'BONA FIDE' POLICE TORTS AND CROWN IMMUNITY: A PARADIGM OF THE CASE FOR JUDGE MADE LAW

by

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'A cardinal principle of the legal system of New South Wales, like that of England on which it is based, is the supremacy of the law, to which all persons are bound to conform ... It excludes the existence of arbitrariness or prerogative on the part of government or of any exemption of officials or others from obedience to the ordinary law or from the jurisdiction of the ordinary tribunals.' *New South Wales Year Book* (1974), at p. 623.

> Law, says the judge as he looks down his nose,
> Speaking clearly and most severely,
> Law is as I've told you before,
> Law is as you know I suppose,
> Law is but let me explain it once more,
> Law is The Law.
>
> from W. H. Auden, *Law Like Love.*

Three men, employed by the same organization, were working together. In the negligent performance of his duties, one of the men shot and wounded another. In the subsequent litigation it was held that the employer was not vicariously liable for the tortious injury to the workman. What was the basis of this decision[1] regarding facts which at first blush seem to have occurred in 'the course of employment', whether judged on 'control' or 'organization' criteria?[2] The employer's immunity from liability was not explicable in terms of a 'frolic' or intentional wrong-doing, and its effect was commensurate with a resurrection of the long dead doctrine of common employment,[3] or the position prior to the 'hospital cases'[4] in which the employer escaped liability if the employee's duties involved such an exercise of professional skill as to limit the employer's capacity for direct control.

This apparent anomaly rested on one word, 'police', and was supported[5] by the statements of Griffith C.J. in *Enever* v. *The King*[6] that a policeman exercised 'original' not delegated authority, and Kitto J. in *A.G. for N.S.W.* v. *Perpetual Trustee Co. Ltd.*[7] that a policeman is, 'under an obligation to perform duties .... of a public character' and neither the Crown nor his superiors, 'can lawfully direct the detailed manner in which he shall perform those duties...'.

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1 *Irvin* v. *Whitrod* (*No. 2*) [1978] Qd. R. 271.
2 J. G. Fleming, *The Law of Torts* (5th ed., 1977) at pp. 358-362.
3 Ibid, at p. 489.
4 *Gold* v. *Essex C.C.* [1942] 2 K.B. 293; *Cassidy* v. *M.O.H.* [1951] 2 K.B. 343 and *Roe* v. *M.O.H.* [1954] 2 K.B. 66.
5 *Irvin* (*supra* n. 1) at pp. 273, 276.
6 (1906) 3 C.L.R. 969 at pp. 977.
7 (1952) 85 C.L.R. 237 at pp. 303.

This rule of Governmental non-liability for police torts exists or existed throughout the common law world,[8] in degree varying with its abrogation by statute.

In Australia, commentators have referred, with varying degrees of urgency, to the possibility of reforming this anomaly.[9] In the last half-decade, Law Reform Commissions have called unequivocally for the abolition of the rule.[10] Elsewhere, writers and Commissions have criticised the poor position of the victim of police tort,[11] who, in the absence of a police insurance scheme, is reduced to suing a tortfeasor of probably little substance, waiting mendicant for the State to offer an *ex gratia* payment in compensation, or in some cases receiving the limited assistance available under Criminal Injuries Compensation Acts.

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8 *Fisher* v. *Oldham Corporation* [1930] 2 K.B. 364; *British South Africa Co.* v. *Crickmore* S.A.L.R. [1921] A.D. 107; *McCleave* v. *City of Moncton* (1902) 32 Can.S.C. 106; *Kader Zailany* v. *Secretary of State* (1931) 18 All India Rep. 294; *Enever* v. *The King* (1906) 3 C.L.R. 969.

9 Lowe C.J., 'The Liability of the Crown in Tort' (1938) 11 *A.L.J.* 402 at p. 405; G. Sawer, 'Crown Liability in Tort and the Exercise of Discretions' (1951) 5 *Res Judicatae* 14 and M. R. Goode, 'The Imposition of Vicarious Liability to the Torts of Police Officers: Considerations of Policy' (1975) 10 *Melb.U.L.R.* 47. Goode makes the telling point that in the common law situation actions for compensation may be precluded for inability to identify the police tortfeasor.

10 Australian Law Reform Commission (1975) Report No. 1 *Complaints Against Police* and (1978) Report No. 9 *Complaints Against Police: Supplementary Report* and N.S.W. Law Reform Commission (1975) Report No. 24 *Proceedings By and Against the Crown.*

11 G. L. Williams, *Crown Proceedings* (1948) at p. 37 *et seq*; *Royal Commission on Police* (1962) Cmnd 1728 para 201; H. Bodenstein 'The Liability of the Crown for Torts of its Servants' (1923) 40 *South African L.J.* 277; J. R. L. Milton, 'The Vicarious Liability of the State for the Delicts of the Police' (1967) 84 *South African L.J.* 25; C. F. Forsyth, 'The Liability of the State for the Delicts of the Police' (1979) 96 *South African L.J.* 12; L. Giroux, 'Municipal Liability for Police Torts in the Province of Quebec' (1970) 11 *Cahiers de Droit* 407; Quebec Civil Code Revision Office (1976) Report No. 43 *Legal Personality*; E. Craig, 'The Innocent Victims of a Police Action' (1977) 26 *U. New Brunswick L.J.* 34. The U.S. material is voluminous. A cross section begins with E. M. Borchard's seminal work 'Government Liability in Tort' (1924) 34 *Yale L.J.* 1 in eight parts, the final two being in (1928) 28 *Columbia L.R.* 576: reference to police at 34 *Yale L.J.* at pp. 240-241. Particularly relevant to the means of reforming Governmental immunity are M. S. Shapo, 'Municipal Liability for Police Torts' (1963) 17 *U. Miami L.R.* 475; A. Van Alstyne, 'Governmental Tort Liability: A Public Policy Prospectus' (1963) 10 *U.C.L.A. L.R.* 463; L. K. Cooperrider, 'The Court, the Legislature and Governmental Tort Liability in Michigan' (1973) 72 *Michigan L.R.* 187; G. E. Goldenziel, 'Governmental Tort Immunity in Pennsylvania: A Job for the Judiciary' (1973) 46 *Temple L.Q.* 345 which was followed by the judicial overthrow of Governmental immunity for Pennsylvania in *Ayala* v. *Philadelphia Board of Public Education* 305 A.2d. 877 (1973): see D. P. Winkle, 'Torts — Governmental Immunity — Judicially Abrogated in Pennsylvania' (1974) 25 *Mercer L.R.* 969 and The National Association of Attorneys General, *Report on Sovereign Immunity and the Liability of Government and its Officials* (1976).
The *droit administratif* recognizes no special category for police. A police officer's delict might be a *faute de service* as much as any other official's: *Bernard* Conseil d'Etat 1 October 1954 cited in L. N. Brown and J. F. Garner, *French Administrative Law* (2nd ed. 1973), at p. 102. Note the apparent acceptance of a change in the law in the Republic of Ireland: W. N. Osborough, 'The State's Tortious Liability' (1976) 11 *Irish Jurist* 11 at p. 17 *et seq.*

THE COMMON LAW IN AUSTRALIA ON THE NON-LIABILITY OF GOVERNMENTS FOR POLICE TORTS

The leading Australian case on the subject is *Enever*,[12] and the fundamental reasoning of the three High Court judges rests on a proposition of Griffith C.J.:[13]

> A constable . . . when acting as a peace officer, is not exercising a delegated authority, but an original authority, and the general law of agency has no application.

