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AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW (NSW BRANCH)

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JUSTICE JOHN BASTEN

In a festschrift in honour of Professor Harlow, published in 2003, Professor Michael Taggart wrote that it was the first publication of British origin to honour a female legal scholar. [1] It may still be the only volume of its kind. A quick glance at Professor Harlow's publications and at the topics covered in the festschrift demonstrate why that should be so. Professor Harlow has worked for much of her career at various interfaces. These include the interface between public policy and the law and that between public and private law. Professor Harlow has also written extensively on the interface between British and European law and on comparative developments in the USA. There are others, but today's discussion of state liability for tort fits within these parameters.

Despite her knowledge of European systems, she is not enamoured of the bright line drawn, for example, by the French, between public law and private law. Professor Taggart noted in his paper in 2003[2]:

> *"So for Carol Harlow any distinction between public/private law is irrelevant, devoid of intrinsic merit, dysfunctional, outmoded, too rigid, ill-timed bridge-building with Europe and productive of executive-minded decisions. Her opposition has been unswerving, and all that has happened in the fields of government liability and judicial review law and practice since the mid-1970s has been grist to this mill."*

To an administrative lawyer in this country, hers may sound a curious position. However, it is taken, as I understand her, not so much to deny the legitimacy of public law considerations as different from private law considerations, but to expose the reasoning of judges who have been unwilling to impose tort liability on the state, because it is different. I think I am also correct in saying, perhaps at the price of oversimplification, that Professor Harlow sees tort law as an appropriate mechanism in holding the state accountable for its wrongs, because the remedies provided by tort law are essentially based on principles of corrective justice, and that in turn is at the heart of the proper role of the courts.

In relation to the liability of the state Professor Harlow's approach may sound strange to Australian ears, perhaps because our Federal Constitution includes a doctrine of the separation of powers and we are used to the High Court exercising a power of judicial review of legislation, and not just review of administrative action. (A similar point was made from an American perspective by Martin Shapiro in the festschrift.[3]

I am also a little uncomfortable about the absence of a clear definition of the state. Not that Australian law does much better.

Secondly, we have grown up with provisions like s 64 of the *Judiciary Act* which provides:

64 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, … as in a suit between subject and subject.
(That language may be found in the 1897 *Claims Against the Government Act* (NSW).)

Whilst we know that this and similar provisions were designed to overcome common law immunities or prerogatives enjoyed by government, the words "as nearly as possible" have always been treated as a recognition that differences remain.

There are two aspects of the differences, which are relevant for present purposes. The first concerns the proposition that the state has all the powers of a private individual, as well as powers conferred by statute or by common law prerogative. That statement is sometimes combined with the proposition that, under the common law, an individual is entitled to do anything which is not prohibited. That commonly espoused principle is, in my view, a piece of political rhetoric: it is rarely of assistance in answering questions as to what the law does prohibit or make subject to liability. The issue is often illustrated by reference to the judgment of Justice Megarry in *Malone v Metropolitan Police Commissioner*[4] a case in which, famously, the Court refused to declare that an act of telephone tapping carried out by the post office, at the request of the police, was not unlawful because an act which is not specifically prohibited is permitted. I do not think Professor Harlow likes the result, but it is precisely the sort of result you get if you treat officers of the state as in no different position to individuals acting in a private capacity.

I do not wish to comment on Part 5 of our *Civil Liability Act* 2002 (NSW), but I do want to refer to the manner in which the courts have dealt with protective provisions which, commonly, provide that no action shall lie against an officer or the state in circumstances where the action undertaken was without lawful authority. As McHugh J noted in *Webster v Lampard*[5]:

> *"Statutory provisions, giving immunity from action to persons discharging public functions, vary in their language. Nevertheless, the courts have construed such provisions by reference to general principles rather than by a textual analysis of individual enactments. Thus, it is a cardinal rule of construction of such provisions that they are to be construed as giving protection 'not where the provisions of the statute have been followed, for then protection would be unnecessary, but where an illegality has been committed by a person honestly acting in the supposed course of the duties or authorities arising from the enactment'."*

Two comments may be made about this statement: first, it is surprising to see a member of the High Court eschewing textual analysis in favour of the application of "general principles" of construction. *Webster* was decided in 1993 and it might be intriguing to ask if the same approach would be adopted today. (Nevertheless, at least one of the statutory provisions under consideration was in very general terms, namely that "no action shall be brought against any person … for any act done in pursuance or execution or intended execution of any Act, or of any public duty or authority".)

The second intriguing aspect of the statement is the requirement that there must be "illegality" in the exercise of a duty "honestly" carried out. That terminology is taken from the judgment of Dixon J in *Little v The Commonwealth*[6]. Mr Little was the subject of an order under national security regulations restricting his place of residence. He was then arrested for failing to comply with the order.

The position of the Minister was that, having made the order (as stated by Dixon J "for some unexplained reason") the opinion on which it was based was unexaminable and that which followed was undertaken in accordance with the *National Security Act*. His Honour held that the making of the order was examinable but only on the grounds of "bad faith"[7]. The fact that the Minister's opinion had been shown to be entirely wrong and without foundation was not sufficient. Nevertheless, the order was invalid in its terms, because it failed to prescribe a restriction in accordance with the statutory formula. In that context, his Honour expressed the principle quoted by McHugh J in *Lampard*.

