Damages in Public Law

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1. Introduction

In *Kruger* v. *Commonwealth*[1] Brennan CJ said:

> The causes of action enforceable by awards of damages are created by the common law (including for this purpose doctrines of equity) supplemented by statutes which reveal an intention to create such a cause of action for breach of its (sic) provisions...if a government does or omits to do something the doing or omission of which attracts no liability under the general law, no liability in damages for doing or omitting to do that thing is imposed on the government by the Constitution.

In this passage the Chief Justice powerfully applies what has been called a 'fundamental tenet'[2] of the common law that whereas damages are the basic remedy for torts and breaches of contract, they are, by contrast, not available as a remedy for breaches of public law rules as such ('public law wrongs' if you like).[3] On the other hand, although the remedies of declaration and injunction started out their lives in private law, they have been easily transplanted and have come to play an important role in relation to breaches of public law rules. In this article I wish to examine the role of damages in remedying public law wrongs, and the reasons why the remedy has traditionally been seen as less suitable for use in public law than in the private law of obligations. To some extent, this may be a result of no more than an unthinking identification of damages with certain causes of action and not others, and the fact that in common law systems, public law has been a quite recent development. Beyond this, however, are there any sound reasons of legal or social policy why damages should play a lesser role in redressing breaches of public law than in redressing breaches of private law? In answering this question, I think that it is important to distinguish between three different issues relevant to the availability of the remedy. The first is the nature of damages as a remedy; the second is the basis of liability to pay damages; and the third is the institutional source of the remedy. I will deal with each of these issues in turn.

I should make it clear at this point that the article is not primarily concerned with the grounds of government liability but with damages as a remedy for

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1 (1997) 146 ALR 126, 142. See also *Simpson* v. *Attorney-General (Baigent's Case)* [1994] 3 NZLR 667, 713 *per* Gault J.

2 Lord Woolf and J. Jowell, *De Smith, Woolf and Jowell, Judicial Review of Administrative Action*, 5th edn (London, 1995), 758.

3 For the purposes of this paper, public law rules are rules about the performance of governmental functions. On the meaning of this latter term see n. 4 below. Private law rules are rules relating to conduct and activities other than governmental functions.

breaches of the law by government.[4] Nor am I concerned with damages for lawful government conduct awarded on what is often called a 'risk theory'[5] — such as compensation for compulsory purchase of land or for the effects of the building of a highway close to one's home.

The 'fundamental tenet' (as I shall call it) should be distinguished from the so-called equality principle.[6] In its unqualified form, this principle states that the government should be subject to the same liability rules as its citizens. The equality principle has two limbs: government should enjoy no immunities from or defences to liability not also enjoyed by citizens; and government should be subject to no liabilities which do not also rest on its citizens. However, the principle is rarely adopted in this pure form. It is typically qualified by the words 'as nearly as possible',[7] or the like. The basic reason for the qualification is that government may legitimately coerce citizens to act or refrain from acting in ways determined by the government in order to further community goals at their expense. This legal power of legitimate coercion is not possessed by any ordinary citizen, however great their *de facto* power over the lives of other citizens may be. Government is different from its citizens in having power which they do not have, and in having responsibilities to the community as a whole which they do not have. The phrase 'as nearly as possible' recognizes that in order to control the exercise of the legitimate coercive powers of government we may be justified in imposing certain liabilities on government which do not also rest on its citizens[8] and that in order to enable it to fulfil its responsibilities to society as a whole, we may be justified in relieving government of certain liabilities to which its citizens are subject. The phrase also indicates, however, that departures from the equality principle ought to be the minimum necessary to achieve an acceptable level of control over the exercise of governmental power, on the one hand, and to give government sufficient freedom to further the public interest at the expense of individuals, on the other.

Expanded in this way, it becomes clear that equality before the law is a formal principle. It instructs us to treat government in the same way as citizens are treated to the extent that government is the same as its citizens; but beyond that,

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4 In this paper I shall use the term 'government' in a broad sense to encompass all entities, whether or not part of the traditional core of government, which perform 'governmental functions'. It is not necessary for present purposes to attempt to define what is meant by 'governmental functions'. Suffice it to say that many of the functions performed by governments are not in any sense 'inherently governmental', but only contingently so; and that the governmental nature of a function may (or may not) survive its being delegated, handed over or 'outsourced' to an entity which is not part of the institutional structure of traditional government.

5 See P. Cane, *An Introduction to Administrative Law*, 3rd edn (Oxford, 1996), 78-9.

6 For an excellent exposition of the equality principle and an analysis of its application see M. Allars, 'Tort and Equity Claims Against the State' in P.D. Finn (ed), *Essays on Law and Government, Volume 2: The Citizen and the State in the Courts* (Sydney, 1996), 49-100.

7 See *e.g.* in Australia Judiciary Act (Cth), s. 64. The Crown Proceedings Act 1950 (NZ), s. 6 is modelled on the Crown Proceedings Act 1947 and contains no such express qualification.

8 But see *Mengel* v. *Northern Territory of Australia* (1995) 185 CLR 307, 352 n 280 and text thereto.

to treat it differently. Under the equality principle, actual equality of treatment is not the ideal to be aimed at. The goal is the 'right' mix of similar and dissimilar treatment. The fundamental tenet should be seen as one view about the right way to treat government in the law of obligations. It asserts that although heads of liability to pay damages which operate between citizens *inter se* should also (with suitable modifications) apply as between citizen and government, there should, as a general rule,[9] be no heads of damages liability which apply only between citizen and government. My aim in this article is to examine whether the fundamental tenet is soundly rooted in legal policy. My conclusion will be that there are no sound arguments of *legal* principle which justify the fundamental tenet. However, the more extensive governmental damages liability becomes, the more significant its implications for public spending. Since the prime responsibility for public spending rests with the executive and legislative branches, they have an important role to play in deciding the scope of the damages liability of government.

2. The Nature of the Remedy of Damages

In this section I shall first define what I mean by 'damages'. I will then locate damages in the wider picture of public law remedies. Thirdly, I will address the question of whether there is anything in the nature of damages as a remedy which makes it unsuitable as a remedy for public law wrongs.

(a) What are damages?

There are four main types of damages.[10] Compensatory damages respond to and in some sense make up for injury, harm, damage, loss, and so on, suffered by one person as a result of conduct (whether act or omission) of another. Restorative damages respond to a shift of resources from one person to another by requiring those resources to be returned. Disgorgement damages respond to gains made by one person 'at the expense of another' (although not received from that other) by requiring those gains to be surrendered to the other. Punitive damages punish a person for their conduct towards another. The aim of each of these types of damages is to shift financial resources from the payer to the payee or, in other words, to enrich the payee financially at the expense of the payer. In this way they can be distinguished from nominal and contemptuous damages, the aim of which is to mark that some wrong has been done by the payer to the payee or that some right of the payee has been interfered with by the payer. Such damages perform a declaratory function in cases where the remedy claimed by the payee is damages rather than a declaration.

In this article I am not using the term 'damages' in the narrow sense of a monetary remedy for breach of a legal obligation. For instance, payments of compensation fall within my definition of compensatory damages even if they are made without admission of, or even in the admitted absence of, legal liability

9 There is one tort which applies only to governmental conduct, namely misfeasance in a public office.

10 For more detail see P. Cane, 'Exceptional Measures of Damages: A Search for Principles' in P. Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (Oxford, 1996), 301-25.

to pay compensation. Damages, as I define them, are monetary payments which address loss suffered, or gains made, or resource-shifts, or reprehensible conduct. I would not, therefore, distinguish between 'damages' and 'compensation' in the way which is sometimes done in discussions of the relationship between monetary payments which redress equitable wrongs ('compensation') and monetary payments which redress common law wrongs ('damages'),[11] or as was done by Cooke P in *Baigent's* case when he said of a particular statutory provision that it referred to 'common law damages, not public law compensation'.[12] Such distinctions rest on a narrow definition of damages as a 'common law' remedy for torts and breaches of contract. By contrast, my definition of damages is in terms of the functions of the remedy (compensation, for instance) rather than the identity of the causes of action to which it attaches.

If we start from the position that the remedy of damages is normally only available for torts and breaches of contract, we will easily reach the conclusion that some special justification is needed for awarding damages in the absence of a tort or a breach of contract. On the other hand, if we start from the position that compensation is an appropriate response to loss, disgorgement an appropriate response to gain, and so on, then we will more easily reach the conclusion that if a person has, for instance, suffered loss in circumstances or as a result of conduct which calls for a remedy, the remedy given ought, prima facie, to be that which responds to loss, namely compensatory damages. If this remedy is to be denied, some good reason needs to be found to justify the denial. Saying no more than that damages is a remedy for common law wrongs, not for equitable or public law wrongs, would provide no such reason unless there were some difference between common law wrongs on the one hand and either equitable wrongs or public law wrongs on the other on which the statement could be soundly based.

(b) The place of damages in the repertoire of public law remedies

Assuming for the moment that damages are not available as a remedy for public law wrongs, public law remedies can be divided into a number of functional categories:[13] mandatory orders, prohibitory orders, quashing orders, substitutionary orders, declarations and recommendations.