Barton J. elaborated on this. The constable who performed the wrongful arrest could only have been 'acting as a servant of the Government in such a sense that the maxim *respondeat superior* applies' if his action had 'been under the control [of the Government] at the time of the doing of the act'.[14] Further, the test for vicarious liability for the tortious acts of employees was the control test. The servant 'must at the time of the act be not only the [employer's] servant but must also be under his immediate control . . .'.[15] Barton J. concluded on this point with extensive reference to two contemporaneous English cases[16] which illustrated the non-liability of an employer where the employee had an 'independent statutory authority'.[17]

O'Connor J. relied[18] on *Tobin* v. *The Queen*[19] as authority that

> The liability of a master for the act of his servant attaches in the case where the will of the master directs both the act to be done and the agent who is to do it.

The constable was endowed with authority to arrest by s. 179 of the Tasmanian *Police Act*, 1865. On this reasoning, it followed that arrest was at the instruction of the Legislature, not the Government.

Prior to the *Police Regulation Act*, 1898, municipalities appointed constables, and on the authority of *Stanbury* v. *Exeter Corporation*[20] a municipality was not liable for the acts of officers performing statutory duties. O'Connor J. could see no difference[21] when, after 1898, the Government of Tasmania employed all police officers in the State. He cited *Tobin*:[22]

> When the duty to be performed is imposed by law, and not by will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment.

Griffith C.J. recognized the fundamental role of *Tobin* to the High

12 (1906) 3 C.L.R. 969.
13 At p. 977.
14 At p. 982.
15 At p. 984.
16 *Baker* v. *Wick* [1904] 1 K.B. 743 and *Stanbury* v. *Exeter Corporation* [1905] 2 K.B. 838.
17 At pp. 985-987.
18 At pp. 990-993.
19 (1864) 16 C.B. (N.S.) 310 at p. 350; *per* Erle C.J.
20 *Supra* n. 16.
21 3 C.L.R. at p. 992.
22 16 C.B. (N.S.) at p. 351.

Court's reasoning, and elaborated on the case.[23] If the Crown in right of Tasmania were to avoid liability for the policeman's tort, the *Crown Redress Act*, 1891 would have to be read down. In this regard, Griffith C.J. said of *Tobin*:

> That was an action against the Crown for loss sustained by reason of the wrongful seizure of a vessel by the commander of a ship of war employed in the suppression of the slave trade, and it was held (1) That the Commander in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament; (2) That if he was an agent employed by the Crown, he was not acting within the scope of his authority in seizing a ship not engaged in the slave trade, and for that reason did not make his principal liable for a seizure made without authority from that principal; and (3) That a Petition of Right would not lie to recover unliquidated damages for a tort. The third ground is no longer the law of Tasmania.

None the less, Griffith C.J. continued, in respect of Crown Liability Acts, such as the *Crown Redress Act*, 'it should be held that *prima facie* it was not intended to create a responsibility in respect of the acts of officers under circumstances which, according to the decisions, did not constitute them agents for the Crown'.

The second ground in *Tobin* is no longer the common law.[24]

Griffith C.J. also relied heavily on the common law position of the constable. Coupled with the theory of 'original authority' fundamental to all three judgments was the failure of the Tasmanian Police Acts to alter the nature or duties of the office of constable except as to the mode of appointment.[25] Wills J. in *Stanbury* v. *Exeter Corporation*[26] referred *obiter* to the empirical evidence against municipalities appointing police being liable for their actions. Griffith C.J. cited this as a subsidiary proof of the effect of 'original authority'.[27]

The remaining aspect of *Enever* was Barton J.'s determination to restrict, as a matter of policy, the ambit of Crown Liability Acts to the reference of the Privy Council in *Farnell* v. *Bowman*[28] covering railways, canals and such like public works. Barton J. speculated on litigation under Crown Liability Acts interfering seriously with 'the ordinary administrative work of the Government' if liability were extended beyond the scope of public construction works.[29]

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23 At pp. 979-980.

24 See text at nn. 76 *et seq.*

25 At p. 975.

26 *Supra* n. 16.

27 At pp. 976-977.

28 (1887) 12 App. Cas. 643 at p. 649.

29 At pp. 987-989. These sentiments were still being echoed in 1979 by Begg J. in *Connell* v. *Commonwealth* [1979] 1 N.S.W. L.R. 653 at p. 659, dealing with the analogous problem of vicarious liability for military tortfeasors injuring other members of the armed services.

THE COMMON LAW ELSEWHERE ON LIABILITY FOR POLICE TORTS

Soon after, South African courts examined the liability for police torts. Decisions of a single judge in the Eastern Cape Division,[30] and of a three member bench in Natal[31] in 1914 came to different conclusions. In *Sipatsa* Hutton J. found that a South African Mounted Rifleman with powers of arrest passed his liability for negligence to the Crown. While the plaintiff was in custody, his horse was ill cared for. Hutton J. held the Rifleman a servant for the purposes of the South African *Crown Liability Act*, 1910 on the basis of *respondeat superior*.

In *Lawford*, the court relied on *Tobin* and *Stanbury* to hold that a police officer was not a servant of the Crown when engaged in arrest. This reasoning was followed by the Appellate Division of the South African Supreme Court in *British South Africa Co.* v. *Crickmore*.[32] A police constable appointed by the British South Africa Company, which was acting as the government of Rhodesia, effected a wrongful arrest. The Appellate Division found the Company not liable on the basis of *Tobin*, and the inability of the Company to direct the constable in the performance of his duties imposed by law.

The continuing impact of this decision may be seen in the recent decision of the same court, *Mhlongo* v. *Minister of Police*[33] where the extensive South African case law on the subject was reviewed, and the State found liable for a fatal negligent shooting, an aspect of the *means* of arrest, while strong *dicta* was led that the State could not be liable for a tort stemming from the *decision* to arrest, over which the State 'has no power of direction or control'.[34]

Fisher v. *Oldham Corporation*[35] is the leading English case, and involved a damages suit against a Corporation for false arrest performed by one of their police. McCardie J. found that the Corporation could not be vicariously liable for the wrongful arrest. He relied[36] on *dicta* in *Stanbury*, and, *inter alia*, *Enever* and *Crickmore*. A detailed discussion of the division of an English constable's employment between local and central authority apparently obscured the resulting utility of *Stanbury*, but the irrelevance of *Enever* and *Crickmore* where the constable was responsible only to one, central authority. Secondly, his Lordship distinguished the 'railway cases',[37] in which railway constables were found to be company employees, as resting on a statutory basis, but did not examine the Act under which the Court of Appeal found

30 *Sipatsa* v. *Minister of Defence* [1914] E.D.L. 323.
31 *Lawford* v. *Minister of Justice and Schmidt* (1914) 35 N.L.R. 284.
32 S.A.L.R. [1921] A.D. 107.
33 1978 (2) S.A. 551 [A.D.].
34 At p. 568.
35 [1930] 2 K.B. 364.
36 At pp. 371-372.
37 At pp. 373-374.

the company liable in *Lambert* v. *G. E. Ry Co.*[38] Finally, other cases exploring employer liability were distinguished.

McCardie J. referred, along with *Enever* and *Crickmore*, to the Canadian Supreme Court decision in *McCleave* v. *Moncton*,[39] finding against an employing city's liability for wrongful entry by a police officer in pursuit of the *Canada Temperance Act*. That Court relied wholly on the reasoning of Bigelow C.J. in *Buttrick* v. *City of Lowell*,[40] a Massachusetts case, and Dillon's book on *Municipal Corporations*. Recent Canadian cases[41] indicate that employing municipalities are still not liable for police torts.

Crickmore and *Fisher* both directly referred to Bigelow C.J. in *Buttrick*. The sway of the Massachusetts Chief Justice throughout the British Commonwealth looms large when his connection is made good, albeit indirectly, in *Enever*. Griffith C.J. referred to *Stanbury*, which relied on the second edition of Beven's book *Negligence*, in which the passages pronouncing the non-liability of corporations for the acts of police were based on Dillon's *Municipal Corporations* and *Buttrick*. Beven conceded that the Crown was the employer of English Metropolitan Police, but asserted the Crown's general immunity from suit at common law. Beven related to the then U.K. position in *Stanbury*, but that was no authority in *Enever* where Crown liability was acknowledged in the Tasmanian statute.