One aspect of this judgment which is intriguing for a public lawyer is that *Little* was decided in July 1947, just under two years after the decision in *R v Hickman; Ex parte Fox and Clinton* [8].There is a similarity in the principles identified in each case. The subject matter in *Hickman* was, of course, a privative clause designed to remove from judicial review an administrative act of a Commonwealth officer; in *Little* the clause in question was designed to provide protection against an action, a term commonly understood as dealing with privative actions for damages or similar relief.[9]

It is tempting to say that the conferral of executive power, whether a function of the common law or the Constitution, is subject to an implied constraint, namely that relevant powers must be exercised for the public purpose for which they are conferred. In this sense, an improper purpose, once identified, will result in invalidity. On the other hand, it is not meaningful to talk of an action of an individual as "invalid": it is either lawful or unlawful. The question is what consequence flows from unlawfulness, illegality (or invalidity) in the contexts in which the activity takes place. It is always possible to argue that the consequence of unlawful or illegal or invalid acts by the state or its officers can be identified or removed by statute. But no statute of which I am aware seeks to excuse, expressly, acts undertaken in bad faith. Perhaps in a confident democratic tradition, no government is likely to pursue such

legislation. Nevertheless, one would like to know whether it could, in principle, given that things can be done by degree and indirectly.

These two issues are related, in a way that Professor Harlow would probably approve. Thus a protection clause has long been held, in accordance with the principles established in *Board of Fire Commissioners v Ardouin*[10]. not to extend to activities of a public authority which do not require statutory authorisation. The scope of this approach was affirmed in uncompromising terms in *Puntoriero v Water Administration Ministerial Corporation*[11].The Corporation was not protected against an action for damages by a farmer to whom it supplied contaminated water. The water was supplied pursuant to a consensual arrangement between the parties.

In my early days at the Bar I was involved in giving advice in relation to a number of claims by prisoners for compensation, either for injuries suffered in prison or for false imprisonment when, under the complicated system of remissions which then operated, the officers in Corrective Services had miscalculated the time at which a person was to be released. One of those cases, was *Cowell v Corrective Services Commission (NSW)* [12]. Mr Cowell had been wrongly detained for approximately a year beyond the date of expiration of his sentence. However, the error was accidental (in the sense of being unintentional) and not the result of negligence on the part of the prison authorities. Mr Cowell was successful, but his success turned primarily on a technical analysis of the person responsible for his custody and application of the various protective provisions contained in the *Prisons Act* at that time. In running such cases, it was assumed that one needed to take two steps. The first was to establish that the action of the government official was unlawful; the second was to consider whether there was statutory protection against tort liability for such an unauthorised act.

Both questions tended to depend on statutory interpretation. Thus in another case, *Carroll v Mijovich* [13], a question arose as to the effect of a failure to comply with a statutory requirement in relation to a search warrant where the *Search Warrants Act* 1985 provided that a search warrant was “not invalidated by any defect, other than a defect which affects the substance of the warrant in a material particular”. Ms Carroll, whose premises were the subject of what turned out to be an illegal search, was successful in seeking declaratory relief. However, Meagher JA dissenting, made the following remarks with respect to the possibility of relief by way of damages [14]:

> *“The purpose of awarding damages to an individual against a public official for that official’s failure to perform a statutory duty is presumably to put the individual in the same position he would have enjoyed had the duty been duly performed. But, in the circumstances under consideration, if the issuing magistrate had performed his duty by supplying his written reasons the invasion of the premises would still have taken place, and caused the same damage as would have been caused if the action had not been complied with.”*

His Honour ended with a flourish:

> *“No amount of Wilkes-like rhetoric can disguise the fact that the decision of the majority will not advance anyone’s rights.”*

Kirby P and Handley JA took a different view.

Similar questions remain topical, particularly in relation to immigration detention. Such questions may also arise in the future if compliance with WTO requirements of free trade, despite the protection for sanitary and phytosanitary exceptions, results in the lowering of customs barriers and the introduction of disease through permitted imports, which then affect local agricultural and aquacultural activities.

Professor Harlow has decried the willingness of the courts to impose liability for violations of human rights. I share her unease with *Bernard’s Case* in the UK, and *Baigent’s Case* in New Zealand – the latter at least is a vivid example of the Court overstepping the boundaries provided by legislation [15]. However, there is a tension between concerns that public revenue will be diverted from other uses, by a court which is over-generous in providing compensation against the state and, on the other hand, requiring that the state and the private individual be treated equally.

End notes

[1] P. Craig and R. Rawlings *Law and Administration in Europe* (OUP 2003) at 108.
[2] Mr Taggart, "The Peculiarities of the English": Resisting the Public/Private Law Distinction in Craig and Rawlings (supra), Ch 6 at p.109.
[3] Op cit, Ch 12; M. Shapiro "Trans-Atlantic: Harlow Revisited" at p.233.
[4] [1979] Ch 344.
[5] (1993) 177 CLR 598 at 619.
[6] (1947) 75 CLR 94.
[7] Ibid at 103.
[8] (1945) 70 CLR 598.
[9] See *Vezitis v McGeechan* [1974] 1 NSWLR 718.
[10] (1961) 109 CLR 105.
[11] (1999) 199 CLR 575.
[12] (1988) 13 NSWLR 714.
[13] (1991) 25 NSWLR 441.
[14] Ibid at 455D.
[15] *Simpson v Attorney-General* [1994] 3 NZLR 667.