Private law litigation against the government: are public authorities and private actors really ‘the same’?

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Abstract

Historically, it was impossible at common law to undertake litigation against the Crown. In Australia, statutory provisions later provided that "in any suit to which the [government] is a party, the rights of parties shall as nearly as possible be the same … as in a suit between subject and subject". Litigation against government or other public authorities in relation to the exercise of functions analogous to those of private actors thus proceeds in essentially the same fashion as between two private individuals. However, the very wording of the statutory provision recognises that government and individuals can never be absolutely the same. Consequentially, there has been some debate as to the extent of government liability in tort in a number of High Court cases over the last 25 years, including Sutherland Shire Council v Heyman (1985) 157 CLR 424, Pyrenees Shire Council v Day (1998) 192 CLR 330, Crimmins v Stevedoring Industry Finance Committee (1999) 200 CLR 1 and Stuart v Kirkland-Veenstra (2009) 237 CLR 215. This article will examine the historical basis of the maxim ‘the King can do no wrong’, the misunderstanding which led to it being taken as conferring a common law immunity from suit on the government and the basis and effect of the statutory provisions which exposed government to liability in tort. It argues that government and private actors can never truly be ‘the same’ and supports this conclusion with an analysis of the leading High Court authorities.

Introduction

Challenging administrative action is usually a matter of public law. A person aggrieved with a decision made by a public authority may pursue a number of administrative law remedies, including merits review in a tribunal or referring the matter to the Ombudsman. He or she may ultimately seek judicial review of the decision, either at common law[1] or under a statutory scheme.[2] However, judicial review's remedies are not universally appropriate: as Keane CJ has recently noted extra-judicially, while "one may accept that ‘public power begets public accountability’ … [it] does not follow … that judicial review is the only mechanism for ensuring public accountability, much less that it is the best available mechanism."[3] Equally, the essentially procedural focus of judicial review's remedies may not provide appropriate redress in all circumstances.

It is possible in some circumstances to obtain compensatory remedies against public authorities. These will usually be in damages for tort but may in some circumstances be in the form of equitable

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1 I include in this term remedies under s 75(v) of the *Constitution* and *Judiciary Act 1903* (Cth) s 39B.

2 *Administrative Decisions (Judicial Review) Act 1977* (Cth). *Administrative Decisions (Judicial Review) Act 1989* (ACT); *Judicial Review Act 2000* (Tas); *Judicial Review Act 1991* (Qld).

3 P.A. Keane, 'Judicial review: the courts and the academy' (2008) 82(9) *Australian Law Journal* 623.

compensation. Such remedies are not dependant on the actions of the relevant public authority being invalid in the public law sense.

Obtaining a compensatory remedy from a public authority in either tort or equity requires first that the plaintiff satisfy the threshold requirement that the public authority is susceptible to litigation in the circumstances. At common law, there was an understanding that the Crown possessed a general immunity from suit, but this has been subject to legislation allowing for proceedings against the government in Australia for 150 years.[4] The modern iterations of that legislation in every Australian jurisdiction[5] provides that:[6]

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall **as nearly as possible be the same**, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

These words at once reflect an aspiration to equality before the law between public authorities and private actors and a recognition that they are essentially different. This article will examine the history of the doctrine of government immunity and will assess to what extent statutory reform has now resulted in government parties being 'the same' as individuals in litigation.

The 'equality principle'

There is a tendency to elide the issues of sovereign immunity from suit and the capacity of the sovereign to violate the law,[7] but this is a separate consideration to the personal liability of government officers for their tortious acts. The latter approach was preferred by A.V. Dicey, the jurist most frequently associated with the view that government officials should be accountable to actions brought by private individuals in the "ordinary courts" of law in the same way as any other private individual.[8] I will describe this view as the Diceyan 'equality principle'.[9] Dicey justified treating public officials as if they were private individuals who were personally liable[10] for damages in tort by reasoning that, by acting unlawfully, their actions were unofficial. Therefore, the common law maxim that "the King can do no wrong" did not apply[11] and any such public official was unable to use his or her public status as a defence to a private law damages action. The first section of this article will consider whether government liability to private law causes of action remains subject to a general immunity and the continued relevance of Dicey's 'equality principle'.

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4 The first *Crown Proceedings Act* was passed in South Australia in 1853, followed by New South Wales and Queensland. For a brief overview of this early legislation, see: Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 44; Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 217-219; Nick Seddon, 'The Crown' (2000) 28(2) *Federal Law Review* 245-262, 257. A thorough analysis is provided in P. D. Finn, *Law and Government in Colonial Australia* (1987).

5 The current State and Territory legislation is: *Crown Proceedings Act 1993* (Tas); *Crown Proceedings Act 1993* (NT); *Crown Proceedings Act 1992* (SA); *Crown Proceedings Act 1992* (ACT); *Crown Proceedings Act 1988* (NSW); *Crown Proceedings Act 1980* (Qld); *Crown Proceedings Act 1958* (Vic); *Crown Suits Act 1947* (WA).

6 *Judiciary Act 1903* (Cth) s 64 (emphasis added). See generally on the words "as nearly as possible": Susan Kneebone, 'Claims against the Commonwealth and states and their instrumentalities in federal jurisdiction: section 64 of the Judiciary Act' (1996) 24(1) *Federal Law Review* 93-132; Bradley Selway, 'The Source and Nature of the Liability in Tort of Australian Governments' (2002) 10 *Tort Law Review* 14, 19-20.

7 Louis L. Jaffe, 'Suits against Governments and Officers: Sovereign Immunity' (1963) 77(1) *Harvard Law Review* 1, 4.

8 See: Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown* (3rd ed, 2000) 1-4.

9 A.V. Dicey, *Introduction to the study of the law of the constitution* (10th ed, 1959) 187-188.

10 Dicey's heirs were not opposed to the now usual arrangement of government standing behind individual tortfeasors in its service, and even nominating an individual where the actual tortfeasor could not be identified.

11 Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial review of administrative action* (4th ed, 2009) 715.

As will be seen, the 'equality principle' is not absolute, either as a matter of statute or of common law. It also differs significantly in modern practice from Dicey's conception. Dicey believed that liability for wrongful acts of government officials should be borne *personally* by those officials in litigation in the "ordinary courts", rather than being tried in specialist administrative tribunals. Dicey saw "ordinary courts" of England as a bulwark against tyrannous abuses of power by those in authority. They stood at the centre of the his conception of the rule of law, since they were the means by which "every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen".[12] Dicey's articulation of the equality principle in these terms had a sound foundation in 19th century judicial dicta.[13]

However, it has long since been accepted that Dicey's articulation of the 'equality principle' is broader than the reality of government liability in tort, the substantive principles of which "do not always apply to government without qualification".[14] Nor is it desirable that they ought. This is because it is recognised that government bodies sometimes act in ways that individuals do not for purposes which are not analogous to those of private individuals; this is to say, for public purposes. While there is consequently a general acceptance that the equality principle must be qualified to exclude from liability some public acts, undertaken by government in the general public interest, the jurisprudential basis for, and extent of, such a qualification has caused considerable dispute. Much of this is expressed as a concern about the demarcation between 'public' and 'private' law.

The starting point for any analysis of the equality principle is dependent on one's conception of the state. Janet McLean has commented that:[15]

> The law contains no single concept of the state. The way that different areas of law conceive of the government as a legal person can be manipulated to achieve different results.

Accordingly, the state may not have *all* of the characteristics of a natural person, but in general governments and public authorities are able to act in the same manner as private individuals. Like private individuals, they are able to enter into contractual relationships, including contracts of employment, pursue commercial goals and enter into litigation, either to vindicate their own rights or to defend an action instigated by another party. They are subject to equitable remedies, including estoppel.[16] They may also be liable in tort.[17] Each of these statements is equally true of government bodies and natural persons.

However, it is the very nature of governments and public authorities that they are also able to act in ways that private individuals cannot. Specifically, they may be given special powers by statute which are able to be used for the benefit of the public generally, or a subset thereof, rather than in their own

12 A.V. Dicey, *Introduction to the study of the law of the constitution* (10th ed, 1959) 193.

13 "But in our opinion no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown - a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike essential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other.": *Feather v The Queen* (1865) 6 B&S 257, 297 per Cockburn CJ. The best known example of this principle remains *Entick v Carrington* (1765) 2 Wils KB 275.

14 Margaret Allars, 'Tort and Equity Claims Against the State' in P. D. Finn (ed), *Essays on law and government - Volume 2: The citizen and the state in the courts* (1996) vol 2, 49, 49.

15 Janet McLean, 'The Transformation from Government to State: Globalisation and Governments as Legal Persons' (2003) 10 *Indiana Journal of Global Legal Studies* 173, 196. See also Janet McLean, 'The Crown in the Courts: Can Political Theory Help' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative law in a changing state: essays in honour of Mark Aronson* (2008) 161, 174-178.

16 *Commonwealth v Verwayen* (1990) 170 CLR 394.

17 Either directly or vicariously in all Australian jurisdictions except Victoria, but vicariously only in New Zealand and the UK. See *Crown Proceedings Act 1950* (NZ) s 6(1); *Crown Proceedings Act 1947* (UK) s 2(1).

interest. Public authorities may be empowered or compelled[18] by legislation to act in certain circumstances or may have a broader general discretion to perform certain acts.[19] While any failure by public authorities to act within the limits of their statutory powers is remediable using judicial review,[20] an act performed *ultra vires* may also result in liability in tort.[21] What, then, are the modern limits of the maxim that "the King can do no wrong" in determining whether compensation can be obtained from governments in either tort or equity for a failure to adhere to the terms of a soft law instrument? The answer to this question requires consideration of whether and to what extent, if at all, government bodies are immune from suit in Australia.

