

LIABILITY OF PUBLIC OFFICERS

*Alan Robertson SC**

Revised version of a paper given at a meeting of the New South Wales Chapter of the AIAL on 30 May 2002 in Sydney.

The public officers referred to in the title are those exercising statutory and non-statutory governmental powers. I leave aside legislators and those who exercise judicial power. It may be seen that I have already begged a number of questions:

- what are governmental powers?
- where does executive power shade into judicial power?
- are all statutory powers governmental?

But what I am speaking about is, broadly, “When may a public servant be sued in tort?”¹

I put it this way rather than “When is a public servant liable to pay damages?” because the administrative law remedies do not, of themselves, give rise to a claim in damages.² It may of course be necessary to have administrative action or an administrative decision set aside on the way to a claim for damages but this is because, outside negligent acts or omissions, there is no claim for damages in respect of a lawful administrative action. “There can be no tortious liability for an act or omission which is done or made in valid exercise of a power.”³ I take this to mean that there is no such thing as a negligent/actionable exercise of a discretionary power where the exercise of the power is valid.

I should spend a minute or two on this point because it is sometimes overlooked. It is one thing to have a decision set aside when it is the justification for a positive act. For example, where you are being sued for a sum of money by a government agency and there is an administrative decision imposing the liability, you can defend yourself by attacking the validity of the administrative decision and, if successful, the agency's action founded on debt may disappear.⁴ Similarly, where a statute is relied upon by a defendant government in an action for trespass to goods, if the statute is invalid then the claim for damages for trespass may succeed.⁵ A revocation of a licence, if invalid, would sustain a similar analysis. So may detention, if invalid, give rise to an action for false imprisonment.

But the result would not follow where a positive grant or licence is fundamental to the plaintiff's cause of action, the activity being otherwise prohibited. This is because invalidating a decision not to grant would leave a causal gap: the plaintiff would still not have the necessary grant or licence unless and until the matter were remitted and a positive decision in favour of the plaintiff were made. To give an example, the absence of a licence or approval may mean that a person is denied the opportunity to conduct a business. But where the positive grant of a licence is, by legislation, a prerequisite to conducting the business, then the mere setting aside of the decision to refuse to grant would not found an

* *Member of the New South Wales Bar.*

action for damages. The lack of legal justification removes a shield, but does not provide a sword.⁶

Now that the action on the case exemplified by *Beauresert Shire Council v Smith*⁷ has gone the way of nominate torts,⁸ there are only two torts which merit detailed consideration and as to one of them, misfeasance in public office, I will be encouraging you to look past its current fashionability to see that success in such a claim would be rare. This leaves the tort of negligence as it impacts on public officials and those dealing with them. For administrative lawyers this means, largely, the negligent exercise of a discretionary power.

Misfeasance in public office

The High Court has twice looked at this tort in recent times, once in *Northern Territory of Australia v Mengel (Mengel)*⁹ and again in *Sanders v Snell*.¹⁰ In neither case did the High Court delineate the most elusive element of the tort which is the state of mind of the official.

Sanders v Snell concerned a direction by the Norfolk Island Minister for Tourism to the members of the Government Tourist Bureau to terminate the employment of the Bureau's executive officer. Procedural fairness was not given. Gleeson CJ, Gaudron, Kirby and Hayne JJ, in considering the tort of misfeasance in public office, said:¹¹

Again it must be accepted that the precise limits of this tort are still undefined. It is an intentional tort. As was said in *Mengel* [at 345]:

...the weight of authority here and in the United Kingdom is clearly to the effect that it is a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power. (Footnotes omitted)

Their Honours had earlier said:¹²

For present purposes it may be accepted that the tort of misfeasance in public office extends to acts by public officers that are beyond power, including acts that are invalid for want of procedural fairness. But to establish that tort, it is not enough to show the knowing commission of an act beyond power and resulting damage. As the majority said in *Mengel*:¹³

The cases do not establish that misfeasance in public office is constituted simply by an act of a public officer which he or she knows is beyond power and which results in damage. Nor is that required by policy or by principle. Policy and principle both suggest that liability should be more closely confined. So far as policy is concerned, it is to be borne in mind that, although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability.¹⁴ And principle suggests that misfeasance in public office is a counterpart to, and should be confined in the same way as, those torts which impose liability on private individuals for the intentional infliction of harm. For present purposes, we include in that concept acts which are calculated in the ordinary course to cause harm, as in *Wilkinson v Downton*,¹⁵ 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.