The *Enever* doctrine received the ultimate accolade in the opinion of the Judicial Committee of the Privy Council in *A.G. for N.S.W.* v. *Perpetual Trustee Co.*[42] The claim of the Crown in right of New South Wales to an action *per quod servitium amisit* for the loss of a constable's services was found not maintainable. In reasoning that the Crown and a constable were not in a master-servant relationship for the purposes of the action, Viscount Simonds for the Committee relied extensively on *Enever* and *Fisher*.[43] The inability of the Crown to 'control' a constable in the exercise of his functions was reasserted, and hence the non-existence of the employer-employee connection between police officer and the Crown as the Executive Government.

Prior to the Privy Council advising in *Perpetual Trustee*, five of six members of the High Court had to varying extents approved a general application of the *Enever* principle to police activities.[44] However, *dicta* of Dixon J. (as he then was) questioned the reasoning of *Tobin* which was fundamental to *Enever*. Dixon J. concluded:

> It is only when in the course of his duties as a servant of the Crown he is confronted with a situation involving the liberty or rights of

38 [1909] 2 K.B. 776.
39 (1909) 32 Can. S.C. 106.
40 (1861) 1 Allen (Massachusetts) 172.
41 *Gallant* v. *Shaw* (1969) 5 D.L.R. (3d.) 623 and *Re St. Catherines Police Association* (1970) 15 D.L.R. (3d.) 532.
42 [1955] A.C. 457.
43 At pp. 478-481.
44 (1952) 85 C.L.R. 237.

> the subject that the law places upon him a personal responsibility of judgment and action.[45]

This restriction of *Enever* solely to the function of arrest corresponds with the South African trend evidenced most recently in *Mhlongo*.[46] Counsel in *Irvin* v. *Whitrod (No. 2)*[47] advanced two South African cases pre-dating *Mhlongo*. In *Union Government* v. *Thorne*[48] the Appellate Division found that a constable's negligent driving was vicariously attributable to the Crown. The same court in *Sibiya* v. *Swart N.O.*[49] held on the same reasoning that a policeman's assault on a prisoner under arrest was not an action pursuant to a personal duty such that the relationship of master and servant did not exist between the policeman and the Crown.

In *Irvin*, D. M. Campbell J. referred to Barwick C.J.'s statement in *Ramsay* v. *Pigram*[50] regarding the negligent driving of a police officer:

> [T]he police officer, being a constable, was not in his activity as such the servant or agent of the Government so as to make his act of driving the car, the act of the Government or the department.

Windeyer J., however, expressly disapproved such generalization.[51] But beyond this uncertainty over the scope of *Enever* is the broader question as to whether the *Enever* doctrine on vicarious liability is good law at all.

THE REASONING UNDERLYING *TOBIN*

As recounted above, the foundations of all the judgments in *Enever* are in small part *Buttrick* and more fundamentally, *Tobin*. *Buttrick* is distinguishable as concerning the non-liability of a municipal employer of police for the torts committed by police in intended performance of State law. All police are employed in Australia by central authorities, State or Commonwealth. This leaves as support only Griffith C.J.'s first principle extrapolated from *Tobin*,[52] that of Crown immunity from liability for torts committed by Crown servants in the supposed performance of a duty imposed upon them by Act of Parliament. In *Tobin*, Erle C.J. cited five cases[53] to support this proposition: *Sutton* v. *Clark*;[54] *Harris* v. *Baker*;[55] *Duncan* v. *Findlater*;[56] *Lucey* v. *Ingram*;[57] and *Milligan* v. *Wedge*.[58]

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45 At p. 252.
46 *Supra* n. 33.
47 *Supra* n. 1.
48 [1930] S.A.L.R. 47.
49 [1950] S.A.L.R. 515.
50 (1968) 118 C.L.R. 271 at p. 279.
51 At p. 289. In the closely reasoned judgment of Lewis J. of the Supreme Court of the Windward and Leeward Islands in *Gordon* v. *A.G.* (1960) 2 W.I.R. 235, a police motor cyclist who killed a pedestrian was held to be a servant of the Crown for the purposes of vicarious liability.
52 *Supra* n. 22.
53 16 C.B. (N.S.) at p. 351.
54 (1815) 6 Taunt. 30.
55 (1815) 4 M. & S.27.
56 (1839) 6 C. & F. 894.
57 (1840) 6 M. & W. 302.
58 (1840) 12 Ad. & E. 737.

In *Sutton*, trustees under a Turnpike Act drained water from a road onto the plaintiff's property. In finding the trustees not liable for the consequent damage, Gibbs C.J. found them to be performing a duty imposed by the Legislature, for public, not private purposes. This latter point ceased in consequence after *Mersey Docks Trustees* v. *Gibbs*,[59] but in that case Blackburn J. exposed the reasoning in *Sutton* as supporting liability for the negligent performance of a statutory duty, signposting his subsequent famous *dictum* in *Geddis* v. *Bann Reservoir*[60] to that effect.

Harris consisted of a short policy statement by Lord Ellenborough C.J. and little law. It appears to rest on the relevant Act not having provided for the liability of the turnpike trustees.

Duncan was a further case analysing the possible liability of turnpike operators. It relied heavily on *Hall* v. *Smith*[61] in which the liability of commissioners for a public utility was conceded if they acted ultra vires or negligently, 'but they are not answerable for such as they are obliged to employ'. The authority of both *Duncan* and *Hall* was decisively destroyed in *Mersey Docks Trustees* v. *Gibbs*.[62]

Lucey dealt with the possible liability of a ship owner for the negligence of a pilot. In *Tobin*, Erle C.J. said this case was authority that a captain was not responsible for damage caused by the ship under the control of a pilot, 'for the pilot performs a duty imposed by act of parliament and is not under the control of the captain'. Erle C.J. had been counsel in *Lucey* and may have been relying on memory. The *ratio* of the case rested quite simply on a statutory immunity granted to captains and owners of vessels when a pilot was in control. The circumstances in *Lucey* were held to invoke this immunity on the basis of the intended policy of the Legislature.

Milligan was resolved on the distinction between a 'contract for services' and a 'contract of service'[63] and not as Erle C.J. thought by reference to 'a duty imposed by law'.

Mersey Docks Trustees v. *Gibbs*, decided two years after *Tobin*, while not directly overruling that case, was indicative of a trend away from such a protectionist theory, and at odds with the philosophy of municipal immunity fostered in the United States by Bigelow C.J. in the State of Massachusets.[64] Furthermore, in *Gibbs* and *Geddis*, Lord Blackburn made it plain that intended performance of a statutory duty was not a blanket protection: liability still lay for negligent performance. That *Tobin* was symptomatic of legal thinking before public law and torts

59 (1866) 11 H.L.C. 686.

60 (1878) 3 App. Cas. 430 at pp. 455-456.

61 (1824) 2 Bing 156.

62 11 H.L.C. at pp. 717-720 and 732.

63 See Coleridge J. at 12 Ad. & E. 742.

64 *E.g. Hafford* v. *City of New Bedford* (1860) 82 Mass. 297 and *Buttrick*, *supra* n. 40.

had been revamped by the likes of Lord Blackburn and Willes J.[65] to suit the altered circumstances of the final third of the nineteenth century is borne out by the inadequate basis for Erle C.J.'s statement that a master had no liability for the acts of a servant performing a statutory duty.[66] Zelman Cowen has suggested[67] treating *Tobin*, 'simply as authority for the proposition that at common law no petition of right will lie in tort'. It is also noteworthy that Erle C.J. ultimately justified his decision by reference to the 'pernicious result' that would follow on a finding of the Sovereign's liability.[68] Suffice it to say that the ground beneath the floodgates of Crown Liability Acts seems not so damp as to hinder orderly administration of the State.