Government immunity from suit

The doctrine of sovereign immunity from suit has a long history in England,[22] but there is a cogent argument that the effects of this doctrine were procedural rather than substantive.[23] Jaffe records that it was settled as early as 1268 "that the King could not be sued *eo nomine* in his own courts"[24] but procedural means soon developed which enabled the King's subjects to obtain relief against government:[25]

> Some of these took the form of suits against the King himself, brought as petitions of right requiring his consent; this type of remedy has been overgeneralised into the broad abstraction of sovereign immunity. Others took the form of suits against an officer or agency of the Crown, not requiring consent. From the reign of Edward I on, there was a continuous and parallel development of both types of action. We can conclude on the basis of this history that the King, or the Government, or the State, as you will, **has been suable throughout the whole range of the law, sometimes with its consent, sometimes without**, and that whether consent was necessary was determined by expediency rather than by abstract theory as to whether the action was really against the state.

Where suits were brought personally against the Crown, the King's consent was required in order for the suit to proceed. The procedural requirement for suing the Crown by name was therefore to bring a petition of right.[26] If the Chancellor, having made inquiries as to the facts of the case, concluded that the plaintiff did in fact have a 'right' against the Crown, the petition would be endorsed with the King's

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18 Although a statutory power to act does not mean that the authority is necessarily under a common law duty of care to undertake a positive act: *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215.

19 Indeed, Jaffe has noted that one of the issues which has confused the common understanding of the doctrine of sovereign immunity is the tendency to misinterpret the liability of the sovereign on the basis that litigation was not truly on the same terms as between subject and subject. Procedural means had developed which enabled subjects to litigate against the King, but "[a]t the same time, many of the circumstances were already manifest which have always made litigating against public officials very different from litigating against private persons. The desire of the King to supervise his own officials, to protect their discretion, to follow different policies than the courts approved, all appeared, with their counterparts in opposition, shaping the extent to which relief was in fact available against public officials.": Louis L. Jaffe, 'Suits against Governments and Officers: Sovereign Immunity' (1963) 77(1) *Harvard Law Review* 1, 3.

20 Subject to the arguments made in chapters 3 and 4 above. See generally Stephen Gageler, 'Administrative law judicial remedies' in Matthew Groves and H. P. Lee (eds), *Australian administrative law: fundamentals, principles, and doctrines* (2007) 368.

21 e.g. *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180. Note, however, that the fact that an act is performed *ultra vires* is not enough *per se* to create a duty of care in negligence any more than the fact that an act is *intra vires* is a defence to a negligence action. This issue will be addressed detail in Part II of this chapter.

22 Interestingly, this is also true of the republics of France and the United States of America; see Janet McLean, 'The Crown in the Courts: Can Political Theory Help' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative law in a changing state: essays in honour of Mark Aronson* (2008) 161, 175.

23 Louis L. Jaffe, 'Suits against Governments and Officers: Sovereign Immunity' (1963) 77(1) *Harvard Law Review* 1, 18.

24 Ibid. 2.

25 Ibid. 3 (emphasis added).

26 This process was ultimately simplified by the passage of the *Petitions of Right Act 1860* (UK) 23 & 24 Vict. C.34. See: *Mulcahy v Ministry of Defence* [1996] QB 732, 740 per Neill LJ.

fiat, “let right be done”,[27] thus empowering the court to proceed. By the nineteenth century, established practice was for a fiat to be granted in respect of any petition which disclosed an arguable case.[28] Because of the cumbersome nature of the legal requirement of consent, equity developed its own procedures for bringing suits against the Crown in parallel to the common law,[29] including filing a bill directly against the Attorney-General.[30]

Jaffe cites historical authority that petitions of right were determined as matters of law and not subject to regal whim. The somewhat tortured procedural requirement that the King give his consent to a suit being brought against him by name:[31]

> was not based on a view that the King was above the law. “[T]he king, as the fountain of justice and equity, could not refuse to redress wrongs when petitioned to do so by his subjects.” Indeed, it is argued by scholars on what seems adequate evidence that the expression “the King can do no wrong” originally meant precisely the contrary to what it later came to mean. “[I]t meant that the king must not, was not allowed, not entitled, to do wrong .... .” It was on this basis that the King, though not suable in his court (since it seemed an anomaly to issue a writ against oneself), nevertheless endorsed on petitions “let justice be done”, thus empowering his courts to proceed.

On this understanding, the King was under a legal obligation to remove the procedural barrier to a petitioner bringing suit against the Crown. Further support for this position can be found in the early High Court decision of *Sydney Harbour Trust Commissioners v Ryan*,[32] in which Griffith CJ recorded that Lord Coke had referred to the maxim “the King can do no wrong” in the *Magdalen College Case*[33] in the following terms:[34]

> The King “is the fountain of justice and common right, and the King being God's lieutenant cannot do a wrong: *solum Rex hoc non potest facere, quod non potest injuste agere*. … And although a right was remediless, yet the Act which provides a necessary and profitable remedy for the preservation of it, and to suppress wrong, shall bind the King.”

Jaffe points out that this analysis of the maxim “the King can do no wrong” is predicated on the notion that the King has in fact acted contrary to law. It follows that the doctrine of sovereign immunity and the *capacity* of the King to violate the law are conceptually distinct.[35]

Misapplication of the doctrine

However, Jaffe’s analysis is contrary to the reasoning that had been prevalent during the 19th century, exemplified by the judgments of Erle CJ in *Tobin v R*[36] and Cockburn CJ in *Feather v R*.[37] In the course

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27 See the sources cited at: Louis L. Jaffe, 'Suits against Governments and Officers: Sovereign Immunity' (1963) 77(1) *Harvard Law Review* 1, 4-5.

28 Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 216.

29 Louis L. Jaffe, 'Suits against Governments and Officers: Sovereign Immunity' (1963) 77(1) *Harvard Law Review* 1, 6-7. See also: Sir William Blackstone, *Commentaries on the Laws of England* (1765 - 1769) Book 3, Chapter 17.

30 Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 217; R. P. Meagher, J. D. Heydon and M. J. Leeming, *Meagher, Gummow and Lehane's Equity: doctrines and remedies* (4th ed, 2002).

31 Louis L. Jaffe, 'Suits against Governments and Officers: Sovereign Immunity' (1963) 77(1) *Harvard Law Review* 1, 3-4 (footnotes omitted).

32 *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358.

33 *Magdalen College* (1615) 11 Co Rep 66, 72a.

34 *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358, 365. See also: Anthony Gray, 'Options for the doctrine of Crown immunity in 21st century Australia' (2009) 16(4) *Australian Journal of Administrative Law* 200, 201.

35 This point is supported at *Mulcahy v Ministry of Defence* [1996] QB 732, 740 per Neill LJ. However, cf *Kawananakoa v Polyblank* 205 US 349, 353 (1907) per Holmes J.

36 *Tobin v The Queen* (1864) 16 CB (NS) 310.

37 *Feather v The Queen* (1865) 6 B&S 257.

of the former case, the Chief Justice explained the meaning of the maxim "the King can do no wrong" as follows:[38]

> [This] ancient and fundamental maxim is not to be understood as if everything transacted by the government was of course just and lawful, but means only two things: first, whatever is exceptionable in the conduct of public affairs is not to be imputed to the King, nor he is answerable for it personally to his people; for, this doctrine would destroy the constitutional independence of the Crown; and, secondly, that the prerogative of the Crown extends not to do any injury.

The essential difficulty caused by such a misapplication of the doctrine of sovereign immunity is demonstrated by its incapacity to deal with the tortious acts of Crown servants.[39] Ultimately, petitions of right were used to enforce rights against the Crown for breach of contract,[40] but *Feather* held that, while the procedural expedient of a petition of right allowed an individual to seek legal redress against the Crown, it did not do so for torts committed by Crown servants.[41]

The judgment of Erle CJ in *Tobin* was informed by the views of Sir William Blackstone.[42] It is, however, interesting to note the subtly different explanations given by Blackstone on one hand and Cockburn CJ on the other as to why the maxim "the King can do no wrong" precluded recovery for the torts of the King's servants. Blackstone accepted that the King could, through "misinformation or inadvertence",[43] personally cause loss to one of his subjects, but he considered that "whatever may be amiss in the conduct of public affairs is not chargeable personally on the King" and that the Crown therefore had no vicarious liability for its servants. However, Blackstone follows that statement with the words "nor is he, but his ministers, accountable for it to the people". Whether or not the point was ever considered by Blackstone, this is consistent with the *government* being vicariously liable for the torts of its servants even if the sovereign was not in a personal sense.[44]

Cockburn CJ, by contrast, held that the Crown could not be vicariously liable for the tortious acts of its servants because the Crown would thereby be held to have authorised wrongdoing, which is itself a

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38 *Tobin v The Queen* (1864) 16 CB (NS) 310.

39 In *Mulcahy*, Neill LJ analysed the history of the doctrine of sovereign immunity and confirmed that its application has long been based on a misunderstanding. The Lord Justice commented that: "proceedings for damages for tort were inhibited or rather prevented by the application of the ... ancient principle … that the King could do no wrong. It may be that at one time the maxim 'the King can do no wrong' meant that the King was not privileged to commit illegal acts, but it came to be understood to be a rule barring actions in tort against the Crown.": *Mulcahy v Ministry of Defence* [1996] QB 732, 740. In Australia, several respected sources have concurred with earlier authority that the understanding that the sovereign had a common law 'immunity' from suit is misconceived. The issue was settled in *Commonwealth v Mewett* (1997) 191 CLR 471, 502 per Dawson J; 513 per Toohey J; 532 per McHugh J; 550-551 per Gummow & Kirby JJ. See also: Graeme Hill, 'Private Law Actions Against the Government (Part 1) - removing the Government's immunity from suit in federal cases' (2007) 30(3) *Melbourne University Law Review* 716, 725; Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 216.

40 *Thomas v The Queen* (1874) LR 10 QB 31.