For the purposes of deciding *Mengel*, the majority considered it sufficient to proceed on the basis that the tort requires an act which the public official knows is beyond power and which involves a foreseeable risk of harm but noted also that there seems much to be said for the view that misfeasance extends to the situation of a public official recklessly disregarding the means of ascertaining the extent of his or her power.¹⁶

In *Three Rivers District Council v Governor and Co of the Bank of England*,¹⁷ the House of Lords considered the scope of the tort of misfeasance in public office and followed *Mengel*. Their Lordships held that the tort involved an element of bad faith and arose when a public officer exercised his power specifically intending to injure the plaintiff, or when he acted in the knowledge of, or with reckless indifference to, the illegality of his act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the plaintiff or persons of a class of which the plaintiff was a member; and that subjective recklessness in the sense of not caring whether the act was illegal or whether the consequences happened was sufficient.

Lord Steyn, with the agreement of Lord Hope and Lord Millett said:¹⁸

The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, ie conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.

The official concerned must be shown not to have had an honest belief that he was acting lawfully; this is sometimes referred to as not having acted in good faith. In the *Mengel* case, the expression honest attempt is used. Another way of putting it is that he must be shown either to have known that he was acting unlawfully or to have wilfully disregarded the risk that his act was unlawful. This requirement is therefore one which applies to the state of mind of the official concerning the lawfulness of his act and covers both a conscious and a subjectively reckless state of mind, either of which could be described as bad faith or dishonest.

Why success in such a claim is rare is illustrated by the recent judgment of von Doussa J in *Chapman v Luminis Pty Ltd (No 5)*,¹⁹ one of the decisions concerning the bridge to Hindmarsh Island. Having set out the law, his Honour needed to say little more than:

In the present case I consider the claims based on the tort of misfeasance in public office must fail if for no other reason because the applicants have not established bad faith. On the contrary I consider that both Professor Saunders and Mr Tickner held honest beliefs that they were acting lawfully at all times.

In *Tahche v Abboud*,²⁰ Tahche had been convicted of rape and his conviction quashed on appeal. In a subsequent civil action brought by Tahche, one defendant was a solicitor employed by the DPP and another defendant was a member of the independent Bar, who had been retained to prosecute at the original rape trial. The plaintiff had sued them, amongst others, claiming damages for misfeasance in a public office, the allegation being founded on their alleged non-disclosure of information relative to the trial of the accused. On the trial of separate questions, Smith J summarised the basic elements of the tort as follows:²¹

- (1) the defendant must hold a public office;
- (2) there must be an invalid exercise of power or purported exercise of power;
- (3) the defendant must be shown to have acted with the necessary intent;
- (4) the plaintiff must suffer damage as a consequence of the exercise of power or purported exercise of power.

The second requirement, the invalid exercise of power, includes an absence of power and acts invalid for want of procedural fairness. It includes the exercise of a power for an improper purpose, including the purpose of a specific intent to cause injury. It arguably

includes an exercise of power for irrelevant considerations or for considerations that were manifestly unreasonable.

It may also include abuse of non-statutory powers.²²

Also of interest for present purposes is the first of these elements, the requirement that the defendant must hold a public office. Smith J,²³ held that these defendants, a solicitor and counsel:

were at the relevant time holders of a public office for the purpose of the tort of misfeasance in a public office in that they were holding specific positions with defined and specialised roles;

- (a) for which they were remunerated from public funds;
- (b) in which they were performing public services, public services of great importance; and
- (c) in which they owed a duty to both the community and to the accused, to disclose information of assistance to the accused.

Smith J also held that any immunity from suit did not apply to the tort as pleaded.

