The Independent Discretionary Function Principle and Public Officers

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INTRODUCTION

In 1986 in the decision of *Oceanic Crest Shipping Company* v *Pilbara Harbour Services Pty Ltd*[1] a majority of the High Court of Australia, following the older decision of *Fowles* v *Eastern & Australian Steamship Co Ltd*,[2] confirmed that the independent discretionary function principle was applicable to a ship's pilot with the result that the pilot's employer was not vicariously liable for the pilot's tortious acts. The independent discretionary function principle is one that has developed in 'public' law in the context of vicarious liability in tort. The basic idea behind this principle is that if powers are conferred by law directly upon an employee, such person is considered to be executing an 'independent discretion' or 'original authority' for the consequences of which the employer is not vicariously responsible.[3] As Gibbs CJ expressed it in *Oceanic Crest Shipping*, the employee is considered to be 'executing an independent legal duty conferred on him by law and his powers are not derived from the general employer'.[4]

The corollary of the independent discretionary function principle, and one which the decision of the High Court in *Oceanic Crest Shipping* confirms, is that a person who exercises an independent discretionary function is acting as a public officer in the public interest, rather than in the direct interests of an employer. On the facts of *Oceanic Crest Shipping*, there was one important difference with the *Fowles* case. In the latter case, the ship's pilot was employed as a public servant,[5] whereas in *Oceanic Crest Shipping* the pilot was employed by a private company. In other words the result of the decision in *Oceanic Crest Shipping* is that the independent discretionary function principle and the concept of a public officer may be applicable to privately employed persons as well as to employees of the Crown and public authorities. The implication of that result is that in certain circumstances a privately employed person will be considered to be a public officer. The result

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1 (1986) 160 CLR 626; (1986) 66 ALR 29 (subsequently *Oceanic Crest Shipping*).

2 [1916] 2 AC 556.

3 The corollary of this principle is the personal liability of the individual officer either through negligence, breach of statutory duty or the tort of misfeasance in a public office. (E.g. *Farrington* v *Thomson & Bridgland* [1959] VR 286.) See *Baume* v *Commonwealth* (1906) 4 CLR 97, 110–1. The availability of a remedy against the individual will of course depend upon being able to identify the individual tortfeasor.

4 (1986) 160 CLR 626, 642; (1986) 66 ALR 29, 37.

5 Pursuant to the *Navigation Act* 1876 (Qld) pilots were licensed by the Marine Board, a government department and were civil servants for the purpose of the *Public Service Act* 1896 (Qld).

of the decision is curious when it is considered that the independent discretionary function principle developed in the context of the vicarious liability of public authorities and the Crown. The paradigm illustration of the principle is in relation to police officers.[6]

In this article I consider the history and development of the independent discretionary function principle and its relationship to general principles of vicarious liability. The question that is raised is whether the independent discretionary function principle is a special example of general principles of vicarious liability[7] or whether, indeed, it embodies a public law liability doctrine. If the latter answer is correct, then two further questions arise. First, should both public and private employers be able to take advantage of the independent discretionary function principle, and secondly, does the principle apply equally to common law and statutory powers? On the other hand, if the independent discretionary function principle is an application of vicarious liability principles, how does it fit into the vicarious liability model? Does it exempt the employer from liability because the employee is considered not to be a servant of the employer, or is the employer exempt because the employee is not acting in the course of employment?[8]

It is necessary to see what answers the High Court of Australia provided in *Oceanic Crest Shipping,* before looking at the origins of the principle provisions in some Crown proceedings legislation which attempt to abrogate it.

THE DECISION IN OCEAN CREST SHIPPING

Oceanic Crest Shipping involved an action for indemnity brought by the owner of a ship which damaged a wharf, against the employer of the pilot whose negligence had caused the damage.[9] The pilot had been provided by the employer, a private company, Pilbara Harbour Services Pty Ltd (Pilbara), which had statutory authority to provide port services.[10] Separate legislation

[6] The rule is discussed in that context by M R Goode, 'The Impositions of Vicarious Liability to Torts of Police Officers : Considerations of Policy' (1975) 10 *Melb Uni LR* 47; and S Churches, '"Bona Fide" Police Torts and Crown Immunity : A Paradigm of the Case for Judge Made law' (1980) 6 *Uni Tas LR* 294, who argue that the principle is insupportable.

[7] Eg PW Hogg, *Liability of the Crown* (North Ryde, Law Book Company, 1971) 104–8, 212; FA Trindade and P Cane, *The Law of Torts in Australia* (Melbourne, OUP, 1985) 599; *Jobling* v *Blacktown Municipal Council* [1969] 1 NSWLR 129; *Commonwealth* v *Connell* (1986) 5 NSWLR 218; (NSW) *Parl Debates* (HA) 17 March 1983, pp 4764–5.

[8] See PS Atiyah, *Vicarious Liability in the Law of Torts* (London, Butterworths, 1967) 78. Atiyah has pointed out that there is a third issue involved in fitting the independent discretionary function principle into the vicarious liability model; the fact that the employee is exercising a statutory duty may make it difficult to attribute that liability to the employer. Eg *Darling Island Stevedoring & Lighterage Co* v *Long* (1957) 97 CLR 36.

[9] The finding of the Full Court of the Supreme Court of Western Australia that the pilot was negligent was not challenged on appeal to the High Court of Australia.

[10] Pilbara was in fact a wholly owned subsidiary and assignee of Hamersley Iron Pty Ltd (Hamersley) under the *Iron Ore (Hamersley Range) Agreement Act* 1963 (WA). Pursuant

made pilotage for vessels entering or leaving the port compulsory.[11] The pilot was employed by Pilbara at an annual salary and subsequently appointed by the Governor to be a pilot for the port. It was held, by three judges to two,[12] that the pilot was exercising an independent function for which the employer was not liable. Thus, the result of *Oceanic Crest Shipping* is that the immunity provided by the independent discretionary function principle extends under the general law to three categories of employers, namely the Crown, a statutory authority and a private employer.

Of the three majority judgments, the judgment of Gibbs CJ reflects the broadest view of the operation of the independent discretionary function principle.[13] He regarded the independent discretionary function principle as different from, but probably consistent with, ordinary principles of vicarious liability.[14] He went so far as to suggest that the doctrine 'does not exempt the employer from liability on the ground that the relationship of master and servant does not exist'.[15] He also considered that the independent discretionary function principle was not limited to cases in which the duty was imposed by law, but that it extended to cases where the duty was imposed either by common law or by statute.[16] Further, he considered the authorities consistent with the view that the principle was not confined to employees of the Crown.[17] He regarded the basis of the doctrine as arising from the nature of the independent duty.[18] He cited[19] Dixon J in *Field* v *Nott* when he said:[20]

> When a *public officer,* although a servant of the Crown, is executing an independent duty which the law casts upon him, the Crown is not liable for the wrongful acts he may commit in the course of its execution. As the law charges him with a discretion and responsibility which rests upon him in virtue of his office or of some designation under the law, he alone is liable for any breach of duty.

The principle, Gibbs CJ said,[21]

> is not limited to cases in which the duty which is being carried out is imposed by statute — the question is whether the person who committed the tort was acting in the performance (or supposed performance) of a duty

to a by-law made under that Act, Hamersley had the entire control of all port services. The facts are more fully set out below.

11 Pursuant to the *Port of Dampier Regulations 1971* MADE UNDER THE *Shipping Pilotage Act* 1967 (WA).

12 Gibbs CJ, Wilson and Dawson JJ were in the majority. Brennan and Deane JJ dissented.

13 It should be noted that his judgment is accepted in *State of South Australia* v *Kubicki* (1987) 46 SASR 282 and in *Esso Petroleum Co Ltd* v *Hall Russell & Co Ltd* [1989] 1 All ER 37.

14 (1986) 160 CLR 626, 639–40; (1986) 66 ALR 29, 33–5 He appears to see both derived loosely from the notion of control.

15 Id 639; 34.

16 Id 638; 33.

17 Id 639, 640; 34, 35.

18 Id 638, 640; 33, 35.

19 Id 639; 35.

20 (1939) 62 CLR 660, 675 (emphasis added).

21 (1986) 160 CLR 626, 637; (1986) 66 ALR 29.

imposed by law (either by statute or by common law) or whether his authority to act was derived from his employment.

He concluded that the decision in *Fowles* v *Eastern and Australian Steamship Co Ltd,*[22] 'rests on an intelligible principle and is not in conflict with fundamental doctrine'.[23]

The judgments of Wilson and Dawson JJ, who agreed in the result with Gibbs CJ are important because of the contrasting views they contain. Wilson J did not doubt that the principle applied to all three types of employers: the Crown, statutory corporations and private companies.[24] Dawson J however was slightly bothered by that issue. He considered that whether there was a distinction to be drawn when a person was privately employed, was a question of 'some difficulty',[25] but that on the facts of *Oceanic Crest Shipping* it was not possible to regard the pilot as having been privately employed, as he was appointed by the Governor of the State. However, he stressed that Pilbara had not taken over the government's function of superintending the harbour and providing properly qualified pilots and that its 'responsibility to *Oceanic* was discharged when it provided a competent pilot'.[26] He considered, in other words, that Pilbara was not exercising a governmental function. He appears to be suggesting therefore that a distinction has to be drawn between the function of the employer and the basis upon which an employee is engaged; that on the facts the pilot's duty was independent of Pilbara's function.

Both Wilson and Dawson JJ regarded the application of the principle as involving issues separate from those of general vicarious liability and emphasised the status of the pilot. Wilson J regarded the general issue as concerning 'control of an employee by a master so as to make the servant's act that of the master',[27] whereas the independent discretionary function principle was concerned with 'status and statutory authority'.[28] He stressed the fact that the pilot derived his authority from statute rather than from his appointment by Pilbara. He said:

> It was his personal authority, and his alone. This consideration invites the further comment that it is the statutory authority possessed by the servant that renders the employer immune to vicarious responsibility.[29]

For that reason, the status of the employer was 'immaterial', he said.

