joint judgment in *Mengel* also has to be measured against the views of Brennan J (as he then was) expressed in a separate judgment, particularly as he is now Chief Justice of the High Court. In *Mengel* Brennan J applied different reasoning to the negligence issue and repeated the view that he has expressed on previous occasions that in a negligence action involving statutory powers the extent of those powers is only relevant as a defence.

I argue that the view expressed in the joint judgment in *Mengel* does not suggest that an ultra vires exercise of power is as such evidence of negligence. However, it does place more emphasis on the relevance of statutory powers than the *Heyman* reasoning suggested and is a welcome progression of that reasoning. It represents a slightly expansive view of negligence liability in contrast to the more restrictive Brennan view (as it will be called). If time were to permit I would extend that argument by showing that the objectives of tort and administrative law are more compatible than is generally assumed and that the Brennan view is an over-protective one.

Mengel's case in context: the basic rule and the negligence claim

Mengel involved a claim for damages for economic loss resulting from the unlawful imposition of movement restrictions by two inspectors of the Northern Territory Department of Primary Industry and Fisheries ('the Department') on the plaintiffs' cattle wrongly suspected of carrying the brucellosis disease. The Brucellosis and Tuberculosis Eradication Campaign ('BTEC') was administered by the Department under the Stock Diseases Act 1954 (NT). The Department argued that the basis for the movement restrictions was a notice gazetted by the Chief Inspector in August 1988 under s27 of the Act which provided for the classification of properties where 'herds [are] subject to an eradication programme approved for the purposes of [the] campaign'. Asche CJ at first instance found that the inspectors had acted without legal authority in the gazettal under s27 as the evidence did not establish that the plaintiffs' property was 'subject to an eradication programme'. However, he also found that they acted in good faith[18] if somewhat zealously[19] in the belief that the BTEC justified their actions. The evidence showed that a manual of procedures was available for the inspectors, but no evidence was led as to whether they were required to satisfy themselves that an eradication

programme was in existence before they acted. The evidence suggested that the inspectors assumed that as they were acting on instructions from Regional Veterinary Officers of the Department, they were justified in acting. The inspectors stressed in their evidence that they were 'hands on' people with an aversion to 'paper work'. The evidence concentrated upon the inspectors' actions, their motives and understanding of their powers, as they were named as defendants, together with the Department. The Department admitted that it was vicariously liable for the acts of the inspectors. In the High Court it was accepted that the inspectors were acting outside the scope of their authority (that is, s27 of the Act) as the property was not subject to an eradication programme and that there was no other authority for their acts.

The Department's tests on the plaintiffs' cattle eventually showed no evidence of the disease. Indeed the evidence showed that the inspectors had not expected the results to be otherwise but had acted because of their commitment to BTEC.

The plaintiffs sought damages for negligent misrepresentation, misfeasance in a public office, negligence under the *Beaudesert* principle[20] and for unlawful interference with property rights and conversion. At first instance, Asche CJ in the Supreme Court of the Northern Territory found for the plaintiffs on the authority of the *Beaudesert* principle and rejected the claims on all the other bases. He assessed the plaintiffs' damages at $305,371 plus interest. On appeal, the Court of Appeal confirmed Asche CJ's decision with respect to negligence, conversion, misfeasance and the *Beaudesert* principle.[21] There was no substantive discussion of the negligence claim in the Court of Appeal. However that Court found that the plaintiffs were entitled to succeed on the basis of unlawful interference with their property rights, relying upon the judgment of Dixon J in *James v Commonwealth*.[22] In addition, Angel J (with whom Thomas J agreed) found that the plaintiffs were entitled to succeed on 'a broader constitutional principle of the rule of law'.[23] The Court of Appeal increased the damages award to $425,125 plus interest.

In the High Court the defendants argued that *Beaudesert* was wrongly decided and that there were no causes of the additional kind identified by the Court of Appeal. The plaintiffs for their part argued that they were entitled to succeed on the misfeasance action if the inspectors either knew or ought to have known that they were acting without authority. It was further asserted that if the inspectors ought to have known that they were acting without authority the plaintiffs were entitled to succeed in negligence.[24] The High Court unanimously allowed the defendants' appeal and rejected the plaintiffs' cross-appeal. All the judges agreed that the *Beaudesert* principle was no longer good law[25] and rejected the claims in misfeasance and negligence. It was also decided that the plaintiffs were not entitled to succeed on the alternative grounds accepted by the Court of Appeal.