However, on appeal by the solicitor and counsel, the Court of Appeal reversed Smith J: *Cannon v Tahche*.²⁴ That Court held that one necessary component of the tort was the misuse or abuse by the holder of a public office of a relevant power which is an incident of the office. The prosecutorial function did not carry with it any relevant power so that it could not be said of a prosecutor appearing at a trial that he or she occupies a public office for the purposes of the tort. A prosecutor's obligation to act fairly, one aspect of which is the prosecutor's duty of disclosure, does not spring from any statutorily given power but from practices established by the judges over the years which have been designed to ensure that an accused person receives a fair trial. When briefed to prosecute at the plaintiff's trial, counsel did not thereby assume any office and did not acquire any relevant power as prosecutor. The same applied even more strongly to the solicitor who was a Crown servant. No relevant power attached to her position. Her obligations could rise no higher than those imposed on prosecuting counsel. Further, whatever the nature and extent of a prosecutor's duty, it is a duty owed to the court and not a duty enforceable at law at the instance of the accused.

In *Edwards v Olsen*,²⁵ Perry J summarised the law relating to the mental element.²⁶ The case concerned claims for some tens of millions of dollars based upon alleged maladministration of the various Fisheries Acts in their application to the South Australian abalone fishery. The plaintiffs had carried on business as commercial abalone divers. Perry J said:²⁷

In the early cases, it was said that malice was essential to the action.²⁸ Modern cases recognise that proof of "targeted malice", as it has come to be called, that is, conduct specifically intended to cause injury to the plaintiff, is not the only means by which the mental element may be satisfied. It is now accepted that the requirement of proof of the necessary state of mind of the defendant may be satisfied if the public officer is shown to have acted with actual knowledge "... that he has no power to do the act complained of and that the act will probably injure the plaintiff".²⁹

Where there is targeted malice, the purported exercise of power, even though ostensibly within power, is invalid as the public officer has acted for an improper or ulterior motive.

Both cases, that is, where there is targeted malice or where there is conduct accompanied by actual knowledge that there is no power to engage in that conduct, involve bad faith. In the first instance the act is in bad faith as it is committed for an improper or ulterior motive. In the second case it involves bad faith in that the public officer lacks an honest belief that his or her act is lawful.

So that for this element of the tort to be satisfied, there must be bad faith in one or other of the two senses which I have explained.

There is a further refinement.

In cases involving bad faith of the second kind which I have described, it has sometimes been argued that the knowledge of the public officer that the act is beyond power may be constructive knowledge, or to put it in the language of the pleader, it is sufficient to prove that the public officer either “knew or ought to have known” of the absence of power. While the argument that the test could be satisfied in that way was expressly rejected by the High Court in *Northern Territory v Mengel*, both the High Court in that case and the House of Lords in their decision in the *Three Rivers* case accepted that, absent actual knowledge of the absence of power, the requisite state of mind might be proved if it could be shown that the public officer was “recklessly indifferent as to the existence of the power to engage in the conduct which caused the plaintiff’s loss”.

So that, to put the matter comprehensively, the element of bad faith which is essential to proof of the requisite state of mind, may be satisfied by evidence amounting to targeted malice in the sense which I have explained that expression, or lack of an honest belief that the act is lawful. Lack of an honest belief that the act is lawful may be demonstrated either by actual knowledge of the lack of power or reckless indifference as to the availability of the power.

Negligence

I move now from intentional wrongdoing to negligence in relation to administrative acts or decisions. Because the threshold for establishing liability is far lower, the tort of negligence is in practice far more important than misfeasance in public office as a source of compensatory damages. But because the elements of the tort are well known and because it is not usual to consider this tort as going to the liability of an officer,³⁰ I shall limit myself to a few observations.

Invalidity without more does not constitute the tort. But in the context of personal injury or damage to property it is not to be thought that a governmental body cannot be found to have acted negligently merely because what it did was “valid”. Indeed, McHugh J has said³¹ that:

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. In *Heyman*, Mason J 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.”³²

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,³³ 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”.

It is useful to go back to *Mengel’s* case and to consider it in a little more detail.

The facts of *Mengel* were that the Mengels purchased a property in the Northern Territory, Banka Banka, for approximately \$3 million, financing its purchase with a bank loan. They intended to repay \$1 million of that loan from the sale of cattle by the end of the 1988 season. However, they were not able to fully realize their selling plans and suffered loss because two inspectors of the Northern Territory Department of Primary Industry and Fisheries had said, following tests for brucellosis, the cattle could only be moved to an

abattoir for immediate slaughter. By the time the matter reached the High Court it was clear that there was no statutory or other authority for the acts of the inspectors notwithstanding that they were furthering the aims of a government-sponsored campaign to eradicate bovine brucellosis and tuberculosis. The Mengels' claims failed.