Distinguishing between the vicarious liability test and the independent discretionary function principle, Dawson J said in relation to the former:

> It is not so much that there is no right of control, but that it is *practically*

[22] [1916] 2 AC 556.
[23] (1986) 160 CLR 626, 642. (1986) 66 ALR 29, 37; In fact, the reasoning of the Privy Council in *Fowles* turned very much upon the fact that pilots were originally employed by masters of ships 'as a matter of private enterprise' and that for 'public reasons' the system was changed to a statutory licensing scheme. See [1916] 2 AC 556, 560–1.
[24] Id 648; 43.
[25] Id 681; 66.
[26] Id 682; 66.
[27] Id 650; 42.
[28] Ibid.
[29] Id 650; 42–3.

> impossible to exercise it because of the skill involved . . . .[30] He continued: On the other hand, in the case of a pilot in the general employ of the Crown or a harbour authority or its equivalent, it is the very nature of the relationship and of the status conferred upon the pilot which is inconsistent with the exercise of control by his general employer over the manner in which he carries out his actual duties as a pilot.[31]

Although neither Wilson J nor Dawson J dealt expressly with the question of whether the independent discretionary function principle applies to the exercise of both statutory and common law powers, Wilson J stressed the fact that the pilot was exercising a statutory authority.

Brennan J, dissenting, took the narrowest and most traditional view of the scope of the independent discretionary function principle. He limited the application of the principle to persons exercising statutory authority and employed by the Crown or a public authority. He said:

> When the Crown and a public authority is the employer of a public officer who is charged by statute with the exercise of an "independent responsibility cast on him by law" . . . what is done in discharge of that responsibility is not done on behalf of the employer . . .. The statute which charges the officer-employee with the exercise of the independent responsibility denies that what he does in discharge of that responsibility is done on behalf of or for the benefit of the Crown or public authority.[32]

He excepted from the application of this principle private trading operations which have a commercial interest in the employees' exercise of the statutory responsibility. He suggested that in the case of a private employer, ordinary principles of vicarious liability would apply to deny liability,[33] but that where the employer is the Crown or a public authority, they would escape liability because it was 'not a function which the employer is authorised to perform'.[34] His remarks here are a little ambiguous, for he could be taken as suggesting that the immunity of the Crown and statutory authorities is simply a particular application of general principles of vicarious liability which he accepted as the 'right to control' test enunciated by Mason J in *Stevens* v *Brodribb Sawmilling Co Pty Ltd.*[35]

Deane J also dissented but unlike Brennan J he attacked the general notion of the independent discretionary function principle. He considered that the principle should simply be an application of vicarious liability principles and that it applied to all 'specialist' employees. He said:[36]

> The proposition that a general employer, be it a public instrumentality or private company, is not vicariously liable for the negligence of licensed pilots in its employ . . . lies ill indeed with the ordinary principles governing

[30] Id 683; 67 (emphasis added).
[31] Ibid.
[32] Id 662; 52.
[33] He accepted the 'right to control' test suggested by Mason J in *Stevens* v *Brodribb Sawmilling Co Pty Ltd* (1986) 60 ALJR 194, 198. See (1986) 66 ALR 29, 53; 160 CLR 626, 663.
[34] Ibid.
[35] (1986) 60 ALJR 194, 198.
[36] (1986) 160 CLR 626, 676; (1986) 66 ALR 29, 62.

> vicarious liability in tort which, however uncertain they may have been . . . are not incontrovertible.

He was concerned that, despite a long line of authority supporting the independent discretionary function principle, and the fact that parties may well have negotiated insurance on the basis of such liability, the principle had failed to keep pace with modern developments. 'The specialist employee' he said;[37]

> be he engineer, architect, lawyer, computer operator, airline pilot, ferry-master or taxicab — has become almost as much the rule as the exception. He frequently performs his duties as an employee under the authority of a personal statutory licence.

He suggested that if the general principles of vicarious liability were to be applied, in those circumstances, an employer would be liable. But even so, Deane J would have been prepared to follow the line of authority, had it not been for the fact that 'serious practical injustice could well flow from its application'[38] to pilots as injured parties would be unable to obtain compensation for injury.[39] Accordingly, he decided that the application of the independent discretionary function principle should be confined to the situation where the employer of a licensed port pilot is either the Crown or a government instrumentality.[40] He concluded that in relation to pilots, it was 'unreal' to see their role as that of 'public officers' entrusted with the performance of public duties.'[41]

In summary, in *Oceanic Crest Shipping*, of the five judges, only Gibbs CJ expressly recognised that the independent discretionary function principle applies to the exercise of both common law and statutory powers by employees, whereas Brennan J limited the application of the principle to the exercise of statutory powers. Gibbs CJ and Wilson J extended the principle to the three categories of employers, whereas Brennan and Deane JJ limited it to 'public' employers. Dawson J however emphasised the 'public' nature of the pilot's employment. All the judges in the majority saw the principle as different to and distinct from the application of ordinary principles of vicarious liability. Nevertheless, the test which Gibbs CJ, Wilson and Dawson JJ applied to determine whether the pilot was exercising an independent discretionary function was the control test (which Dawson J said meant something other than the right to control practically). The control test is applied[42] in the context of ordinary vicarous liability to determine whether a master-servant relationship arises. This might suggest that they regarded the independent discretionary function as a special application of vicarious liability principles. However Gibbs CJ expressly denied that his conclusion was

[37] Ibid.
[38] Id 677; 62–3.
[39] There are frequent claims in respect to negligent acts by ship pilots. For example, there is a current claim in the New South Wales Supreme Court arising from the grounding of the cruise ship 'Mikhail Lermontov' in New Zealand in February 1986.
[40] Id 679; 63.
[41] Id 629; 64–5.
[42] *Stevens* v *Brodribb Sawmilling Company Pty Ltd* (1986) 60 ALJR 194.

related to that issue.[43] The reasoning of the High Court on the issue of the relationship between the independent discretionary function principle and general principles of vicarious liability, is somewhat ambiguous and fails to explore the question of how the principle fits into the vicarious liability model.

Despite individual variations in the judgments, the main difference between Brennan J and the majority (Gibbs CJ, Dawson and Wilson JJ) is that he stressed the nature of Pilbara's function whereas the majority emphasized the fact that the pilot's duty was imposed upon him directly by law. All four judges were however in agreement that in considering the application of the independent discretionary function principle a basic distinction has to be made as to the source of the employee's authority — whether, to use the words of Gibbs CJ, the person who committed the tort was acting in the performance 'of a duty imposed by law . . . or whether his authority to act was derived from his employment'. Overall, with the exception of Deane J, the judgments in *Oceanic Crest Shipping* impliedly confirm the 'public officer' corollary of the independent discretionary function principle.[44]

In *Oceanic Crest Shipping*, the majority drew support for their conclusion that the employer of the pilot was not liable from the provisions of s410B(2) of the *Navigation Act* 1912 (Cth). Section 410B(2), which has the same effect as s15(1) of the *Pilotage Act* 1913 (UK), provides that the owner or master of a ship shall be answerable for loss or damage caused by a ship under pilotage. In *Oceanic Crest Shipping,* it was held that this provision did not detract from the general proposition that the owner or master of the ship is not responsible when the pilot is executing an 'independent legal duty conferred on him by law and his powers are not derived from the general employer'.[45] In other words, the provision was restrictively interpreted. In a recent House of Lords decision, *Esso Petroleum Co Ltd* v *Hall Russell & Co Ltd,*[46] the same approach to s15(1) of the *Pilotage Act* 1913 (UK) was adopted. The House of Lords referred to the judgment of Gibbs CJ in *Oceanic Crest Shipping* with approval[47] and rejected an attempt to argue that a different conclusion should be reached, based on broad principles of vicarious liability.[48] The House of Lords applied the *Oceanic Crest Shipping* case for the broad proposition that 'a port authority was not vicariously liable for the negligence of a pilot because such liability was impliedly excluded by statute and also because the pilot was a public officer executing an independent duty which the law cast on him'.[49] Thus, the House of Lords appears to have endorsed the view that the independent discretionary function principle is a special application of ordinary

[43] (1986) 160 CLR 626, 639; (1986) 66 ALR 29,34.
[44] Id 637; 33.
[45] (1986) 160 CLR 626, (1986) 66 ALR 29, 37; 641–2 per Gibbs CJ.
[46] [1989] 1 All ER 37.
[47] Id 63–4.
[48] It was argued that either the owner of the ship owed a non-delegable duty, or that the owner was liable on the basis that the pilot was an independent contractor for whom the owner was vicariously liable.
[49] Id 63.

principles of vicarious liability and depends upon the concept of a 'public officer'.

The next issue which arises is which of the views expressed in *Oceanic Crest Shipping* as to the scope and limits of the independent discretionary function principle should be accepted as being correct and consistent with authority and principle — the broad Gibbs CJ view that would extend it to private employers, the narrower Brennan J view, or the middle view of Dawson J which emphasized the status of the employee and the relationship with the employer? In relation to that latter point, it should be noted that the facts in *Oceanic Crest Shipping* involved a complex arrangement between Hamersley Iron Pty Ltd and Pilbara, which had statutory backing. Pilbara was in fact a wholly owned subsidiary of Hamersley. Pursuant to the *Iron Ore (Hamersley Range) Agreement Act* 1963 (WA), which embodied an agreement between the government of Western Australia and Hamersley, the latter company had the entire control of port services in the Port of Dampier.[50] That port had been proclaimed under the *Shipping and Pilotage Act* 1967 (WA). Regulations made under that Act[51] provided for compulsory pilotage. Hamersley had assigned its rights under the *Iron Ore (Hamersley Range) Agreement Act* to Pilbara. It was a term of the assignment that Pilbara would provide towing and pilotage services as required by the *Iron Ore (Hamersley Range) Agreement Act* and the *Shipping and Pilotage Act.* Thus it could be argued, on the facts, that Pilbara was in fact an assignee of part of Hamersley's right to exercise a governmental function, namely the control of the harbour.[52] However, this was an argument that Dawson J appeared to reject,[53] and Brennan J expressly characterised Pilbara as a trading company.

