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“JUDICIAL REVIEW, STATUTORY INTERPRETATION AND COMPENSATION”

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A major theme of judicial review case law in the last decade has been the interface between general law principles and statutory provisions. The focus for this consideration has undoubtedly been the flood of cases under the *Migration Act 1958* (Cth) and particularly those involving decisions with respect to protection visas.

A level of dissatisfaction with perceived outcomes in the courts led the Government into two kinds of statutory response. The first was an attempt to restrict the grounds of judicial review, by prescribing inflexible criteria and removing discretionary elements (except with respect to refugees), by imposing limitations on the jurisdiction of the Federal Court and finally by way of a privative clause. The second form of response was to seek to particularise procedural requirements, including those intended to accord procedural fairness. Because it has always been understood that the content of procedural fairness is subject to legislative regulation, the adoption of that course was seen as a means of developing a degree of certainty as to the requirements to be met by administrative decision-makers.

Each response proved less than satisfactory in achieving the Government's goal. The prescription of inflexible criteria ran aground on Australia's commitment to the *Convention Relating to the Status of Refugees*. The grant of protection visas to those with well-founded fears of persecution in their countries of origin required the assessment of quite diverse factual situations and the formation of evaluative

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judgments. More importantly, the abandonment of flexible criteria for other visas, including for persons with compassionate grounds, forced numerous claimants with strong humanitarian claims on Australia's protection to seek to bring themselves within the Refugees Convention. That circumstance placed significant pressure on the courts to allow a stretching of the Convention criteria to fit the circumstances of particular cases. That in turn led to Government dissatisfaction with the consequences of judicial review. Attempts to restrict the grounds of judicial review foundered in *Yusuf*¹ and *Plaintiff S157*.²

The fate of attempts to prescribe procedural rules miscarried in a different way in *Miah*.³ These statutory prescriptions were effective, but far from limiting applications for review, tended to provide new scope for claims of procedural failure in circumstances where such claims would have been quite unlikely to succeed under the general law. An example is to be found in *SAAP*,⁴ although it is one from which there has since been some retreat.⁵ Further guidance in respect of the construction of such statutory provisions is likely to be available in the coming months when the High Court considers an appeal from the decision of the Full Court of the Federal Court in *SZIZO*.⁶ *SZIZO* was the most recent in a line of cases dealing with communications between the Refugee Review Tribunal and applicants before it. Where an applicant gives the Tribunal notice of the name and address of another person to be the "authorised recipient" of notices, the Tribunal is required to send notices to the authorised recipient.⁷ The Full Court held that a failure to do so, by sending the notice to the primary applicant instead, constituted jurisdictional error. The applicants were a family; each member of which authorised the husband and father as the person to whom notices should be sent on their behalf, the husband identifying the eldest child (who was 21 years of age) as the authorised recipient for notices. A notice of hearing was sent to the husband, not the eldest child as

¹ *Minister for Immigration and Multicultural Affairs v Yusuf* [2001] HCA 30; 206 CLR 323.

² *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; 211 CLR 476.

³ *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* [2001] HCA 22; 206 CLR 57.

⁴ *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] HCA 24; 228 CLR 294.

⁵ *SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26; 81 ALJR 1190.

⁶ See *SZIZO v Minister for Immigration and Citizenship* [2008] FCAFC 122; 172 FCR 152 (Moore, Marshall and Lander JJ).

⁷ *Migration Act 1958* (Cth), s 441G.

authorised recipient. The husband signed the response to the notice and all members of the family attended at the hearing. Nevertheless the Full Court felt compelled to set the decision aside. Lander J described this as a “rather absurd conclusion”, there being in fact “no unfairness or prejudice” flowing from the Tribunal’s failure to comply with its statutory obligation.⁸

The importance of statutory interpretation in identifying the availability and limits of judicial review is not to be underestimated. Nevertheless, there appear to be times when the courts have lost their focus on general principle in a semantic examination of statutory formulae.

Rather than revisit some of the battles which have been fought over the last decade, I will seek to anticipate an area of potential development in the forthcoming decade. It lies in the little visited country between judicial review and claims for compensation.

Compensation for unlawful acts?