Mandatory orders, which require action, and prohibitory orders, which forbid action, share important characteristics and may be referred to collectively as 'peremptory' orders. A quashing order deprives a decision of legal effect. Substitutionary orders, which are made in the exercise of appellate functions, replace the decision of the body appealed from with that of the appellate body. Substitutionary orders and quashing orders I refer to collectively as 'executory' orders, that is, orders by which the entity making the order achieves a particular result by means of that order instead of instructing someone else to bring about a specified state of affairs.

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11 *e.g.* J.D. Heydon, 'The Negligent Fiduciary' (1995) 111 *LQR* 1.

12 *Simpson* v. *Attorney-General (Baigent's Case)* [1994] 3 NZLR 886, 678.

13 For more detailed discussion see P. Cane, 'The Constitutional Basis of Judicial Remedies in Public Law' in P. Leyland and T. Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (London, 1997), 242-70.

Declarations are of two types. What I call a 'surrogate declaration' is a non-coercive alternative to some other remedy, such as a peremptory order. An 'autonomous declaration' simply states what the law is on a particular topic or what legal rights or obligations a person has. A declaration creates no legal obligation of compliance. But failure of compliance may lay the groundwork for a subsequent application for a coercive remedy, such as a peremptory order. Recommendations, which are most commonly associated with the office of ombudsman, are also non-coercive and create no legal obligations of compliance. In substance, a recommendation will typically be a surrogate for some other remedy, such as a peremptory order. Although a recommendation creates no obligation of compliance, failure to comply may trigger separate enforcement procedures. Recommendations are, in effect, non-judicial surrogate declarations.

Adding damages to the catalogue of public law remedies would add significantly to the range of functions performed by public law remedies. Excluding damages from the public law remedial repertoire puts victims of public law wrongs at a significant disadvantage which requires justification.

(c) Are damages, by their nature, an unsuitable remedy for public law wrongs?

In this subsection I will examine three possible reasons why damages might, by their nature, be thought an unsuitable remedy for public law wrongs: their 'intrusiveness', the fact that they shift financial resources, and the fact that they benefit individuals.

(i) Intrusiveness

Public law remedies can usefully be compared and contrasted with one another in terms of what might be called their 'intrusiveness'. In relation to remedies addressed by one organ of government to another,[14] this concept is based on the constitutional desideratum (usually referred to in terms of 'separation of powers') that heavy concentrations of different types of governmental power (legislative, administrative and judicial) in individual governmental organs should be avoided in order to minimize conflicts of interest in the exercise of governmental functions and to facilitate accountability and external scrutiny as between the various branches of government.[15] In accordance with the principle of separation of powers, remedies given by one organ of government against another ought to be designed to facilitate external scrutiny of and accountability for decisions and actions of the entity against which the remedy is given, while at the same time not intruding unduly into the province of that entity's functions. The intrusiveness of a remedy in this context depends on how much freedom the addressee of the remedy has in deciding how to react to the remedy. A remedy which leaves its addressee a significant amount of freedom in deciding how to comply with it is less intrusive than one which leaves the addressee little or no such freedom.

[14] As we will see later, the courts are not the only governmental organs which can award damages in the broad sense in which I am using the term in this paper.

[15] In other contexts, the criterion of intrusiveness may rest on the concept of expertise. This is one of the reasons why courts are quite cautious about awarding damages for negligence against doctors.

The value of the concept of intrusiveness can be illustrated by considering the relationship between the courts and the executive in the context of judicial review of administrative action. Classically, courts operating in the English legal tradition and in Westminster-style governmental systems have adopted what might be called a 'principle of restrained intrusion'. This is reflected, for instance, in the idea that the executive should be given considerable leeway in matters of policy (as opposed to matters of law and fact); in the adoption of a concept of unreasonableness which refers only to decisions so unreasonable that no reasonable body could make them; and in the theory of jurisdiction, one implication of which is that courts may tell administrators what decisions they may not make, but may not tell them what decisions they ought to make. There is, of course, no clearly defined standard of optimum intrusiveness but only a principle of relativity to the effect that in designing grounds and remedies of judicial review, the courts ought to respect the autonomy of the executive branch of government, and should not usurp the functions allocated by constitutional arrangements to the executive under the guise of scrutinizing the performance of those functions.

Can this criterion of intrusiveness and the principle of restrained intrusion help to explain aversion to the use of damages as a public law remedy? Where do damages stand on the scale of intrusiveness as compared with other types of public law remedy?

The concept of intrusiveness has three dimensions. The first relates to the substance of the remedy. For instance, a peremptory order is more intrusive than a declaration in that by its terms, it requires the addressee to act or to refrain from action. The second dimension relates to the enforceability of the remedy. In this respect, too, peremptory orders are more intrusive than a declaration because a person who disobeys such an order may be punished for contempt of court. The third dimension of intrusiveness relates to the feasibility of bargaining around any particular remedy by agreement with the beneficiary of the remedy. For example, the addressee of a peremptory order may be able to bargain around it, whereas executory orders are not susceptible to bargaining.

In terms of substance, a damages remedy is intrusive in that it requires the person to whom it is addressed to take precisely defined action, namely to pay a sum of money to another. However, in this respect, it is no more intrusive than peremptory orders[16] and it is less intrusive than a substitutionary order which gives the decision-maker no control at all over giving effect to the remedy. So far as enforceability is concerned, failure to comply with a legally binding order to pay damages is itself a legal wrong; but so too is failure to comply with a

16 In one way, damages are less intrusive than peremptory orders: they do not prohibit or require action but only penalize action or inaction after the event. This may be why peremptory orders are exceptional in the private law of obligations and are used only to protect highly valued interests (such as property rights in the law of nuisance) or where damages would be an inadequate remedy. Peremptory orders are not exceptional in public law, probably because governments possess legal powers of coercion for the adequate control of which *ex post facto* remedies are thought inadequate. The possibility of claiming damages after a decision has been executed is inadequate protection against a decision-maker with legal power to coerce compliance with its will.

peremptory order. As for freedom to bargain around the remedy, the most intrusive remedies are substitutionary orders, which give the addressee no room for manoeuvre at all. At the other extreme are peremptory orders from which the addressee may be able to secure release by offering some alternative satisfaction to the beneficiary of the remedy. On this scale, damages fall in the middle — there is no reason in principle why the addressee should not seek to bargain release from a damages remedy, but in practical terms there may often be no substitute remedy which would be more attractive both to the beneficiary and the addressee of the damages remedy.

The conclusion must be that in terms of intrusiveness, damages are not, on balance, obviously more objectionable than certain other public law remedies which are freely available. The principle of restrained intrusion does not, therefore, convincingly explain reluctance to make damages available as a remedy for public law wrongs.

It is important for present purposes not to confuse the intrusiveness of remedies with the intrusiveness of grounds on which remedies are awarded. For example, in terms of the policy / operational distinction, it is often said that decisions about the allocation of scarce resources are policy decisions which cannot form the basis of a successful tort action because such decisions are for the executive and the legislature to make, not the courts. On the other hand, it seems clear that at least some such decisions may be subject to judicial review and may be quashed if they are *Wednesbury* unreasonable.[17] Such a high proportion of governmental decisions have either explicit or implicit resource implications that if such decisions were to be non-justiciable simply because they had resource implications, judicial control of governmental action would be of very little value. Moreover, applying the principle of restrained intrusion, unless damages are, by nature, a more intrusive remedy than a quashing order (for instance), there seems no reason why a decision with resource implications which could, in principle, be quashed on the ground of unreasonableness should not also in principle be the subject of a successful action for damages. Conversely, for instance, if a court would not be willing to award damages for loss inflicted by a governmental decision to allocate resources to one activity rather than another, it should not be willing to quash such a decision either.[18]

(ii) Damages require the expenditure of resources

As a remedy, damages have two basic characteristics: first, they involve the shifting of financial resources from the addressee to the beneficiary of the remedy; and secondly, they benefit individuals. Does either of these characteristics render damages unsuitable as a public law remedy?

Consider resource-shifting first. A damages remedy by its nature requires its addressee to expend financial resources in order to comply with it, whereas a declaration, for instance, or a prohibitory order, may not. However, even a non-monetary remedy may have the effect of requiring its addressee to expend financial resources to achieve compliance. For example, decision-making

17 Cane, *op cit* n 5 above, 247-8.

18 See also J. Allison, 'The Procedural Reason for Judicial Restraint' [1994] *PL* 452, 459.

processes are not costless; and if a decision is quashed and the decision-maker is ordered to make a substitute decision, it will have to spend money in order to comply with the remedy. Certainly, a non-monetary remedy will not expressly require the expenditure of financial resources; but this may only mean that its resource implications are hidden at the time the remedy is awarded. Perhaps the most extreme example of a non-monetary remedy with resource implications is what, in the United States, is called a 'structural injunction'; such a remedy may require large amounts of money to be spent to remedy systemic illegality in the administration of government programmes. This is, no doubt, one of the reasons why courts operating in the English tradition do not award structural injunctions. However, it is not only such 'quasi-legislative remedies' which illustrate the potential resource implications of non-monetary remedies. For example, a decision that an individual should have been given a hearing in particular circumstances may require the decision-maker to reactivate the decision-making process and even to spend more on making the second decision than was spent on making the first. Moreover, such a decision may have knock-on effects, requiring the decision-maker to put in place for the future a more elaborate and expensive process for making decisions of a particular type.