The High Court recognised the tort of misfeasance but rejected the assertion that the action in misfeasance was made out where there was constructive knowledge. In tortious terms the issue whether a person 'ought' to know certain facts amounts to arguing that there was negligence and the High Court was right to reject the assertion. It was agreed however that the state of mind which constitutes abuse of power for the purpose of that tort was satisfied by reckless indifference as to the limits of authority.[26] On the facts the state of mind was not established. The High Court decision certainly confirms the availability of the tort where a malicious or knowing 'abuse of office' can be established.[27] This is sometimes called 'targeted malice' to emphasise the intentional character of the tort. However as these elements are

notoriously difficult to establish, the availability of the tort is generally raised in the context of preliminary issues,[28] and liability has been found in only a handful of cases.[29] Thus in my view this aspect of the decision has a cautionary effect but is unlikely to open up liability to a great extent.

One other tort mentioned in the joint judgment although not pleaded by the plaintiff was the action for breach of statutory duty. This tort, although well-established, is, like the misfeasance tort, also very limited in scope. Basically it depends upon first establishing an intention to confer a right to bring a private right of action. It is most likely to succeed where the claim is for personal injury arising from safety legislation specifically directed at the protection of the plaintiff. The courts have made it clear that they will not allow the tort to be used to expand the scope of negligence.[30] For that reason this paper concentrates upon negligence and the effect of the basic rule that liability is governed by the same principles and under the same headings as those which apply to private individuals.

The reasoning of the joint judgment under all heads of liability illustrates the impact of the basic rule. The justification for overruling the *Beaudesert* decision was that it was inconsistent with the modern trend to impose liability for only intentional or negligent infliction of harm in the law of torts. The decision under the misfeasance tort was directed by similar concerns.

The rejection of liability under *James v Commonwealth*[31] and of liability based upon the constitutional principle of the rule of law represents an affirmation of the basic rule. It is significant that it has been argued that such a principle should exist on the basis that tort issues concerning public authorities cannot always be satisfactorily solved by reference to private law principles alone.[32] The suggested principle is one of liability of *governments* for the acts of their officers, possibly as a result of the *de facto* officer principle which was established by *James v Commonwealth* (and accepted in the joint judgment in the High Court in *Mengel*).[33] However, it was said in the joint judgment that there was no support for the *James v Commonwealth* cause of action. Further '[s]o far as individual government employees are concerned, it would extend personal liability beyond misfeasance in public office or, even, in negligence and, in effect, impose liability for an error of judgment.'[34]

In the Court of Appeal, Angel J (Thomas J agreeing) had decided that the legality and actionability of the defendants' actions lay outside the realm of private torts. He said that the liability of the defendants properly rested on the place of individual liberty of action within society under the constitutional principle of the rule of law.[35] The response in the joint judgment was to refer to the basic rule.[36]

The reasoning of Brennan J on the misfeasance tort differed in one substantial respect from that of the joint judgment, which stressed the basic rule and the need to recognise only tort liability for intentional or negligent conduct. Brennan J by contrast recognised the 'special' nature of the misfeasance tort but suggested that liability was conditioned upon proof of an invalid exercise of power. His reasoning on the negligence issue also differed from that of the joint judgment.

The question of negligence was raised in the High Court in relation to the knowledge of the inspectors about the eradication programme. It was argued that constructive knowledge was sufficient for both the misfeasance claim and in negligence. The view expressed in the joint judgment was that it was not open to the Mengels to make a case for negligence on the basis that the inspectors should have known that their actions were unauthorised. The 'critical information', their Honours said, was the

existence of an approved programme and they thought that in the absence of conclusive evidence or a finding on that fact, the claim could not proceed.[37] Deane J disagreed: he thought that a positive finding was implicit in Asche CJ's judgment. His Honour invited the plaintiffs to reformulate their case as an action in negligence, although he had some doubts about establishing causation.[38] Brennan J seemed to agree with the view in the joint judgment that negligence could not be made out on the facts.[39]

At first instance the claim in negligence was pleaded on two bases. First it was alleged that there was negligence in the way that the inspectors had placed restrictions upon the plaintiffs without first ensuring that the cattle tested positively or that there was a real possibility that they would. The second claim was for negligent misrepresentation.