Administrative lawyers have long assumed that compensation is not a form of relief available in judicial review proceedings and, in any event, is not an entitlement dependent upon invalid or unlawful action by a government officer. The exception to this general principle is the tort of misfeasance in public office. That tort is available, however, only in limited circumstances identified by the High Court in *Northern Territory v Mengel*,⁹ as a tort analogous to the liability of private individuals for “the intentional infliction of harm”. The joint judgment continued:

“For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm ... or which are done with reckless indifference to the harm that is likely to ensue, as is the case where a person, having recklessly ignored the means of ascertaining the existence of a contract, acts in a way that procures its breach.”

⁸ [2008] FCAFC 122 at [91].

⁹ [1995] HCA 65; 185 CLR 307 at 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

There are two aspects of this tort which are of interest in the broader context of a potential right to compensation for maladministration. The first is the explicit use in *Mengel* of analogy with the liability of private individuals for the intentional infliction of harm; the second is the likely practical overlap between intentional abuse of a power to inflict harm and the public law doctrine of improper purpose.

Despite the absence of any case law in Australia challenging the assumption that compensation is not generally available merely for the inaction, or conduct beyond power, of a government officer, there has been a gathering cloud of academic writing questioning both the procedural and substantive limbs of the assumption. There is also the pressing question of when it is appropriate to impose on a statutory authority liability in negligence.

In the UK, questioning of the traditional position has gained significant momentum in recent years, in part arising from concern that the lack of a remedy by way of compensation for loss suffered may be in breach of the *Convention for the Protection of Human Rights and Fundamental Freedoms* and subject to review by the European Court of Human Rights. This in turn has given rise to the issue of a consultation paper by the Law Commission entitled *Administrative Redress: Public Bodies and the Citizen*.¹⁰

But that is only part of the basis for rethinking established principles. More broadly, there is the concern that citizens should not suffer loss as a result of government error, without some entitlement to compensation. Underlying this idea is the great expansion of the role of the state, particularly in the last 60 years, carrying with it duties with respect to public interests and increasing powers to interfere in the life of citizens. When the various *Crown Proceedings Acts* sought to withdraw immunity in tort from the government, their focus was the Diceyan concept that officers of the State, being subject to the law, should be treated in the same way as other citizens. Their employer, being the government, should similarly be liable for their torts in the same way as any other employer.¹¹ A century later, liability in New South Wales

¹⁰ Consultation Paper No 187 (2008).

¹¹ See, eg, *Claims Against the Colonial Government Act 1876* (NSW), applied in *Farnell v Bowman* (1887) 12 App Cas 643.

was imposed for actions of agents of the government exercising independent discretionary authority.¹² Shortly thereafter, in *Bropho v Western Australia*,¹³ the High Court abandoned the presumption that statutes were not intended to bind the Crown.¹⁴

Many conferrals of statutory power carried with them a statutory immunity for acts done in good faith in execution of the power.¹⁵ Occasionally such provisions carried with them the possibility of compensation where a government officer acted otherwise than honestly.¹⁶

The questions raised by such provisions conferring a degree of immunity include whether a different test should be applied to public authorities acting in a way which would be available to ordinary members of the community and to public authorities carrying out statutory powers which are not available to individuals. Two related questions may be identified as relevant to the latter circumstance: first, does the imposition of a common law duty to act in a particular way turn a discretionary power into a power subject to a duty to act? Secondly, is the imposition of a general law duty, subject to an order for payment for compensation for breach, consistent with the statutory scheme by which the duty or power is imposed?

In truth, there are few examples of statutory provisions which expressly deal with general duties of care in the exercise of statutory powers, except to confer a degree of immunity. Further, to rely upon some “implied” statutory duty of care is likely to involve reliance upon a fiction based on an analogy with general law principles. Nevertheless, there are many cases in which a concern that general law duties conform to the statutory scheme of powers conferred on a public authority is discussed. There is an additional concern apparent from that discussion, namely, that a statutory conferral of a discretionary power should not be turned into a duty to act without some clear intention in the statute that such a duty was intended and

¹² See *Law Reform (Vicarious Liability) Act 1983* (NSW).

¹³ [1990] HCA 24; 171 CLR 1.

¹⁴ The origin of the presumption is usually sourced to the decision of the Privy Council in *Province of Bombay v Municipal Corporation of the City of Bombay* [1947] AC 58.