DISSENTING JUDICIAL VIEWPOINTS

Three judges in inferior courts prior to the final judgments in *Enever* and *Crickmore* found that the Crown was liable for police torts, on the basis that an employer was liable for his servant's acts where he left the servant to act on his own discretion in a certain contingency. In the Tasmanian Supreme Court in *Enever*, Clark J. (dissenting) relied[69] on Blackburn J. in two railway constable cases[70] to illustrate the theory of employer liability for illegal arrests performed by servants clothed with statutory powers, exercisable at their own discretion. In *Sipatsa*[71] in the Eastern District Local Division of the South African Supreme Court, Hutton J. relied on two judgments of Willes J.[72] to similar effect.

An attempt to rebut the relevance of these cases might be made by finding no *duty* in the Crown to keep the peace. It would follow that a constable was acting entirely on his own initiative, and not 'in the place' of the Crown to paraphrase Willes J. in *Bayley*.[73] In the High Court of Southern Rhodesia, Russell J. at first instance in *Crickmore*[74] relied on the duty cast on the British South Africa Company by its Charter to keep the peace. Russell J. said:

> I consider that a servant of the company in making an arrest is acting as the agent of the company in the preservation of peace and order. The company appoints a policeman to make arrests. The statutes tell him how far he may go in making arrests. I can-

65 In *Tobin* Erle C.J. concluded his judgment by saying that 'some of the reasons have not the concurrence of my much respected brother Willes'. (16 C.B. (N.S.) at p. 368. See W. S. Holdsworth, *History of English Law*, 1965, vol. 15 at pp. 492-498 and pp. 505-508 and C. H. S. Fifoot, *Judge and Jurist in the Reign of Victoria* (1959), at pp. 16-19, 43-46 and 69-71 for summaries of the impact of Willes and Blackburn.

66 *Supra* n. 53.

67 'The Armed Forces of the Crown' (1950) 66 *L.Q.R.* 478 at p. 484.

68 16 C.B. (N.S.) at pp. 367-368.

69 [1905] Tas. L.R. 70 at pp. 86, 91.

70 *Goff* v. *Great Northern Railway Co.* (1861) 3 El. & El. 672; *Moore* v. *Metropolitan Railway Co.* (1872) L.R. 8 Q.B. 36.

71 *Supra* n. 30.

72 *Barwick* v. *English Joint Stock Bank* (1867) L.R. 2 Ex. 259 (Ex. Ch.), *Bayley v. Manchester etc. Railway Co.* (1872) L.R. 7 C.P. 415.

73 *Supra.*

74 Cited in S.A.L.R. [1921] at p. 112.

> not see that because the statutes define his powers they make him no longer the company's agent.

The Appellate Division firmly overruled this view. The company could not be liable, duty or no duty, because it could not *control* the police in carrying out their duty.[75]

ENEVER AND THE ALTERED LAW ON VICARIOUS LIABILITY

Griffith C.J. used exactly this reasoning on 'control' in the *ratio* of *Enever*.[76] The authority of that case stands or falls on the nature of the employer-employee relationship where the employer is unable to control directly an employee's mode of work performance because the latter is performing a common law or statutory duty.

Atiyah has championed the case for employers being vicariously liable for employees' torts in such circumstances.[77] This he did on unashamedly policy grounds in accordance with modern theories of 'loss distribution' as the basis of employer vicarious liability, rather than reliance on sometimes strained phrases such as *respondeat superior* or *qui facit per alium, facit per se*.[78] More specifically, Sawer has described the *Enever* theory as '. . . the pestiferous doctrine which insulates the public treasury from responsibility for many kinds of official wrong, because of an antiquarian concentration on what "the Crown" can command, when a more contemporary approach would be to inquire merely whether the officer in question is carrying on the business of government'.[79]

Coupled with this academic rethinking of the basis for liability in a policeman's situation, is the weakness of Griffith C.J.'s supporting cases. As an example of 'original authority' he cited a master of a ship *vis à vis* the owners, saying, 'I do not know of any instance in which it has been sought to hold the owners responsible for an excess by the master . . .'.[80] In *The Thetis*,[81] Sir Robert Phillimore relied on Willes J. in *Barwick*[82] to find vessel owners liable for a master's negligence in a salvage operation. Though the owners had not directly authorised the salvage, the 'duty' and 'obligation' on the master to act arose from 'public policy' and the owners were liable for negligent performance because the master was there, 'agent . . ., to do that class of acts'. In

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75 Ibid at p. 113 *per* Solomon J.A. and p. 118 *per* Maasdorp J.A.
76 At p. 977.
77 P. S. Atiyah, *Vicarious Liability* (1967) at pp. 75-82 and see pp. 280-284.
78 Ibid Chapter 2 and Fleming *Torts*, 1977, chapter 18. especially p. 355. Willes J. had faced this reality as early as 1862 in *Limpus* v. *London General Omnibus Co.* 1 H. & C. 526 at p. 539. The writer trusts that keeping reputable company will save him from the stricture levelled at Professor Hogg's *Liability of the Crown* by Begg J. in *Connell supra* n. 29 at p. 657 of being, 'based to a degree upon sociological approaches rather than strict principles of law'.
79 Sawer (1955) 18 *M.L.R.* 489.
80 At p. 977.
81 (1869) L.R. 2 A. & E. 365 at p. 368.
82 *Supra* n. 72.

The Swift,[83] even more proximate to the decision in *Enever*, Jeune P. simply assumed the owners' vicarious liability. The High Court decision in *Shaw Savill and Albion Co. Ltd.* v. *Commonwealth*[84] found the Commonwealth liable as owner of a vessel. Williams J. held[85] the relationship between navigating officer and the Commonwealth to make the latter liable on the basis of *respondeat superior*, while Starke J. pointed out[86] that the naval officer was solely liable under the common law, but statutory provisions in the shape of the *Judiciary Act* 1903-1940, ss. 56 and 64 allowing suit against the Commonwealth made the Commonwealth liable for his torts.

Shortly after giving judgment in *Enever*, Griffith C.J. paralleled[87] the inapplicability of *respondeat superior* in respect of a customs officer, and the subsequent non-liability of the Crown, with the position of the police officer in *Enever*, and a physician in relation to the municipal authorities running a hospital in which the doctor was employed as in *Evans* v. *Liverpool Corporation*.[88] The medical analogy has proved as unseaworthy in the passage of time as Griffith C.J.'s suppositions regarding the ship's captain/owner cases.[89]

THE POLITICAL THEORY UNDERLYING *TOBIN* AND *ENEVER*

Coupled with the collapse of analogous support for *Enever* is the sterility of the political theory in that case. Fundamental to the reasoning of the High Court was the assumption that Legislature and Executive were not merely separate in constitutional theory, but distinct in a way that rebutted the policy notions underlying employer vicarious liability. However, referring to this bifurcation, fundamental to the reasoning in *Tobin*, Clark J. said, when dissenting in the Tasmanian Supreme Court:

> I cannot understand how any person can be properly described as a public officer who performs an act of duty in obedience to a law which requires him as such officer to do it, if he is not the agent or servant of the political community for whose purposes and by whose legislative and executive organs the law is made and executed.[90]

Sawer has subsequently referred to Erle C.J.'s conception of Government as, 'thoroughly feudal and pluralistic' and 'naive'.[91]

In similar vein, Bodenstein wrote in the wake of the South African *Crickmore* decision:

> The Executive is that organ of the body corporate which has been designated as the defendant in case of a law suit against the State. The Legislature cannot be sued, because that branch of the State

83 [1901] P. 168 at p. 176.
84 (1940) 66 C.L.R. 344.
85 At p. 365.
86 At pp. 352-353.
87 *Baume* v. *The Commonwealth* (1906) 4 C.L.R. 97 at p. 112.
88 [1906] 1 K.B. 160.
89 *Supra* n. 4.
90 *Supra* n. 69 at p. 88.
91 (1951) 5 *Res Judicatae* 14 at pp. 17, 18.