In the context of the claim for misfeasance in public office, the joint judgment contains the following passage:³⁴

If it were the case that governments and public officers were not liable in negligence, or that they were not subject to the same general principles that apply to individuals, there would be something to be said for extending misfeasance in public office to cover acts which a public officer ought to know are beyond his or her power and which involve a foreseeable risk of harm. But in this country governments and public officers are liable in negligence according to the same general principles that apply to individuals.

More directly for the present question, their Honours also said:³⁵

Governments and public officers are liable for their negligent acts in accordance with the same general principles that apply to private individuals and, *thus, there may be circumstances, perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power.*³⁶ (Emphasis added)

Deane J³⁷ referred more obliquely to the possibility that the inspectors were in breach of a duty of care owed to the Mengels in failing to appreciate that their actions were unauthorised. His Honour would have given the Mengels the opportunity of applying for a further order which would have allowed them to apply to the Court of Appeal for leave to seek to reformulate their case as an action in negligence.

Brennan J said:³⁸

Different considerations apply when a tort other than misfeasance in public office is relied on as a source of liability. Public officers, like all other subjects, are liable for conduct that amounts to a tort unless their conduct is authorized, justified or excused by statute. A statute is not construed as authorizing, justifying or excusing tortious conduct unless it so provides expressly or by necessary intendment. In particular, a statute which confers a power is not construed as authorizing negligence in the exercise of the power. Thus liability may be imposed on a public officer under the ordinary principles of negligence where, by reason of negligence in the officer's attempted exercise of a power, statutory immunity that would otherwise protect the officer is lost.

But Brennan J went on to say that where the sole irregularity consists of an error as to the extent of the power available to support the action:

liability depends upon the officer's having one of the states of mind that is an element in the tort of misfeasance in public office. That element defines the legal balance between the officer's duty to ascertain the functions of the office which it is his or her duty to perform and the freedom of the individual from unauthorised interference with interests which the law protects. The balance that is struck is not to be undermined by applying a different standard of liability - namely, liability in negligence - where a plaintiff's loss is purely economic and the loss is attributable solely to a public officer's failure to appreciate the absence of power required to authorise the act or omission which caused the loss.³⁹

The key, in my opinion, is in the emphasised part of the joint judgment.⁴⁰ In cases of potential claims for the negligent exercise of discretionary powers those advising a plaintiff, or a defendant, should closely consider whether it may be alleged that the government has failed to take steps to ensure that its officers and employees know and observe the limits of

their power. It would also be as well to consider whether or not the *officer* had a duty to ascertain the limits of his or her power and had failed to do so.

The approach I have described is more likely to bear fruit than more common ways of alleging negligence in the context of discretionary governmental powers. It is more likely to strike the appropriate chord with a finder of fact because it is consistent with what governments do or are perceived to do and see themselves as doing. Of course it would still be necessary for the plaintiff to establish causation and the other elements of the tort of negligence.

For example, outside safety legislation, a claim for breach of statutory duty would have limited prospects since a necessary first step is a conclusion that the legislation confers on the plaintiff a cause of action for the recovery of damages for breach by the defendant of duties imposed upon it by the legislation. It is necessary to find a relevant statutory duty attended by a sanction for non-performance. Secondly, “there is no action for breach of statutory duty unless the legislation confers a right on the injured person to have the duty performed” and, if no right is conferred, the general rule is that there is no liability in damages.⁴¹ The legislation will rarely yield the necessary implication positively giving a civil remedy.⁴²

I am of course considering cases where the negligence is said to be in the exercise of a discretionary power in the sense that there is a choice as to whether and to what extent and how the power is to be exercised, perhaps involving matters of policy. But is there a line between the application of a public law approach and private law concepts seen most clearly in personal injury cases where a government is a defendant? And if there is a line, how and where may it be found? Put differently, is there a resolution of the apparent conflict between the dicta of Brennan J in *Menge*⁴³ and of McHugh J in *Crimmins*.⁴⁴