The second claim in negligence raised at first instance was based on the fault or 'misrepresentation' of the inspectors in not ensuring that the plaintiffs' property was subject to an eradication programme prior to imposing movement restrictions. It was thus based on the same facts as were raised in the High Court on the negligence issue. Asche CJ at first instance appeared to dismiss the second claim on the basis that it was a challenge to the exercise of a statutory discretion (or a policy function).[40] He also thought that the claim was excluded on broad policy considerations.[41] Although the High Court did not comment directly upon this reasoning, on its face it appears to be inconsistent with the thrust of the view expressed in the joint judgment that liability could arise in some circumstances for negligent failure to ascertain the limits of statutory powers. It is possible as is explained below that Brennan J would have agreed with Asche CJ about the policy implications of this claim.

Asche CJ analysed the first claim as involving two allegations, namely a duty of care to ensure that there was no reasonable possibility of brucellosis being present in the herd before taking any steps to prevent its movement, and secondly to act promptly in obtaining and acting upon the results. He tested the first allegation by the converse hypothesis: if the defendants had allowed free movement of the herd and if the evidence had subsequently shown the herd was infected, then negligence would have been established. Therefore it followed in his view that they were not negligent in acting with extra caution. In fact this allegation raised the issue whether the inspectors were negligent in exercising their judgment to impose movement restrictions. It amounted to alleging that the defendants were over-cautious and that in the circumstances they should have foreseen the economic loss that the plaintiffs would incur. In effect, it amounted to an attack on the 'policy' decision of the inspectors - although this language and analysis was not applied by Asche CJ. The only 'fault' of the inspectors was in relation to their judgment (which Asche CJ had said was made in 'good faith') that the BTEC scheme should be implemented.

Asche CJ examined all the evidence about the tests carefully and concluded that there was no 'operational' negligence (although he did not use that term) or delay in handling or returning the results.

The facts and evidence as discussed above suggested that any fault lay with the procedures laid down by the Department. The basis of the High Court's discussion of the negligence issue was the Department's 'fault' in failing to ensure that an eradication programme was in issue, or that the inspectors ensured that such a programme was in issue. The fact that a majority of the High Court was prepared to countenance a claim in negligence on that basis, subject to adequate evidence, is significant. It is consistent with the statement set out

above that liability can arise where there is a failure to observe the limits of powers.

Brennan J's judgment is an important one in the light of his status as Chief Justice of the High Court. In discussing the misfeasance tort, he made a special effort to distinguish it from negligence. In particular he distinguished between the question of whether a power is available, which he said was the relevant issue in misfeasance, and the negligent exercise of a power. He was concerned to keep negligence issues out of misfeasance and stressed as he did in *Heyman* the need to find a positive duty to act in a negligence action.

He said about the misfeasance tort that 'the legal balance between the officer's duty to ascertain the functions of the office ... and the freedom of the individual from unauthorised interference with interests which the law protects' is not to be 'undermined'[42] by a different standard, namely liability in negligence. At that point he cited the Privy Council decision in *Rowling v Takaro Properties Ltd*[43] and contrasted the decision in the New Zealand Court of Appeal in that case. In particular he referred to the judgment of Cooke P in the Court of Appeal which supported the idea expressed in the joint judgment that negligence liability could arise from a failure to observe the limits of powers. The Privy Council decision which is discussed below supports the view that if a claim is justiciable in public law, it is unlikely to give rise to an action in negligence. It is consistent with the idea that 'invalidity is not the test of fault'. However Brennan J emphasised that the loss was economic loss and in that context he appeared to cite the Privy Council decision in *Takaro* with approval. So it seems that Brennan J neither approved nor expressly disapproved the joint judgment view that liability in negligence could arise where there was a failure to observe the limits of power. But he did appear to approve the policy behind the decision in *Takaro* which is consistent with the idea that it is difficult to establish negligence where there is a failure to observe the limits of powers and the loss can be characterised as economic loss. It can be anticipated that Brennan CJ will be very cautious about finding a positive duty on the part of a public authority to know and observe the limits of its authority.