41 *Feather v The Queen* (1865) 6 B&S 257. Prior to this, in *Tobin*, Erle CJ had cited *Blackstone's Commentaries* in support of the following statement: "The maxim that the King can do no wrong is true in the sense that he is not liable to be sued civilly or criminally for a supposed wrong. That which the sovereign does personally, the law presumes will not be wrong: that which the sovereign does by command to his servants, cannot be a wrong in the sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command.": Sir William Blackstone, *Commentaries on the Laws of England* (1765 - 1769) Book 3, 254; *Tobin v The Queen* (1864) 16 CB (NS) 310.

42 Sir William Blackstone, *Commentaries on the Laws of England* (1765 - 1769) Book 3, 254.

43 Ibid.

44 Such a debate draws us into complex discussion of the nature of the Crown, which has been dealt with elsewhere, see e.g.: Peter W. Hogg and Patrick J. Monahan, *Liability of the Crown* (3rd ed, 2000) Ch1; Nick Seddon, 'The Crown' (2000) 28(2) *Federal Law Review* 245-262.

wrong.[45] His Lordship held that it was not possible for the Crown to be vicariously liable for the wrongs of its servants because it was *impossible* for the sovereign to be directly liable for his or her *own* wrongs. This was not a view which Blackstone appears to have shared. However, whatever its theoretical basis, the refusal to make the Crown vicariously liable was reinforced by Dicey's view that recovery should be available from servants of the Crown for wrongs on a personal basis as they would be against any other individual and, consistently with the view expressed by Cockburn CJ, causes of action in tort against the Crown were prohibited in the UK until the 20th century.[46] In other words, the Crown's general common law immunity from the *procedure* of a suit being issued in a tort action was misunderstood as a common law immunity from *substantive* tort liability.

Statutory reform

As with the original prohibition on the Crown being the subject of suit, alternative means developed to remedy the injustice caused by the incapacity to seek redress from the Crown for the tortious acts of its servants. In England, where a Crown servant had committed a tort, "the Crown, in what were considered to be appropriate cases, would pay the damages on an *ex gratia* basis".[47] Mark Leeming has noted that two particular shortcomings of this method of compensating a subject's loss were that:[48]

> there could be no recourse by a plaintiff who did not know the identity of the servant by whom the tort had been committed, or whose only cause of action was directly against the Crown (such as in cases of occupier's liability).

While this system was unsatisfactory, it was not subject to legislative reform in the UK[49] until almost a century after the first legislation allowing suits to be brought against the Crown in tort had been passed in Australia. In the UK, the *Crown Proceedings Act 1947* provides that the central government has the same liability in tort as a private person of full age and capacity.[50]

Similarly, sovereign immunity was abolished in America in civil actions by the *Federal Tort Claims Act 1946*[51] although, as Jaffe notes,[52] there is a fundamental difference between the UK and countries which do not have "an identifiable unitary sovereign" but are instead governed subject to a written constitution,[53] with different branches of government undertaking discrete roles. This is one reason why

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45 "Now, apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shews no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done to a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorise wrong. For to authorise a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorised it to be done. It follows that a petition of right which complains of a tortious act by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground. Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of the minister of the Crown is without a remedy. As the Sovereign cannot authorise wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown.": *Feather v The Queen* (1865) 6 B&S 257, per Cockburn CJ.

46 See the examples cited by Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 217 (fn 13).

47 *Mulcahy v Ministry of Defence* [1996] QB 732, 740.

48 Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 217 (footnote omitted).

49 *Crown Proceedings Act 1947* (UK).

50 See: Robert Stevens, *Torts and Rights* (2007) 218.

51 28 USC ss 1346(b) 2671-2680 (1982). See: Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 233ff; Robert Stevens, *Torts and Rights* (2007) 228.

52 Louis L. Jaffe, 'Suits against Governments and Officers: Sovereign Immunity' (1963) 77(1) *Harvard Law Review* 1, 4. See also: Ibid. 19ff.

53 Indeed, there are also important differences between the American and Australian *Constitutions* as supreme sources of law in their respective countries. See: Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 225.

the doctrine of Crown immunity as it was applied in England had trouble being transferred to the colonies.[54] A second, related, difference between England's approach to sovereign immunity and those of Australia and the USA is the "axiomatic"[55] nature of *Marbury v Madison*[56] in countries where legislative power is circumscribed by a written constitution. This means that it is not open to the executive government to declare what the law is in a conclusive manner which binds the judiciary. A third was recognised in an early Privy Council decision, viz. that colonial governments undertook many developments and improvements, and employed many people, whereas 'the Crown' in England generally left such work to private enterprise. Therefore, a strict application of the maxim 'the King can do no wrong' would "work much greater hardship than it does in England" if it were applied to claims against colonial governments in the same way as to claims against the sovereign personally.[57]

The Crown's specially protected position in Australia was removed by statute under a series of Australian *Crown Proceedings Acts* from the 1850s. Paul Finn has stated[58] that the early colonial legislation was not drafted with the intention that it would provide for liability in tort. Nonetheless, the Privy Council held[59] that the terms of the legislation were sufficiently broad to cover claims in tort, and most[60] colonial legislation was ultimately drafted expressly to cover tort claims. The legislation required that suits between a private individual and the Crown be conducted on the 'same' basis as in suits between private individuals. Following Federation, this language was replicated at Commonwealth level with the result that the same rights were covered federally as had been the subject of the Privy Council's judgment in *Farnell v Bowman*[61] and therefore the Commonwealth was "in the same position as the colonies had been in prior to Federation".[62] The relevant provision is s 64 of the *Judiciary Act*, which reads:[63]

> In any suit to which the Commonwealth or a State is a party, the rights of parties shall **as nearly as possible be the same**, and judgment may be given and costs awarded on either side, as in a suit between subject and subject.

The significance of the qualifier "as nearly as possible" will be considered further below.

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54 As Gaudron, Gummow and Kirby JJ have noted, "care is required in translating to the legal structure and practical circumstances applying in Australia doctrines which in England have been identified as 'constitutional'. The inapplicability in federal jurisdiction of the maxim that the Crown can do no wrong is one example.": *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 155 ALR 684, 694.

55 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 per Fullagar J ('*Communist Party Case*').

56 *Marbury v Madison* (1803) 5 US (1 Cranch) 137.

57 *Farnell v Bowman* (1887) 12 App Cas 643, 649 (Privy Council). Cited by Griffith CJ in *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358, 366. See also: P. D. Finn, *Law and Government in Colonial Australia* (1987); Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 218-219.

58 P. D. Finn, *Law and Government in Colonial Australia* (1987) 143. See also: Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17 (3) *Australian Bar Review* 215, 218.

59 *Farnell v Bowman* (1887) 12 App Cas 643, (Privy Council). See also: *Sydney Harbour Trust Commissioners v Ryan* (1911) 13 CLR 358, 370 per Barton J.

60 The terms of the Victorian and Western Australian legislation were somewhat narrower than was the case in other jurisdictions. See: Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 218.

61 *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397, 427 per Kitto J.

62 *Baume v Commonwealth* (1906) 4 CLR 97; Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 221.

63 *Judiciary Act 1903* (Cth) s 64 (emphasis added). See generally on the words "as nearly as possible": Susan Kneebone, 'Claims against the Commonwealth and states and their instrumentalities in federal jurisdiction: section 64 of the Judiciary Act' (1996) 24(1) *Federal Law Review* 93-132; Bradley Selway, 'The Source and Nature of the Liability in Tort of Australian Governments' (2002) 10 *Tort Law Review* 14, 19-20.

The basis of government liability: statute or common law?

In *Commonwealth v Mewett*,[64] a majority of the High Court[65] held that the Commonwealth government had a common law liability in tort, but was unable to take advantage of a common law immunity from such liability. This was because sovereign immunity had been removed by s 75(iii) of the *Constitution*.[66] Consequently, the majority took the view that section 64 of the *Judiciary Act* does not *impose* a liability and define its extent but merely recognises the existence of the Commonwealth's liability in tort.

Bradley Selway QC, as his Honour then was, argued that this changed the law in theory but brought it into line with how it had long been applied in practice and was therefore desirable regardless of the persuasiveness of the constitutional considerations applied by the plurality.[67] Graeme Hill, by contrast, has indicated a greater level of concern that the plurality's approach has unduly disturbed the common law doctrine of government immunity from suit,[68] arguing that the plurality should have modified the common law doctrine to make it compatible with Australia's *Constitution* rather than abolishing it altogether.

Contrary to the view of the plurality, a minority[69] in *Mewett* held that the Crown's common law immunity in Australia had been removed by the various *Crown Proceedings Acts* and that these statutes were in turn the source of government liability in tort.[70] At Commonwealth level, therefore, liability was *imposed* by s 64. Further, the minority held that s 75(iii) of the *Constitution* does not affect the issue of immunity from suit *per se*, nor impose liability in private law actions, but simply confers jurisdiction on the High Court to hear such matters.

Since the decision in *Mewett* was handed down, the plurality view that government liability in tort is not conferred by statute has become orthodox and has been applied without comment in numerous cases,[71] including the subsequent High Court case of *British American Tobacco v Western Australia*.[72] On either view, government immunity from suit in federal matters is not constitutionally entrenched, and it can therefore be modified or overturned by statute,[73] subject to the *Constitution*.[74] The late Bradley Selway argued convincingly that there is no constitutional imperative for the Commonwealth to be liable in tort under s 75(iii) of the *Constitution* and that the *Mewett* plurality's attempt to base its conclusion on constitutional reasoning was "not altogether satisfactory".[75] Nonetheless, he approved of the *result*

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64 *Commonwealth v Mewett* (1997) 191 CLR 471.

65 Gummow and Kirby JJ wrote a joint judgment with which Brennan CJ and Gaudron J each agreed.

66 For the reasons given above, the *Constitution* is not wholly compatible with the common law maxim that "the King can do no wrong" in any case.

67 Bradley Selway, 'The Source and Nature of the Liability in Tort of Australian Governments' (2002) 10 *Tort Law Review* 14, 22.