I conclude, therefore, that the mere fact that the addressee of a damages remedy must expend resources in order to comply with it does not distinguish damages from other remedies freely available in public law. On the other hand, the fact that the resource implications of the damages remedy are explicit rather than implicit may explain historic reluctance to make the remedy available in public law on the basis that responsibility for spending public money rests with the legislature and the executive, not the courts.

The fact that remedies other than damages may require their addressees to expend resources does not mean that we should be indifferent as between damages and other available remedies.[19] There seems no reason why a person should be allowed to claim damages when he or she could have claimed a suitable alternative remedy which would have required the expenditure of fewer resources. Suppose that a person could have had an adverse decision quashed, but instead they complied with it or let it be executed to their detriment and then claimed damages. If it were reasonable to expect the person to have applied to have the decision quashed, and if by so doing they would have suffered less detriment than in fact they did, their damages ought to be limited to that lesser amount simply on the basis that an applicant for damages ought to take reasonable steps to mitigate their loss.

(iii) Damages benefit individuals

Not only do damages remedies shift financial resources; they shift them to individuals. Is this a reason to be wary about their use in public law? Consider a remedy which, for compliance, requires its addressee to repeat a decision-making process in order to secure a fair hearing for the beneficiary of the remedy. Complying with such a remedy will cost money, but that money will not be

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[19] E. Campbell, 'The Citizen and the State in the Courts' in P.D. Finn (ed), *Essays on Law and Government, Volume 2: The Citizen and the State in the Courts* (Sydney, 1996), 19-20.

shifted to the beneficiary of the remedy. In such a case the immediate benefit of the remedy to the beneficiary is non-pecuniary (a fair hearing); whereas in the case of a damages remedy, the cost of compliance (ignoring the cost of shifting the resources) is equivalent to the benefit of the remedy to the beneficiary. This example suggests that if there is a problem with damages remedies, it is not that they benefit individuals but that they do so by shifting financial resources to individuals.

Does the fact that the immediate benefit of a damages remedy to its beneficiary is financial make it problematic in public law? The traditional argument for answering this question affirmatively rests on the idea that what legitimizes the exercise of power by governments is that governments can secure for the society which they govern benefits which could not be secured at all, or at least as well, by individual action. However, the securing of such benefits may not make every individual in society better off. Indeed, because governments obtain most of their resources from members of the society they govern, any governmental programme which redistributes those resources will make some people better off and others worse off. The more public resources we spend on monetary payments to those made worse off by government programmes to return them to their former position, the fewer resources will be available for the implementation of those programmes. Put crudely, the more we spend on helping losers, the less we will have to spend on creating winners.

However, there are losers and losers. For example, it would be self-defeating to compensate 'losers' in the tax system, that is, those who pay relatively more tax. On the other hand, it seems only right that if the government demands a tax payment which is not due, it should return the overpayment. In other words, a distinction needs to be drawn between what we might call 'endogenous losers' on the one hand, and 'exogenous losers' on the other. Endogenous losers are those who are made worse off by the legitimate operation of legitimate government programmes in the way they were designed to operate. By 'legitimate government programmes' I mean programmes which satisfy any and all constraints imposed on governmental action by constitutions or other democratic techniques; and by 'legitimate operation' I mean an operation which satisfies any and all such constraints. Exogenous losers are those who are made worse off by the operation of an illegitimate feature of a government programme (even though in the way it was designed to operate) or by the operation of a legitimate government programme in an illegitimate way.[20] By an 'illegitimate feature' I mean a feature which does not comply with some democratic constraint on governmental action. While it would be self-defeating to make monetary payments to endogenous losers to return them to their former position, the same could not be said about making such monetary payments to exogenous losers.

If this is accepted, the mere fact that the remedy of damages shifts resources to individuals would not make it problematic in public law. While it may be problematic to pay damages to endogenous losers, it seems much less so to pay them to exogenous losers. This is because the existence of endogenous losers is consistent with the legitimacy of the exercise of government functions to the

20 This distinction is analogous to that between design defects and production defects in the law of product liability.

extent that redistribution of resources is seen as a legitimate government function. By contrast, the existence of exogenous losers is a result of the breach of some constraint on legitimate government action or of the operation of a legitimate programme in an illegitimate way. On this basis, paying damages to exogenous losers may be seen as necessary in order to maintain the legitimacy of government. Governments should not be free to ignore with impunity the constraints imposed on them by their citizens.

The fact that damages shift financial resources to individuals does not, as such, make them problematic in public law. If the 'harm'[21] suffered by an exogenous loser is of a type which some form of damages addresses, damages of that type can at least be said to be an appropriate response to that harm; and we may even want to say that an award of such damages is necessary to maintain the legitimacy of government. On the other hand, the fact that an endogenous loser has suffered harm of a type which some form of damages addresses would not by itself[22] make an award of such damages appropriate. In other words, any problem about using damages as a public law remedy resides not in the nature of damages as a remedy. If there is such a problem, we should look for it not in the nature of damages as a remedy but rather in the grounds on which damages might be awarded in respect of the performance of government functions. It is to that which we now turn.

3. The Grounds of Awards of Damages in Public Law

According to the fundamental tenet, damages are available as a remedy for private law causes of action in tort and contract and perhaps in equity, but not for breaches of public law as such. I have argued elsewhere[23] that causes of action in the law of obligations (contract, tort and trust) can usefully be analysed in terms of three components: protected interests, sanctioned conduct and sanctions. I have also argued that the distinctiveness of the various 'departments' of the law of obligations (contract, tort and so on) resides in differences between the interests protected, the conduct sanctioned and the sanctions provided by those various departments of the law. If we apply this analysis to damages as a public law remedy, three issues deserve discussion. First, are the functions performed by damages under existing causes of action appropriate to public law? Secondly, are there any interests of citizens vis-a-vis government which are not protected by existing causes of action to which damages attach as a remedy but which arguably deserve the protection of a damages remedy? Thirdly, are the rules, principles and concepts relating to sanctioned conduct in private law suitable and adequate to deal with issues arising in public law?

21 This word is parenthesised because I am not using the word in the sense in which it is often used in tort law (as a correlate of compensation) but in a wider sense to refer to whatever way an exogenous loser suffers or is worse off as a result of the performance (or non-performance) of governmental functions.

22 Of course, we do pay damages to some endogenous losers. The traditional trigger for such payments is the 'taking' by the State of private 'property'. Such payments are beyond the scope of this essay.

23 In *The Anatomy of Tort Law* (Oxford, 1997).

(a) The functions of damages

Damages, it will be recalled, perform four main functions: compensatory damages compensate for losses, restorative damages reverse shifts of resources, disgorgement damages require gains to be given up, and punitive damages punish. These four remedial functions seem just as appropriate in relation to breaches of public law as in relation to breaches of private law. If a breach of public law causes loss, compensation seems an appropriate legal response; if a gain is made out of a breach of public law, disgorgement seems an appropriate response; and so on. It has been argued that substantial damages should be available for breach of certain public law rules simply in order to mark the importance of the rule breached.[24] This seems to me to be undesirable. Under existing causes of action, although nominal damages may be awarded simply to mark the fact that a person has suffered a wrong or that their rights have been interfered with, substantial damages may be awarded only in order to further one of the four functions mentioned above.[25] If it is thought necessary to mark in some way the importance of a breach of a public law rule even in a case where it would not be appropriate to award any of the four main types of damages, this should ideally be done by some means other an award of damages, such as the granting of a declaration.

Related to the argument that public law damages can be used to mark the importance of the rule breached is the idea that public law damages can and should be used to deter breaches of public law rules.[26] In assessing this approach it is important to distinguish between deterrence as an effect of awards of damages and deterrence as a justification for or purpose of awards of damages. Deterrence is not the purpose of any of the four types of damages we are dealing with. The purpose of compensatory damages is to compensate and of restorative damages to reverse resource shifts. The purpose of punitive damages is to punish a person for the way they behaved in the past; and the purpose of disgorgement damages is to prevent people profiting by exploitation of the assets of others or by wronging them in some other way. Awarding damages of any type may or may not have deterrent effects, but since the purpose of damages is not deterrence, the probability of such effects should not be taken into account *in individual cases* where liability is established, either in deciding whether damages (as opposed to any other type of remedy) ought to be awarded or in assessing any damages to be awarded.

It is a different question whether the possible effect of damages (or any other remedy) in deterring rule-breaking either by the person against whom they are awarded or others, ought to be taken into account in deciding whether, as a general rule, the remedy ought to be available. Some commentators argue against

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24 *e.g.* M.L. Pilkington, 'Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms' (1984) 62 *Can BR* 517. On the other side see D.J. Mullan, 'Damages for Violation of Constitutional Rights - A False Spring?' (1996) 6 *National J of Constit L* 105. There is a view that substantial damages are available in the tort of defamation even in the absence of actual damage: see Cane, *op cit* n 23 above, 48, n 18.