Discussion

The reasoning on the negligence issue was brief and raises more questions than it is possible to answer in this paper. Does the joint judgment reasoning suggest a return to the controversial reasoning in *Anns*? My view is that a principle which encourages public officials to actively and positively use their powers is desirable. Further, a principle which enables the courts to *directly* scrutinise statutory powers in tort actions, to recognise that in this context there is an intersection between tort and public law, is to be welcomed.

The Brennan view represents a 'zone of immunity' attitude and a protective approach to the tort liability of public authorities which is arguably incompatible with modern notions about the nature and exercise of public powers. But as His Honour's judgment reminds us, policy considerations play a strong factor in this context.

Policy considerations

The policy considerations against liability were articulated by the Privy Council in *Takaro* (and were possibly approved by Brennan J in *Mengel*). *Takaro* involved a claim for financial loss against a Minister arising from an administrative decision not to approve an investment by a foreign national and which led to the plaintiff incurring substantial financial loss. In judicial review proceedings the decision was held to be invalid as the Minister was influenced by irrelevant considerations. The allegations of negligence included the

taking into account of the irrelevant considerations and the failure of the Minister to take reasonable care to ascertain the extent of his powers. In deciding that no tort liability arose the Privy Council set out the considerations against liability on the facts of that case. The first was to point out the availability of judicial review as a remedy. The only effect of the decision, said the Privy Council, was delay. They warned that negligence actions would have the consequence of delay and expense to the public (the 'floodgates' argument). Secondly, said the Privy Council, an error of law or misconstruction of a statute will only rarely amount to negligence. The third consideration was the danger of 'overkill': the danger of inducing over-caution in civil servants and imposing a 'substantial and unnecessary financial burden on the community'. Fourthly, said the Privy Council, it was difficult to say that the Minister had a duty to seek legal advice. It was pointed out that in exercising his statutory discretion the Minister is essentially acting as a guardian of the public interest.

On the basis upon which *Mengel* was argued in the High Court there was arguably little room for the application of these policy considerations. The claim as argued in the High Court arose out of an operational fault in the Department's system; the Department had admitted its vicarious responsibility; the claim was not in any event for an extraordinary amount. It seemed an ideal case for imposing liability without making too extravagant a claim on the public purse. So the fact that the majority of the High Court in principle approved a broader approach has to be tempered with the realisation that only Deane J was prepared to acknowledge that a claim in negligence might succeed - and he had doubts about the causation issue. The implication is that the 'overkill' policy consideration may well have been a factor in this case. Therefore *Mengel* is equivocal in indicating an approach to policy considerations.

It is arguable that the issue of evidence about the existence of the eradication programme aside, *Mengel* would have been decided in favour of the plaintiffs applying a reliance approach to proximity and \ or the policy-operational distinction.

Reliance

In *Heyman*, three members of the High Court of Australia (Mason, Brennan and Deane JJ) applied a reliance test as part of the process of determining whether a duty of care existed. Mason J in *Heyman* distinguished specific and general reliance.[44] He thought that reliance in either sense could lead to a proximate relationship. According to Mason J, specific reliance is encouraged by some conduct on the part of the defendant (and the plaintiff generally incurs detriment as a result), whereas general reliance depends upon an expectation arising from a general relationship of reliance or dependence in situations where a public authority has assumed a responsibility. He said that general reliance 'is in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their protection'.[45] The basis of the plaintiff's reasonable reliance in the case of general reliance is, in the words of Mason J[46] a 'general dependence on the authority's performance of its functions with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of the plaintiff.' He suggested that the following were situations where general reliance might arise: air traffic control, safety inspection of aircraft, fire-fighting.[47]

Burchett J in the recent decision in *Alec Finlayson Pty Ltd v Armidale City Council*[48] adopted and applied the general reliance principle. In particular Burchett J referred to the council's position of

'dominating advantage' on the facts of this case which involved the rezoning and granting of development applications for land which the council (but not the plaintiff) knew to be contaminated. Also of importance was the fact that the council had a statutory duty to consider whether land was suitable when considering development applications.[49] Burchett J decided that the council's action in granting the development application created a hazard - that is it had taken an active part in the creation of the situation which led to the plaintiff's economic loss.