68 Graeme Hill, 'Private Law Actions Against the Government (Part 1) - removing the Government's immunity from suit in federal cases' (2007) 30(3) *Melbourne University Law Review* 716, 725.

69 Dawson J, with whom Toohey and McHugh JJ agreed in separate judgments.

70 *Commonwealth v Mewett* (1997) 191 CLR 471, 496 per Dawson J.

71 See the cases listed at: Graeme Hill, 'Private Law Actions Against the Government (Part 1) - removing the Government's immunity from suit in federal cases' (2007) 30(3) *Melbourne University Law Review* 716, 721 (fn 25). In an article published prior to this line of authority developing, Leeming stated the view that judicial support for the majority position in *Mewett* had been "only relatively slight": Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 223.

72 *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, 57-58 per McHugh, Gummow and Hayne JJ.

73 See: Graeme Hill, 'Private Law Actions Against the Government (Part 1) - removing the Government's immunity from suit in federal cases' (2007) 30(3) *Melbourne University Law Review* 716, 721; Nick Seddon, 'The Crown' (2000) 28(2) *Federal Law Review* 245-262, 257-258.

74 *Commonwealth v Mewett* (1997) 191 CLR 471, 531 per Gaudron J. See: Mark Leeming, 'The Liability of the Government under the Constitution' (1998) 17(3) *Australian Bar Review* 215, 229.

75 Bradley Selway, 'The Source and Nature of the Liability in Tort of Australian Governments' (2002) 10 *Tort Law Review* 14, 34.

reached by the plurality because the common law doctrine of immunity from suit "was based on a misunderstanding"[76] and ought not, in any case, to be extended vicariously to every agent of the Commonwealth.[77] With respect, this must be correct, since *Mewett*'s result was the only one which is practical.

Following *Mewett*, there may remain some academic disquiet about the *source* of the federal government's liability in tort, but as a matter of practice it is now a dead letter for several reasons: the reasoning of the *Mewett* plurality has been accepted as orthodox, the legislation of the various States and territories which defines the extent of government immunity from suit is irrelevant in respect of any alleged contravention of the *Constitution*[78] and, as Selway pointed out, Crown liability in tort had been a practical reality long before the High Court decided *Mewett*.[79] Regardless of the competing views about the reasoning in *Mewett*, the liability of Australian governments in tort is an established fact. Some have argued at length about the constitutional implications of *Mewett*'s finding that what has been abolished by legislation is a common law doctrine of government immunity.[80] With respect, there has been relatively little focus on why it is desirable or necessary to perpetuate such a doctrine in any case.

Government liability under a qualified equality principle

In relation to its normative approach, Dicey's expression of the equality principle has alternately been described as "very modern"[81] and as "the expression of an ideology, classical liberalism, whose day has passed".[82] As an aspirational goal, there is no doubt of the modernity of Dicey's expressed preference for government to be accountable in the same manner as individuals since it predated the passage of the *Crown Proceedings Act*[83] by over 60 years. Furthermore, the aspiration of "equality before the law, embracing governments and citizens"[84] is still expressed in the current legislation and "continues to reflect a political ideal of equality widely adhered to throughout the common law world".[85]

On the other hand, Dicey's expression of the equality principle now seems quaintly old-fashioned in many respects,[86] perhaps never more so than in Dicey's insistence that wrongs committed by Crown officers be compensated in suits against those officers personally. To a large extent, this reflects more the old-fashioned nature of the common law (at least in the UK) rather than of Dicey's views. The position was stated by Sedley LJ, on behalf of the Court of Appeal, as follows:[87]

> [T]he English common law has no knowledge of the state. Public law recognises the Crown as the repository of a range of prerogative and statutory powers. By the prerogative writs and orders, it

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76 By which he was referring to the arguments surveyed above in relation to the maxim "the King shall do no wrong".

77 Ibid. 34-35.

78 *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30, [22] per Gleeson CJ.

79 Bradley Selway, 'The Source and Nature of the Liability in Tort of Australian Governments' (2002) 10 *Tort Law Review* 14, 35.

80 See e.g.: Graeme Hill, 'Private Law Actions Against the Government (Part 1) - removing the Government's immunity from suit in federal cases' (2007) 30(3) *Melbourne University Law Review* 716.

81 "Although Dicey recognised that there were some laws which applied to government that did not apply to everybody else, his starting point was very modern: wherever possible, the political imperative is to put government on a level playing field with the rest of us: A.V. Dicey, *Introduction to the study of the law of the constitution* (10th ed, 1959) 193-194.": Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 44.

82 Tom Cornford, *Towards a Public Law of Tort* (2008) 9.

83 *Crown Proceedings Act 1947* (UK).

84 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 556 per Gleeson CJ.

85 Carol Harlow, *State Liability: tort law and beyond* (2004) 137.

86 Tom Cornford has criticised it on the basis that "[a]lmost no one now believes that the state's role in domestic affairs should be restricted to the protection of the private rights traditionally recognised in the common law": Tom Cornford, *Towards a Public Law of Tort* (2008) 9. I shall address this perceived limitation below.

87 *Chagos Islanders v Attorney General & Anor* [2004] EWCA Civ 997 [[20]].

> has for centuries called ministers to account if they abuse the latter, and in recent years if they misuse the former. But the State has no tortious liability at common law for wrongs done by its servants, from ministers down. In England at least (Scottish law has historically differed) either the Crown's servants are personally liable or there is no redress. It was to change this anomalous situation that the *Crown Proceedings Act 1947* was passed. But the 1947 Act does not work by making the state a potential tortfeasor: it works by making the Crown vicariously liable for the torts of its servants. It has only been with the enactment of the *Human Rights Act 1998* that the Crown, in the form of a 'public authority', has acquired a primary liability for violating certain rights. Where, of course, a limb of the state has corporate legal personality – a local authority, for example, or the Bank of England – no such problem arises…[88]

Consequently, no liability can be attached to the Crown in English law unless there has been a wrong committed by one of the Crown's servants.[89] Sedley LJ's description of the steps that the English law has taken over the course of more than a century since Dicey first wrote serves to emphasise the extent to which the idea of 'the Crown', bound up as it is with the person of the monarch, remains an inhibiting influence on the common law. The situation is somewhat different in Australia for two reasons: first due to the more symbolic nature of 'the Crown'[90] and secondly, and of greater practical importance, because s 64 of the *Judiciary Act* removes the procedural bar to bringing suit for torts committed directly by the Crown rather than by its servants,[91] which the English legislation does not. Governments are vicariously liable in all Australian jurisdictions and also in the UK for torts committed by their employees,[92] provided that the usual requirements of vicarious liability are met.[93]

Dicey's broad aspiration that governments and individuals each be equally liable in law and equity has largely, but not absolutely, been realised. However, the method of this realisation is not as Dicey envisaged: rather than government employees and agents being personally required to pay damages consequent upon their wrongful acts, governments are now usually vicariously liable for those acts and therefore any award of damages is met by them.[94] Governments may alternatively be directly liable due to legislative reform for acts which would previously have been subject to a Crown immunity from suit. As we have seen, such equality as exists between governments and private individuals engaged in tort litigation is a creature of statute and exists on the terms of the statute whereby it is created, subject to the *Constitution*.

Most current Australian iterations of Crown proceedings legislation continue to qualify the proposition that governments are to be liable to subjects in tort in the same way as in any action between two

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88 Dicey was not prepared to exclude public authorities from his general principle that individual tortfeasors be liable for their wrongs as a matter of 'private law'. This view may now rightly be regarded as old-fashioned.

89 Tom Cornford, *Towards a Public Law of Tort* (2008) 10.

90 Nick Seddon, 'The Crown' (2000) 28(2) *Federal Law Review* 245-262, 246.

91 *Commonwealth v Mewett* (1997) 191 CLR 471.

92 With the exception of Victoria, whose legislation is modelled on the UK Act: *Crown Proceedings Act 1958* (Vic).

93 These are generally held to include two basic elements. First, there must be a relationship between the tortfeasor and the government sufficient to generate vicarious liability in the government. This will usually be an employment relationship although it could also be a relationship of agency. In relation to determining whether a relationship is one of employment, see: *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21. Second, the wrongful act of the tortfeasor must be sufficiently connected to his or her relationship with the government. This is usually expressed as a requirement that the act be 'within the course of employment' or 'within the scope of the authority'. See: *Bugge v Brown* (1919) 26 CLR 110; *Deatons Pty Ltd v Flew* (1949) 79 CLR 370. There are also circumstances where a duty owed by a public authority may be held to be non-delegable, meaning that the relevant duty is not to take reasonable care but "to ensure that reasonable care to avoid injury to the plaintiff was exercised".: *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22, 27 per Gleeson CJ. Consequently, a government will be directly rather than vicariously liable for breach of a non-delegable duty where it fails to ensure the relevant result. See also Panel of Eminent Persons ('Ipp Committee'), *Review of the Law of Negligence: Final Report* (2002) [11.15]. The recommendation contained therein has been given legislative effect in NSW and Victoria: *Civil Liability Act 2002* (NSW) s 5Q; *Wrongs Act 1958* (Vic) s 44.

94 Additionally, in NSW, South Australia and the Northern Territory, legislation is in place removing employers' common law right of indemnity from an employee whose act has created vicarious liability in tort in the employer. See e.g. *Employees' Liability Act 1991* (NSW) s 3.

subjects by stating that suits between individuals and government are to be conducted "*as nearly as possible*"[95] on the same basis as between two individuals.[96] The qualification "as nearly as possible" recognises implicitly that governments cannot be dealt with on *exactly* the 'same' basis as private individuals. The equality principle expressed by Dicey is therefore subject to the reality that governments are empowered to act in ways that individuals cannot, and have duties and responsibilities that individuals do not, and this affects the extent of governments' liability in tort.[97] The problem with this simple statement "is that while most people have a sense that governments occasionally warrant different treatment, the commentators have difficulty agreeing on a set of principles to determine when that is the case".[98]

Susan Kneebone has argued that the weight of High Court authority[99] indicates that the words "as nearly as possible" in s 64 of the *Judiciary Act* should be understood as giving effect to "the principle that governments should be subject to the same law as citizens **when analogous functions are being exercised**".[100] She cites as an example the fact that, while ordinarily governments and private individuals enter into contracts in exactly the same way, the principle in *Auckland Harbour Board v R*[101] allows government to recover illegal payments made from consolidated revenue.[102] This principle is "peculiar to government"[103] and is therefore not affected by the terms of s 64.