THE ORIGINS AND DEVELOPMENT OF THE INDEPENDENT DISCRETIONARY FUNCTION PRINCIPLE

There are two main authorities which are usually cited in support of the independent discretionary function principle: the decisions in *Enever* v *R.*, [54] and *Stanbury* v *Exeter Corporation.*[55] One case concerned the liability of the Crown, the other of a public authority.

In *Stanbury* v *Exeter Corporation*[56] an action was brought against the corporation for the negligence of an inspector who acting under the *Diseases of*

[50] Under the *Hamersley Iron (Port of Dampier) By-Laws* 1971 made under the *Iron Ore (Hamersley Range) Agreement Act* 1963.
[51] *Port of Dampier Regulations*, 1971.
[52] On the assumption that it could be so characterised.
[53] (1986) 160 CLR 626, 682; (1986) 66 ALR 29, 66.
[54] (1906) 3 CLR 969.
[55] (1905) 2 KB 838. See e.g. the argument of counsel in *Fowles* v *Eastern Steampship Company Ltd* [1916] 2 AC 556, 558 (in fact no authorities other than *Brabant & Co* v *King* [1895] AC 632, were referred to in the opinion of the Privy Council in *Fowles.* In *Brabant & Co* v *King* the Government was held liable as bailee for hire. As Isaacs J points out in his dissenting judgment in the High Court of Australia (1913) 17 CLR 149, 184, the decision seems to be irrelevant to the issue in *Fowles*).
[56] (1905) 2 KB 838.

Animals Act 1894 (UK) seized and detained sheep suspected of sheep-scab. It was held that the corporation was not liable. The reasoning in that case appears to be based upon general principles of vicarious liability[57] and the public nature of the function which the inspector was exercising. The report of the case is only three pages in length and the judgments contain no discussion of English authorities[58] as the judges obviously considered that the principle was settled beyond doubt. Lord Alverstone CJ and Wills J regarded the inspector's duties as analogous to the powers of a policemen.[59] Darling J said 'the particular things which the inspector did here were things which the corporation could not do themselves, and they were not in fact doing them'.[60] Wills J reinforced this point by saying:

> If the duties to be performed by officers appointed are of a public nature and have no peculiar local character, then they are really a branch of the public administration for purposes of general utility and security which affect the whole kingdom . . ..[61]

On the facts of *Stanbury* the inspector was performing a function imposed directly upon him by statute, a function which was for him and not the corporation to perform.[62] But it is unclear whether the decision was based upon a finding that the inspector was not in a master-servant relationship or whether it was based upon the fact that he was not 'acting in the course of his employment.[63]

Stanbury v *Exeter Corporation*[64] is consistent with earlier authorities in which public authorities, such as highway authorities[65] and Drainage Commissioners,[66] were held not to be vicariously liable for the negligent acts of their employees. These authorities were relied upon by both counsel for the trustees and the plaintiff in the seminal decision of *Mersey Docks & Harbour Board Trustees* v *Gibbs*[67] in which the trustees were held directly liable in negligence as a public body exercising statutory powers. In discussing those authorities Blackburn J suggested that, insofar as they were based on a trend

[57] See GE Robinson, *Public Authorities and Legal Liability* (University of London Press, 1925), Chapter III, 'Local Administrative Authorities: The Doctrine of Respondeat Superior and the effect of Central Control', pp 66–70.

[58] In argument counsel for the defendant referred to T Beven *Negligence in Law* (London, Stevene Haynes, 1895) and two American authorities.

[59] (1905) 2 KB 838, 841, 842.

[60] Id 843.

[61] Ibid.

[62] Robinson, *Public Authorities*, 69.

[63] Atiyah, *Vicarious Liability*, 78. Cf W Harrison-Moore (1907) 89 LQR 12, 26, where it is suggested that Lord Alverstone and Darling J rested their judgment on the ground that the officer was not acting as a servant of the local authority, but that Wills J took a broader ground based on the American idea that 'purely governmental powers are not sources of civil liability' (id 25).

[64] (1905) 2 KB 838.

[65] Eg *Hall* v *Smith* (1824) 2 Bing 155 (130 ER 265); *Holliday* v *St Leonard's Shoreditch* (1861) 11 CB (NS) 192 (142 ER 769); *Duncan* v *Findlater* (1839) 6 Cl & Fl 894 (7 ER 934). Cf *Foreman* v *Mayor of Canterbury* (1871) LR 6 QB 214 (which was decided subsequent to the decision in *Mersey Docks & Harbour Board Trustees* v *Gibbs* (1866) LR 1 HL 686.

[66] *Coe* v *Wise* (1864) 5 B & J 439 (122 ER 894).

[67] (1866) LR 1 HL 686 (11 ER 1500).

towards exempting public authorities who acted without profit from liability, they were unacceptable. It is clear from his discussion of *Metcalfe* v. *Heatherington*[68] in which the independent discretionary function principle was applied to a harbourmaster that he accepted that the principle was an accepted exception to the vicarious liability of public authorities. Blackburn J suggested that to apply the principle to trading dock companies would be a *reductio ad absurdum*[69]. In other words, he accepted that the principle was based upon the public nature of the function conferred upon the individual officer and upon broad considerations of public policy.

In *Enever* v *R*[70] the High Court was concerned with the interpretation of the *Crown Redress Act* 1891 (Tas), s4, which imposed liability in tort upon the Crown in respect to the acts or omissions of 'an officer, agent or servant of the Government of Tasmania'. That case concerned a police constable acting under statutory authority who had made an admittedly wrongful arrest. It was not disputed that the constable was personally liable; rather, what was in issue was whether the Government was liable as a result of the *Crown Redress Act* (1891). The court said the matter was not simply whether Enever was a servant of the Crown in a 'general sense'[71] but whether he came within the meaning of s4.[72] The judges read into the legislation the requirement that *in so acting,* Enever had to be performing a function which made him a servant of the Crown.

In simple terms this decision represents a finding that Enever was not acting as the Crown or Government's servant because there was no master-servant relationship between Enever and the Government when he was acting as a 'public officer' exercising a statutory duty.[73] All three judges reached their conclusions by relying on the absence of control by the Government, meaning 'Executive Government',[74] over the activities of a police constable.[75] Whilst O'Connor J emphasized the Government's traditional immunity in relation to such claims,[76] Barton J and Griffith CJ elaborated upon the source of the police constable's powers. Barton J said[77] that control was absent because Enever was 'a person who is obeying . . . the authority of an Act of Parliament . . .' and therefore was not 'so under the control or the State as to render the State responsible . . .'. Griffith CJ said[78] that 'the powers of a constable . . . whether conferred by common law or statute law, are exercised by him *by virtue of his office,* and cannot be exercised on the responsibility of any person

[68] (1855) 11 Ex 257 (156 ER 826).
[69] (1866) LR 1 HL 686, 724 (11 ER 1500, 1515).
[70] (1906) 3 CLR 969.
[71] Id 990 per O'Connor J. Cf id 982 per Barton J.
[72] Id 981 per Barton J suggesting that Enever might be an 'officer, agent or servant' without specifying which. Cf *Delacauw* v *Fosbery* (1896) 13 WN (NSW) 49.
[73] (1906) 73 CLR 969, 993–3 per O'Connor J.
[74] Id 989, per O'Connor J; 982–5 per Barton J.
[75] Cf *Davidson* v *Walker* (1901) 1 SR (NSW) 196.
[76] (1906) 3 CLR 969, 991–3 per O'Connor J.
[77] (1906) 3 CLR 969, 972–5 per Barton J.
[78] Id 977.

but himself . . .. A constable, therefore, when acting as a peace officer, is not exercising a *delegated authority,* but an *original authority* . . .'.[79]

The combined effect of this reasoning is to say that a function imposed by law on an officer of the Crown is not a function of the Crown; that in other words acts of the legislature are not acts of the Crown. This conclusion depends upon employing a concept of the Crown as equivalent to the executive government;[80] authority delegated by the legislature is 'original authority'. Thus any person acting under statutory authority may be exercising an 'independent discretion function'. As an application of principles of vicarious liability, *Enever* v *R* rests upon a presumed absence of control because the officer is exercising an independent discretion conferred directly by law and not by the instructions of the employer.[81]

The judgments in *Enever* v *R* distinguished in particular the railway cases, in which railway companies were held liable for the wrongful arrests by its employees,[82] and relied instead upon the authority of the decisions of *Stanbury* v *Exeter Corporation* and *Tobin* v *R.*[83]

In *Tobin* v *R*[84] the commander of a Queen's ship employed in the suppression of the slave trade on the coast of Africa, seized Tobin's schooner which he wrongly suspected of being illegally engaged in slave traffic. In seizing the ship, the commander was performing a duty imposed upon him by Statute 5G4, c113. Section 43 enacted that vessels engaged in the slave trade shall be seized by the commanders of ships of Her Majesty. The ship was burnt and Tobin brought an action in trespass to recover damages. The petition of right[85] was rejected by Erle CJ for two main reasons. The first was that the commander was not acting in obedience to a 'command' of Her Majesty, but in supposed performance of a duty imposed by Parliament;[86] that is, he was acting under statutory authority when he seized the schooner. The second was that, in any event, the commander could not be said to be a 'servant' of the Crown for the purpose of seizing the schooner. Erle CJ's reasoning on this point commenced from the proposition that the 'liability of a master for the act of his servant attaches in the case where the will of the master directs both

[79] Emphasis supplied.