25 See also *Carey* v. *Piphus* (1978) 435 US 247.

26 *e.g.* P. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven and London, 1983).

expanding public law damages liability on the basis that other remedies (such as injunctions) are better adapted to achieving desired systemic changes in the way government business is conducted, both because they operate more directly and because they can be more precisely targeted; and on the ground that where systemic failings within government result from lack of funds, damages liability may exacerbate rather than ameliorate the problem.[27]Damages are better suited to repairing the past than to remoulding the future.[28] However, it does not follow from such arguments that public law damages liability ought not to be expanded, but only that deterrence is not a good reason for doing so.

A different argument frequently used by English courts in recent years and supported by many commentators to justify restricting the damages liability of public authorities rests on the proposition that awards of damages are likely to make officials overly cautious in performing their functions and even to cause them to neglect the public interest for fear of incurring liability to individuals. This is the argument that damages liability may produce 'overkill' or have a 'chilling effect' on the vigorous performance of governmental functions in the public interest. Whether deterrence is seen as an advantage or a disadvantage of damages liability in respect of the performance (or non-performance) of governmental functions, there is good reason to be cautious about giving the overkill argument too much weight in deciding what role damages should play in public law. First, the argument can be and has been used not only to oppose damages liability but also, for instance, to justify restricting the operation of the idea of estoppel in public law and as an objection to the establishment of the office of ombudsman. Indeed, it is not implausible to suggest that the possibility of any form of *ex post facto* scrutiny of decision-making or conduct may have an effect on the way in which the entity potentially subject to such scrutiny makes decisions and conducts itself. Opinions may differ on how great such an effect might be and whether it is desirable or not. The relevant point here is that it is difficult to treat the overkill argument as providing an argument against damages liability in particular.

A second reason not to give the overkill argument too much weight is that the effect of damages awards (or other forms of *ex post facto* scrutiny) on conduct and decision-making is ultimately a question of fact about which we know very little.[29] Moreover, there is no accepted criterion in this context for what constitutes overkill. People vary greatly in the attitude to risk— what is to one person a sensible precaution is to another a symptom of neurotic timidity. Thirdly, whatever the force of the overkill argument, its relevance is not limited to public

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27 C. Whitman, 'Constitutional Torts' (1980) 79 *Michigan LR* 5, 48-52.

28 This was one of the reasons why the House of Lords refused to award damages in *Hill* v. *Chief Constable of West Yorkshire* [1989] AC 53.

29 For a review of the evidence on judicial review see G. Richardson and M. Sunkin, 'Judicial Review: Questions of Impact' [1996] *PL* 79. It has been argued that as a class, public servants 'are substantially more risk-adverse (sic) than the population as a whole': D.S. Cohen, 'Regulating Regulators: The Legal Environment of the State' (1990) 40 *UTLJ* 213, 225. Cohen's general argument is that damages liability is 'not the instrument one would choose...to minimize the number and severity of accidents [i.e. exogenous harms] associated with the activities of...government' (ibid, 269).

law contexts. For instance, it is often used as an argument for restricting the tort liability of doctors so as not to encourage 'defensive medicine'. It is not obvious that it provides any better (or worse) argument against public law damages liability than against damages liability under existing causes of action.

I conclude, therefore, that there is no good reason why the conditions for the availability of damages based on the nature of the remedy should be different in cases against government than in cases against citizens.

(b) Protected interests

The traditional catalogue of interests protected by private law causes of action includes personal health and safety, private property (both tangible and intangible), rights under contracts, reputation and personal liberty. Such interests are protected both 'horizontally' as between citizen and citizen, and 'vertically' as between citizens and entities exercising governmental functions.[30] Also traditionally recognised is the interest in being fairly heard before being subjected to an adverse decision. For a long time, this interest was thought of as operating only vertically (and only in favour of citizens); but it has more recently also been given horizontal operation in the context, for instance, of protection against unfair dismissal.

The traditional catalogue has been extended, especially in the latter half of the 20th century, by appeal to the notion of 'human rights' and the enactment of statutes and constitutional documents embodying and 'guaranteeing' such rights. Some of the rights recognized in such documents also appear in the traditional catalogue. In such cases, existing causes of action may be sufficient, with or without modification, to provide damages remedies for the protection of such rights. However, some of the new rights do not appear in the traditional catalogue. Of these, some operate horizontally as well as vertically — anti-discrimination rights are, perhaps, the best example; the right to privacy is another. Others are conceived of as rights of citizens only against governments, and not also against other citizens.[31] Because of the traditional identification of damages with private law causes of action, and because private law causes of action may operate both horizontally and vertically, the availability of damages as a remedy for breach of 'horizontal human rights' (by which I mean human rights enforceable both horizontally and vertically) is normally assumed without question in relation to the vertical as well as the horizontal operation of such rights. For instance, government employers as well as private employers are typically bound by measures against discrimination in recruitment, and can be held liable to pay damages to victims of discrimination. It is clear, then, that there are some rights against government, not contained in the traditional catalogue, for infringement of which damages is accepted to be an appropriate remedy.

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30 Some of these interests can be asserted by as well as against the government, but others cannot be asserted by government.

31 See generally A. Clapham, *Human Rights in the Private Sphere* (Oxford, 1993).

By contrast, it is in relation to infringements of 'vertical rights' (by which I mean rights which only operate vertically) that damages may be seen to be more problematic. Thus the High Court of Australia has held that infringements of provisions of the Australian Constitution which impose limits on executive and legislative power are not, as such, remediable by awards of damages because those provisions constitute shields against government which can be used to invalidate or prevent decisions and actions, but not swords which can be used to require decision or action or as the basis for a cause of action for damages.[32]

The main sources of rights against government which are not contained in the traditional catalogue are statutes and constitutional documents (including bills of rights and other human rights documents). Some rights are contained in both. There are, perhaps, two main reasons for this. One is that constitutional documents tend not to be very detailed. If it is felt desirable to define a right or mechanisms for its protection in detail, this is usually done in statutory form. The second is that constitutional documents are basically concerned with the structure and powers of government and the rights of citizens against government. Statute is the more appropriate place to spell out rights which also operate between citizens. On the other hand, constitutional documents are usually more immune than statutes from repeal or amendment by government, and for this reason they provide a measure of protection for rights against the government greater than statute can provide. Often statutory and constitutional documents which confer rights against government do not specify whether damages will be available for infringement of the rights they confer. In such cases, the body with the power to award damages must decide whether the document in question allows or requires damages to be available.

As noted above, the High Court of Australia has held that damages are not available to remedy breaches of the Australian Constitution, even breaches of those (relatively few) provisions which the Court recognizes as conferring vertical rights on citizens against government.[33] By contrast, in the US, breaches of constitutionally guaranteed vertical rights can be remedied both by 'structural injunctions', which require governments to eradicate systemic infringements of human rights, and by awards of damages. Awards of damages for breach of vertical constitutional rights are also available, for instance, in Canada,[34] New Zealand[35] and Ireland[36] and under the European Convention on Human Rights.[37] There is, then, a widely held view that there are vertical rights against

32 See T. Blackshield and G. Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Sydney, 1998), 1033.

33 For a thorough discussion of such provisions see G. Williams, *Human Rights under the Australian Constitution* (Melbourne, 1998).

34 See M.L. Pilkington, *op cit* n 24 above.

35 See J.A. Smillie, 'The Allure of Rights Talk: *Baigent's Case* in the Court of Appeal' (1994) 8 *Otago LR* 188; New Zealand Law Commission, *Crown Liability and Judicial Immunity: A Response to Baigent's case and Harvey* v *Derrick*, Report 37, May, 1997.

36 J.M. Kelly, *The Irish Constitution*, 3rd edn, G. Hogan and G. Whyte (eds), (Dublin, 1994), 702-708.

37 See A. Mowbray, 'The European Court of Human Rights' Approach to Just Satisfaction' [1997] *PL* 647; D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention of Human Rights* (London, 1995), 682-8.

government which deserve the protection of the damages remedy. Foremost amongst such rights are those classified as fundamental human rights.

There are also many interests of citizens which governments seek to protect or further to a greater or lesser extent which are not classified as fundamental human rights. The typical medium of protection of such interests is a statutory document. Courts operating in the English legal tradition typically deal with the question of the actionability in damages of infringements of such interests through the medium of the tort of breach of statutory duty. For instance, the English House of Lords has held that breaches of provisions concerning the administration of prisons and the treatment of prisoners are not actionable in damages;[38] and that breaches of provisions designed to protect the welfare of children are not remediable in damages.[39] These decisions perhaps rest on the distinction between civil and political rights on the one hand, and social and economic rights on the other.[40] In EC law, by contrast, 'serious breach' of any provision of EC law which is 'intended to confer rights on individuals'[41] can give rise to a claim for damages against the government of a member state. This rule has to be understood against the background of the constitutional structure of the EU.[42] The two main forms of EC legislation are regulations and directives. Regulations of their own force create rights and obligations between citizens of Member States. By contrast. directives are 'horizontally effective' in a member State only when they have been 'implemented' in some way by that Member State; and under EC law, Member States are under an obligation to implement directives. But how to enforce the obligation to implement? Because directives are instructions to Member States, the European Court of Justice (ECJ) held that an unimplemented directive was enforceable, but only against the Member State

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38 *R* v. *Deputy Governor of Parkhurst Prison, ex parte Hague* [1992] 1 AC 58.