This reasoning is consistent with the understanding that governments and individuals cannot be treated in exactly the same way because governments are sometimes able or obliged to act in the public interest. It gives the words "as nearly as possible" the narrow meaning of "as completely as possible",[104] which is consistent with the purpose of s 64 that identical functions of government and individuals should be treated equally in litigation.

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95 This form of words is not precisely consistent across every Australian jurisdiction. The NSW, Queensland and Victorian legislation each uses the words "as nearly as possible", as does s64 of the *Judiciary Act*. These qualifying words are not found in the relevant sections of the legislation in the other Australian jurisdictions. Compare: *Crown Proceedings Act 1993* (Tas) s 5(1); *Crown Proceedings Act 1993* (NT) s 5(1); *Crown Proceedings Act 1992* (SA) s 5(1); *Crown Proceedings Act 1992* (ACT) s 5(1); *Crown Proceedings Act 1988* (NSW) s 5(2); *Crown Proceedings Act 1980* (Qld) s 9(2); *Crown Proceedings Act 1958* (Vic) s 25; *Crown Suits Act 1947* (WA) s 5(1); *Judiciary Act 1903* (Cth) s 64.

96 The effect of the respective sections is the same in each jurisdiction regardless of whether the same formulation of words is used because the "qualification flows not from statute but from substantive principles of the common law": Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 45.

97 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 556 per Gleeson CJ.

98 Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 46.

99 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 265.

100 Susan Kneebone, 'Claims against the Commonwealth and states and their instrumentalities in federal jurisdiction: section 64 of the Judiciary Act' (1996) 24(1) *Federal Law Review* 93-132, 115 (emphasis added).

101 *Auckland Harbour Board v R* [1924] AC 318.

102 Susan Kneebone, 'Claims against the Commonwealth and states and their instrumentalities in federal jurisdiction: section 64 of the Judiciary Act' (1996) 24(1) *Federal Law Review* 93-132, 115 (fn 191).

103 *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254, 265.

104 Ibid. 264-265 per Gibbs CJ, Mason, Wilson, Deane & Dawson JJ. Their Honours cited: *Asiatic Steam Navigation Co Ltd v The Commonwealth* (1956) 96 CLR 397, 427 per Kitto J.

Why public authorities and private actors can never be ‘the same’

As Gleeson CJ noted in *Graham Barclay Oysters*, the qualification “as nearly as possible”[105] is an “aspiration” that cannot be realised completely.[106] It recognises implicitly that the responsibilities of governments *do* make them different to individuals in some important senses. The battleground for testing the extent of the differences between government and private actors has, for at least the last 40 years,[107] has been the law of negligence.

Governments differ from private actors because they owe duties[108] to the public generally, and they may or may not additionally owe a common law duty of care to specific individuals in the way that private actors do.[109] Governments have limited resources with which to achieve many ends. For this reason, courts have attempted to find a principled basis on which to decide when public authorities will be liable. Since *Anns*, courts have separated acts of “policy” performed by public authorities from merely “operational” acts in order that public authorities will not be held to owe a duty of care when acting (or failing to act) in pursuance of a policy but may owe a duty of care when performing acts analogous to acts which could be performed by a private actor.[110] The basis for this distinction is that acts performed in pursuit of a public authority’s power to formulate policy are non-justiciable. The problem with this reasoning is that, by stating that a decision is non-justiciable on the ground that it is an expression of policy is to state a conclusion rather than a process of reasoning which is able to assist in deciding future cases.

The utility of the policy / operational distinction was disapproved by Lord Hoffmann in *Stovin v Wise*[111] on this basis. His Lordship stated that it was “an inadequate tool with which to discover whether it is appropriate to impose a duty of care or not”.[112] Stevens explains that, while the distinction was a necessary limitation given that *Anns* allowed recovery from a public authority for failure to confer a

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105 His Honour was discussing the NSW legislation: *Crown Proceedings Act 1988* (NSW) s 5.

106 “That formula reflects an aspiration to equality before the law, embracing governments and citizens, and also a recognition that perfect equality is not attainable. Although the first principle is that the tortious liability of governments is, as completely as possible, assimilated to that of citizens, there are limits to the extent to which that is possible. They arise from the nature and responsibilities of governments. In determining the existence and content of a duty of care, there are differences between the concerns and obligations of governments, and those of citizens.”: *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 556 (citation omitted).

107 Since the decision of the House of Lords in *Home Office v Dorset Yacht Co. Ltd* [1970] AC 1004.

108 These may be either imposed by statute or in the more generic sense that governments hold their power on trust for the public, as to which see: P. D. Finn, 'The abuse of public power in Australia: making our governors our servants' (1994) 5(1) *Public Law Review* 43-57; P. D. Finn, 'The State Corporation' (1999) 3 *Flinders Journal of Law Reform* 1, 3; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 195-196. It is generally accepted that the equitable notion of a ‘trust’ is used by analogy only in regard to public power: Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial review of administrative action* (4th ed, 2009) 94; *Hot Holdings Pty Ltd v Creasy* (2002) 210 CLR 438, 481 [135] per Kirby J.

109 Peter Cane, *Administrative law* (4th ed, 2004) 275.

110 This was the standard terminology following *Anns v Merton Borough Council* [1978] AC 728. This was altered to the tripartite classification of (a)(i) non-justiciable discretionary decisions, (a)(ii) discretionary decisions subject to attack only if they are *Wednesbury* unreasonable and (b) matters of “implementation” by Lord Browne-Wilkinson in *X and others (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and other appeals* [1995] 2 AC 633, ('*X v Bedfordshire CC*'). One article commenting on *X v Bedfordshire* has noted that it is “helpful to have it recognised that there is a distinction in the context of claims against public bodies between matters which (arguably) need to pass through a public law filter before being subjected to the general [duty of care] principles and matters which generally have no meaningful public law overtones (for example, matters of safety in a school): there was something rather peculiar in the proposition implicit in *Anns* that simple carelessness at the most purely operational level amounted not only to private law negligence but also to *ultra vires* conduct.”: C.J. Hilson and W.V.H. Rogers, 'X v Bedfordshire County Council: Tort law and statutory functions — probably not end of the story' (1995) 3 *Torts Law Journal* 221, 228 (citations omitted).

111 *Stovin v Wise* [1996] AC 923, 951-953.

112 Ibid. 951. His Lordship cited observations to the same effect made by Lord Keith of Kinkel in the Privy Council: *Rowling v Takaro Properties Ltd* [1988] 1 AC 473, 501.

benefit,[113] it becomes a “red herring” where tort liability is assessed on a ‘rights’ basis. For example, once it is understood that the failure to confer a benefit is non-justiciable, not because it is an exercise of policy, but because a private individual has no enforceable *right* to the benefit in question. This reflects the “uncompromising orthodoxy” ascribed to Brennan J[114] by Lord Hoffmann in finding that, contrary to *Anns*, “one simply could not derive a common law ‘ought’ from a statutory ‘may’”.[115] In the UK, at least, it is now settled that the grant of a statutory power to a public authority cannot create a common law duty of care which would not otherwise have existed.[116]

Public authorities are given some protection, both at common law and in statute, from being found to owe a duty of care in respect of acts which are not analogous to things that could be done by any private actor. For example, the common law protection against liability for nonfeasance by highway authorities, abandoned by the High Court of Australia in *Brodie*,[117] now exists as a matter of statute in most Australian jurisdictions.[118]

There is, however, a counterpoint to the fact that public authorities are public-regarding and that is the expectation that they will perform the functions allocated to them fully and competently. From the reasoning of Lord Wilberforce in *Anns*, it followed that, contrary to existing precedent,[119] a plaintiff could obtain damages from a public authority for failing to perform an act, which it was empowered by statute to perform, with sufficient efficiency or skill on the basis that the statutory power created a common law duty to act, or at least to give proper consideration to acting. The liability thus imposed on the authority would not be under the tort of breach of statutory duty but for breach of a duty of care in the tort of negligence.

The reasons for *Stovin*’s departure from the reasoning in *Anns* are understandable.[120] However, the disappointment felt by some commentators with that rejection is also understandable, because *Anns* was at its heart an expression of the belief that having certain responsibilities carries the moral expectation that those responsibilities will be properly fulfilled. This should not be any the less so because individuals have no enforceable right to the conferral of a certain benefit by a public authority.[121] To use a comparison beloved of judges,[122] while the man rescued by the Good Samaritan[123] had no legal right which would have compelled the Priest or the Levite to come to his aid, there is certainly an argument that he had a *moral* claim. In respect of individuals, this is irrelevant: a moral claim will not suffice to compel positive action in the absence of a legal duty of care.[124] However, some have argued that this principle should not apply to a public authority whose *raison d'être* is to take positive action in given circumstances. So, to extend the parable, if there had been a public authority

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113 Robert Stevens, *Torts and Rights* (2007) 228.

114 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 483 ('*Heyman's Case*').

115 *Stovin v Wise* [1996] AC 923, 951. Mark Aronson has described this as a distraction: “The obvious answer·is 'never'. A statutory duty is not in itself enough to create a common law duty.”: Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 67. See also: *Stovin v Wise* [1996] AC 923, 948, 953.

116 Ibid. 947-948.

117 *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

118 See e.g. *Civil Liability Act 2002* (NSW) s 45.

119 *East Suffolk River Catchment Board v Kent* [1941] AC 74.