One preliminary but important issue is whether the alleged tortious act is properly to be characterised as done in the exercise of statutory functions. If not, then the common law duty and breach of that duty should be approached without reference to issues arising from the exercise of statutory duty.⁴⁵

This leads to a further consideration and that is the legal source of the alleged duty. If that source is the common law, as it would be in most personal injury cases, then issues arising from the exercise of statutory powers are unlikely to be relevant. It is otherwise where the statutory powers are relied on as the source of the alleged duty or as affecting the content of that duty.

The crucial consideration would appear to be whether the action involves the exercise of a discretionary power. If it does not, then the notion of *ultra vires* is not determinative because it may be assumed, as a matter of construction, that the tortious action was not authorised by the statute. The duty which is breached has its source in the common law and, as Brennan J said, a statute is not construed as authorising, justifying or excusing tortious conduct unless it so provides expressly or by necessary intendment.⁴⁶

If however the action does involve the exercise of a discretionary power then it is likely that one is in the realms of decision-making where public law remedies are paramount. This is so absent any common law right of action where invalidity exposes the officer to a liability in tort, such as trespass, in that the officer's defence depends on the validity of the warrant for the trespass. The alignment, at the level of duty, would not seem to be with whether the plaintiff's loss is purely economic rather than involving personal injury or damage to property. The clearer approach seems to be by resort to ideas which underlay the now questionable distinction between operational and policy decisions or by reference to the related notion explored at length by Lord Browne-Wilkinson that a failure in the exercise of a statutory duty

may not give rise to any claim for damages in private law because the regulatory system is to be treated as intended for the benefit of society in general rather than for the benefit of individuals, except where the statutory duty is very specific. On that analysis, a claim could succeed if it were based on a free standing common law cause of action but there would be no common law duty of care to the plaintiff in a matter of policy.⁴⁷ In that light it could be said that, subject to *Mengel*, there is not a common law duty owed by a public officer to an individual to make a valid decision and, therefore: "The validity of a decision and whether the harmful consequences of that decision are actionable are two entirely different questions."⁴⁸

Negligent misstatement, in the context of liability for pure economic loss, appears to have escaped these difficulties. The reason is, perhaps, that an alleged tortious act is not properly to be characterised as done in the exercise of statutory functions.⁴⁹ Subject to statutory defences, it does not seem to be more difficult to succeed in an action for negligent misstatement against a government official than any other person. Indeed at the factual level it may be easier since, reflecting the passage I emphasised from the joint judgment in *Mengel*, Miles CJ in a recent case concerning negligent advice given to a naval officer about retirement options said:

In this respect the Commonwealth is hardly to be compared with an inexperienced litigant or potential litigant who may not recognise a problem as one of a legal nature, who does not know where to turn for advice of a legal nature and who may have difficulty in affording such advice or indeed difficulty in understanding the advice when given. Whether the Authority had a legal officer on its staff or any officer with legal qualifications with the capacity to express a view on the merit of the interpretation of the Act that the appellant was urging does not appear to be answered in the evidence before the Magistrate. However if the Authority did not have a legal officer on its staff, the Commonwealth should have had in place arrangements, as was once common with Commonwealth instrumentalities, for the Authority to be able to consult with and receive advice from the Attorney-General's Department or the Australian Government Solicitor.⁵⁰

Conclusion

Should not each jurisdiction, better still all jurisdictions together, consider a standard test to apply when the liability of an officer is in issue? It is, I suggest, the mental element which should be the key to statutory defences. The citizen is not well served by the variety of statutory defences⁵¹ ranging from acts done honestly or in good faith or in pursuance of the execution or intended execution of any Act or public duty or authority⁵² and in circumstances where good faith sometimes requires only subjective honesty or absence of malice and sometimes objective diligence.⁵³ I do not suggest the appropriate formulation would be easy since what is involved is a balance between "the freedom of the individual from unauthorised interference with interests which the law protects",⁵⁴ on the one hand and, on the other hand, efficient but reasonably competent public administration involving, as a minimum, an officer's duty to ascertain the functions of the office it is his or her duty to perform.