is not constituted for that purpose. But that surely does not mean that the Executive can completely dissociate itself from the Legislature, as if it had nothing to do with it! No one would allow a natural person to plead his own instruction in defence to an action on a tort committed by his servant in the execution of those instructions. Neither can we allow the State to do so.[92]

THE RESPONSE

Some common law jurisdictions have taken legislative action to alter the law as it stands. New Zealand overthrew the general doctrine of *Tobin* with the *Crown Proceedings Act*, 1950, s. 6 (3), to the effect that tortious performance of a statutory duty did not raise an immunity in the Crown. South Australia also refrained from legislating solely for the police, by providing in its *Crown Proceedings Act*, 1972-1977, s. 10 (2) for Crown liability for employees exercising independent discretions.[92a]

The U.K., Queensland and the Northern Territory have all opted for legislation specifically providing that vicarious liability exists for police torts. In the U.K., after the *Crown Proceedings Act*, 1947, s. 2 (6) had excluded Crown liability for police torts, (while abolishing the *Tobin* doctrine: s. 2 (3)), the *Police Act*, 1964, s. 48 established the liability of the chief officer of police in any police area for torts committed by constables 'under his direction and control' on a 'master/servant' basis. The chief officer is to be indemnified out of the police fund.

The Queensland *Police Act* was amended in 1978 (five months after *Irvin's* case) to provide, in s. 69B, for Crown liability for police torts, but withholding such liability from punitive damages awarded in respect of a tort. The balance between the compensatory and punitive aspects of tort liability was thus preserved. The Northern Territory *Police Administration Act* 1979, s. 163 is identical with the Queensland provisions.

Other jurisdictions have initiated reports on the position. Quebec has long had this area of the common law grafted onto its civil code.[93] The *Report on Legal Personality* (1976)[94] recommended that 'peace officers' and members of the police force were to be treated as 'servants' of their employers, municipalities or the Crown.

The Australian Law Reform Commission in its report *Complaints*

92 (1923) 40 *South African L.J.* 277 at p. 285.

92a The S.A. Act may not succeed in its apparent intention. It provides: 'In any proceedings in tort against the Crown no defence based upon an actual or presumed independent discretion on the part of the person whose act or default is alleged to constitute the tort shall be admitted unless a similar defence would be admitted in the case of proceedings between subject and subject.' In *Jobling* v. *Blacktown Municipal Council* [1969] 1 N.S.W.R. 129 (the facts of which read like a script for Fawlty Towers) the N.S.W. Court of Appeal found that a Council employee who falsely arrested a person under the authority of being a special constable, but in the course of his employment, could not pass his liability to the Council. It thus appears that courts will apply *Enever* to protect subjects (in *Jobling* the Council) as well as the Crown.

93 See L. Giroux *supra* f.n. 11.

94 *Supra* n. 11, articles 63, 65 and 67.

against Police (1975)[95] recommended the overturning of the *Enever* doctrine, but the continued immunity of the Crown from punitive damages awarded against the police, the approach followed in Queensland and the Northern Territory.

Contemporaneously, the New South Wales Law Reform Commission in its report *Proceedings by and against the Crown* (1975)[96] comprehensively analysed *Tobin* as the antecedent basis of *Enever*, and a case with ramifications extending beyond solely police liability. As a conclusion to the examination and rebuttal of possible objections to Crown liability for tortious performance of duty under statute or common law, the report furnished a *Draft Vicarious Liability (Independent Functions) Bill.*

NEW SOUTH WALES LEGISLATION: THE 'BONA FIDE' JOKER IN THE PACK

Three years after the presentation of the New South Wales L.R.C. report, the New South Wales Parliament passed the *Police Regulation (Amendment) Act* 1978. Under s. 7A of the *Police Regulation Act* 1899-1978 an additional specific statutory duty was cast on the New South Wales police of protecting persons from injury or death and property from damage. With regard to police liability s. 26A now provides:

> A member of the police force is not liable for any injury or damage caused by him before or after the commencement of the Police Regulation (Amendment) Act, 1978, in the exercise or performance by him, in good faith, of a power, authority, duty or function conferred or imposed on him by or under this or any other Act or by law with respect to the protection of persons from injury or death or property from damage.

Now persons taking actions in tort against New South Wales police would be confronted not only with the continued immunity of the Crown, but the immunity of the police tortfeasor in certain situations not uncommon in police work. This immunity might not extend to the false arrest cases, or the negligent shooting in *Irvin*, but could extend to cover a situation such as in the recent South African *Mhlongo* case[97] in which a bystander had been shot dead by police attempting to apprehend a thief carrying stolen goods.

The case law on the extent of protection afforded by such a 'good faith' or '*bona fide*' section reveals a diversity of opinion. Does immunity from suit extend to the *negligent* performance of a statutory power or duty? The recent South African Appellate Division decision in

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95 *Supra* n. 10 Report No. 1 at paras. 213-229, pp. 58-63 and Appendix F, proposed legislation clause 5; and Report No. 9 at para. 136, pp. 80-81. Goode *op. cit. supra* n. 9 is particularly valuable in its reference to the defects in the U.K. legislation and its discussion of the compensatory and deterrent aspects of vicarious liability.

96 *Supra* n. 10, part 13.

97 *Supra* n. 33.

Mjuqu v. *Johannesburg City Council*[98] summarized the English case law on the subject. Two cases decided in 1857[99] and the judgment of Parker J. (as he then was) in *Bullard* v. *Croydon Hospital* to the effect that, 'one must read, after "*bona fide*", the words "and without negligence" '[100] were agreed in by the Appellate Division: immunity from the results of *bona fide* actions under statutory authority did not extend to negligent performance of such actions. A series of Scottish cases in 1950 culminated, after some indecision, in a finding to the same effect.[101]

In Australasia the law on *bona fide* protection for statutory performance is largely found in 'fire brigade' cases. In 1902 the N.S.W. Supreme Court found that the Superintendent of Fire Brigades was liable for the admitted negligent performance by firemen of a statutory capacity to pull down a wall.[102] Stephen A.C.J. and Pring J. were particularly adamant on the irrelevance of *bona fides* in the performance of the power, to the question of negligence in its performance.[103] Pring J. said:

> I treat the case simply as one of negligence because, in my opinion, the words 'bona fide' when used to qualify a negligent act are quite meaningless. A negligent act is one which a man exercising ordinary care and prudence would not commit. The element of bad faith has manifestly no place in such a definition. A man may act with the most perfect bona fides and yet be guilty of imprudence or carelessness.

The New South Wales Parliament passed the *Fire Brigades Act* in 1909. A provision that had not existed in the previous legislation was enacted as s. 46:

> The board, the chief officer, or an officer of the board, exercising any powers conferred by this Act or the by-laws, shall not be liable for any damage caused in the bona fide exercise of such powers....

Other Australasian jurisdictions soon followed suit in their Fire Brigade legislation.[104] A pattern was apparent of a duty to protect lives and property, a capacity to deal with property as occasion demanded, a grant of immunity for *bona fide* performance, and a provision that damage

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98 1973 (3) S.A. 421 [A.D.].

99 *Ward* v. *Lee* (1857) 7 El. and Bl. 426; (the head-note is misleading) and *Arthy* v. *Coleman* (1857) 30 L.T. (O.S.) 101.

100 [1953] 1 Q.B. 511 at p. 519.

101 Discussed in argument and judgments in the Inner House in *M'Ginty* v. *Glasgow Victoria Hospitals* [1951] Scots Law Times 92. The legislative background is explained in O. R. Marshall 'Hospitals and the *National Health Service Act*' [1952] *Current Legal Problems* 81 at p. 92 *et seq.*

102 *Vaughan* v. *Webb* (1902) 2 S.R. (N.S.W.) 293.