120 In Australia, the picture remains unclear to some extent because the High Court did not accept every aspect of *Anns* in the first place and has not since adopted every aspect of *Stovin*.

121 cf Robert Stevens, *Torts and Rights* (2007) 221-222.

122 e.g. *Donoghue v Stevenson* [1932] AC 562, 580 per Lord Atkin; *Hargrave v Goldman* (1963) 110 CLR 40, 66 per Windeyer J.

123 Gospel according to St Luke 10:30-37.

124 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 478 per Brennan J ('*Heyman's Case*').

empowered to assist people injured in the public highway and it had known of the man's circumstances, ought this to have been enough to establish a duty of care?

Robert Stevens states the orthodox position following *Stovin*, that a claim against a public authority will fail unless the plaintiff can demonstrate that a duty of care was owed by the public authority to him or her personally.[125] In other words, a statutory duty imposed on a public authority will be insufficient to ground a successful claim for damages unless the plaintiff can show either that, on its proper construction, the legislation confers a personal right upon him or her to enforce the duty in question, or that there is a common law duty of care. This is a much more satisfactory statement of principle than was achieved by cases which attempted to mark out exceptions to the general rule expressed in *Anns*. For example, *Hill v Chief Constable of West Yorkshire*[126] is better understood as a case where the plaintiff was precluded from recovering damages because the duty of police to catch criminals is owed to the community at large and confers no right on any individual, rather than as the basis for saying that there is a broad exception to the usual duty of care doctrine in the case of police investigations.[127] To use reasoning which is slightly more general, and as the House of Lords noted in *Hill*, it is also inappropriate for reasons of public policy to subject police investigations to a common law duty of care. This proposition is relatively uncontroversial but to state, without more, that a certain category of cases is 'non-justiciable' provides little assistance in formulating a legal principle which can be extended in future cases. The post-*Stovin* rights-based reasoning therefore has much to recommend it.

However, the desire to require public authorities, at least in general terms, to perform their statutory duties with competence cannot be discounted absolutely. This desire has seen a number of different judicial and legislative attempts to impose at least a minimal qualitative standard on public authorities.

Reliance on public authorities to take action

The proposition that there is no general common law duty to act imposed on a public authority which is not under a statutory duty to act[128] is qualified by two sets of circumstances.[129] First, there is a general common law duty owed by any person or authority to take positive action where he, she or it *creates* a risk.[130] Secondly, any person or authority may come under a duty to take positive action by undertaking

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125 Robert Stevens, *Torts and Rights* (2007) 220.

126 *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

127 More recently, Lord Steyn has commented that "it would be best for the principle in *Hill*'s case to be reformulated in terms of the absence of a duty of care rather than a blanket immunity", although his Lordship did not query the result of the case, stating that if *Hill* "arose for decision today I have no doubt that it would be decided in the same way": *Brooks v Metropolitan Police Commissioner* [2005] 2 All ER 489, 504.

128 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 459-460 per Mason J ('*Heyman's Case*').

129 It is now correct to speak of a third circumstance in which public authorities may be liable for a negligent failure to act, additional to situations where a specific expectation of performance is created. Courts have held over the course of the last 40 years (since *Dorset Yacht* and, particularly, *Anns*) that governments may in some circumstances have a common law duty to perform a positive act in order to prevent loss or damage to an individual even without that individual having any subjective expectation of, or express reliance on, such action. This includes the proposition "that a public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty", with the caveat that the existence of a statutory duty per se is insufficient to create a common law duty of care: Ibid. 458; 467 per Mason J. Liability in these circumstances is fundamentally different, since it applies only to public authorities rather than to private actors, who will not generally be invested with statutory powers.

130 Such an omission to take care of others exposed to a risk created by the defendant is contrasted to 'pure' or 'mere' omissions. The line of authority started in the UK by the decision of the House of Lords in *Anns* extended the liability of public authorities by holding, in essence, that not only was a public authority under an obligation not to cause or increase danger or risk, but that it may be exposed to liability in respect of a 'pure' omission if a court held that it owed a common law duty of care to exercise statutory powers available to it which would have reduced or prevented the plaintiff's loss. This line of reasoning was subsequently rejected by the House of Lords in *Stovin v Wise* [1996] AC 923. *Stovin* was not followed by the High Court in *Pyrenees Shire Council*, which has since been applied in both *Crimmins* and *Brodie*. See Scott Wotherspoon, 'Translating the public law 'may' into the common law 'ought' : the case for a unique common law cause of action for statutory negligence' (2009) 83(5) *Australian Law Journal* 331, 334.

"some task which leads another to rely on its being performed".[131] Specifically, a duty of care may be owed by a public authority in circumstances where it has conducted itself in such a way that others have relied on it to exercise its statutory powers.[132] This has since been described as 'specific reliance'.[133] This doctrine may apply to a public authority because it excites a specific expectation in individuals that it will exercise a statutory power or discretion.[134] This may be through a soft law instrument or other representation which leads individuals to believe that the authority will follow its stated policy in all circumstances. For example, if it is the usual practice of a local government authority to use its powers to close down any business premises which contain a fire risk, it would be reasonable for individuals to assume that no fire risk is posed by any business which has come to the authority's attention and remains open. There is eminent support for the proposition that a public authority may owe a duty to act where it "has undertaken to do so or induced a person to rely on [it] doing so".[135]

In *Heyman's Case*, Mason J proposed the doctrine of general reliance as an extension of this reasoning.[136] His Honour argued that some duties of public authorities are relied upon by the public at large implicitly and without any (or much) subjective consideration because this is the entire reason why some public authorities exist. Mason J offered possible examples, including public authorities charged with "the control of air traffic" and "the safety inspection of aircraft".[137] While it offers a somewhat untidy exception to the neatness of a purely rights-based approach,[138] there is no principled reason why a public authority responsible for air-traffic control ought not to be liable to a plaintiff for breach of a common law duty of care where the plaintiff has suffered loss as a result of the authority's less-than-competent performance of its sole charge.

Mason J stated in *Heyman's Case* that general reliance will rarely generate a duty of care. Demonstrating specific reliance on a representation being *positively* applied by government may also be difficult; indeed, it was not established in *Heyman's Case*.[139] Any such reliance must be reasonable, and reasonableness of reliance will naturally be informed at least in part by the terms of the representation and the circumstances in which it has been made. For example, a soft law instrument

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131 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 479 per Brennan J ('*Heyman's Case*').

132 See: Ibid. 459-460 per Mason J.

133 Brennan and Deane JJ agreed with Mason J that there was a doctrine of specific reliance in separate judgments in *Heyman's Case*: Ibid.

134 This may be either due to the reliance of an individual on acts of the authority which led him or her to believe that the authority would act in a consistent manner in the future or, more likely, as the result of a negligent misrepresentation made by the authority and relied upon by the individual to his or her detriment. As we will see, there is substantially less chance that courts will provide an equitable remedy to an individual misled in this way than a remedy in tort.

135 *Stovin v Wise* [1996] AC 923, 944 per Lord Hoffmann.

136 "[T]here will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care, without the need for contributing conduct on the part of a defendant or action to his detriment on the part of a plaintiff. Reliance or dependence in this sense 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 own protection. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realisation that there is a general reliance or dependence on its exercise of power … The control of air traffic, the safety inspection of aircraft and the fighting of a fire in a building by a fire authority ... may well be examples of this type of function.": *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 464 per Mason J ('*Heyman's Case*').

137 Ibid. 464.

138 The general benefits of a rights-based approach to establishing a duty of care, as opposed to a loss-based approach which looks for exceptions to exclude liability in some circumstances, is argued cogently by Robert Stevens, particularly in regard to *X and others (minors) v Bedfordshire County Council; M (a minor) and another v Newham London Borough Council and others; E (a minor) v Dorset County Council; and other appeals* [1995] 2 AC 633, ('*X v Bedfordshire CC*'). See: Robert Stevens, *Torts and Rights* (2007) 224-225. Note, however, that the opposing theoretical approaches are relevant only in the case of *inaction* by, for example, an air traffic control authority: to carelessly *direct* a collision between aeroplanes would certainly result in liability on either view. The example employed by Mason J is therefore decisive only if the controllers were to abandon their posts during the course of a flight.

139 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 470 per Mason J ('*Heyman's Case*').

may be stated in terms that contain an implicit (or explicit) warning that it should not be relied upon other than at the risk of the reliant party.

One of the reasons for holding an authority liable in circumstances such as those described above is that individuals will not take any action to protect themselves where it is generally known, or at least assumed, that a public authority has taken charge. More to the point, it will frequently be impossible for individuals to take steps to protect themselves from the relevant form of damage (notably, from unsafely maintained or directed aircraft, as in the two examples cited from Mason J's judgment in *Heyman's Case* above). This will usually be the very reason why a public authority has been given certain powers in the first place. Even those who reject the concept of a 'general reliance' doctrine accept that a duty of care may arise where the plaintiff is in fact ignorant of the danger against which a public authority owes a duty to protect him or her.[140]

This reasoning underlying the general reliance doctrine is supported by the fact that many of the objections to requiring a defendant to take positive action are inapplicable to public authorities. The refusal to hold the metaphorical Priest and Levite of Christ's parable accountable for their failures to act as the Samaritan did is usually justified on one or more of the following grounds: that it is unfair to require a party who has not caused danger to get his or her "feet wet" by coming to the rescue; that it offends individual autonomy to require private individuals to solve problems not of their making; and the 'why me?' objection. These objections amount to much the same thing, which is to say that in the absence of an enforceable right against the Priest or the Levite, their right to determine how they will and will not act ought not to be interfered with. In respect of individuals, it is difficult to argue against this proposition.[141]

However, as we have seen above, public authorities are not like individuals. Mark Aronson has noted that:[142]

> the starting point in most cases involving government defendants is to ask why their status should entitle them to any special dispensation. In other words, the government's civil liability should be judged by the same standards that govern private sector defendants. It is commonplace, however, that people expect positive action from government that they would not demand of a private person or firm,[143] and some of the leading negligence cases have tried to turn that expectation into a common law duty.