¹⁵ See *Board of Fire Commissioners (NSW) v Ardouin* [1961] HCA 71; 109 CLR 105.

¹⁶ See, eg, *Little v Commonwealth* [1947] HCA 24; 75 CLR 94 (Dixon J).

then having due regard to the statutory intention with respect to relief available where the duty has not been exercised.

That issue arose in the English case of *Stovin v Wise*.¹⁷ *Stovin* was a case brought against a road authority seeking to establish liability for damages for personal injury resulting to the plaintiff from an accident at an intersection. The intersection was known to be dangerous because of poor visibility resulting from a mound of earth on adjoining land, owned by British Rail. The road authority had power to order the removal of the mound of earth and, indeed, had resolved to do so. The House of Lords divided, the minority view expressed in the opinion of Lord Nicholls of Birkenhead would have upheld the liability of the local council as the relevant road authority. In identifying the issues, his Lordship made the following remarks:¹⁸

“The liability of public authorities for negligence in carrying out statutory responsibilities is a knotty problem. The decision of this House in *Anns v Merton London Borough Council* [1978] AC 728 articulated a response to growing unease over the inability of public law, in some instances, to afford a remedy matching the wrong. Individuals may suffer loss through the carelessness of public bodies in carrying out their statutory functions. Sometimes this evokes an intuitive response that the authority ought to make good the loss. ...

Expressed in traditional tort terms, the loss in this type of case arises from a pure omission. Any analysis must recognise this. But the omission may also constitute a breach of the authority’s public law obligations. As will be seen, the present case is an example of this, even though the relevant statutory function was expressed as a statutory power and not a statutory duty. When this is so, the question is not whether the authority was under a legal duty to take action. The authority was already so obliged, as a matter of public law. The question, rather, is what should be the remedy for the breach.”

¹⁷ [1996] AC 923.
¹⁸ *Ibid* at 933.

Lord Hoffmann, speaking for the majority, stated:¹⁹

“In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised.”

It may thus be seen that all members of the House of Lords in *Stovin* imported breach of public law obligations into their assessment of a right to compensation for loss flowing from a failure to exercise a power.

In *Pyrenees Shire Council v Day*²⁰ Brennan CJ expanded on this analysis. First, his Honour noted the circumstances in which a power could be understood to be a duty in accordance with *Julius v Lord Bishop of Oxford*.²¹ Secondly, Brennan CJ referred to the cause of action for breach of statutory duty, which can arise in private litigation:²²

“No duty breach of which sounds in damages can be imposed when the power is intended to be exercised for the benefit of the public generally and not for the protection of the person or property of members of a particular class. And I doubt whether a duty breach of which sounds in damages would be held to exist if the power were conferred merely to supervise the discharge by a third party of that third party’s duty to act to protect a plaintiff from a risk of damage to person or property.”

One thing which is troubling about the language in *Stovin* is the reliance in tort upon administrative law concepts for determining the validity or invalidity of a particular

¹⁹ Ibid at 953 (Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreeing).

²⁰ [1998] HCA 3; 192 CLR 330 at [21].

²¹ (1880) 5 App Cas 214 at 222-223 (Earl Cairns LC); see also *Samad v District Court of New South Wales* [2002] HCA 24; 209 CLR 140.

²² 192 CLR 330 at [26].

decision or course of conduct. The contrary view was identified by McHugh J in *Crimmins v Stevedoring Industry Finance Committee*:²³

“With great respect to the learned judges who have expressed these views, I am unable to accept that determination of a duty of care should depend upon public law concepts. Public law concepts of duty and private law notions of duty are informed by differing rationales. On the current state of the authorities, the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires.”

McHugh J remarked that in *Heyman*²⁴ Mason J had rejected the view that mandamus could be “regarded as a foundation for imposing ... a duty of care on the public authority in relation to the exercise of [a] power. Mandamus will compel proper consideration by the authority of its discretion, but that is all”.²⁵ McHugh J continued:²⁶

“The concerns regarding the decision-making and exercise of power by statutory authorities can be met otherwise than by directly incorporating public law tests into negligence. Mr John Doyle QC (as he then was) has argued,²⁷ correctly in my opinion, that there ‘is no reason why a valid decision cannot be subject to a duty of care, and no reason why an invalid decision should more readily attract a duty of care’.”