39 *X* v. *Bedfordshire County Council* [1995] 2 AC 633.

40 A statutory provision which is held not to be actionable in damages would also probably be held not to be enforceable by coercive non-monetary remedies enuring for the benefit of individuals. The main public law remedy used in public interest litigation is the autonomous declaration. The structural injunction used in the US is a coercive public interest remedy. Sunstein argues that the structural injunction is preferable to damages for protecting social and economic rights: C.R. Sunstein, 'Judicial Relief and Public Tort Law' (1983) 92 *Yale LJ* 749. In his view, 'judicial supervision [of government is] an indispensable element in self-government' and not just an external protection for the rights of individuals, as it is in the dominant English tradition in which it is for the political branches of government and not for the courts to decide what the structure of society should be. I agree with Sunstein that damages should not be used to protect public interests. This is one reason why I earlier argued against awards of substantial damages to individuals who have suffered no personal harm.

41 This condition of actionability is analogous to (although apparently less strict than) the requirement in the law of breach of statutory duty that the statutory provision in question, properly construed, protects individuals and gives rise to a right to claim damages; and also to the principle that a duty of care in relation to the exercise of a statutory function will be imposed only if this is 'compatible' with the statutory scheme.

42 But see the excellent account in T. Tridimas, 'Member State Liability in Damages for Breach of Community Law: An Assessment of the Case Law' in J. Beatson and T. Tridimas (ed), *New Directions in European Public Law* (Oxford, 1998), esp. 13-15.

which had failed to implement it. So even if a directive was designed to create rights and obligations between citizens of Member States *inter se*, it would not create such rights and obligations until it was implemented. Until that time, a directive could only create rights and obligations as between Members States and citizens of the EC. Suppose that a citizen of a Member State suffers loss as a result of some conduct of another citizen which would have given rise to a cause of action for damages if an EC directive had been implemented. In *Francovich* v. *Italy*[43] the ECJ held that in such a situation the citizen could recover damages for the loss suffered against the Member State which had failed to implement the directive. Having gone this far, it was only a short step to the decision in *R* v. *Secretary of State for Transport, ex parte Factortame Ltd (No 4)*[44] that any serious breach by the legislative, executive or judicial branch of the government of a Member State of a provision intended to confer rights on individuals gives rise to a cause of action for damages. This decision brought the liability of Member States for breaches of EC law roughly into line with that of EC institutions.

These rules of EC law are concerned with what are called in EC law 'acts intended to have legal effects'.[45] In other words, they are concerned with the exercise of legislative, executive and judicial powers by EC institutions and Member States. They are not concerned, for instance, with the liability of EC institutions or of Member States for personal injury resulting from negligent driving of a car belonging to an EC institution or Member State by an employee of that institution or Member State. The requirement that the breached rule should have been intended to confer rights on individuals is easily satisfied.[46] In EC law the liability of government institutions to pay damages in respect of acts designed to have legal effect is broadly based.

Cohen and Smith have developed a similarly broadly-based theory of public law damages liability outside the context of EC law.[47] They put forward what they call an 'entitlement theory' of public law damages. It is concerned with 'benefits which the state decides individuals are to receive'; that is, with non-constitutional benefits[48] — the benefits which constitutions confer on citizens are beyond the power of the government acting as such to withdraw or abridge. According to the entitlement theory, once the state has decided that citizens should receive a particular benefit, citizens are entitled to receive that benefit or 'damages in lieu thereof'. The theory is put forward apparently as a supplement to tortious liability for negligence as a basis for the award of public law damages. The authors do not offer the entitlement theory as a complete theory of the damages liability of government.[49] It would not, for instance, cover the liability

43 [1991] ECR I - 5359.
44 [1996] QB 404.
45 See T.C. Hartley, *The Foundations of European Community Law*, 3rd edn (Oxford, 1994), 482-98.
46 P. Oliver, 'State Liability in Damages Following *Factortame III*: A Remedy Seen in Context' in Beatson and Tridimas (eds), *op cit* n 42 above, 53.
47 D. Cohen and J.C. Smith, 'Entitlement and the Body Politic' (1986) 64 *Can BR* 1.
48 Ibid, 33; see also 55, n 133.
49 See esp ibid, 15, n 26.

of the state for personal injury resulting from careless driving of a state-owned vehicle by a state employee.[50] The theory only deals with liability for failure by the state to provide benefits which it has decided citizens should receive. Cohen and Smith do not attempt to provide a catalogue of, or even a formula for identifying, such benefits; they admit that doing so is 'an extraordinarily difficult task'.[51] The primary actors in the process of defining entitlements are the legislature and the executive. The courts play a marginal role in entitlement definition, but their main function is to protect entitlements either by requiring government to deliver them or by awarding damages *in lieu*.

It is widely accepted that the availability of damages against the state ought not to be limited to infringement of interests in the traditional catalogue or even to horizontal interests. Is there any reason why the law should not simply be that damages are available as a remedy against the state in any case where a remedy is due and where substantial damages would be an appropriate response to the applicant's claim, given the four functions of awards of damages? Is there any logic in restricting the damages remedy, for instance, to cases of breach of very important interests, or to cases of breach of civil and political rights as opposed to social and economic rights? My view is that provided the person claiming damages is an exogenous as opposed to an endogenous loser[52] as a result of the performance (or non-performance) of governmental functions, there is no reason why damages ought not in principle to be available to rectify the harm suffered by that person. In other words, if a citizen is made worse off by the illegitimate performance (or non-performance) of governmental functions, damages should, in principle, be available to rectify the citizen's position. In this context, 'loser', 'harm' and 'worse off' are all the be understood in terms of the four main functions of damages as a remedy.

(c) Sanctioned conduct

(i) Standards of liability

Having decided which interests to protect by the damages remedy, it is then necessary to decide which sorts of conduct they are to be protected against. Under existing causes of action, the most highly valued interests are protected by strict liability rules. For instance, in tort law, liability for misappropriation of real property or its exploitation without the owner's consent is strict: a person can be liable even if he neither knew nor had reasonable means of knowing that the property belonged to another, and even though the interference with the

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50 On the other hand, a duty not to cause harm may be just as much an entitlement as a duty to confer a benefit: ibid, 12. Cohen and Smith insist in detail and at length that their approach to compensation rights against government is preferable to that based on the tort of negligence (but see 51). Their motivation appears to be a desire to create a strict liability regime to protect 'property-like rights' (20, 31 n 65) to welfare benefits (24) which traditional tort law does not protect by strict liability rules (see esp 44-6).

51 Ibid, 47; see also 55.

52 The issue of paying damages to endogenous losers is beyond the scope of this essay.

property was neither deliberate, reckless or negligent. At the other end of the scale, to the extent that tort law protects an interest in making advantageous contracts, it only does so in respect of deliberate and intentional 'interference with trade'. The interest in personal health and safety falls in the middle: on the whole, it is protected against deliberate, reckless and negligent interference, but it is not protected by strict liability.

In public law, too, the most highly valued interests are protected by strict liability rules. In systems where such claims are allowed, it is no answer to a claim directly against the government for breach of a fundamental human right for the government to plead that the breach was not deliberate, reckless or negligent.[53] Indeed, strict liability is a corollary of rights reasoning — what matters is that the right has been interfered with, and the quality of the interfering conduct is irrelevant. This is not to say that human rights are absolute. On the contrary, most are hedged about with limitations designed to reconcile the rights of individuals with the life of the society in which they live. But such qualifications and limitations are typically built into the definition of the right, not into the definition of 'interference' with the right.

We have seen that in EC law, by contrast, breach of any rule intended to confer rights on individuals can give rise to a claim for damages against a governmental institution of the EC, but only if the breach is 'serious'. A serious breach is one which involves a 'manifest and grave disregard' of the limits of its power by the institution in question. In applying this test, relevant factors are the clarity and precision of the rule breached, the width of discretion left by the law to the institution,[54] whether the breach was 'intentional or voluntary', whether any error of law which led to the breach was 'excusable', and whether the conduct of an EC institution contributed to the breach. In private law terms, seriousness is a form of fault. The ECJ made it clear in *Factortame (No 4)*[55] that the degree of fault entailed in seriousness is less than deliberation or intention. So while liability for damages in EC public law is fault-based, it is more extensive than that imposed by the tort of misfeasance in a public office, the fault element of which is intention to injure or deliberately (i.e. knowingly) acting *ultra vires*.