That governments have different capacities and expectations to individuals is an important factor in limiting the extent to which they can be treated in 'the same' way as private actors in private law actions. This ought not to be discounted where it serves to remove some of the objections to finding a positive duty to act. Hence, if a public authority is *not* held to owe a positive duty to take action, this cannot be justified on the basis that it infringes on the autonomy of a certain authority or will cause it to get its metaphorical "feet wet".[144] Yet, while these objections are phrased such that they refer only to characteristics of private actors, they would not alone be enough to compel a public authority to take positive action. For example, one could not commence proceedings against a highway authority for the negligent failure to inspect premises for risk of fire. It would not infringe upon the authority's autonomy, *per se*; it's just nothing to do with that particular authority. Modern government is not a monolith. Many public functions are performed by many different authorities. Therefore, the 'why me?' objection is still

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140 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 390 [170] per Gummow J.

141 cf *Lowns v Woods* [1996] Aust Torts Reps 81-376, (NSW Court of Appeal).

142 Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 68.

143 See e.g. *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 553 per Gleeson CJ.

144 Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 69.

of central importance. This should be set aside only where it is the very purpose for which an authority exists to take certain positive action.

Unlike the House of Lords, the Australian High Court has demonstrated, in *Pyrenees Shire Council*, that it is prepared to find that a common law duty of care is owed by public authorities which are able to foresee harm to an individual and also have the capacity to avoid it. By doing so, it has created a legal environment in which public authorities do sometimes owe a greater duty than would be owed by a private actor due to a superior capacity to prevent harm.[145] Foreseeability of harm and capacity to prevent it are insufficient bases for finding that a duty of care is owed by a private actor, who would in any case generally have the right to refuse assistance.

The potential relevance of a 'moral' duty on the part of a public authority can be demonstrated using the well-worn example of *East Sussex Rivers Catchment Board v Kent*.[146] The plaintiff suffered flooding to his land as the result of a breach in a sea wall. This was not as a result of any negligent act of the respondent authority. Rather, Mr Kent sought compensation from the defendant because it had exercised its statutory powers to repair the wall in such an inefficient manner that Mr Kent's farm land remained flooded for longer than it would have done if the Board had exercised its powers with due care and skill. Robert Stevens categorises this as nothing more than a failure of the Board to confer a benefit to which Mr Kent had no enforceable right.[147] This reasoning would be incontestable if the party who failed to confer the benefit of repairing the sea wall was Mr Kent's neighbour; regardless, it is an accurate statement of the law relating to public authorities in the UK following *Stovin v Wise*.

If we assume, however, that repairing sea walls was a substantial purpose of the defendant Board and that the plaintiff either elected not to take action to help himself or was unable to do so, then the Board's failure to prosecute its statutory purpose with reasonable[148] skill and expedition breaches, at the very least a moral duty on the part of the Board, even if it cannot *create* a common law duty of care. The absence of a right to the benefit which it was the purpose of the Board to confer does alone not provide a satisfying basis for the denying the existence of such a duty of care.

In articulating the general reliance doctrine in *Heyman's Case*, Mason J was at pains to point out that liability for breach of a duty of care where there has been general reliance on a public authority arises in negligence and not as a matter of public law:[149]

> [A]lthough a public authority may be under a public duty, enforceable by mandamus, to give proper consideration to the question whether it should exercise a power, this duty cannot be equated with, or regarded as a foundation for imposing, a duty of care on the public authority in relation to the exercise of the power. Mandamus will compel proper consideration by the authority of its discretion, but that is all.

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145 Scott Wotherspoon, 'Translating the public law 'may' into the common law 'ought' : the case for a unique common law cause of action for statutory negligence' (2009) 83(5) *Australian Law Journal* 331, 334-335.

146 *R v East Sussex County Council; ex parte Reprotech (Pebsham) Ltd* [2002] 4 All ER 58.

147 Robert Stevens, *Torts and Rights* (2007) 221. cf Tom Cornford, *Towards a Public Law of Tort* (2008) 131.

148 I use 'reasonable' in its negligence law sense, rather than the public law sense of *Wednesbury* unreasonableness.

149 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 465 ('*Heyman's Case*'). Lord Hoffmann shared some of Mason J's concerns with a right to a writ of mandamus as the source of a common law duty of care: "A mandamus can require future consideration of the exercise of a power. But an action for negligence looks back to what the council ought to have done. Upon what principles can one say of a public authority that not only did it have a duty in public law to consider the exercise of the power but that it would thereupon have been under a duty in private law to act, giving rise to a claim in compensation against public funds for its failure to do so?": *Stovin v Wise* [1996] AC 923, 950. Given his Lordship's support for a rationality standard to be applied to public authorities' exercises of power in order to determine whether they owe a duty of care, it is clear that his objection to mandamus as a source of such a duty is not based on the fact that it is a public law remedy.

However, courts and legislators are frequently tempted to carry public law notions across to the law of torts.[150] Notwithstanding the view expressed by Mason J, other judges have held that, in order to create a common law duty of care, a power to act held by a public authority must be enforceable by a writ of mandamus. In *Pyrenees Shire Council v Day*, Brennan CJ built on Lord Hoffmann's speech in *Stovin v Wise*[151] to state that:[152]

> [A] duty to exercise a power may arise from particular circumstances, and may be enforceable by a public law remedy. Where a purpose for which a power is conferred is the protection of the person or property of a class of individuals and the circumstances are such that the repository of the power is under a public law duty to exercise the power, the duty is, or in relevant respects is analogous to, a statutory duty imposed for the benefit of a class, breach of which gives rise to an action for damages by a member of the class who suffers loss in consequence of a failure to discharge the duty. The general principles of public law establish the existence of the statutory duty to exercise the power and the statute prescribes the class of individuals for whose benefit the power is to be exercised.

Gummow J put the contrary view in the same case that "the liability of the Shire in negligence does not turn upon the further (and public law) question whether (as may have been the case) those who later sued in tort would have had standing to seek against the Shire an order in the nature of *mandamus*. Their actions for damages in negligence are not brought in addition to or in substitution for any public law remedy."[153] McHugh J also later criticised the importation of public law doctrines into private law in *Crimmins*.[154] Nonetheless, Brennan CJ's use of *mandamus* to indicate when a statutory power is converted into a common law duty as the result of an implied statutory right of action, while unique in judicial circles, now has a level of statutory support[155] under the *Civil Liability Act 2002* (NSW), which imposes a barrier to the recognition of a common law duty to act on the part of a public authority "if the authority could not have been required to exercise the function in proceedings instituted by the plaintiff".[156]

General reliance was disapproved by a majority of the High Court in *Pyrenees Shire Council v Day*.[157] Brennan CJ would have preferred to make legislative intent the basis for a finding that a duty of care is owed by a public authority. His Honour cited the *dicta* of Lord Hoffmann in *Stovin v Wise* in which his Lordship seemed to doubt[158] that "the general expectations of the community", possibly not shared subjectively by the plaintiff, were an appropriate method of establishing whether a duty of care is owed

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150 One example of this would be demonstrated if commission of an ultra vires act were made the threshold for a finding that a public authority owes a common law duty of care. A second would be if public authorities were held to a public law standard in assessing whether they owe a common law duty of care.

151 See: Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 67-68.

152 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 347 per Brennan CJ.

153 Ibid. 390-391 (citations omitted).

154 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 35-36. In Pyrenees, his Honour merely noted that "in many cases where the [general reliance] doctrine applies, the public authority will already have a public duty, enforceable by mandamus, to consider whether it should exercise its power or perform its function. In some cases, its knowledge may be such that, though the power or function may be discretionary, it nevertheless has a public duty to act.": *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 371. Remarking that the doctrine of general reliance frequently has a basis which is more than illusory, as the majority held, because public authorities subject to that doctrine may also be subject to a writ of mandamus is, with respect, a more benign use of public law than to use it as the basis for finding a common law duty of care.

155 Albeit "in mangled form": Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 68.

156 *Civil Liability Act 2002* (NSW) s 44. See the discussion of s 44 at: Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 73-76.

157 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 344. Gummow and Kirby JJ each agreed with the Chief Justice on this issue. Dissenting on this point, both Toohey and McHugh JJ would have retained the general reliance doctrine on the basis that it remained a useful concept. The doctrine was also was also disapproved by Lord Hoffmann in *Stovin v Wise* [1996] AC 923, 953-955.