The cases suggest that reliance is an element in establishing proximity in the following situations:

(i) Where the defendant has given an assurance or undertaking express or implied that it will exercise its powers to protect the plaintiff's interests and it is reasonable for the plaintiff to rely upon it.[50]

(ii) Where there is evidence that the defendant had a regular practice in relation to the exercise of powers upon which the plaintiff relied.[51]

(iii) Where statutory conditions for the exercise of power are satisfied and it is reasonable for the plaintiff to expect that the power will be exercised.[52]

(iv) Where the public authority's activity contains a high risk or is unusually complex and the plaintiff cannot be expected to or is unable to take steps for his or her protection.[53]

The general reliance idea was not discussed in either court in *Mengel*.[54] The existence of the BTEC scheme arguably gave rise to an expectation that the Department would exercise its powers with care in the interest of the public. The negligence claim based on the presence of an eradication scheme could have been analysed in terms of general reliance.

The policy-operational distinction

The overriding consideration in determining the liability of public authorities in tort is justiciability. The policy-operational dichotomy is directed to the justiciability of the issue. Justiciability enables courts to determine what matters 'can' and 'should' be the subject of a tort claim. The 'can' issue goes to whether there are 'judicially manageable' standards which the court can apply. In judicial review cases a court will sometimes for example say that it 'cannot' determine whether a broad discretion or a decision with a high level of policy content has been exercised improperly. Similarly, Lord Wilberforce in *Anns* implied that the more discretionary the activity, the less justiciable it would be. The 'ought' issue is one of wider justiciability. For example, on judicial review, the courts will exercise their discretion not to grant a remedy if to do so would interfere with a decision of executive government or a policy decision made at a high level. In the tort context non-justiciability is often equated with any decision which contains an element of discretion. This suggests that justiciability is a limiting concept used to protect a public authority from liability rather than one which defines the circumstances in which an authority can and should be liable.

The modern version of the dichotomy was described by Mason J in *Heyman* when he suggested[55] that a public authority is under no duty of care with respect to financial, economic, social and budgetary allocations but that it might owe a duty of care in relation to administrative directions, expert advice, technical standards, or general standards of reasonableness. This test indicates those matters which the courts 'cannot' adjudicate because of the lack of judicially manageable standards.

'Policy' function characterisations have been made where a high element of discretion has been involved. These are

examples of non-justiciable discretions under both the 'can' and 'ought' criteria. In *Sasin v Commonwealth*[56] it was said that a decision to approve the design of a seat belt reel in an aircraft was a discretionary (policy) decision. In *Commonwealth v Eland*[57] it was decided that the failure of the Commonwealth to enact legislation to control alcoholism amongst the Australian Aboriginal population was a failure to perform a function at the policy-making level. In *Alec Finlayson Pty Ltd*[58] it was said that the decision to rezone the land was a policy one, but that the granting of the application was an operational decision.

Operational decisions are those which the courts feel can and ought to be subject to a claim in tort; where the 'polycentric' elements or multi-faceted aspects of the claim are minimal and the claim is therefore justiciable.[59] In a number of recent cases failures to implement policy decisions have been characterised as operational decisions. In *Glasheen v Waverley Municipal Council*[60] the plaintiff was hit by a hard board whilst swimming in a flagged area where such boards were not permitted. At the time that the plaintiff was injured there was only one of two beach inspectors on duty as the other had taken a lunch break. The decision to employ only two inspectors was described as a policy decision but it was held that the claim arose from an operational matter (the presence of one inspector) as the council had undertaken responsibility for the safety of swimmers by employing the inspectors.[61] In other words there was a failure to clarify the policy or to implement it properly

In *Mengel* the policy-operational distinction was implicit in Asche CJ's reasoning but the judgments in the High Court did not advert to it. A majority of the High Court approved, as stated above, the idea that public authorities could be liable in negligence for failure to ascertain and observe the limits of their authority. It is possible that the fault in *Mengel* was an operational fault.