[80] Id 989 per O'Connor J. Cf the submission of counsel for the appellant, id 971, to the effect that both the legislature and the executive were simply branches of the government. See eg *R* v *Industrial Court of South Australia; ex parte the Australian Broadcasting Commission* (1976) 13 SASR 460; *Wingercombe Shire Council* v *Minister for Local Government* (1953) SR (NSW 523).

[81] Eg *Jobling* v *Blacktown Municipal Council* [1969] 1 NSWLR 129.

[82] Eg *Goff* v *Great Northern Railway Co* (1861) 3 El & El 672 (121 ER 549); *Moore* v *Metropolitan Railway Co* (1872) LR 8 QB 36. See (1906) CLR 969, 987 (Barton J), 994 (O'Connor J).

[83] (1864) 16 CB (NS) 310, (143 ER 1148).

[84] Ibid.

[85] This was a special procedure by which claims against the Crown were brought. It was brought into use in the 13th century. See L Erlich, 'Proceedings against the Crown (1216–1337)' in P Vinogradoff (ed) 6 *Oxford Studies in Social and Legal History* (1921), Part 12; WS Holdsworth, 'The History of Remedies Against the Crown' (1922) 38 LQR 141; LL Jaffe, 'Suits against Government Officers: Sovereign Immunity' (1963) 77 *Harvard LR* 1; H Street, *Government Liability : A Comparative Study* (Cambridge University Press 1953), Chapter I.

[86] Id (1162) per Erle CJ.

the act to be done and the agent who is to do it'.[87] But said Erle CJ when 'the duty to be performed is imposed by law, and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment'.[88] On the facts, a master-servant relationship was not established because, first, the Queen did not personally choose the servant, and, secondly, 'the will of the Queen alone does not control the conduct of the captain in his movements, but a sense of professional duty',[89] and thirdly, because the act complained of was not done by order of the Queen, 'but by reason of a mistake in respect of the path of duty'.[90] From this reasoning it appears that Erle CJ employed a 'command' concept of vicarious liability which depended upon the 'personal' fault of the Crown.[91]

The first reason embodies a constitutional and political concept of the Crown. According to this concept the Crown is equated to the Executive and directions by the Legislature are not considered to be acts of the Crown. That this reasoning also embodied a notion of a 'personalized Crown' is clear from the words of Erle CJ when he said: 'Where the duty to be performed is imposed by law, and not by the *will of the party* employing the agent, the employer is not liable for the wrong done by the agent in such employment.[92]

The second reason also reflects both the 'political' and 'constitutional' aspects of the Crown. According to this reason, the 'control' of the master (in this case the Crown) is not established because the Commander was appointed not directly by the Crown, but through an officer of state. Further, the will of the Queen alone could not be said to control the commander's conduct but rather his 'sense of professional duty'.[93] Thus *Tobin* v *R* made the distinction between a servant of the Crown and a person holding a public office and exercising his powers by virtue of his office — a distinction which was adopted and applied in *Enever* v *R*.[94]

Enever v *R* appears to embody the two concepts employed in *Tobin* v *R*[95]

[87] Id 350 (1163).
[88] Id 351 (1163).
[89] Id 353 (1164).
[90] Ibid.
[91] The decision was consistent with the previous decision in *Viscount Canterbury* v *Attorney-General* (1842) 1 Ph 306 (41 ER 648). In that case proceedings by petition of right were brought by the Speaker of the House of Commons for damage done to his furniture when the Houses of Parliament were burnt down in 1834, allegedly due to the negligence of subordinate officers of the Commissioners of Woods and Forests in whom the control of the Houses had been vested. The Lord Chancellor decided that a petition of right could not lie for two main reasons. The first reason was that the Crown could not be liable as a principal on the admission that the 'Sovereign' could not be personally liable, and no negligence in retaining the officials had been alleged. The second reason given was, that the action could not be brought between subject and subject. The King against whom the action had been brought had died and the maxim *action personalis mortiur con persona* applied to defeat the petition (Id 321 (654), 325 (656)).
[92] Id 351 (1163).
[93] Id 352 (1164).
[94] (1906) 3 CLR 969. Atiyah, *Vicarious Liability*, 75.
[95] (1864) 16 CB (NS) 310, (143 ER 1148).

which rest in part upon a concept of a 'personalized Crown',[96] and in part upon the fiction that the Crown controls the executive.[97] That fiction has been described as a 'thoroughly feudal and pluralistic conception of Government'.[98]

Enever v *R* and the 'independent discretion function' exception has gained acceptance as a legal principle despite the fact that it relies on a now discredited notion of actual 'control' as the basis of vicarious liablity[99] and despite its reliance on dubious constitutional concepts. It is used to support the view that a police officer is not an ordinary servant of the Crown,[100] but performs his duties 'by reason of the allegiance he owes to the Crown' rather than 'on behalf of the government'[101] or as a 'ministerial officer'.[102] It has been used in subsequent cases to express both the 'independent discretion' function exception [103] and the idea that the acts of persons acting under 'original authority'[104] do not bind the Crown. As a principle exempting the Crown from liability it has been applied not only to police officers,[105] but also to a legal aid

[96] See eg (Vic) Vol 246 *Parl Deb* (HA) 6 September 1955, 255, where it was expressly acknowledged that the Crown was not 'personally liable' under the (Vic) *Crown Proceedings Act* 1958.

[97] G Sawer, 'Crown Liability in Tort and the Exercise of Discretions' (1951) 5 *Res Jud* 19.

[98] Id 14, 17.

[99] *Stevens* v *Brodribb Sawmilling Co Pty Ltd* (1986) 60 ALR 194.

[100] Eg *Osgoode* v *Attorney-General* (1971) 13 MCD 400. *Irvin* v *Whitrod* (No 2) [1978] Qd R 271; *Chapman* v *Commissioner, Australian Federal Police* (1983) 50 ACTR 23. *Griffith* v *Haines* (1984) 3 NSWLR 653, 661. The immunity of police officers is now embodied in legislation which protects police officers from acts done in good faith. Eg *Police Regulation Act* 1952 (SA), s51A(1); *Police Regulation Amendment Act* 1986 (Tas), s52; *Police Regulation Act* 1899 (NSW), s26A. Cf *Police Act* 1937 (Qld), s69B; *Police Administration Act* 1979 (NT), s163; *Australian Federal Police Act* 1979, s64B which specifically provide for the vicarious liability of the Crown. The *Police Act* 1964 (UK), s48 makes the chief officer of police liable. For the purposes of the *Accident Compensation Act* (Vic) 1985, members of the police force are deemed to be employees of the Crown (see s14(4)). For a discussion of the application of the principle to police officers see R Goode, (1975) 10 MULR 47; Churches, (1980) 6 *Uni Tas LR* 294 who argue that the principle is unsupportable on policy grounds.

[101] *Delacauw* v *Fosbery* (1896) 13 WN (NSW) 49, 51. (although not referred to in the judgments in *Enever* v *R*, this case was cited in argument.) See also *Finemores Transport Pty Ltd* v *Cluff* [1973] 2 NSWLR 303; cf *Clyne* v *Deputy Commissioner of Taxation* (1982) 69 FLR 345 (Commissioner of Taxation not a servant or agent of the Commonwealth).

[102] *Attorney-General for New South Wales* v *Perpetual Trustees Co* [1955] AC 457. Cf *Alley* v *Minister of Works and Helgeson* (1974) 9 SASR 306, 310 per Zelling J dubitante.

[103] Eg *Baume* v *Commonwealth* (1906) 4 CLR 97. *Bannockburn* v *Williams* (1912) 12 SR (NSW) 665. *Griffith* v *Haines* (1984) 3 NSWLR 653.

[104] *Oriental Foods (Wholesalers) Co Pty Ltd* v *Commonwealth* (1983) 50 ALR 452. Cf *Davidson* v *Walker* (1901) 1 SR (NSW) 196. Eg *Hole* v *Williams* (1910) 10 SR (NSW) 638; *Field* v *Nott* (1939) 62 CLR 660, 669; *Osgoode* v *Attorney-General* (1971) 13 MCD 400 (NZ); *Irvin* v *Whitrod* (No 2) [1978] Qd R 271; *Griffith* v *Haines* (1984) 3 NSWLR 653. Cf *Baird* v *R* (1973) 148 DLR (3d) 1, 19–20.

[105] See fn 105 above, and *Thompson* v *Williams* (1915) 32 WN (NSW) 27. Cf *Akers* v *P & V* (1987) 42 SASR 30.

officer,[106] to a court security officer,[107] to ship pilots[108] and customs officers.[109]

The cases mentioned involved the liability of the Crown and the exercise of statutory powers. There are however dicta in *Enever* v *R* which suggest that the principle established by the older authorities in relation to constables and police officers applied to both common law and statutory powers.[110] This suggests that the important feature of the principle is that the 'powers are exercised by virtue of the office'[111] or that the employee is a 'public officer'. The decision in *Oriental Foods (Wholesalers) Co Pty Ltd* v *Commonwealth*[112] emphasises that the power must also involve a truly 'independent discretion'. In that case it was held that a Customs officer was not exercising such a discretion.[113] There the act involved a mere examination and repacking of goods.