158 cf *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 370 [105] per McHugh J. In *Crimmins*, Gaudron J listed Lord Hoffmann amongst the critics of a 'general reliance' doctrine: *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 24 (fn 55).

by a public authority. Indeed, one of the most persuasive objections to the doctrine of general reliance is that to describe the expectations created by the "situation" in which an individual's interests are within the control of a public authority as 'reliance' is slightly misleading.[159] The doctrine as proposed by Mason J[160] requires no subjective reliance on the part of a plaintiff. Lord Hoffmann's starting point was to say that it will be rare indeed for a public authority to owe a common law duty of care where "Parliament has conferred a discretion [which] must be some indication that the policy of the act [*sic.*] conferring the power was not to create a right to compensation."[161]

The High Court's rejection of the doctrine of general reliance in *Pyrenees Shire Council* meant that it needed to develop a different analytical model for dealing with situations in which a plaintiff argued that a public authority bore a common law duty of care to exercise a statutory power. In *Crimmins*, the Court's reasoning on this point was largely in terms of the 'control' of the public authority and the 'vulnerability' of the individual to whom it was asserted that the authority owed a common law duty, although Gaudron J pointed out that "those precise considerations appear to underpin the notion of general reliance as explained by Mason J" in *Heyman's Case*.[162] The question of control arose more squarely in *Crimmins* than it had in *Pyrenees Shire Council*,[163] where, as Mark Aronson has noted with some understatement, the Council "was not in complete control of the situation".[164] It was in fact the steps taken by the Council which led to a finding that it owed a duty of care in that case,[165] since the questions of whether an authority has "control" or those who rely on it are relevantly and sufficiently "vulnerable"[166] are only ever relevant to the extent that they establish the existence of a relationship upon which a duty of care can be grounded.[167]

The facts of *Crimmins* are, briefly, as follows. The predecessor authority of the respondent Stevedoring Industry Finance Committee ("the Authority") bore a statutory duty under s 8 of the *Stevedoring Industry Act 1956* (Cth) to perform its functions, and exercise its powers, under that Act "with a view to securing the expeditious, safe and efficient performance of stevedoring operations". The Authority had a broad array of statutory functions, set out in s 17(1) of the Act.[168] Section 18(1) empowered the Authority, for the purpose of the performance of its functions under s 17 to "make such orders, and do all such other things, as it sees fit". The Authority had certain disciplinary powers over workers, including power to cancel or suspend registration, but once a worker was assigned to a wharf he was subject to the

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159 As Lord Hoffmann commented in *Stovin v Wise*, "the plaintiff does not need to have relied upon the expectation that the power would be used or even know that it existed. It appears rather to refer to general expectations in the community, which the individual plaintiff may or may not have shared. A widespread assumption that a statutory power will be exercised may affect the general pattern of economic and social behaviour.": *Stovin v Wise* [1996] AC 923, 954.

160 Brennan and Deane JJ did not adopt the terms 'general reliance' and 'specific reliance' but used the same approach as Mason J: Margaret Allars, 'Tort and Equity Claims Against the State' in P. D. Finn (ed), *Essays on law and government - Volume 2: The citizen and the state in the courts* (1996) vol 2, 49, 61.

161 *Stovin v Wise* [1996] AC 923, 953.

162 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 24 [43].

163 McHugh J stated that he did not regard the result in *Pyrenees Shire Council* as being dependent on the Council's "control" of the situation: *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 581.

164 Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 71.

165 *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 390 per Gummow J.

166 See *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 24-25 [44] per Gaudron J; 40-41 [100] per McHugh J; 85 [233] per Kirby J.

167 Ibid. 22 [36] per Gaudron J; *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 254 [113] per Gummow, Hayne & Heydon JJ.

168 These included regulating the performance of stevedoring operations; ensuring that sufficient waterside workers were available for stevedoring operations at each port and that their labour was used to the best advantage; making arrangements for allotting waterside workers to stevedoring operations; determining the method of, and other matters relating to, the engagement of waterside workers; investigating means of improving, and encouraging employers to introduce methods and practices that would improve, the expedition, safety and efficiency with which stevedoring operations were performed; and encouraging safe working in stevedoring operations and the use of articles and equipment, including clothing, designed for the protection of workers engaged in stevedoring operations and, where necessary, providing waterside workers with articles and equipment designed for that purpose: *Stevedoring Industry Act 1956* (Cth) s 17 (1).

direction of the employer who supplied the safety equipment required by an award. Thus, the Authority had broad powers of control over stevedores, including the late husband of the plaintiff ("Mr Crimmins").

Under s 33(1) of the Act, a registered employer was also required to ensure that, as far as was practicable, stevedoring operations for which it had engaged waterside workers were expeditiously, safely and efficiently performed. Mr Crimmins was employed as a stevedore in the Port of Melbourne between 1961 and 1965 by various registered employers. Over thirty years later, he was diagnosed as suffering from mesothelioma caused by the inhalation of asbestos fibres, to which he had been exposed by various employers in the course of his employment as a stevedore. He sued the respondent Committee as the successor to the liabilities and obligations of the Authority, although he had not been employed by the Authority, which was generally ignorant of the structure or size of the ships to which workers were allocated and of the nature of the cargoes to be handled.

The practical control which the Authority had over the stevedores at the Port of Melbourne was immense, regardless of the fact that it was not their employer. The stevedores were employed, but on a casual basis from time to time. Thus, the Authority was the only entity which had both control over the conditions in which the stevedores worked and a continuous role in the industry. Gaudron J noted in this regard that:[169]

> that the relevant time, work on the waterfront stood in a somewhat different position from work in most other industries. Employment was casual, with waterside workers being engaged by the day by different stevedoring companies. The shipping companies whose ships were to be loaded and unloaded might or might not be Australian-based: they might or might not meet Australian safety standards. And although employment was regulated by award, day to day activities and conditions might vary from employer to employer, ship to ship and cargo to cargo. Moreover, not only was work on the waterfront casual, it was also hazardous. Much of this finds recognition in various provisions of the [*Stevedoring Industry Act*]… Indeed, it explains the particular functions of the Authority …

The appeal in *Crimmins* was allowed by majority.[170] Each of the judgments considered, consistently with the manner in which the case was argued in the High Court, whether the control of the Authority was such that it came under a common law duty of care to exercise its statutory powers to prevent harm to Mr Crimmins. In other words, *Crimmins* was argued and decided on the basis that the relevant duty of care owed by the Authority was to take reasonable steps to prevent foreseeable harm from befalling stevedores including Mr Crimmins. McHugh J, with whom Gleeson CJ agreed, would have preferred that the case were argued on a different basis:[171]

> There is one settled category which I would have thought covered this case: it is the well-known category "that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely[172] to be occasioned, by their exercise, damages for negligence may be recovered".[173] Similarly, in *Sutherland Shire Council v Heyman*,[174] Mason J, citing *Caledonian Collieries Ltd v Speirs*,[175] said that "[i]t is now well settled that a public authority may be subject to a common law duty of care when it exercises a statutory power or performs a statutory duty."

169 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 22 [36].

170 Gleeson CJ, Gaudron, McHugh, Kirby & Callinan JJ; Gummow & Hayne JJ dissenting.

171 Ibid. 29-30 [62]. See also Mark Aronson, 'Government liability in negligence' (2008) 32(1) *Melbourne University Law Review* 44-82, 71.

172 Later cases require "likely" to mean that there is a reasonable possibility that the injury is likely to be occasioned.

173 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202, 220 per Dixon CJ, McTiernan, Kitto and Taylor JJ.

174 *Council of the Shire of Sutherland v Heyman* (1985) 157 CLR 424, 458 ('*Heyman's Case*').

175 *Caledonian Collieries Ltd v Speirs* (1957) 97 CLR 202, at 219-220.

In other words, his Honour saw the relevant breach of duty to be in the fact that the Authority had *directed* Mr Crimmins, and others like him, to work in circumstances where it knew that he would be exposed to danger in the form of asbestos fibres.[176] With respect, this is the approach that best reflects the reality of the relationship between Mr Crimmins and the Authority,[177] which had both the power to direct Mr Crimmins where to work and the power to cancel or suspend his registration to work as a stevedore if he did not comply with the Authority's directions.[178] Once the relevant breach of duty is characterised as a positive act on the part of the authority, questions of whether and how the liability of public authorities should be limited become moot.

The way McHugh J saw the relationship between the Authority and Mr Crimmins is much the same as the way in which soft law often works. A soft law instrument, in the form of a guideline or practice note or, less formally, an oral directive, is apt to be followed without question, particularly when it is inferred that a favourable outcome is dependant on conforming to the directive given. The concept of vulnerability is relevant to the imposition of tortious liability in these circumstances, but does not of itself answer the question of whether there is a relationship which gives rise to a duty of care.

This point can also be observed from the judgment of Crennan and Kiefel JJ in *Stuart*. Their Honours held that, contrary to the facts in *Pyrenees Shire Council* and *Crimmins*,[179] the defendant police officers had not "entered the field", which is to say that they had not commenced to exercise their statutory power to apprehend Mr Veenstra.[180] Consequently, they could not be said to have "control" over the situation in which Mr Veenstra was endangered.[181] Unlike *Crimmins*, there could be no finding that the officers had put Mr Veenstra in harm's way, nor did they "control the source of the risk" to him.[182] Therefore, the fact that Mr Veenstra was "vulnerable" was irrelevant to a duty of care being owed to him by the defendant officers, since that vulnerability was not an incident of his relationship with them. It would be otherwise if Mr Veenstra was vulnerable as a direct result of a direction which had been given to him by the officers.

Conclusion

The Diceyan formulation of the rule of law was based on the premise that government tortfeasors should be treated in exactly the same manner as an individual in the same position. Well over a century after Dicey first voiced this opinion, it is universally admitted that this statement amounts to no more than an aspiration that can never be realised. Indeed, this was understood during Dicey's lifetime, as the text of section 64 of the *Judiciary Act 1903* demonstrates. This is not to say that Dicey's aspiration for a 'level playing field' between government and private actors is anything but laudable. Rather, it is no more than a recognition of the fact that public authorities are **not** in fact the same as private actors; their purposes are fundamentally different. It is for this reason that the reformist zeal which has systematically removed government immunities has stopped short of any declaration that public authorities and private actors are absolutely 'the same'. The reality must always be otherwise.

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176 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 28 [58].

177 Gummow, Hayne & Heydon JJ seemed prepared to accept in *Stuart* that the Authority had, at least, done something positive; it had "put the workers at risk of harm because it was the Authority that assigned the workers to particular stevedores": *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 255 [115].

178 Gaudron J viewed this as a circumstance going to Mr Crimmins' vulnerability: *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 24-25 [44].

179 And also the reasoning of Warren CJ in the Victorian Court of Appeal: *Kirkland-Veenstra v Stuart* [2008] Aust Torts Reports 81-936, 61,305 [44].

180 The unanimous finding of the High Court that the conditions for the exercise of this statutory power had not arisen is irrelevant to this point.

181 *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215, 263 [140] per Crennan & Kiefel JJ. cf Ibid. 254 [114] per Gummow, Hayne & Heydon JJ.

182 Ibid. 255 [116] per Gummow, Hayne & Heydon JJ.