Despite the equivocal indications of *Mengel* as a policy decision, the statement in the joint judgment suggests that the High Court is developing a new principled approach to the issue of negligence liability in the exercise of statutory powers. The High Court has made it clear that ordinary tort principles apply to public and local authorities exercising statutory powers and that this involves a duty to ensure that they act within powers. It should serve as a note of caution to public authorities to ensure that they and their employees know and observe the limits of their authority.

In the decade ahead we are likely to see an increasing divergence between the Brennan view and that of the other members of the High Court. That divergence will exacerbate that which already exists between the Australian and English approaches to this area of tort liability. The Brennan view aligns more closely with the restrictive approach of the English courts whereas the rest of the High Court falls somewhere between that of the expansive Canadian and New Zealand approaches and that of the English courts. This divergence is undesirable in principle and points to the urgent need to reassess the approach to liability this context.

Another divergence to which *Mengel* points is that between the position of the executive government (the 'Crown') under the Crown Proceedings Act 1958 (Vic) and other public authorities and governments.

The vicarious liability of the Crown

The Crown Proceedings Act 1958 (Vic) is now unique within Australia as liability is limited to vicarious liability and direct liability is excluded.[62] The idea that the Crown can only be vicariously liable (an imputed liability) rather than directly

(personally) liable reflects the maxim that the 'King can do no wrong'. This is arguably incompatible with the basic rule expressed by the High Court in *Mengel* as large chunks of direct liability cannot be pleaded against the Crown. It excludes the well-recognised examples of direct liability which apply to the Crown as an occupier or employer.[63] It excludes for example the 'general reliance' concept put forward by Mason J in *Heyman* and liability for 'system' faults[64] such as there appeared to be on the facts of *Mengel*. Also excluded is liability under the 'non-delegable' duty concept which depends on the idea that some duties are personal and too important to be delegated.[65] It sits uneasily with the statement in the joint judgment in *Mengel* which requires *governments* to ensure that their officers and employees know and observe the limits of their power and thus places primary responsibility on the Crown.

Sometimes it is difficult for a plaintiff to establish a relationship of vicarious liability, for example where the plaintiff is unable to establish the liability of a Crown servant or agent[66] or where liability is imposed by statute directly upon the employee.[67] Conversely if a statute protects an employee from liability difficult questions sometimes arise as to the Crown's liability.[68] Two doctrines have developed in this context to exclude vicarious liability on the basis that no vicarious relationship exists: the 'independent discretionary function' principle[69] which excludes the Crown's liability where powers are conferred directly upon an employee, and the immunity of 'superior servants' (heads of departments) for the torts of their 'inferiors' who are considered to be direct servants of the Crown.[70] The issue that arises is how these ideas fit with the view that there are 'considerations of social policy favouring the grant of immunity to Crown servants but not to the Crown ...'?[71]

The position of the Crown in Victoria therefore needs careful consideration to bring it into line with other States. Either the restriction to vicarious liability should be removed or the circumstances in which the Crown is to be vicariously liable should be clarified to recognise the basic rule.[72]

Conclusion

I have approached tonight's discussion from the perspective of reconciling tort principles with administrative law ideas. Others are simultaneously looking at administrative law ideas to see how they can accommodate tort liability. For example there has been some attention to the development of a remedy for administrative wrong - doing. In my opinion this is piecemeal and too narrow in its approach.[73] The attraction of the joint judgment in *Mengel* is that it faces squarely the intersection between tort and administrative law. The Brennan view by contrast tries to conceal it within the tort route by turning a vague principle of statutory interpretation (the defence) on its head and applying rhetoric such as 'negligence cannot be authorised in advance'. The *Mengel* statement encourages the courts to confront the intersection between tort and administrative law directly and to develop justiciability criteria to determine issues of tort liability.