Endnotes

¹ I do not consider criminal liability or liability under legislation such as the *Independent Commission Against Corruption Act 1988* (NSW). Neither do I consider liability for breach of contract, where only rarely would the official be the contracting party in his or her own right, nor breach of a fiduciary duty either to the Crown or to the public. Breach of fiduciary duty by a public officer is discussed by Tina Cockburn in "Personal liability of government officers in tort and equity" at pages 374-389 in Chapter 9 of Bryan Horrigan (ed) *Government law and policy - Commercial aspects*, The Federation Press, 1998.

² *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 45; *Macksville & District Hospital v Mayze* (1987) 10 NSWLR 708 at 724, 731; *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637 at 645. There have been many suggestions for reform: see for example Rossana Panetta "Damages for wrongful administrative decisions" (1999) 6 *A J Admin L* 163.

³ *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 per Brennan J at 356.

⁴ *Federal Airports Corporation v Aerolineas Argentinas* (1995) 63 FCR 100; (1997) 76 FCR 582.

⁵ *James v Commonwealth* (1939) 62 CLR 339.

⁶ P W Hogg *Liability of the Crown* (2nd ed 1989) 110.

⁷ (1966) 120 CLR 145.

⁸ *Northern Territory of Australia v Mengel* (1995) 185 CLR 307.

⁹ (1995) 185 CLR 307.

¹⁰ (1998) 196 CLR 329.

¹¹ (1998) 196 CLR 329 at 346[42].

¹² At 344-345 [38].

¹³ At 347.

¹⁴ The issue of vicarious liability is considered by Weinberg J in *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 [250]-[257].

¹⁵ [1897] 2QB 57.

¹⁶ Note that when the matter was re-heard by Beaumont CJ, who had not considered the allegations of misfeasance in public office at the first trial, his Honour held this was a case of "targeted malice" in that the defendant actually intended to cause harm to the plaintiff by peremptorily and unlawfully removing him from office. Damages of \$83,000 with costs, including the costs of the first trial, were awarded including exemplary damages of \$10,000: *Snell v Sanders* [2000] NFSC 5 (24 November 2000).

¹⁷ [2000] 2 WLR 1220. Reference should also be made to Dr Sadler's article "Intentional abuse of public authority: A tale of three rivers" (2001) 21 *Aust Bar Review* 151.

¹⁸ At 1231, 1269.

¹⁹ (2002) ATPR (Digest) 46-214; [2001] FCA 1106.

²⁰ [2002] VSC 42.

²¹ At [16]-[17].

²² *Tampion v Anderson* [1973] VR 715 at 720; *Mengel* per Brennan J at 355: "The tort is not limited to an abuse of office by exercise of a statutory power." His Honour referred to *Henly v Mayor of Lyme* (1828) 5 Bing 91 at 107-108 [130 ER 995 at 1001] and to *R v Boston* (1923) 33 CLR 386 at 412.

²³ At [101].

²⁴ [2002] VSCA 84.

²⁵ [2000] SASC 438.

²⁶ Considered also in *Mengel* (1995) 185 CLR 307 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ at 347, Brennan J at 359, Deane J at 370-371, *Sanders v Snell* (1998) 196 CLR 329 at 345, *Garret v AG* [1997] 2 NZLR 332; *Three Rivers District Council v Bank of England* [2000] 2 WLR 1220 at 1231-1233, 1236, 1266-7, 1269-70, 1273-5. In *Tahche v Abboud* [2002] VSC 42 at [19], Smith J said "What is involved is an abuse of power, and it is the absence of an honest attempt to perform the functions of the office which is at the heart of the tort."

²⁷ At [398]-[404].

²⁸ See, for example, *Ashby v White* (1703) 2 Ld Raym 938; 3 Ld Raym 320 [92 ER 126; 710] cited by Brennan J in *Mengel*, 185 CLR at 356.

²⁹ See *Three Rivers District Council and Ors v Governor and Co of the Bank of England* [2000] 2 WLR 1220 per Lord Steyn at 1231.

³⁰ The government would be the natural defendant but the officer would also be liable. For New South Wales see section 8 of the *Law Reform (Vicarious Liability) Act 1983*. For Federal Police see sec 64B of the *Australian Federal Police Act 1979*.