The decision in *Enever* v *R* is also relied upon to support decisions based on general principles of vicarious liability. In *Griffith* v *Haines*[114] a policeman injured in the Hilton bombing incident in February 1978 alleged a breach of duty by the Government or its servants resulting from a failure to warn him of the danger or to devise a system designed to prevent receptacles such as garbage cans from being used to hide bombs. It was alleged that the police in charge of the operation were either aware of a bomb being placed there or the risk of it, and did not warn the plaintiff or instruct him how to deal with it. It was also alleged that the police did not devise any system designed to prevent receptacles such as garbage cans being used to hide bombs and did not instruct the plaintiff as to such measures. The basis of the plaintiff's claim was that he was 'employed' by the Government and that the Government was under a duty to take care for his safety either personally or through the acts and omissions of its servants, the police directing the operation. In other words, he argued that there was either a personal and direct duty of care on the part of the Government or that it was vicariously liable.

In relation to the first limb of the argument, Lee J found that no relationship of master and servant existed in relation to the plaintiff police officer 'when that officer is performing a duty cast by law upon a constable'.[115] Relying upon

[106] *Field* v *Nott* (1939) 62 CLR 660.
[107] *Skuse* v *Commonwealth* (1985) 62 ALR 108, 114 per Fox J (cf id 121 Lockhart J dubitante).
[108] *Bannockburn* v *Williams* (1912) 12 SR (NSW) 665; *Fowles* v *Eastern & Australian Steamship Co Ltd* [1916] 2 AC 556; *Oceanic Crest Shipping Co* v *Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626; (1986) 66 ALR 29.
[109] At least when not performing ministerial duties. See *Baume* v *Commonwealth* (1906) 4 CLR 97; *Zachariassen* v *Commonwealth* (1917) 24 CLR 166; *Oriental Foods (Wholesalers) Co Pty Ltd* v *Commonwealth* (1983) 50 ALR 452.
[110] (1906) 3 CLR 969, 975, 977 per Griffith CJ. Eg *Jobling* v *Blacktown Municipal Council* [1969] 1 NSWLR 129.
[111] *Enever* v *R* (1906) 3 CLR 969, 977 per Griffith CJ.
[112] (1983) 50 ALR 452.
[113] See also *Baume* v *Commonwealth* (1906) 4 CLR 97 where a distinction was made between a ministerial or absolute duty and an independent discretion. That distinction was applied in *Zachariassen* v *Commonwealth* (1917) 24 CLR 166.
[114] [1984] 3 NSWLR 653.
[115] [1984] 3 NSWLR 657, 661.

the statutory basis of a constable's duties[116] and applying the decisions of *Enever* v *R* and *Attorney-General for New South Wales* v *Perpetual Co Ltd,*[117] Lee J found that the 'very independence of the constable's office precludes the existence of the traditional common law duties of a master to a servant'.[118] Therefore, he concluded, the Government did not owe him a duty to take care for his safety.[119] Lee J considered the issues on the basis that in order to establish a breach of a duty of care on the part of the government, the plaintiff had to prove that it failed to discharge its duty 'through the acts and omissions of its "servants", the police . . .'.[120] In other words, Lee J was not prepared to accept that a direct liability or responsibility lay on the Government in these circumstances.[121] Therefore his conclusion on the second limb of the argument, that the Government was not vicariously liable, was inevitable. Just as the plaintiff was exercising an independent and original authority, so were his fellow police officers. In this context Lee J considered the *Claims Against the Government and Crown Suits Act* 1912 (NSW), which he accepted as only applying to situations where an action would lie *in consimili casu.*[122] In order to render the Government liable, the plaintiff had to establish a duty of care owed to him on the part of the other police officers,[123] and this he was unable to do because they were also exercising an independent discretion. The plaintiff was therefore left without a remedy against the government.[124] It may be queried whether *Enever* v *R* was intended to be applied in this context. The exercise of the powers of a constable in arresting a subject is quite a different matter to the question of whether a fellow policeman, or a police authority owes a duty of care to another fellow policeman in the conduct of police operations.

The *Enever* v *R* principle was applied in this case to justify two decisions. First, to establish that no master-servant relationship existed between the plaintiff and the defendant[125] for the purpose of a direct duty, and secondly, to establish that no individual tortfeasor owed a duty of care to the plaintiff for which the defendent could be vicariously liable. The plaintiff's only remedy would have been to bring an action in negligence or for misfeasance against individual police officers, but his chances of success on either action would have been slight.[126]

[116] Id 657–8, 661.
[117] [1955] AC 457.
[118] [1984] 3 NSWLR 653, 661.
[119] Id 662.
[120] Id 656.
[121] He envisaged that injuries 'to police officers occurring, for instance, in police stations and brought about by the defective nature of premises or injuries arising from . . . defective equipment (whether pistol or motorcar, etc) . . .' would suggest a direct breach of duty. Id 662.
[122] Id 663–5.
[123] Id 665. Applying *Groves* v *Commonwealth* (1981) 40 ALR 193.
[124] Lee J also considered the effect of ss7A and 26A of the *Police Regulation Act* 1899, but this did not alter his opinion. Section 26A is considered below.
[125] See also *Clyne* v *Deputy Commissioner of Taxation* (1982) 69 FLR 345.
[126] As to negligence, see *Calveley* v *Chief Constable of Merseyside* [1988] 3 All ER 385 affirmed House of Lords [1989] 1 All ER 1025, in which it was held that an investigating officer's duties in conducting an investigation were derived from and controlled by

RETREAT FROM ENEVER v R : SOME LEGISLATIVE PROVISIONS

In South Australia there has been a legislative attempt to abrogate the effect of the *Enever* v *R* principle insofar as it applies to the Crown. In New South Wales, legislation has purported to modify the principle in relation to employers in general. The South Australian provision is discussed and compared with the similar United Kingdom and New Zealand legislation to determine which is the better model. In addition, special provisions which have been passed in some States to deal with the position of police officers are discussed.

(1) South Australia

In South Australia, s10(2) of the *Crown Proceedings Act* 1980 has purported to abolish the 'independent discretion function exception'.[127] Section 10(2) provides that: 'In any proceedings in tort against the Crown no defence based upon an actual or presumed independent discretion on the part of the person whose act or default is alleged to constitute the tort shall be admitted *unless a similar defence would be admitted in the case of proceedings between subject and subject'.*[128]This provision was discussed in *State of South Australia* v *Kubicki.*[129] In that case, Kubicki claimed that he had been unlawfully arrested under the *Mental Health Act* 1977 (South Australia) as the statutory requirement of 'reasonable belief' provided by that Act had not been satisfied.[130] At trial, the judge found that it was not shown that the police had reasonable cause to believe that the plaintiff was suffering from a mental illness. On appeal to the Full Court of South Australia, s10(2) of the *Crown Proceedings Act* was raised as a defence to the action against the Crown.[131] It was argued that the words (emphasised) qualifying the abolition of the independent discretion function defence had to be interpreted broadly as in effect preserving the defence if it were generally available as between subjects. Thus it was argued, as the general common law retained the defence,[132] the Crown could

statute and that it would not be just and reasonable to impose a duty of care in the circumstances (applying *Peabody Donation Fund* v *Sir Lindsay Parkinson & Co* [1985] AC 210); see also *Hill* v *Chief Constable of West Yorkshire* [1988] 2 All ER 238 (no duty of care to the public in respect of a police investigation).

127 Churches, 6 *Uni Tas LR* 294, 305.

128 Emphasis supplied.

129 (1987) 46 SASR 282.

130 S18(1) of the *Mental Health Act* 1977 provided:
'(1) Where a member of the police force has reasonable cause to believe —
a) that a person is suffering from a mental illness or mental handicap . . .
the member of the police force shall apprehend that person . . .'.

131 Pursuant to s5(2) of the *Crown Proceedings Act* 1980 (SA), the title of the defendant is the State of South Australia. In *State of South Australia* v *Kubicki* no procedural objection was taken to the naming of the State as defendant, although the proceedings did not appear to have been commenced under the provisions of the *Crown Proceedings Act* 1980 (SA).

132 See eg *Oceanic Crest Shipping Co* v *Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626; (1986) 66 ALR 29; *Esso Petroleum Co Ltd* v *Hall Russell & Co Ltd* [1989] 1 All ER 37.

claim it on the facts of that case. The Full Court rejected that argument, holding that s10(2) only preserved the defence where an exact private analogy was available on the facts. As, in that case, the particular function being performed by the Crown's servants, namely the duty to arrest under the *Mental Health Act* 1977 (SA) was one which was of an 'exclusive'[133] kind, the defence was not available and the Crown was liable.

On the face of it, s10(2) could be read either broadly, as counsel for the Crown argued, or narrowly as the Full Court in *Kubicki* decided. Jacobs J, delivering the opinion of the Full Court, considered that the words 'unless a similar defence would be admitted in the case of proceedings between subject and subject' were superfluous[134] and that the section was to be interpreted by ignoring those words. The broad argument was that the ordinary meaning of those words had to be accepted; that in effect s10(2) was a legislative attempt to put the Crown on the same footing as ordinary citizens (as the Crown proceedings legislation does generally[135]). Whilst there is some merit in this argument, that reading of s10(2) would have made nonsense of the obvious attempt to abrogate the independent discretion function principle in relation to a particular function. Jacobs J's interpretation of the section as preserving the defence only where an exact private analogy for a particular function exists, is consistent with the general interpretation of the Crown proceedings legislation. However, it does point to one anomaly, and that is the fact that when the Crown is the employer, the defence will not generally be available, but that if the employer is a private body, a local authority, or statutory authority which does not come under the 'shield of the Crown', the defence will be available under the general law.[136]

In the South Australian legislation, the words 'unless a similar defence would be admitted in the case of proceedings between subject and subject' would seem to be superfluous and to give rise to an ambiguity of meaning.