These denials leave open the question whether invalidity is in any sense relevant to liability in tort, or whether concepts such as *Wednesbury* irrationality (or manifest irrationality) should be relevant to the existence of a duty or the content thereof. That question has tended to be sidestepped by looking elsewhere for control mechanisms with respect to liability in tort. Despite the degree of imprecision of

²³ [1999] HCA 59; 200 CLR 1 at [82].

²⁴ *Council of the Shire of Sutherland v Heyman* [1985] HCA 41; 157 CLR 424.

²⁵ *Ibid* at 465.

²⁶ *Crimmins* at [83].

²⁷ J Doyle, “Tort Liability for the Exercise of Statutory Powers” in P Finn (ed), *Essays on Torts* (1989) 203 at 235-236.

such criteria, there is still an emphasis placed upon rejecting liability where to do so would impinge upon “core policy making” or “quasi-legislative” functions.²⁸

There remains, however, as Lord Nicholls said in *Stovin*, an attraction in the idea that a statutory authority which acts carelessly in a serious respect should be liable for at least some kinds of loss where the decision was invalid, even if not where the decision was valid. Nevertheless, there are difficulties with this kind of reasoning. One is the proposition, more evident in some cases than in others, that a judgment for payment of compensation involves a judicial determination as to the correct or preferable decision to be made by a statutory authority exercising a discretionary power.

Nevertheless, these concepts have intruded into the tort law area through the recent civil liability reforms. Thus, in New South Wales, there is no liability in a public or other authority in negligence to the extent that the liability “is based on the failure of the authority to exercise or to consider exercising any function of the authority to prohibit or regulate an activity if the authority could not have been required to exercise the function in proceedings instituted by the plaintiff”.²⁹ In Victoria, road authorities are encouraged to develop and promulgate codes of practice, which can include policies, so that decisions made in accordance with those policies cannot be in breach of a common law duty unless the policy is “so unreasonable that no road authority in that road authority’s position acting reasonably could have made that policy”.³⁰

The UK Law Commission has provisionally proposed a right to compensation in respect of an act or omission of a public body which is categorised as “a serious fault”. It has said:³¹

“Within the ‘sufficiently serious’ test, the ‘serious’ criterion can be broken down into two components. The breach of the ‘manifest’ and ‘grave’. It is sometimes said that ‘manifest’ relates to the manner in which the rule is

²⁸ See, eg, *Crimmins* at [93] (McHugh J) and, in relation to the latter, *Pyrenees Shire Council* at [182] (Gummow J).

²⁹ *Civil Liability Act 2002* (NSW), s 44(1).

³⁰ *Road Management Act 2004* (Vic), ss 39(5), 103.

³¹ Law Commission, above fn 10, at par 4.151.

breached; and 'grave' to the consequences that flow from it. Furthermore, the European Court of Justice has identified a number of factors which are relevant to the characterisation of a breach as 'sufficiently serious':

- (1) the clarity and precision of the rule breached;
- (2) the measure of discretion left by that rule to the national or community authorities;
- (3) whether the infringement and the damage caused was intentional or involuntary;
- (4) whether any error of law was excusable or inexcusable;
- (5) the fact that the position taken by a Community institution may have contributed towards the omission;
- (6) the adoption or retention of national measures or practices contrary to Community law."

The Commission continued:³²

"We see 'serious fault' as the key to our proposals. Under the current law, the court's decision on whether or not to impose a duty of care is the major limiting factor on liability. However, within our scheme, the way in which the public body acted, or failed to act would be the deciding factor, with liability only being imposed where the administrative behaviour of the public body fell far below that reasonably expected of that body."

The Law Commission proposals involve two elements. One is the adoption of fresh criteria for a right of compensation for losses from public maladministration. The second is the inclusion of a power to award compensation as part of the range of remedies available in public law proceedings. With respect to the latter reform, a precondition to a payment would be the availability of relief of the traditional kind in administrative law.

³² Ibid at par 4.152.