³¹ *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 35-36.

³² (1985) 157 CLR 424 at 465.

³³ JJ Doyle QC, "Tort liability for the exercise of statutory powers", in PD Finn (ed), *Essays on torts* (1989) 203, 235-6.

³⁴ 185 CLR at 348.

³⁵ At 352-353.

³⁶ This approach had been argued in *Dunlop v Woollahra Municipal Council (No. 2)* [1982] AC 158, where it was doubted by the Privy Council, and in *Rowling v Takaro Properties Ltd* [1988] AC

473 where policy factors were discussed but, since it was held that there was no breach of duty (there being no particular reason why the minister should have taken legal advice), it was unnecessary to resolve the issue.

37 185 CLR 307 at 373.

38 At 358.

39 Cf *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22 esp at 68; but see *Rowling v Takaro Properties Ltd* [1988] AC 473 at 511-512.

40 As indicated, Brennan J did not agree with this statement of the majority.

41 185 CLR at 343-344.

42 *O'Connor v SP Bray Ltd* (1937) 56 CLR 464 at 477-478; see also *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 per Gummow J at [157]. See also *Bhagat v Global Custodians Ltd & Ors* [2000] NSWSC 321 per Young CJ in Eq.

43 185 CLR at 356.

44 200 CLR at 35-36.

45 *Australian National Airlines Commission v Newman* (1987) 162 CLR 466. See also *Puntoriero v Water Administration Ministerial Corp* (1999) 199 CLR 575.

46 185 CLR at 358.

47 *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 at 730-740; see also *Sullivan v Moody* (2001) 183 ALR 404 at 417 [59]-[60] (HC) where the Court found there was no duty to the plaintiff because it would be inconsistent with the proper and effective discharge of the defendants' statutory responsibilities that they should be subjected to a legal duty, breach of which would sound in damages. See also *Tame v New South Wales* (2002) 191 ALR 449 (HC) and *New South Wales v Paige* [2002] NSWCA 235 at 263. In *Chapman v Luminis Pty Limited* (No. 5) [2001] FCA 1106 Von Doussa J held that there was no duty of care owed by the Minister because to impose a private law duty upon him in the exercise of a legislative power to make a declaration under the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 would be to distort the focus of the Act in favour of individual interests of a few members of the community.

48 See Aronson and Whitmore *Public Torts and Contracts* LBC 1982, 103.

49 Nevertheless, in the case of an authority exercising statutory powers it is necessary to view the particular circumstances with an appreciation of that legislation: *Tepko Pty Limited v Water Board* (2001) 206 CLR 1.

50 *Glass v Commonwealth of Australia* [2002] ACTSC 30 at [12].

51 See *Little v Commonwealth* (1947) 75 CLR 94 and, more recently, *Webster v Lampard* (1993) 177 CLR 598 where the Police Act test was "unless there is direct proof of corruption or malice" and the *Limitation Act* test was "done in pursuance or execution or intended execution of any Act, or of any public duty or authority".

52 Or "in the bona fide exercise of such powers": see, eg, *Board of Fire Commissioners of New South Wales v Ardouin* (1961) 109 CLR 105.

53 See *Chief Commissioner for Business Franchise Licences (Tobacco) v Century Impact Pty Ltd* (1996) 40 NSWLR 511 which concerned good faith in sec 27 of the *Business Franchise Licences (Tobacco) Act 1987* (NSW) and compare *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290. In the former case the defence was made out although the officer was quite wrong in law in doing what he did and his belief that he was acting reasonably was itself unreasonable. The Court of Appeal said the critical point was that there was no finding and no suggestion that the officer was aware that he was acting unreasonably. In the latter case the Full Court held that the defence in sec 149(6) of the *Environment Planning and Assessment Act 1979* (NSW): "(6) A council shall not incur any liability in respect of any advice provided in good faith pursuant to subsection (5)", was not made out by "honest ineptitude". The Court said that the statutory concept of "good faith" with which the legislation was concerned called for more than honest ineptitude. "There must be a real attempt by the authority to answer the request for information at least by recourse to the materials available to the authority."

54 185 CLR at 359.