Endnotes

1 *Northern Territory v Mengel* (1995) 69 ALJR 527 ('*Mengel*').

2 B Schwartz, *An Introduction to American Administrative Law*, (2nd ed 1962), 218.

3 KC Davis, *An Administrative Law Treatise*, 1958, at 487.

4 The others who joined in the judgment were Dawson, Toohey, Gaudron and McHugh JJ. Brennan and Deane JJ handed down separate judgments.

5 (1995) 69 ALJR 527, 544.

6 The tort of misfeasance in a public office which was recognised in *Mengel* is a possible exception. But see S Kneebone 'Misfeasance in a Public Office after *Mengel's* Case : A Special Tort No More?' (1995) 3 *The Tort Law Review* (forthcoming). Other exceptions are the defence of statutory authority in nuisance and judicial immunity.

7 Eg Crown Proceedings Act 1992 (ACT); Crown Proceedings Act 1993 (NT); Crown Proceedings Act 1992 (SA); Crown Proceedings Act 1993 (Tas) - s5 (1) of each Act. This legislation purposely adopts the wording of s64 of the Judiciary Act. See also Crown Proceedings Act 1980 (Qld) s9 (2); Crown Proceedings Act 1988 (NSW) s5 (2); Crown Suits Act 1947 -1954 (WA) s5 (1).

8 Thus the term 'public authority' includes government, local government and privatised bodies in relation to their statutory or public functions.

9 [1978] AC 728 ('*Anns*').

10 (1985) 157 CLR 424, 457-458 ('*Heyman*').

11 *East Suffolk Rivers Catchment Board* v *Kent* [1941] AC 74 (House of Lords)

12 *Sheppard* v *Glossop Corporation* [1921] 3 KB 132.

13 (1985) 157 CLR 424, 456.

14 Ibid, 456-457.

15 Mason, Brennan and Deane JJ.

16 See *Northern Territory* v *Deutscher Klub (Darwin) Incorporated* (1994) Aust Torts Reports 81-275 per Priestley JA.

17 Eg. *Jones* v *Department of Employment* [1988] 1 All ER 1025; *Dunlop* v *Woollahra Municipal Council* [1982] AC 158.

18 (1993) Aust Torts Reports 81-261, 62,762, and 62,789.

19 Ibid, 62,790.

20 In *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, 156 it was held that 'independently of trespass, negligence or nuisance but by an action upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other'.

21 (1994) Aust Torts Reports 81-267.

22 (1939) 62 CLR 339.

23 (1994) Aust Torts Reports 81-267, 61,183.

24 This point was raised by a notice of contention under Order 6(5) of the High Court Rules.

25 Although Brennan J and Deane J in separate judgments thought that the *Beaudersert* principle was supported by the case law, they agreed that it should no longer be followed.

26 Brennan J disagreed with the majority to the extent that they suggested that foreseeability was relevant. See S Kneebone (1995) 3 *Tort Law Journal* (forthcoming).

27 This is a different concept to ultra vires as the whole court recognised.

28 Eg striking out actions.

29 Eg *Farrington* v *Thomson and Bridgland* [1959] VR 286.

30 *Heyman*, 457 per Mason J; 434 & 436 per Gibbs CJ. In Canada the tort no longer has a separate existence.

31 Above, n 22.

32 C L Pannam 'Tortious Liability for Acts Performed under an Unconstitutional Statute' (1966) 5 Melb Uni LR 113.

33 (1995) 69 ALJR 527, 529, fn 1.

34 Ibid, 543.

35 (1994) Aust Torts Reports 81-267, 61,183.

36 (1995) 69 ALJR 527, 543-544.

37 Ibid, 541. Further as the plaintiffs had not raised the point in the Court of Appeal (see n 24 above) they could not proceed with it in the High Court.

38 (1995) 69 ALJR 527, 556.

39 Ibid, 548.

40 (1993) Aust Torts Reports 81-201, 62,810-62,811.

41 Ibid, 62,811-62,812, applying the passage from *Rowling v Takaro Properties* [1988] 1 All ER 163 which is discussed in the text below.

42 (1995) 69 ALJR 527, 548.