103 Stephen A.C.J. at pp. 298 and 300, and Pring J. at p. 307.

104 *Fire Brigade Act,* 1926, (N.Z.) s. 52 bearing the same wording as Act No. 24 of 1914, s. 3 (1); *Fire Brigade Act,* 1945, (Tas.) s. 57, formerly Act No. 61 of 1920, s. 33; *Fire Brigade Act,* 1936-1974, (S.A.) s. 81 (2), formerly Act No. 1130 of 1913, s. 81 (2) and *Fire Brigades Act,* 1964, (Qld.) Schedule I Part III rule 34 (1) formerly *Fire Brigade Act,* 1920. Schedule Part III rule 38. The Queensland *Traffic Act,* 1949-1971, s. 67 provides an immunity for police and other officials from liability for the performance of acts for the purpose of the statute, done, 'in good faith and without negligence'.

caused by the Fire Brigade should be fire damage for insurance purposes. In *Tally* v. *Motueka Borough*,[105] *Board of Fire Commissioners* v. *Rowland*[106] and *Osborne* v. *Burnie Fire Brigade Board*[107] the Supreme Courts of New Zealand, New South Wales (Full Court) and Tasmania respectively held that s. 46 or its equivalent founded protection against liability for negligent performance. *Tally* was the object of a brief decision, largely based on the capacity for transferring loss to fire insurers. *Osborne* was founded on the reasoning in *Tally* and *Rowland*.

The facts in *Rowland* have the bizarre scent of law school examinations about them. A chief officer of the Fire Brigade was inspecting a theatre for compliance with regulations. The officer's torch failed in the darkness and to read details on an inaccessible plate he used a cigarette lighter. In so doing he set fire to a curtain, but put the flames out with his hands rather than using an available fire extinguisher. Some hours later the theatre was partially destroyed by fire.

In deciding on this case of fire damage resulting solely from negligent ignition by an officer empower to suppress fire, the Full Court (Owen, Manning and Else-Mitchell J.J.) in joint judgment found for the Fire Commissioners on the ground that s. 46 could not have been intended to be limited to the protection of authorised and lawful acts. Their Honours quoted Fullagar J. in *Trobridge* v. *Hardy*[108] as authority, but did not distinguish between 'negligent' and 'conscientious' (to use Fullagar J.'s word) attempts to perform a public duty.

A little over a year later in *Ardouin* v. *Board of Fire Commissioners of New South Wales*[109] a differently constituted Full Court (Evatt C.J., Sugerman and Nield J.J.) invited by M. H. Byers Q.C. (now Commonwealth Solicitor General) to reverse the law as declared in *Rowland*, did so. Their Honours were careful to find a legislative purpose for s. 46, appearing as it did after the decision in *Vaughan* v. *Webb*. The Court held that s. 46 materially affected the position where a fire officer caused damage while acting in the *bona fide* belief that he had a statutory power which was in fact non-existent. It was thus unnecessary to assume that the legislature had intended s. 46 to cover the instant situation of a fire engine causing a traffic accident through negligence on the way to a fire.[110] The Court concluded:

> The authorities show that liability for negligence exists unless expressly taken away by the legislature and s. 46 can, it seems to us, be reasonably construed and applied without its having anything to do with actions based on negligent driving. Negligence and actions based on negligence are not mentioned in the section, and on the contrary words like *bona fide* are used which have been

105 [1939] N.Z.L.R. 252.
106 (1960) 60 S.R. (N.S.W.) 322.
107 [1959] Tas. S.R. 133.
108 (1955) 94 C.L.R. 147 at p. 156.
109 (1961) 61 S.R. (N.S.W.) 910.
110 At pp. 913-921.

> said by our court [in *Vaughan* v. *Webb*] to be meaningless so far as negligence is concerned.[111]

On appeal to the High Court,[112] a majority (Dixon C.J., Kitto, Taylor and Windeyer J.J., McTiernan J. dissenting) agreed with the result in the court below, but the entire court preferred the reasoning in *Rowland* to that of the Full Court in *Ardouin.* The majority of the High Court found s. 46 inapplicable to negligence en route to a fire; but it was assumed in *dicta* to cover negligence in the exercise of the Board's *specific* powers.[113] Kitto and Taylor J.J. also based their reasoning in respect of s. 46 on its chronological succession to *Vaughan* v. *Webb,* and the assumption that the section must have been intended to alter the law in the Board's favour.[114] As Windeyer J. suggested,[115] such legislative response was tardy, and references such as Taylor J.'s to a change in the law 'in some curious way' have an air of mysticism when compared with the rigorous logic applied by the New South Wales Full Court in *Ardouin* to the legislative intent of a *bona fide* section.

Suffice it to say that the High Court *dicta* in *Ardouin* have been adopted by the New South Wales Supreme Court in *R. & W. Vincent Pty. Ltd.* v. *Board of Fire Commissioners.*[116] Firemen left the scene of a fire with the words 'She's right, mate. We're off.' The fire reignited and caused considerable damage. Rather than explore the question of negligence under the circumstances, Taylor C.J. at C.L. was prepared to allow s. 46 as a protection to negligent performance.

It follows that with regard to the New South Wales *Police Regulation Act,* 1899-1978 s. 26A that damages resulting from the good faith, but negligent performance of a statutory or common law police power in the protection of persons or property, will not sound in tort against the police.

POLICIES INVOLVED IN THE SITUATION

It is suggested that the legal condition which finally gives birth to an enactment such as that in New South Wales, severing fundamental common law rights from the community, is unsatisfactory, and deserving of further enquiry. The *Enever* doctrine is based on a judicial choice of policy alternatives. As outlined above, those chosen may be seen as:

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111 At p. 922. See also the Scottish case of *M'Ginty supra* n. 101 particularly Lord Blades in the Outer House at p. 95 on the strict construction of statutes which interfere with existing rights.

112 (1962) 109 C.L.R. 105.

113 Dixon C.J. at p. 109, McTiernan J. at p. 112, Taylor J. at pp. 124-125, but Windeyer J. cautiously at p. 128. With respect it appears that the Court's approach to the question of negligence reflected concepts of nuisance under statutory authority: see Fleming *supra* n. 2, at pp. 422-424. The distinction between general and specific powers was relied on by the N.S.W. Court of Appeal in *McIntosh* v. *Board of Fire Commissioners* (1969) 90 W.N. (Pt. 2) (N.S.W.) 125 to limit the Board's immunity.

114 *Per* Kitto J. at p. 115 and Taylor J. at p. 122.

115 At p. 128.

116 [1977] 1 N.S.W.L.R. 15.

(1) The non-applicability of the 'control' basis of vicarious liability in the case of police because
   (a) the police officer was not capable of control in the function in question by the Crown,
and (b) the Legislature, not the Executive gave the 'orders' under which he operated: the *Tobin* theory;
and (2) It was not the intention of Crown Liability Acts to open Government administration to curial supervision.

Against these choices of 1906 might be ranged new factors requiring consideration:

(1) The general philosophy underlying modern employer vicarious liability of loss distribution: the exclusion of police officers from the theory creates an unwarranted anomaly;
(2) The need to recognise for certain purposes the unity of the Crown acting through the Legislature and Executive;
(3) The weakness of *Tobin* as foundation for twentieth century law;
and (4) The possibility that in the century since *Farnell* v. *Bowman* levels of State activity and enterprise have increased enormously: Barton J.'s gratuitous restriction of the ambit of Crown Liability Acts is in a late twentieth century context a blatant political policy choice.

Along with the overt policy choices in *Enever* came a more subtle consideration. The High Court was jealous of the independence of police from Government control, a theory that may ultimately be based on half, rather than absolute truths.[117] Events in Australia during the last decade involving public assemblies and the police, and the relationships of some State Governments to their Police Commissioners at least lend a reasonable latitude of doubt to the efficacy of the theory. But the theory may stand[118] without necessitating the brunt of tortious liability falling on individual police officers. The comprehensive theory of vicarious liability does not depend on detailed 'control'.