(2) United Kingdom & New Zealand

The provisions of the South Australian Act can be compared with the provision contained in the United Kingdom and New Zealand legislation. Those Acts provide:[137]

[133] (1987) 46 SASR 282, 289 per Jacobs J.

[134] Id 286.

[135] See eg *Crown Proceedings Act* 1980 (SA), s10(1)(b) which provides that the Crown shall be liable in tort 'in the same manner and to the same extent as a private person of full age and capacity'. The 'assimilation' of the Crown to a private person is generally implied by the provision that the rights of the parties shall 'as nearly as possible' be the same as between private persons. Eg *Crown Proceedings Act* 1988 (NSW) s5(2); *Crown Proceedings Act* 1980 (Qld) s9; *Crown Proceedings Act* 1958 (Vic) s25; and *Crown Suits Act* 1947–54 (WA) s9.

[136] See *Oceanic Crest Shipping Co* v *Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626; (1986) 66 ALR 29; *Esso Petroleum Co Ltd* v *Hall Russell & Co Ltd* [1989] 1 All ER 37.

[137] *Crown Proceedings Act* 1947 (UK), s2(3). *Crown Proceedings Act* 1950 (NZ), s6(3). Emphasis added.

> Where any *functions* are conferred or imposed upon an *officer of the Crown as such* either by any rule of the common law or by statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort shall be such as they would have been if those functions had been conferred or imposed solely by virtue of *instructions lawfully given by the Crown.*

This provision appears intended to avoid the implication of *Enever* v *R* that a person is not an 'officer of the Crown as such' or a servant of the Crown because such officer is acting under 'original authority' or exercising an 'independent discretion'. The term 'officer' is defined in each Act to 'include' a servant of the Crown.[138] The ordinary meaning of this provision suggests that such officers or servants are deemed to be acting upon direct instructions from the Crown when performing independent functions.

Nevertheless, this provision does appear to create some difficulties arising from the description of an 'officer of the Crown as such'. Treitel has argued that the United Kingdom legislation is still limited to 'officers' in respect to whose activities the Crown could be traditionally liable; that 'public officers' within the meaning of the *Enever* v *R* principle are not such officers.[139] He suggests that s2(6), in exempting the Crown from liability 'in respect of the act, neglect or default of any officer of the Crown unless that officer has been directly or indirectly appointed by the Crown . . .', means that a person who has not been so appointed may still be an officer of the Crown although he cannot involve the Crown in tortious liability. By contrast, Glanville Williams has argued that the provision has the intended wide effect. He argues that the meaning of 'officer' and 'servant' for the purpose of that legislation is co-extensive.[140] His argument is based on a reading of s2(6) together with s2(1)(a) which provides that the Crown shall be liable as a private person 'in respect of torts committed by its servants or agents'. Williams argues that to read down the meaning of 'officer' would be to deny the effect of s2(1)(a).[141]

Currie has suggested[142] that the New Zealand provision does not have the intended effect as it is still arguable that an officer is not acting as an 'officer of the Crown as such' in some circumstances; that in other words the distinction made in *Tobin* and *Enever* between saying that a person is a servant and saying that the master is liable when the servant acts by virtue of some special qualification or status, persists. However, the subsequent decision of *Osgoode* v

[138] *Crown Proceedings Act* 1947 (UK), s38(2). *Crown Proceedings Act* 1950 (NZ), s2. In the *Crown Proceedings Act* 1950 (NZ) the term 'servant' is also defined.

[139] GH Treitel 'Crown Proceedings : Some Recent Developments' [1957] *Public Law* 321, 332–3.

[140] GL Williams, *Crown Proceedings* (London, Stevens & Co, 1948) 31. Cf Treitel [1957] *Public Law* 321, 332, who disagrees with this interpretation. He argues that the word 'includes' in the definition section enlarges the meaning of the words, so 'officers' refers to servants and officers *stricto senso.* Ibid.

[141] Williams, *Crown Proceedings* 34.

[142] AE Currie, *Crown and Subject : A Treatise on the Rights and Legal Relationship of the Crown and New Zealand.* (Wellington, Legal Publications Ltd, 1953) 8–9, 76–8 (Subsequently: *Crown and Subject*).

Attorney-General[143] appears to have settled the question, at least for the purpose of the New Zealand legislation. It was decided in that case that the provision under discussion[144] operated to make the Crown vicariously liable for the alleged assault by a police officer in the course of an arrest. The remedial intention of the legislation was taken into account and the section was read as extending the Crown's liability into fields where no private analogy exists.[145] Thus the constable was deemed to be a servant or agent even when exercising original authority.[146]

It should be noted that the New Zealand legislation contains no equivalent to s2(6) of the United Kingdom legislation[147] and that therefore Treitel's argument would not apply to the New Zealand legislation. Currie's attempt to establish that 'officer' is not synonymous with 'servant', distinguishing the nature of each relationship with the Crown in terms of conditions of employment, appointment and remuneration[148] is arguably defeated by *Osgoode* v *Attorney-General.*[149]

The South Australian legislation in s10(2) appears to avoid the argument that a distinction can be made based on the status of persons according to the *Enever* v *R* principle, by referring to 'an actual or presumed independent discretion on the part of the person'. But it is possible that by referring to the 'independent discretion' function exception, it has excluded reference to 'the original authority' exception. One limb of the *Enever* v *R* principle establishes that a person acting under 'original authority' is not a servant of the Crown. Section 10(1) of the *Crown Proceedings Act* 1980 (SA) describes the Crown's liability as being either vicarious[150] or direct.[151] If it were to be argued that there is no vicarious liability because of the 'original authority' of a 'servant or agent . . . of the Crown',[152] the liability of the Crown in such circumstances could then only come within the ambit of s10(1)(b)(ii), namely if there was a direct 'breach of duty that would, *as between subjects,* give rise to liability in tort'.[153] If, for example, it were alleged that there was a statutory duty and a failure to inspect a highway which breach of duty failed to reveal a physical defect, and if that inspection, for the sake of argument, was carried out by an independent firm of consulting engineers who were retained by the Commissioner for Highways on an ad hoc basis to perform such inspection, it could be argued that the engineer who conducted the inspection was exercising an 'original authority' derived from statutory authority. It would be

[143] (1971) 13 MCD 400. Approved by (NZ) *14th Report of Public and Administration Law Reform Committee (1980).* 43. See also *Baird* v *R* (1983) 148 DLR (3d) 1, 18–20.
[144] *Crown Proceedings Act* 1950 (NZ) s6(3).
[145] (1971) 13 MCD 400.
[146] Ibid.
[147] *Crown Proceedings Act* 1950 (New Zealand), s2.
[148] Currie, *Crown and Subject* Chapter III.
[149] (1971) 13 MCD 400. See also *Ellis* v *Frape* [1954] NZLR 341; *Cullen* v *Attorney-General* [1972] NZLR 824.
[150] Section 10(1)(b)(i).
[151] Section 10(1)(b)(ii).
[152] Section 10(1)(b)(i).
[153] Emphasis added.

difficult in those circumstances to argue that the Crown was directly liable.[154]

In Canada, it was recently argued that the *Enever* v *R* principle applied to s3(1)(a) of the *Crown Liability Act* 1970[155] because of the words in s3(6) of that Act which said: 'Nothing in this section makes the Crown liable in respect of anything done or omitted in the exercise of . . . any power or authority conferred on the Crown by any statute.[156] However, Le Dain J decided that despite the absence of a provision similar to s2(3) of the *Crown Proceedings Act,* 1947 (UK), the independent discretion rule should not apply to the Canadian legislation. He was impressed by criticism of the *Enever* v *R* principle.[157] He suggested that s3(6) arguably applied to statutory 'powers' not duties, and further that it contemplated power or authority of the Crown itself, 'such as prerogative and statutory authority that should be regarded as conferred on the Crown, as distinct from that conferred on specific Crown servants chosen to perform a particular statutory function'.[158]

(3) Victoria

In Victoria, it was suggested as early as 1952 that the Crown should be liable for torts committed in the exercise of 'independent discretions'.[159] The Bill which the 1952 committee discussed had contained a 'deeming' provision which was intended to cover the *Enever* v *R* principle. Clause 4(3) of that Bill was in the same terms as s2(3) of the *Crown Proceedings Act* 1947 (UK) and s6(3) of the *Crown Proceedings Act* 1950 (NZ) except that the word 'servant' was used in place of 'officer'. The term 'servant' was comprehensively defined in clause 2 of the Bill to mean

(a) any officer of the Crown including a Minister of the Crown;
(b) any person in the service of the Crown whether or not subject to the Public Service Act . . . or any other Act or enactment;
(c) any agent of the Crown.[160]

However, the provision made by clause 4(3) and the definition of 'servant' was omitted from the 1958 *Crown Proceedings Act*[161] as it was felt to be 'too

[154] By contrast, if the defect arose from the design of the highway, it might be possible to argue for a direct liability. Liability in respect to defects arising from the maintenance of highways is one of the areas where the courts recognise the Crown's immunity from action. See Robinson, *Public Authorities and Legal Liability* 82–97; *Holliday* v *St Leonard's Shoreditch* (1861) 11 CB (NS) 192 (142 ER 769); *Municipal Council of Sydney* v *Bourke* [1895] AC 433 (following *Cowley* v *Newmarket Local Board* [1892] AC 345); cf *McDonough* v *Commonwealth* [1985] AC LD 270. Special rules have developed which turn upon the distinction between misfeasance and non-feasance.

[155] Pursuant to this provision, liability is imposed on the Crown for acts 'for which if it were a private person of full age and capacity, it would be liable'.