43 [1986] 1 All ER 163 (PC) on appeal from the New Zealand Court of Appeal [1986] 1 NZLR 23 ('*Takaro*'). At first instance Quilliam J found that a duty of care was owed but that breach had not been established. The Court of Appeal unanimously held that the Minister was negligent.

44 (1985) 157 CLR 424, 462.

45 Ibid, 464.

46 Id.

47 Ibid , 462-3, citing USA authorities.

48 (1994) 123 ALR 155; Aust Torts Reports 81-282. See the discussion of this case by Noel Hemmings QC in (1995) 1 LCLJ 30 - 34.

49 Environmental Planning and Assessment Act 1979 (NSW) s90(1)(g).

50 Eg *Parramatta City Council* v *Lutz* (1988) 12 NSWLR 293.

51 *Heyman* (1985) 157 CLR 424 per Brennan J at 486; eg *Brown* v *Heathcote County Council* [1986] 1 NZLR 76: cf *Coshott* v *Woollahra Municipal Council* (1988) 14 NSWLR 675.

52 *Lonhro* v *Tebbit* [1992] 4 All ER 280.

53 Eg *Parramatta City Council* v *Lutz* (1988) 12 NSWLR 293; *Alec Finlayson Pty Ltd* v *Armidale City Council* (1994) 123 ALR 155; Aust Torts Reports 81-282

54 Asche CJ did however discuss reliance in relation to the misrepresentation claim - see (1993) Aust Torts Reports 81-261, 62,810-62,811. But this is specific reliance.

55 (1985) 157 CLR 424, 469.

56 (1983) 52 ALR 299.

57 (1993) 27 ALD 516 (Supreme Court of NSW: Studdert J).

58 Above, n 48.

59 See *Swanson* v *R.* (1991) 80 DLR (4th) 741, 750 - operational decision without 'polycentric' aspects.

60 (1990) Aust Torts Reports 81-015 (Sharpe J, Supreme Court of New South Wales)

61 Sharpe J accepted the reasoning of Gibbs CJ in *Heyman*, and questioned the validity of the policy. See (1990) Aust. Torts Reports 81-015, 67,717. See also *Nagle* v *Rottnest Island Authority* (1989) Aust. Torts Reports 80-298 (Nicholson J) (operational decision not to warn of danger at recreational site). Note: the High Court did not comment upon this reasoning.

62 Paragraph 23 (1)(b).

63 Cf *Crown Proceedings Act* 1947 (UK) s2 (1); *Crown Proceedings Act* 1950 (NZ) s6 (1). These statutes also include the direct liability of the Crown for breach of statutory duty.

64 Eg *State of Western Australia* v *Watson* [1990] WAR 248.

65 Eg *Commonwealth* v *Introvigne* (1982) 150 CLR 258. Cf *State of Victoria* v *Bryar* (1970) 44 ALJR 174. Note that in *Burnie Port Authority* v *General Jones Pty Ltd* (1994) 68 ALJR 331, 346 this concept was said to be based upon the central element of control.

66 Eg *Quinn* v *Hill* [1957] VR 439.

67 *Darling Island Stevedoring & Lighterage Co Ltd* v *Long* (1956) 97 CLR 37.

68 *Cowell* v *Corrective Services Commission of NSW* (1988) 13 NSWLR 714 (governor's protection could not be claimed by the Commission).

69 *Enever* v *R* (1906) 3 CLR 969. See S Kneebone 'The Independent Discretionary Function Principle and Public Officers' (1990) 16 Mon LR 184.

70 See *Bainbridge* v *Postmaster-General* [1906] 1 KB 178; *Cowell* v *Corrective Services Commission of NSW* (1988), above n 68.

71 Ibid, 739 per Clarke JA.

72 Cf Law Reform (Vicarious Liability) Act 1983 (NSW). Note also that in the context of torts of police officers many jurisdictions provide that the State cannot avoid vicarious liability or that it is to be directly liable. See *Cekan* v *Haines* (1990) 21 NSWLR 296.

73 Cf CL Roots, 'Damages for Wrongful Administrative Action: A Future Remedy Needed Now' (1995) 2 AJAL 129.

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