The regrettable feature of this supposed judicial bolstering of police independence is that it has exactly the opposite effect. Under *Enever*, compensation by the State to police for damages awarded against them is determined administratively, not curially. Rather than a determination in open court of whether the tortious activity was within the scope of employment, an inherently secret bureaucratic process operates to

117 See R. Plehwe 'Police and Government' [1974] *Public Law* 316 at pp. 326-334; P. Applegarth 'Police Investigations and Politicians' (1979) 4 (5) *Legal Service Bulletin* 204 commenting on *R.* v. *Bjelke Petersen ex parte Plunkett* [1978] Qd. R. 305 and L. Waller 'The Police, The Premier and Parliament: Governmental Control of the Police' (1980) 6 *Monash U.L.R.* 249.

118 *R.* v. *Commissioner of Police of the Metropolis, ex p. Blackburn* [1968] 2 Q.B. 118 at p. 136 *per* Lord Denning M.R. and R. Mark *Policing a Perplexed Society*, (1977), at pp. 12 *et seq.* and *In the Office of Constable*, (1978), at pp. 282-284.

indemnify the police officer, if the Government so wishes. A system better designed to subvert police independence can hardly be imagined.

LINES OF ACTION: JUDICIAL ACTIVISM OR NO?

The inequity of *Enever* may be cured by legislation, but legislation may worsen the situation as in New South Wales where a victim of police tort can neither sue the Crown, nor in many situations sue the individual tortfeasor. But may judges on occasion reshape judge made law independently of the legislature? In two recent judgments the High Court was confronted with exactly this problem, and twice Murphy J. was the sole dissentient from a majority viewpoint that it is for Parliament, not the courts, to alter the law.

The lines were drawn in *Dugan* v. *Mirror Newspapers*[119] when some of the majority held that medieval doctrines of criminal status, however unsuitable to Australia in 1979, were part of the law and immutable save to Parliamentary intervention.[120] Murphy J. trenchantly disagreed, advancing reasons for the necessity of judicial activism in such circumstances.[121] Subsequently in *S.G.I.C.* v. *Trigwell*,[122] concerning the standing in Australia of the rule in *Searle* v. *Wallbank* on the anomalous non-liability in negligence of owners of straying animals, Murphy J. took up his torch, but his brethren in general refrained from discussing the subject directly. The words of the dissenter are apposite to the *Enever* doctrine:

> The virtue of the common law is that it can be adapted day by day through an inductive process which will achieve a coherent body of law. The legislatures have traditionally left the evolution of large areas in tort, contract and other branches of the law to the judiciary on the assumption that judges will discharge their responsibility by adapting the law to social conditions. It is when judges fail to do this that Parliament has to intervene . . . . [but] The results of legislative intervention often produce difficulties [authority cited] because legislation does not fit easily with 'the seamless fabric of the common law'.[123]

Between the judgments in *Dugan* and *Trigwell*, Barwick C.J. and Murphy J. delivered extra-judicial speeches supporting opposing viewpoints on judicial activism. The Chief Justice addressed the Bentham Club saying:

> [S]eeming rigidity in the administration of the common law is, I think, preferable to allowing the judiciary to act as a law-reforming

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119 (1979) 53 A.L.J.R. 166.

120 *Per* Barwick C.J. at p. 167, Gibbs J. at pp. 168-169. See also Stephen J. in *Bradken Consolidated* v. *The Broken Hill Proprietary Co.* (1979) 53 A.L.J.R. 452 at p. 459 on another public law problem, the presumption of Crown immunity from the operation of statutes, and Gibbs, Stephen and Mason JJ. in *Australian Conservation Foundation* v. *Commonwealth* (1980) 54 A.L.J.R. 176 on the restriction of *locus standi*.

121 At pp. 176, 177.

122 (1979) 53 A.L.J.R. 656.

123 At p. 668. Dealing with *Enever* raises the more specific problem of *stare decisis*. R. C. Springall concluded a comment on *stare decisis* in the High Court (1978) 9 *Fed. L.R.* 483 with ten considerations which might lead to review. Numbers 2, 3, 5 and 10 (p. 503) at least apply to *Enever*.

> agency and thus to usurp the proper function of the legislature. It is worth saying that the legislature, notwithstanding its burden of party politics, is better fitted to ascertain and express the common will . . . . than is the judiciary which does not have at its command the information required to decide on the acceptability of an existing rule in times of change. As well these days the legislature is served by law-reforming commissions able to present the various facets of the problem of what the law should be . . . .[124]

In his address to a conference of Labor lawyers, Mr. Justice Murphy recognised the charge of 'non-democratic process' levelled at his scheme of judicial reform. He accepted the fact, but posited the exposure of 'appointed law makers' to 'legitimate public opinion' to which they should be responsive.[125] In *Trigwell*, Mason J. referred to the difficulty of assessing the merits of conflicting interests beyond the immediate litigants if change to the law were adumbrated,[126] but Murphy J. attacked the problem head on.[127] The anomaly in the law of negligence created by *Searle* v. *Wallbank* was not arrived at after a general enquiry into the competing interests of motorists and animal owners, but in any case Murphy J. thought the judiciary might rely on Law Reform Commission reports which recommended change after the making of such enquiry.

If the competing concepts of judicial function reduce to the quotient of curial information necessary for 'law adjusting' in a democratic society, a recent Wyoming decision is of interest.[128] Rose J. dissenting, advocated the judicial abolition of municipal immunity from suit. In denying such an 'unrelenting sweep' until 'the whole story' was heard, Raper J. suggested that 'A case should be before this court in a setting permitting such a coverage, through not only the litigants involved but *amicus curiae*, representing other interests as well'.[129] The law on *locus standi* and *amicus curiae* is not as flexible in this country as in the United States but Mr. Justice Zelling has suggested a court led reform in this area.[130] Such a change could support a further suggestion from Mr. Justice Zelling that judicial influence on the development of the law can proceed by updating 'many areas of the law whose only reason for existence comes from decisions based on the habit of life of by-gone ages'.[131]

Another argument propounded against judicial variation of the law is the need for certainty: a stable basis is necessary for the planning of affairs, particularly those of a commercial nature. Whatever force this

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124 'Judiciary Law: Some Observations Thereon' (1980) 33 Curr. Leg. Problems 239 at pp. 246-247.
125 'The Responsibility of Judges' in G. Evans (ed.) *Law, Politics and the Labor Movement* (1980) p. 2 at p. 6.
126 53 A.L.J.R. at p. 662.
127 At p. 668.
128 *Jivelekas* v. *City of Worland* 546 P. 2d. at p. 419 (1976).
129 At p. 434.
130 'The Scope of Judicial Development of the Law', Proceedings and Papers, 5th *Commonwealth Law Conference*, Edingurgh 1977, at p. 49.
131 Ibid at p. 51 and generally 'Law Reform in Retrospect — The Achievement' (1979) 53 *A.L.J.* 745.

argument carries with regard to private business transactions, it fails when applied to Government activity. The cost to the State has been suggested as a reason for failing to provide vicarious liability for police torts. The State may have to balance its books, but one would have thought the claim of the victim of police tort to weigh heavier in the scales. If a sudden judicially enforced compensation were sufficient to bankrupt the Treasury, one would be entitled to wonder at the unassuaged losses borne hitherto by individual citizens. American courts have dealt with this objection by providing for *prospective* destruction of the State immunity, thus allowing administrators a period in which to institute an insurance scheme, or leaving legislators with time to re-entrench the State's immunity.[132]