[156] *Baird* v *R* (1983) 148 DLR (3d) 1, 19–20, per Le Dain J. Note: *Suche* v *R* (1987) 37 DLR (4th) 474, suggests that specific exceptions in relation to Crown liability might be contrary to the equality provisions of the the *Canadian Bill of Rights,* s1(b).

[157] (1973) 148 DLR (3d) 1, 19–20.

[158] Id 19.

[159] *Statute Law Revision Committee Report,* 1952, (Vic), 669–71.

[160] Id Appendix B, 683.

[161] (Vic) Vol 246 *Parl Debates* (HA 6 September 1955) 256.

immature'.[162] In justifying this omission it was pointed out that a person could seek a remedy directly against the individual concerned. The same policy considerations were articulated in the 1957 report of the Statute Law Revision Committee on Anomalies in the Statute Law relating to Crown Proceedings.[163] It was suggested that to remove the *Enever* v *R* principle would 'seriously weaken the sanction attaching to the individual officer who exercises the discretion'[164] and make the Crown liable for acts it cannot control.[165] It would also 'involve a new concept of legal theory'[166] it was said, thus indicating the hold that the *Enever* v *R* principle has in legal theory.

A Position Paper prepared by the Victorian Attorney-General's department[167] has discussed the issue and recommended either that the Victorian Act be amended along the lines of the United Kingdom provision, or that the *Law Reform (Vicarious Liability)* Bill (NSW) (now enacted) be adopted.[168] For reasons suggested above, the United Kingdom Act is not *in toto* a sound model. The New South Wales legislation, it is suggested, is a better model for reasons to be explained.

(4) New South Wales

The recommendation of the 1975 New South Wales Law Reform Commission on 'proceedings by and against the Crown'[169] in respect to vicarious liability was implemented by the *Law Reform (Vicarious Liability) Act* 1983 (NSW). The Law Reform Commission was of the opinion that the State should be legally liable for torts of officers committed in the performance of 'an independent legal duty'[170] and dismissed possible objections to that view.[171] In presenting the Bill to the 1983 Act, the Minister[172] stressed the Government's intention that it extend to all persons exercising 'functions conferred by law'[173] and that it was intended to put the liability of such persons in line with common law principles of vicarious liability.[174] In other

[162] (Vic) Vol 246 *Parl Debates* (HA 12 October 1955) 986.
[163] *Statute Law Revision Committee Report,* 1957 (Vic), 5, 11–2.
[164] Id 5.
[165] Id 12.
[166] Id 5.
[167] Position Paper : Aspects of Crown Liability in Victoria. Attorney-General's Department (Vic) 1986.
[168] Id 14.
[169] NSW *Law Reform Commission Report* 24 (1976) (NSW) on 'Proceeding By and Against the Crown'.
[170] Id 40.
[171] Id 45–8.
[172] Mr Walker, Minister for Youth and Community Services, for Aboriginal Affairs and for Housing.
[173] *Parl Debates,* (HA) 17 March 1973, (NSW), p4764.
[174] Id 4764–5. (Citing as examples of persons protected by the *Enever* v *R* principle, a store detective exercising a common law power of arrest and a factory worker carrying out a statutory obligation). The aim of the legislation to make the Crown liable as if it were an ordinary employer is furthered by the *Employees Liability Act* 1990, which is expressed to bind the Crown (s8) and which provides that an employee is not liable where the employer is also liable (s3). This legislation confirms the decision of the High Court in *McGrath* v *Fairfield Municipal Council* (1985) 59 ALR 18 that the *Employers' Liability (Indemnification of Employer) Act* 1982 removed the right of an employer to claim a

words, the principle was treated as an application of principles of vicarious liability.

The 1983 Act attempts to assimilate the vicarious liability of ordinary employers and the Crown by providing for the vicarious liability of persons fulfilling independent functions 'in the course of ... service' or which is 'directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity' of the employer or the Crown.[175] Section 7 of the Act covers the vicarious liability of masters for 'servants', whereas s8 deals with the 'further vicarious liability of the Crown ... by a person in the service of the Crown'. 'Person in the service of the Crown' is defined as not including 'servants of the Crown'.[176]

In s5 of the 1983 Act, 'independent function' is defined 'in relation to a servant or a person in the service of the Crown' to mean 'a function conferred or imposed upon the servant or person, whether or not as the holder of an office, by the common law or statute *independently of the will of his master or the Crown,* as the case may require ...'.[177]

By avoiding any reference to an 'officer of the Crown as such'[178] and by defining 'independent function' comprehensively without confining it to 'discretions',[179] the *Law Reform (Vicarious Liability) Act* 1983 (NSW) appears to have eliminated the possibility of arguments similar to those raised in relation to the United Kingdom and New Zealand Crown proceedings legislation, based on the nature of the particular function being performed. Section 8 of the 1983 Act makes it clear that a person 'is acting in the service of the Crown' when the function being performed is in the course of, or an incident of, the service with the Crown[180] or 'is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the Crown'. When the person performing the 'independent function' is a direct employee or 'servant' of the Crown, the vicarious liability of the Crown in such circumstances is governed by s7 of the 1983 Act which is in similar terms to s8.[181]

The Act thus clearly contemplates that there must be a nexus between the Crown's activities and the independent function. Thus, it seems clear that the *Law Reform (Vicarious Liability) Act* 1983 (NSW) eliminates arguments based upon status or the nature of the relationship between the Crown and the 'person in the service of the Crown' or 'Crown servant' and leaves the issue of

contribution from the employee as a joint tortfeasor. In addition, the *Law Reform (Vicarious Liability) Amendment Act* 1989 amends s10 of the 1983 *Vicarious Liability Act* by providing that 'For the purposes of determining whether or not a person is vicariously liable in respect of a tort committed by another person, any statutory exemption conferred on that other person is to be disregarded'. 'Person' is defined to include the Crown.

175 Sections 7 & 8.

176 Section 5(1)

177 Emphasis added.

178 Cf the United Kingdom and New Zealand *Crown Proceedings Acts* discussed above p26–30.

179 See s5(2) of the *Law Reform (Vicarious Liability) Act* 1983 (NSW), which provides that a reference to 'a function includes a reference to a power, authority and duty'. Cf the *Crown Proceedings Act* 1980 (SA), s10(2), set out above.

180 Section 8(1)(a).

181 Section 8(1)(b).

the vicarious liability of the Crown to be determined by ordinary principles.[182] On that basis, it leaves open the possibility of arguing that the particular person is not performing a function which is 'incidental' to the Crown's activities.

The *Law Reform (Vicarious Liability) Act* 1983 (NSW) appears to remove the anomalous dichotomy, which persists as a result of other Crown proceedings legislation, between persons who are employed by the Crown (either directly or through a statutory authority which comes under the 'shield of the Crown') and persons who are employed by private employers. Under the South Australian, New Zealand and United Kingdom legislation, which only apply to actions against the Crown, the position of persons employed by a private employer and exercising statutory authority will be governed by the general law.[183]

However, it will be noted that the definition of 'independent function' entrenches the notion of a personalized Crown in referring to the fictitious 'will of . . . the Crown'.[184] In the United Kingdom legislation 'function' is not defined, except inferentially, in referring to a function as being 'conferred or imposed . . . by any rule of the common law or by statute'.[185] It is suggested that this is a better expression and that the words 'independently of the will of his master or the Crown' in s5 of the 1983 Act are superfluous.

For the purpose of the *Law Reform (Vicarious Liability) Act* 1983 (NSW) a member of the police force is 'deemed to be a person in the service of the Crown and not a servant of the Crown'.[186] The vicarious liability of the Crown for the acts of police officers is therefore governed by s8 of the 1983 Act which requires that an independent function be performed 'in the course of' or as an 'incident of' service with the Crown, or that it be 'directed to' or 'incidental to the carrying on of any business, enterprise, undertaking or activity of the Crown'. Arguments as to the status of the officer are therefore abrogated, and the ordinary law of vicarious liability will apply to determine whether there is sufficient nexus between the Crown's activities and that of the police officer.[187]

[182] It therefore qualifies s5(2) of the *Crown Proceedings Act* 1988 (NSW) which provides that the 'proceedings and rights of parties . . . shall as nearly as possible be the same . . .'. Sections 7 and 8 of the *Law Reform (Vicarious Liability) Act* 1983 (NSW) provide otherwise. (See the words with which they commence: 'Notwithstanding any law to the contrary'.)

[183] See eg *Oceanic Crest Shipping Co* v *Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 606 (1986) 66 ALR 29; *Esso Petroleum Co Ltd* v *Hall Russell & Co Ltd* [1989] 1 All ER 37.

[184] See NSW *Law Reform Commission Report* 24, Appendix F, 160 (cl 2). Cf *Law Reform (Vicarious Liability) Act* 1983 (NSW) s5(2). In the Draft Bill, 'function' was simply defined to include 'power or duty'.

[185] *Crown Proceedings Act* 1947 (UK), s2(3). *Crown Proceedings Act* 1950 (NZ), s6(3).

[186] Section 6.

[187] On the facts of *Griffith* v *Haines* [1984] 3 NSWLR 653, it would be difficult to argue that the independent acts which the police performed were not 'incidental' to the 'service of the Crown'.