In the UK, comments on the discussion paper appear to have been mixed. There is a degree, however, of support for some form of compensation for public maladministration.³³

But, as explained by Emeritus Professor Mark Aronson in a submission to the Commission:

“The negligence action classically calls for the court to determine the merits of the defendant’s acts or omissions. Whilst that determination exonerates the defendant whose acts or omissions were within a range of reasonable responses to a given situation, it nevertheless remains the case that the exercise requires the court to second-guess the merits of the defendant’s conduct.”

In Australia, the limits on that activity are sometimes described by reference to the concept of “justiciability”.³⁴ However, even without the inclusion of a right to award compensation in judicial review proceedings, public lawyers need to give careful consideration to the scope for such merits review in tort actions.

That these concerns will gain increasing importance in common law countries is an inevitable consequence of the UK adherence to the European Convention. A quarter of a century ago (in 1984) the Council of Europe published a study which adopted the following principles:³⁵

- I Reparation should be ensured for damage caused by an act due to a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person. ...
- II 1. ... [R]eparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the

³³ See M Fordham, “Monetary Awards in Judicial Review” [2009] Public Law 1; T Cornford, “Administrative Redress: the Law Commission’s Consultation Paper” [2009] Public Law 70.

³⁴ *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [14] (Gleeson CJ).

³⁵ Recommendation No R(84)15 of the Committee of Ministers to Member States Relating to Public Liability (Adopted by the Committee of Ministers on 18 September 1984 at the 375th meeting of the Ministers’ Deputies).

general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act.”

These principles are clearly reflected in the recommendations of the Law Commission. They form the basis of a recent book by Tom Cornford entitled *Towards a Public Law of Tort*.³⁶ They have clearly found their way into the discourse of the UK courts without statutory reform.

It may well be that Australian courts will be resistant to such principles. Nevertheless, in a sense these principles do no more than highlight a tension which already exists between administrative law and tort law. A better understanding of that tension is essential, if only to avoid legislative confusion of the kind reflected in the *Civil Liability Act 2002* (NSW), Pt 5, of which Aronson remarked in his submission to the UK Law Commission that it is “difficult to imagine legislation that is more ill-considered”.³⁷

The imperial march of negligence in tort law was arguably slowed, if not halted, by the *Civil Liability Act* and equivalent legislation in other Australian jurisdictions. Ironically, that legislation may have encouraged the potential intrusion into negligence of concepts developed in public law. The consequences of that for judicial review remain to be explored.

Further, there is an uncertain borderline between the controls being developed with respect to negligence claims against statutory authorities, and the circumstances, usually rarely fulfilled, in which a claim for breach of statutory duty may succeed against a statutory authority. In each case questions of statutory construction are of critical importance. With respect to breach of statutory duty, an affirmative finding is required that the statute was intended to benefit a particular class of persons and that, at least by implication, it intended that compensation be available for breach of the duty. With respect to negligence claims, the courts have used the principle of coherence to ensure that a statutory authority is not made liable for general law

³⁶ (2009).

³⁷ See generally, M Aronson, “Government Liability in Negligence” (2008) 32 MULR 44.

damages in circumstances where to impose such a duty would be inconsistent with the fulfilment of the statutory purpose.³⁸

So far, there has been little by way of repercussion in the area of judicial review flowing from developments in respect of tort liability of statutory authorities. That situation is likely to change if tort law adopts concepts from public law and applies them in different circumstances and for different purposes. The consequences remain to be seen, but it may not be entirely coincidental that while the British courts have been feeling their way towards a theory of liability for compensation in respect of acts of public maladministration, they have also developed theories of substantive due process, allowing intervention in judicial review proceedings in circumstances which would be seen to cross the divide into impermissible merit review in Australia.³⁹

³⁸ See, eg, *Sullivan v Moody* [2001] HCA 59; 207 CLR 562, holding that doctors subject to an obligation to report cases of child abuse did not owe a duty of care to the parents; see also *Tame v New South Wales* [2002] HCA 35; 211 CLR 317, with respect to the completion by a police officer of a record containing erroneous information as to the blood alcohol reading of the plaintiff.

³⁹ See *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; 214 CLR 1 at [28] (Gleeson CJ), [67]-[76] (McHugh and Gummow JJ), [118]-[119] (Hayne J), and [148] (Callinan J).