In the common law, some of the rules of public law, breach of which is remediable by non-monetary public law remedies (such as quashing orders and peremptory orders), entail strict liability. If, for instance, an entity exercising a governmental function makes an error of law or of fact in reaching a decision, that decision can may be quashed even if the error was neither deliberate nor reckless nor negligent.[56] Indeed, Lord Keith asserted in *Takaro* that errors of

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53 But if the claim against the government is based on vicarious liability, the government may not be liable in the absence of fault on the part of the responsible officer if that officer enjoys an immunity from liability for acts done 'in good faith'.

54 For this reason, legislative acts are relatively unlikely to constitute a serious breach. This factor performs an analogous function to the concept of 'policy' in the policy / operational distinction, and to the concept of *Wednesbury* unreasonableness; i.e. it prevents the court intruding unduly into the policy-making sphere of the legislature and the executive.

55 [1996] QB 404, applied in *R* v. *Secretary of State for Transport, ex parte Factortame Ltd (No 5), The [London] Times*, 11 Sept 1997.

56 Strict liability is implicit in the theory of jurisdiction. This is the basis on which

interpretation of statutory provisions (such as could constitute *ultra vires* conduct) will rarely be negligent because reasonable people can usually disagree about what is the correct interpretation. Remediable breaches of natural justice may also be faultless. On the other hand, policy decisions are often challengeable only if they are unreasonable in the (so-called *Wednesbury*)[57] sense of a decision so unreasonable that no reasonable decision-maker, properly understanding its powers and duties, could have made it. This sense of 'unreasonable' is stronger than that normally used in the law of tort. A decision will be *Wednesbury* unreasonable only if no reasonable decision maker could consider it reasonable. *Prima facie*, therefore, a decision which is *Wednesbury* unreasonable would, *ipso facto*, be 'unreasonable' and, therefore, 'negligent' in the sense in which these terms are used in tort law. Indeed, in several recent cases the House of Lords has held that *Wednesbury* unreasonableness is the only ground of public law illegality on which a tort claim for negligence can be based.[58] It has been argued that a decision might be *Wednesbury* unreasonable but not negligent in the tort sense if the decision maker exercised all reasonable care in making it.[59] In my opinion , this is a mistake which arises out of thinking about negligence as a frame of mind (inadvertence) rather than as what it is, namely breach of a standard of conduct. Conduct can be unreasonable and negligent in the tort sense no matter how much deliberation was put into it, if it does not meet the standard required by the law. Viewed in this way, a decision which is so unreasonable that no reasonable decision-maker could have made it must also breach the standard of reasonableness which tort law imposes because under that latter standard, a decision can be unreasonable even though some people (or even a significant number of people) would think it reasonable.

Underlying the fundamental tenet is the proposition that something more than breach of a public law rule is needed to justify awarding damages. That something more is either interference with one of the interests in the traditional catalogue or an element of fault, whether deliberation, intention, recklessness or negligence. We have already seen that the first of these has been abandoned in various legal systems. As for the second, even if it were accepted that there should be no strict liability in damages for breach of public law,[60] it would not be necessary to adopt or maintain the fundamental tenet in order to achieve this result. As EC law shows, it is possible to develop a fault-based system of damages liability for breach of public law rules, if this is thought desirable. There is no theoretical reason why the law governing liability in damages for breach of public law rules should be dependent upon or an adjunct to the law governing liability in damages for breach of private law rules. Ideologically, the main motivation of those, like Dicey in the 19th century and his modern-day followers, who insist

illegally levied taxes and charges can be recovered. In this context, at least, strict damages liability for breach of public law rules already exists.

57 *Associated Provincial Picture Houses* v. *Wednesbury Corporation* [1948] 1 KB 223.

58 *X* v. *Bedfordshire County Council* [1995] 2 AC 633; *Stovin* v. *Wise* [1996] AC 923. Brennan CJ took a similar approach in *Pyrenees Shire Council* v. *Day* (1998) 151 ALR 147.

59 Woolf and Jowell, *op cit.* n 2 above, 763.

60 As argued by J.C. Jeffries, 'Compensation for Constitutional Torts: Reflections on the Significance of Fault' (1989) 88 *Michigan LR* 82.

that citizens and those entities exercising governmental functions should be equal before the law, is that government should enjoy no legal immunities or privileges not enjoyed by its citizens. By contrast, the main motivation of those who support the fundamental tenet is apparently to protect entities which exercise governmental functions from a regime of liability more demanding than that to which citizens are subject in their dealings *inter se*. I agree that governments ought to be subject to the law applicable to dealings between citizens *inter se* with an absolute minimum of qualifications and modifications to take account of the responsibilities of government to the community as a whole. It does not follow, however, that the rules applicable between citizens ought to govern the liability of government in respect of the performance of governmental functions.[61]

I am not suggesting that government should be subject to a dual liability regime, one strand of which would govern exercise by it of governmental functions, and the other strand of which would govern its other activities. My only argument is that the fundamental tenet imposes an unnecessary straightjacket on the development of damages liability for breach of public law rules. The constraint is unnecessary because all of the conceptual and juridical elements and resources used in existing causes of action for damages are also present in public law. Putting the point more concretely, I suspect that supporters of the fundamental tenet assume that the only alternative to existing causes of action as a basis for the damages liability for breaches of public law rules is general strict liability for such breaches.[62] This certainly does not follow. Abandonment of the fundamental tenet would not prevent the development of a rich and flexible 'public law of damages' with the advantage of having been constructed specifically to deal with issues arising from the exercise of governmental powers. Our public law of damages need not consist of 'hand-me-down' causes of action which were not developed to deal with the exercise of governmental powers and which need to be qualified and modified in order to do so.

Of course, the burden of legal history is heavy, especially in systems where the modes of legal thought are dominated by formulae.[63] The relative ease and rapidity with which a full-blown public law of damages has been developed in EC law can be explained partly in terms of the constitutional structure of the EC and the need for the ECJ to develop mechanisms for the enforcement of EC law; but also partly by the fact that the EC legal system so recently started from scratch. In old and arthritic legal systems, such as the common law, a greater leap of imagination is needed to break out of long-established patterns of legal thought. What I am arguing in this article is that if we make explicit the conceptual and juristic elements of the causes of action to which the fundamental tenet refers and of the rules of public law, we find that they share all the basic building

61 See n 4 above for my definition of this term.

62 This theme certainly runs through the judgments in *Northern Territory of Australia* v. *Mengel* (1995) 185 CLR 307 which insist that damages liability ought to rest on fault. Why, the argument seems to run, should liability for economic harm be strict (as harm inflicted by breaches of public law will typically be) when liability for personal injury is fault-based? An answer might be that strict liability is justified as a means for controlling abuse of governmental power.

63 See *op cit* n 23 above, esp. ch 1.

blocks of damages liability. Abandonment of the fundamental tenet would leave us free to put those building blocks together in order to construct a public law of damages which met whatever policy objectives we chose. There is no need to be slaves to existing causes of action in the way the fundamental tenet requires because we are masters of the building blocks out of which they were constructed. We can use those blocks to build whatever new causes of action are needed for the important task of holding government accountable to its citizens in the 21st century.

On the other hand, public law damages liability ought to be thought of as supplementing existing heads of damages liability where this is thought appropriate to remedy breaches of public law which do not fall within existing causes of action. It should not duplicate existing causes of action. If a particular breach of public law falls within an existing cause of action for damages, that cause of action should be used to redress the breach. For instance, a separate cause of action for damages to protect a constitutional guarantee of personal liberty should not be laid on top of common law damages liability protecting the same interest. Concurrent causes of action of this sort are undesirable: either they enable litigants to pick and choose between causes of action on grounds which may have nothing to do with the merits of their claims,[64] or rules to prevent such behaviour need to be developed which typically generate wasteful disputes about the respective spheres of operation of the various causes of action involved. If an existing cause of action needs to be modified to take account of the fact that it is being applied to the performance of governmental functions, this should be done by way of rules which operate within that cause of action and which are applied by the court in deciding whether an claim will succeed, not by the creation of a new cause of action which litigants are free to choose in preference to the existing cause of action for reasons which may be unrelated to those which led to the creation of the new cause of action.[65]

(ii) Omissions

In the law of tort, liability for not preventing harm is more restricted than liability for causing it. The mere fact that a person did not prevent another suffering harm will not trigger damages liability. There needs to be some additional factor to justify the imposition of liability for failure to prevent harm. One of the most important aspects of the landmark decision of the House of Lords in *Anns* v. *Merton London Borough Council*[66] was the acceptance that public bodies having statutory regulatory powers which could be used to prevent harm could, in certain circumstances, be liable in damages for failure to exercise such powers, as well as for the way they were exercised. This approach was, I believe, underpinned by an implicit assumption that the possession by a government body of regulatory powers which could be used for the benefit of citizens to

64 See ibid, 22-4, 199-200.

65 The decision in *Baigent's* case [1994] 3 NZLR 667 is objectionable on this ground. But the Court was forced to create a new cause of action because of the unsatisfactory state of the law in respect of the immunities of government functionaries and vicarious liability (see comment of Gault J at 708). For complications created by the concurrent liability approach see e.g. 678 *per* Cooke P.