(5) Torts of police officers

In three Australian jurisdictions, legislation has specifically abrogated the *Enever* v *R* principle in respect to the torts of police officers by providing that the Crown shall be vicarously liable for such torts. The *Police Act* 1937 (Qld), s69B provides that 'the Crown is liable in respect of a tort committed by a member of the Police Force in the performance or purported performance of his duties as such a member in like manner as a master is liable in respect of a tort committed by his servant in the course of his employment, and shall, in respect of such a tort, be treated for all purposes as a joint tortfeasor with the member'.[188] It is further provided that 'any act done, or purported to have been done, by a member of the Police Force in the capacity of a constable shall be deemed to have been done in the performance or purported performance, . . . of his duties as such a member'.[189] The Queensland legislation which was effected by an amendment in 1978 was a specific response to the decision in *Irvin* v *Whitrod (No 2)*.[190] That decision applied the *Enever* v *R* principle to a claim by a police officer for damages in respect to an accidental shooting by another police officer during the course of a raid on a house.

Section 51A of the *Police Regulations Act* 1952–81 (SA) provides:

> (1) A member of the police force shall not incur any civil liability for an act or omission done or made in good faith in the exercise or discharge, or purported exercise or discharge, of any powers, functions, duties or responsibilities conferred or imposed upon him by any provision of this or any other Act (whenever enacted) or by law.
> (2) A liability that would, but for sub-section (1), lie against a member of the police force shall lie against the Crown.

The effect of this section is to protect an officer against personal liability and to impose liability on the Crown in cases where, but for the protective clause the officer would be personally liable.[191] That is to say, the Crown can be liable in tort in circumstances when the individual tortfeasor is immune.[192] The Crown's direct liability is thus contingent upon the individual officer's immunity.[193] The Tasmanian provision is in identical terms.[194]

Thus, in South Australia and Tasmania, the Crown's liability only arises if the individual police officer's act comes within the scope of s51A(1) or its Tasmanian equivalent and the act was done in good faith. Acts which do not depend upon any particular statutory authority would not come with s51A(1).

[188] *Police Act* 1938 (Qld), s69B(1).
[189] Section 69B(8).
[190] [1978] Qd R 271. See Churches 6 *Uni of Tas LR* 294, 305.
[191] Cf *State of South Australia* v *Kubicki* (1987) 46 SASR 282, 290–1 where Jacobs J discussing this provision, considered that it was intended to have the same broad effect as s10(2) of the *Crown Proceedings Act* 1980 (SA). But note: on the facts of the case no 'reasonable belief' had been established under s18(1) of the *Mental Health Act* 1977 (SA), and it is doubtful whether the protection of s51A(1) could have been satisfied.
[192] Cf *Edgecock* v *Minister for Child Welfare* [1971] 1 NSWLR 751.
[193] Eg *Little* v *Commonwealth* (1947) 75 CLR 94; *Board of Fire Commissioners (NSW)* v *Ardouin* (1961) 109 CLR 105; *Australian National Airlines Commission* v *Newman* (1987) 61 ALJR 205.
[194] *Police Regulation Amendment Act* 1986 (Tas), s52.

For example, in *Akers* v *P & V*,[195] two police officers who were called to intervene in a domestic dispute, directed a man who was clearly under the influence of alcohol to ride away from the scene on a motor bike. The man suffered injuries as a result of obeying this direction and successfully sued the two police officers in negligence. Such acts would arguably fail to come within the scope of s51A(1),[196] but an illegal arrest would. However, malicious acts would not be protected by s51A(1).[197] Thus s51A of the *Police Regulation Act* 1952–81 (SA) has the effect of making the Crown liable for the traditional law enforcement functions of an individual police officer, but leaves intact such person's liability to personal action in respect to acts which do not depend upon statutory authority.

In New South Wales the *Police Regulation Act* 1899, s26A, provides as follows:

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

In *Griffith* v *Haines*,[198] in discussing this provision, Lee J said:[199]

> The immunity is an immunity given only to the police officer and if the government could be held, in the present case, to be vicariously liable at law for the acts of the police officers involved, then I do not see on what basis the section could be prayed in aid by the government. But in the present case, it is the application of the principle that the government is not vicariously liable for the tort of its officer when he is acting in the exercise of an independent duty cast on him by law, and the expression of that principle in the *Claims Against the Government and Crown Suits Act* 1912, which precludes the plaintiff from suing the government: accordingly s26A has no role to play.

This statement, which suggests that the personal immunity of a police officer will not generally affect the Crown's vicarious liability in tort has been confirmed by the *Law Reform (Vicarious Liability) Amendment Act* 1989 (NSW) which amends s10 of the 1983 Act by providing in s10(2) that for 'the purposes of determining whether or not a person is vicariously liable in respect of a tort committed by another person, any statutory exemption conferred on that other person is to be disregarded'. 'Person' for the purpose of s10 is defined as including the Crown.[200]

[195] (1987) 42 SASR 30.

[196] Cf *Howard* v *Jarvis* (1957) 98 CLR 177. (Failure of a police officer to ensure that a person in detention did not have flammable material would be the subject of a common law duty of care.)

[197] See (1983) 57 ALJ 651; letter by T Molomby to the Editor.

[198] [1984] 3 NSWLR 653.

[199] Id 670.

[200] This provision is consistent with and appears to be designed to meet the reasoning in the decision of *Cowell* v *Corrective Services Commission of New South Wales* (1988) 13 NSWLR 114. In that case it was decided by the New South Wales Court of Appeal that a statutory protection clause which might exempt the governor of a prison from liability did not preclude the Commission for liability.

Section 26A of the *Police Regulation Act* 1899 (NSW) is limited to immunity for acts concerned with 'the protection of persons from injury or death or property from damage'. It has been argued that the effect of this section is to draw a distinction between a policeman's law enforcement functions, and his functions as a 'good Samaritan'.[201] Section 26A, in terms, does not affect the immunity of a police officer in tort in respect to acts for which he was traditionally immune and can therefore stand with s8 of the 1983 Act, which in terms is broad enough to cover such functions. However, s8 would not cover acts which are committed maliciously, for such would not be 'incidental' to the Crown's activities.

In Western Australia and Victoria,[202] the liability of the Crown for the torts of police officers is left to the common law.

CONCLUSION

The decision in *Oceanic Crest Shipping* v *Pilbara Harbour Services Pty Ltd*[203] suggests that not only does the High Court of Australia want to retain the independent discretionary function principle but that it is content to allow it to apply to persons who are technically employed by private employers. Leaving aside for one moment the anomalous consequence that such employees are in theory 'public officers', the trend displayed by the High Court of Australia in *Oceanic Crest Shipping* can be interpreted in two ways. Either the High Court is happy to allow the tort liability of employers to be determined by the independent status of the employee, or it is saying that the application of principles of vicarious liability result in the employer's lack of liability. On balance the High Court seems to be consistent with the first view but is applying the principle in a broader context. The policy implications of the decision in *Oceanic Crest Shipping* to the Australian community which is well-known for the degree of statutorily regulated activities of individuals are crucial as Deane J's dissenting judgment illustrates. There will be many persons who may be said to be exercising an 'original authority' or an 'independent discretion' for whose torts the 'enterprising' and financially viable employer will not be liable. On the broadest Gibbs CJ view, liability does not depend upon any nexus between the individual employee's activities and the employer's role being disproved, but rather depends upon the fact that a duty is imposed by law.

The decision in *Oceanic Crest Shipping* is disappointing for its failure to discuss the basis and origins of the independent discretionary function principle which clearly arose in the context of the liability of the Crown and public authorities. The attendant public law policy and theoretical implications of

[201] M Aronson & H Whitmore, *Public Torts & Contracts,* (Sydney, Law Book Company, 1984) p 172; Churches, 6 *Uni of Tas LR* 294, 313–4.

[202] However for the purposes of *Accident Compensation Act* 1985 (Vic), s14(4), a police officer is deemed to be employed by the Crown under a contract of service and the relationship of master and servant is deemed to exist.

[203] (1986) 160 CLR 626; (1986) 66 ALR 29.

this historical principle were overlooked by the High Court of Australia. In many instances, the fact that a function is conferred by statutory or common law authority will be a result of a deliberate choice to impose or to retain a degree of regulation by a central authority; in other circumstance it will arise purely by chance. In some circumstances, such authority will be intended to confer an independent discretion for which the individual is answerable directly to the public as a 'public officer'. The approach of the High Court of Australia makes no distinction between these situations but simply suggests that a blanket public law liability policy renders the employer immune from liability. However, the actual result of the decision in *Oceanic Crest Shipping* v *Pilbara Harbour Services Pty Ltd* would seem to be correct in principle if my analysis of the facts is correct, for it could be argued that Pilbara was in fact exercising a governmental function and was therefore entitled to be treated as a public authority.[204] The judgments in *Oceanic Crest Shipping* generally lack attention to the details of the pilot's employment and of his relationship with his employer, but the decision is consistent with previous authority which establishes that ships' pilots are exercising an independent discretion.[205]

Another feature of the judgments of the High Court of Australia is the lack of clarity as to the relationship between the independent discretionary function principle and principles of vicarious liability. It seems, with respect, that the High Court of Australia has passed over an opportunity to re-examine the basis and rationale for the independent discretionary function principle and to either reject it as being inappropriate for present day society, or to clearly state that it is a rule based on public law liability policy. As it is, unless there is legislative intervention, the principle remains in most States (except perhaps in relation to the torts of police officers) and in matters within the federal jurisdiction, whereas in South Australia it has been abrogated in relation to the Crown (but remains under the general law). Consideration should be given to following the example of the New South Wales legislation which clearly envisages the independent discretionary function principle as an instance of ordinary principles of vicarious liability and attempts to put the liability of all employers, be they the Crown, public authorities or private organisations, upon the same footing.

[204] Upon the analogy of cases such as *Bradken* v *Trade Practices Commission* (1979) 24 ALR 9, it would be entitled to claim the 'shield of the Crown'.

[205] *Bannockburn* v *Williams* (1912) 12 SR (NSW) 665; *Fowles* v *Eastern & Australian Steamship Co Ltd* [1916] 2 AC 556.