THE WORK OF JUDGES: A NECESSARY BULWARK AGAINST AN APPOINTED PUBLIC SERVICE

It is submitted that the 'democratic model' of populace, popularly elected legislature as lawmakers, advised by Law Reform Commissions, and appointed judges as law finders is deficient when reform of public law as it affects the State is under discussion. Between the legislature and the Law Reform Commission, the nexus relied on by the Chief Justice in his Bentham address, lies a Public Service, with its own interests as well as the public's to serve. Not only did the 1975 New South Wales L.R.C. report on Crown Proceedings appear to go to an unmarked grave in the New South Wales Attorney General's Department, but the exposed position of police led to representations from the Police Department seeking immunity from liability arising out of *bona fide* actions, for example, render safe operations of explosive devices.[133] No imputation of bad faith is intended against Public Services, general

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132 E.g. *Molitor* v. *Kaneland Community* 163 N.E. 2d 89 (1959 Ill.) noted in Shapo *op. cit. supra* n. 11 at p. 501; *Spanel* v. *Mounds View School District* 118 N.W. 2d 745 (1962 Minn.) immunity abolished prospectively from next adjournment of State legislature; *Pitmann* v. *City of Taylor* 247 N.W. 2d 512 at p. 515 (1976 Mich.). Note the warning of sometime Chief Justice of California, Professor Roger Traynor, against the glib use of prospective law making. 'The Limits of Judicial Creativity' (1978) *Hastings L.J.* 1025 at pp. 1035-1037. On the other hand, Traynor could see no reason for prospective rather than immediate overruling in tort law and thought the argument for dealing with sovereign immunity in the case before a court was, by corollary, as strong.

133 Correspondence: N.S.W. Premier's Department P. 78/698 of 20 September, 1978. See also H. Street (1949) 47 *Michigan L.R.* at p. 365, n. 115 referring to Viscount Jowitt's speech in House of Lords during debate on the Crown Proceedings Bill, revealing the pressure applied by Service Departments for immunities. The American material referred to at n. 11 indicates that despite Borchard's preference for legislative rather than judicial action, the law on immunity remained unchanged at the State level until judicial abrogation in 1957 in Florida, followed by the same process in six other States up to 1962. The Californian and Illinois legislatures reversed, in part, the judicial work. By 1976 twenty seven jurisdictions had to some extent altered this area of law judicially, while nineteen had legislated on the subject in the absence of judicial activity.
Perhaps N.S.W. residents should be grateful they are not confronted with the *presumption* of good faith present in the South African *Indemnity Act*, 1977, s. 1 (3): see *Damane* v. *Minister of Police* 1979 (4) S.A. [C.P.D.] 400.

or in particular, but the seigneurial attitude of some career public servants can be dominated by only the most determined of elected Governments.

The proposal that emerged as *Police Regulation Act.* s. 26A was debated in New South Wales Parliament as a 'Good Samaritan' statute.[134] Such statutes are common in the United States to protect professionals in the healing arts, but they are not necessary where the 'Good Samaritan' in a rescue situation is an employee capable of passing liability vicariously. But it cannot be expected that Police administrators with a narrow objective and legislators from all walks of life will recognise the legal consequences of interference such as s. 26A.

It is further suggested that Parliament may be reduced to 'rubber stamping' sectional public service interests not only through Executive control based in a rigid party system, but through quite external circumstances. By chance s. 26A received its second reading speech on the day after the Sydney Hilton bombing, in which a police officer was fatally wounded. It is not surprising that Parliament was uncritical of a measure designed to alleviate a policeman's lot. But if that is the level of discussion of competing interests afforded by Parliament to change in the law, are the courts less suitable vehicles of rationalisation?

The position on police torts in New South Wales is now so tangled that a high level of activism would have to be exhibited to achieve a judicial solution. While *Enever* might by overturned judicially in Western Australia, Victoria and Tasmania, such action would not have the effect of passing liability for many police torts to the Crown in New South Wales. Section 26A as interpreted under *Ardouin* would provide a *substantive,* not merely procedural bar to police liability, and as such there would be no liability to pass vicariously[135] even if *Enever* were abolished. Perhaps the Australasian doctrine on *bona fide* sections is ripe for return to the mainstream of the common law.[136]

It remains only to suggest that the question of police negligence should be determined as a question of fact on the circumstances as any other negligence action.[137] The Canadian Supreme Court and Ontario Court

134 N.S.W. Parliamentary Debates, Legislative Assembly, 14 February 1978, at p. 11755 *et seq.*

135 G. Williams 'Vicarious Liability: Tort of the Master or of the Servant?' (1956) 72 *L.Q.R.* 522 is to be preferred on this to Fleming, *supra* n. 2 at p. 356. Note Williams particularly at pp. 530 and 535. Cozens-Hardy M.R. in *Lambert* v. *Great Eastern Railway* [1909] 2 K.B. 776 at p. 781 is exactly to point, but *contra Goldschagg* v. *Minister of Police* 1979 (3) S.A. [T.P.D.] 1284.

136 *Ward* v. *Lee* (1857) 7 El. & Bl. 426 at p. 430, and *Bullard* v. *Croydon Hospital* [1953] 1 Q.B. 511 at p. 519 indicate the normal English practice of ensuring a compensation section in legislation containing a *bona fide.* immunity. Such solicitousness is absent in Australian legislation e.g. *Highways Act,* 1926-1975, (S.A.) s. 29 (1). However, in all the cases cited above, save *Tally,* in which immunity for negligence was granted, the courts found either insurance or vicarious liability available for compensation. Insurance against police action is not yet commonplace in Australia.

137 *Gaynor* v. *Allen* [1959] 2 Q.B. 403, *Johnstone* v. *Woolmer* (1977) 16 A.C.T.R. 6.

of Appeals in the leading case of *Priestman* v. *Colangelo*[138] were in substantial agreement on this approach despite a flirtation by Taschereau and Locke J.J. of the Supreme Court majority with the generalised defence of *raisons d'etat, salus populi suprema lex.* The divisions in those Courts arose over varying interpretations of what constitutes negligence under the circumstances.

As to judicial reform of this area of 'lawyers' law', hesitancy in curial action may not lead to a following of the Queensland and Northern Territory models, as the New South Wales experience shows. The suggestion is a modest proposal for the rounding out of the private law analogy on which our public law is based.[139] As the common law stands at present, tenderness for anomalies over coherence and social practicality in the law has left a condition calling for the work of the common law judge, of whom Fifoot said:[140]

> [W]hen he makes law in the fullest sense open to him, [he] is like all great artists, not so much an innovator as an interpreter. He is necessarily conditioned by the material fortuitously given to him, by the anxiety not to impair judicial consistency and by the predominant feeling of the profession. Working within these limits, he transmutes experience into law and, by generalising, performs a genuine act of creation.

POST SCRIPT

Since this article was written the report of the South African Appellate Division in *Minister of Police and another* v. *Gamble and another*[141] has become available, together with a case note in the South African Law Journal.[142] The decision settles the law in South Africa, left uncertain only the year before in *Mhlongo.*[143] In the words of Joubert J.A. speaking for the whole court:[144]

> .... the State as employer is indeed vicariously liable for a wrongful arrest made by a police officer, acting in his capacity as such, within the scope of his employment, i.e. when he is about police business. A police officer is indeed always, when he is about police business, under the command, supervision and control of his seniors and thus under the control of the State. It cannot be said that *pro hac vice* he is not an employee or servant of the State when he exercises a statutory discretion within the scope of his employment.

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138 (1957) 11 D.L.R. (2d.) 301 and (1959) 19 D.L.R. (2d.) 1.
139 A more radical suggestion would encompass public law reflecting 'the unique nature of Government undertakings': see Professor H. N. Janisch cited in British Columbia Law Reform Commission Report No. 9 (1972) 'Civil Rights: The Legal Position of the Crown', at p. 51.
140 C. H. S. Fifoot *Judge and Jurist in the Reign of Victoria* (1959) at pp. 36-37.
141 1979 (4) S.A. 759 [A.D.]
142 (1980) 97 South African L.J. 207.
143 *Supra* f.n. 33 and see text after f.n. 51.
144 1979 (4) S.A. at 768.