66 [1978] AC 728.

prevent them suffering harm constituted an additional factor sufficient, in certain circumstances, to justify the imposition on that body of damages liability for failure to exercise such powers with the result that citizens did not receive the benefit of being saved from harm. In other words, the decision in *Anns* rested on a particular view of the role and responsibilities of government vis-a-vis its citizens. Opposition to the *Anns* approach was based mainly on the overkill argument and on the observation that imposing damages liability on government for regulatory failure burdened the taxpayer to the benefit of those amongst the regulated group whose substandard conduct was the immediate cause of the harm.

In the UK in the 1980s, the *Anns* view of the role of government became deeply unpopular, giving way to an ideological starting-point that as a general rule, people should take adequate steps to protect themselves against harm and not rely on others to do it for them. This new approach was applied both in dealing with damages claims made by one citizen against another and in dealing with damages claims made by citizens against government regulators. By contrast, courts in Australia, Canada and New Zealand, for example, have been more prepared to award damages in respect of regulatory failures on the part of government. Cohen and Smith argue that while reluctance to impose damages liability on a citizen for failure to prevent harm to another citizen is often justified, the law ought to take a different attitude to failure by government to perform its harm-prevention functions.[67] Under their entitlement theory of public law liability, citizens are entitled to receive benefits which government has decided they should receive, or damages *in lieu*. Under this theory, the distinction between performing and failing to perform governmental functions contrary to law is of no importance because the focus of the theory is the entitlements of citizens, not the conduct of entities charged with governmental functions. In the view of Cohen and Smith, using existing causes of action (most notably the tort of negligence) as the basis for public law damages liability introduces into public law a distinction between misfeasance and nonfeasance which has no place there.

At one level, the debate about the proper scope of government damages liability for nonfeasance is independent of the debate about the fundamental tenet. Neither the decision in *Anns* nor criticism of it challenged that tenet. On the other hand, abandonment of and pressure to abandon the fundamental tenet is largely based on a shift of focus from the behaviour of government to the rights of citizens. The entitlement theory of Cohen and Smith generalizes the underlying rights-centred logic of decisions such as *Bivens*[68] and *Baigent*[69] and of remedial provisions in bills of rights. As Cohen and Smith rightly argue, the distinction between misfeasance and nonfeasance makes less sense from a rights-centred perspective than in traditional tort law. Abandonment of the fundamental tenet might, therefore, lead to an expansion of government liability for nonfeasance, as Smith and Cohen appear to desire. The extent of that expansion would depend partly on whether the abandonment took the form of adoption of a general entitlement theory or an incremental extension of the grounds of government

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[67] *Op cit* n 47 above.

[68] See n 70 below.

[69] See n. 35 above.

damages liability to encompass rights not included in the traditional catalogue and breaches of public law rules not currently actionable in damages.

Nevertheless, the debate about government liability for nonfeasance is of only incidental relevance to the central issue addressed in this article, namely the desirability of maintaining the fundamental tenet.

(iii) Vicarious liability

An important feature of the famous case of *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*,[70] in which the US Supreme Court first imposed damages liability for breach of the Fourth Amendment to the US Constitution, was that the agents who had committed the unconstitutional acts on which the claim was founded were protected by a federal statute from personal liability in tort. As a result, the agents could not be held liable, and the government could not be held vicariously liable. Instead, the damages liability imposed by the Court rested on government directly, not indirectly by way of vicarious liability for the conduct of government functionaries. In this case, the operation of the traditional rules of vicarious liability precipitated the development of public law damages liability.[71]

The personal liability of government functionaries is an application of basic principles of legal responsibility; and the principle of equality before the law requires that government functionaries should, as nearly as possible, be legally responsible for their conduct as if they were not acting on behalf of the government. On the other hand, persons exercising governmental functions are often more or less protected by statute from legal liability; and traditionally, servants and agents of the Crown enjoyed common law immunity. Even where government functionaries are not protected from the operation of the ordinary rules of legal responsibility, in practice they are rarely worth suing for damages and are rarely sued. Typically, the government is sued, and any liability imposed is vicarious. No doubt, too, governments rarely if ever seek to enforce their right of indemnity against their functionaries, instead taking whatever disciplinary or preventive measures seem appropriate through other mechanisms.

In my view, vicarious liability has no useful part to play in public law.[72] Vicarious liability may be seen either as a loss-shifting mechanism to maximize

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70 (1971) 403 US 388. See W.E. Dellinger, 'Of Rights and Remedies: The Constitution as Sword' (1972) 85 *Harv LR* 1532, 1534-7. Concerning the damages liability of the states for breaches of the constitution see C. Wightman, 'Constitutional Torts' (1980) 79 *Michigan LR* 5.

71 The same process was at work in *Baigent's* case [1994] 3 NZLR 886.

72 I make no comment here on its proper role in relation to breaches of private law by government employees. C.L. Pannam, 'Tortious Liability for Acts Performed under an Unconstitutional Statute' (1966) 5 *Melb ULR* 113 argues that personal liability of government employees was developed to overcome the immunity of the government from tort liability and only makes sense against that background. He favours employee immunity (at least where the employee was not at fault) and government liability; but he suggests modification of the rules of vicarious liability to achieve this rather than the recognition of direct governmental liability.

the chance that victims of legal wrongs will find a solvent defendant; or as based on some normative principle which justifies imposing liability on someone other than the person whose conduct gave rise to the claim in question. In terms of loss-shifting, since the government will always be a better target than its functionaries, there seems little reason to insist that its liability is indirect rather than direct. In constitutional terms, it is arguable that the government[73] should take direct responsibility for the exercise of governmental functions by its functionaries even in cases where the functionary deliberately or intentionally abuses his or her power and position to the detriment of a citizen. Breaches of public law are often symptomatic of systemic defects in the conduct of government business for which the government should accept direct responsibility even (and especially) if it is not possible to identify the individual government functionaries whose conduct directly caused the harm complained of. But in other cases, too, direct liability is justified by the power of government vis-a-vis its citizens. The idea, implicit in the doctrine of vicarious liability, that the liability of the employer is secondary rather than primary seems out of place when the employer is the government. Consistently with this approach, I think that the rule that governments are not liable for torts committed by functionaries exercising 'independent discretions', to the extent that it still exists, should be entirely abolished; as should any rule that governments are not liable for torts of independent contractors performing governmental functions. Nor should the government, via the doctrine of vicarious liability, be allowed to take advantage of immunities attaching to its functionaries. Such immunities are designed to protect those who act on behalf of the government, not the government itself. In the public law of damages, the government should, and its functionaries should not,[74] be liable to citizens for the exercise of governmental functions. The public law of damages should not be the medium through which the conduct of government functionaries is controlled. Unlike some commentators,[75] I would not justify this conclusion by appeal to the overkill argument because that argument also applies to direct governmental liability: if government functionaries (who typically do not pay any damages awarded against them) may be rendered overcautious by the fear of damages liability, the same fear (backed, in their case, by the risk that the government will have to pay damages) may cause their superiors to instruct them to be overcautious.

The conclusion that government functionaries should not be personally liable is neither controversial or new: witness the fact that statutory provisions protecting government employees from liability for the exercise of governmental

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73 I leave aside complications arising from the fragmentation of the conduct of government functions by techniques such as outsourcing and the creation of quasi-autonomous administrative units within government. For present purposes it is sufficient to distinguish between individual employees and the corporate entities for whom they work without worrying about principles of responsibility relevant to cases where several corporate entities are related in a network of entities which share responsibility for the conduct of particular government functions. On this issue see New Zealand Law Commission, *Crown Liability and Judicial Immunity* (1997), paras 57, 87-90, 97-107.

74 Cf Pilkington, *op cit* n 24 above, 555-562.

75 *e.g.* Pannam, *op cit* n 72 above, 124.

functions are by no means rare. However, many such statutory provisions and the views of most commentators go no further than providing protection from liability for the *bona fide* exercise of governmental functions.[76] The common view is that where a government functionary acts deliberately, intentionally or maliciously beyond power, or even negligently, the functionary should be subject to personal liability in order to punish and deter such conduct. This approach is undercut by the fact that the government can be held vicariously liable even in respect of such conduct.[77] Moreover, I think that it is symbolically important that the government should accept responsibility to citizens even for the conduct of rogue functionaries; and that the punitive and deterrent goals be met by arrangements within government (which may, of course, themselves, be subject to legal or political scrutiny).

(iv) Immunities

If this conclusion is accepted, the next obvious question is whether government ought ever to be immune from damages liability in respect of particular government functions. Two possible immunities deserve discussion because they find expression in some form or other in the law of many common law systems. They relate to the performance of judicial functions and to policy-making.

Whatever arguments there may be for immunizing judicial officers from personal liability, in my view they do not apply to government liability for the performance of judicial functions. In EC law, damages liability attaches under the *Factortame* principle to all organs of government— legislative, executive and judicial. Under human rights documents, judicial decisions, as much as legislative and executive acts, must respect human rights;[78] the only exception (demanded by logic) being decisions of a judicial body in exercise of ultimate jurisdiction to settle the meaning of the document. I am certainly not arguing that every incorrect judicial decision should give rise to a claim for damages, or that a person dissatisfied with a judicial decision should be able to bypass normal appeal mechanisms by making a claim for damages. My argument is only that there is no reason why government should enjoy a blanket immunity from damages in respect of the exercise of judicial functions. There is nothing in the nature of judicial functions which requires or justifies such immunity.

So far as policy-making functions are concerned, I think that separation of powers principles, the desirability that the judiciary be independent, and the unelected and politically unaccountable nature of judicial office all demand that

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76 But see the dissenting judgment of Gault J in *Baigent's* case [1994] 3 NZLR 667, strongly criticized by Smillie, *op cit* n 36 above, 198.

77 Concerning vicarious liability for misfeasance in a public office see *Racz* v. *Home Office* [1994] 2 AC 45. It would seem to follow from this decision that there could be vicarious liability to pay punitive damages which are available in respect of abuse of governmental power. If government can be vicariously liable to pay punitive damages, perhaps direct governmental liability to pay such damages should be possible; but cf Pilkington, *op cit* n 24 above, 574.

78 Subject to the scope of the document in question. If the document does not apply between citizens *inter se* but only as between citizens and government, much judicial activity will be beyond the purview of the document. See *e.g.* the discussion in Clapham *op cit* n 31 above, 164-9.

on many matters, the judiciary should defer to the legislature and the executive, and in such matters only play a marginal role. There is no way of defining with analytical rigour the sort of matters on which the judiciary ought to defer to the other branches of government or how deferential the courts should be. Certainly, the principle of judicial deference is relevant to the awarding of non-monetary and monetary remedies alike. We have already concluded that there is nothing in the nature of damages as a remedy which makes it less suitable as a public law remedy than non-monetary remedies freely available in public law. There are some functions, such as the formulation of national economic policy, which, in accordance with the principle of restrained intrusion, would not be subject to judicial review except in the most extreme circumstances. Whether there are any areas of government policy-making which should be entirely immune from judicial scrutiny is a question difficult to answer in the abstract; but even if there are, principles of good government surely demand that they be very few.

(d) Conclusion

This discussion shows that there are important issues to be resolved in deciding whether and in what ways the rules governing the award of damages against the government should differ from those governing damages awards against citizens. To some extent, continued adherence to the fundamental tenet may result partly from a fear that if it were abandoned, certain of these issues would necessarily be resolved in ways which judges find unsatisfactory. I believe that this fear is groundless. Damages liability beyond that falling within existing causes of action would not necessarily be strict; it need not fall on individual public employees; and it need not extend to all breaches of public law rules. All these issues are up for grabs. At all events, developments around the world suggest that the High Court of Australia will not be able to maintain its strict adherence to the fundamental tenet for ever. Sooner or later it will have to address the many difficult issues about the proper scope of damages liability for the performance of government functions free of the shackles of the fundamental tenet.

4. The Source of the Damages

The definition of damages I have adopted in this paper is not restricted to monetary remedies awarded by courts or for breaches of legal rules. In fact, there are two very important non-judicial sources of damages which demand attention in any discussion of public law damages. These are recommendations of ombudsmen and governmental *ex gratia* compensation schemes. In some countries, at least, ombudsmen make recommendations for the payment of damages (which are complied with) much more often than courts and in situations where courts cannot or will not award damages remedies.[79] Nor are the amounts paid out invariably insignificant: in one case, after a major investigation by the ombudsman of the conduct of a government department,

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79 See *e.g.* P. Brown, 'The Ombudsman: Remedies for Misinformation' in G. Richardson and H. Genn (eds), *Administrative Law and Government Action* (Oxford, 1994), 309.

the UK government paid out about £150 million to people who had deposited money in a failed investment group. All governments adopt more or less formalized schemes for payments of damages without admission of liability, and the administration of such schemes may itself be subject to judicial scrutiny.[80] In the UK, one of the principles of the Citizen's Charter is the payment of damages in appropriate cases. In that context, indeed, the UK government has accepted a general principle that when a person has suffered financial loss as a direct result of maladministration, compensation should be paid to put the person in the position he or she would have been in if the maladministration had not occurred.[81] In the words of Harlow and Rawlings, 'The common law does not recognise a general principle of administrative compensation but the administration does'.[82] All this reinforces the assertion of this article that there is nothing in the nature of damages as a remedy which makes it unsuitable as a public law remedy. It also suggests that the grounds on which courts are willing to award damages are narrower than those on which governments are prepared to pay damages on the recommendation of ombudsmen or of their own accord under *ex gratia* schemes.

In the UK, one of the motivations for making damages available under the Citizen's Charter was to give government bodies an added incentive to efficiency and good service. Critics argued that paying damages in respect of past failings would typically reduce the amount of money available to increase efficiency and improve service in the future. This argument deserves to be taken seriously. It is important not to lose sight of the fact that the paying of damages by publicly-funded entities is an item of public expenditure. It was suggested earlier that some of the judicial reluctance to develop damages as a public law remedy springs from the precisely this insight. However, in my view, it is not the prime responsibility of the courts or other bodies with the power to award or recommend the payment of damages to give effect to this argument. The prime responsibility for making decisions about public spending rests with the executive and the legislature. The relatively greater willingness of ombudsmen to recommend damages may partly be a function of the fact that in theory, at least, the government can refuse to pay: the ultimate power of the purse remains with the government. By contrast, judicial awards of damages impose an obligation to pay which it is very difficult for governments to ignore. In practice, however, it may be just as difficult for a government to reject a recommendation of an ombudsman that damages be paid as to ignore a judicial award of damages.

In my view, the courts should not allow their attitude to public law damages to be unduly swayed by the fact that damages payments involve public expenditure. In fact, doing so relieves the government of the need to make important decisions about how public money should be allocated as between making amends for past failings and improving matters for the future. It is not the role of the courts to refuse to develop a public law of damages because to do

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80 The Australian Ombudsman has recently expressed concern about the Commonwealth's compensation arrangements especially as they relate to incorrect advice: Annual Report, 1996-7, ch 5. Concerning judicial review of *ex gratia* payments see Woolf and Jowell, *op cit* n 2 above, 760.

81 Cane, *op cit* n 5 above, 79-80.

82 C. Harlow and R. Rawlings, *Law and Administration*, 2nd edn (London, 1997), 633.

so would make greater demands on the public purse. If leaving this consideration aside, it seems consistent with sound legal principles to expand the public law of damages, the courts should do so and leave it to the executive and the legislature to react if they think that public law damages liability has become too extensive.

This conclusion would suggest that there should be no *constitutional* right to damages for breaches of public law[83] and that the legislature should be left free to remove rights to damages conferred by the courts. The right to damages is constitutionally entrenched under EC law[84] and under the European Convention on Human Rights.[85] In Canada, too, (in contrast to the position in the US) the ultimate power to fashion remedies for breaches of the Charter of Rights and Freedoms rests with the courts.[86] But even if we were prepared to contemplate a constitutional right to damages for very serious breaches of public law or for interference with very important rights, my view is that a general constitutional right to damages for breaches of public law would impose unacceptable constraints on the power of the government to make public spending decisions, and hence its freedom to formulate and give effect to social and economic policy. One suggestion is that the government should be free to remove rights to damages for breaches of public law but only to the extent that some adequate alternative remedy is provided.[87] The problem with this suggestion is that the only adequate alternative to court-ordered damages would be an equivalent monetary remedy from another source; and such an alternative would not produce any less impact on public spending.

5. Conclusion

Strict adherence to the fundamental tenet is becoming a minority position. In my view, there are no sound reasons of legal policy why the damages liability of government should be limited to existing causes of action in the law of obligations when the amenability of government to other remedies is not so limited. Abandonment of the fundamental tenet does, of course, raise many difficult issues about the desirable scope of government damages beyond existing causes of action, but the existence and difficulty of such issues does not provide an argument for adherence to the fundamental tenet. The fundamental tenet is no more than a dogmatic assertion which bars consideration of important questions about the relationship between government and its citizens and about the accountability of government.

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83 This may have been one of the factors which led the High Court of Australia to refuse to create an independent cause of action for breach of the Constitution.

84 The right to damages against organs of government of Member States for serious breaches of EC law has been grounded by the European Court of Justice in provisions of the Treaty of Rome, the EC's constitution. At first, the ECJ took the view that remedies were a matter for the courts of Member States, but as time has gone on, it has come to exercise more and more control over remedies, including such matters as statutory exclusions, time limits and quantum.

85 See A. Mowbray, *op. cit.* n. 37 above.

86 Pilkington, *op cit* n 24 above, 529-32.

87 G.R. Nichol, '*Bivens, Chilicky*, and Constitutional Damages Claims' (1989) 75 *Va LR* 1117, 1142-5.

My argument in this article has not been that government damages liability ought to extend beyond existing causes of action, but only that there is nothing in the nature of damages as a remedy which justifies the adoption of the fundamental tenet in relation to it alone and that the fundamental tenet should be abandoned in order to allow the issue of governmental damages liability to be properly addressed.