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Public Actors and Private Obligations – a Judicial Perspective

*Sian Elias¹

I am very grateful to the organisers for inviting me to this exceptional conference. I have learned a great deal. So much indeed, that I have decided that the best policy in addressing you is to copy Sir Anthony and emphasise that mine is only a judicial perspective. And it is a judicial perspective shaped by a small jurisdiction which has always been happy to borrow and learn from others. Our inclination is ever towards convergence, but local conditions and preferences have in some things pushed us to diverge. Because of our circumstances we have always relied heavily on statute law. And, as a result, I think we may have had a less suspicious view of statutes than the older common law jurisdictions and have been willing from earliest times to see statutes and common law as forming one legal order. We have never found it difficult to reason by analogy with statutes and look to statutes for help in identifying the values of our society, when it is necessary to take them into account in shaping the common law. Because of the circumstances of a new country, much that in other countries is undertaken locally or by private parties has in New Zealand been undertaken by the State. Public and private have not diverged as starkly as may have been the case in other jurisdictions.

How the law of obligations treats public actors is therefore something that has been an important focus of our law. Addressing it offers an opportunity to consider divergence and convergence in different jurisdictions of the common law, but it also invites reflection on how we treat the public dimension in private law.

The state as litigant

Under the rule of law described by Dicey, governments are subject to ordinary law and accountable in the ordinary courts.² Doing justice between the individual and the state is, as Lord Denning recognised, every bit as important as doing justice between individuals.

In the statutes common to many common law jurisdictions which remove procedural and jurisdictional impediments to suing the Crown,³ equivalence

¹ The Rt Hon Dame Sian Elias, GNZM, Chief Justice of New Zealand.

² AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, MacMillan, London, 1961) at 193.

³ Crown Proceedings Act 1950 (NZ), s 3; the Crown Proceedings Act 1947 (UK), s 1; Crown Liability and Proceedings Act, RSC (1985) (Can); Judiciary Act 1903 (Cth), s 64. In Australia and Canada there are in addition statutes governing non-federal cases.

is usually “as nearly as possible”.⁴ In New Zealand, however, the right to bring civil proceedings against and to defend those brought by the Crown is recognised without qualification in legislation as a human right.⁵ The right is “to have those proceedings heard, according to law, in the same way as civil proceedings between individuals”. The provision was explained in the white paper which preceded enactment of the Bill of Rights Act as being:⁶

... designed to give constitutional status to the core principle recognised in the Crown Proceedings Act 1950: that the individual should be able to bring legal proceedings against the Government, and more generally to engage in civil litigation with it, without the Government enjoying any procedural or jurisdictional privileges. This is central to the rule of law.

In *Darker v Chief Constable of West Midlands Police*,⁷ other members of the House of Lords affirmed that the public policy that those who suffer wrongs should have a remedy required existing immunities to be strictly confined. Lord Cooke of Thorndon simply said flatly that immunities of the Crown were in principle inconsistent with the rule of law.⁸ The New Zealand courts have yet to consider whether the enactment of s 27 of the Bill of Rights Act affects the interpretation of the Crown Proceedings Act or the development of the common law concerning the liabilities of the Crown. Some reconsideration of existing authority may be necessary.

On the other hand, the law also imposes liabilities on public actors which either have no equivalence for private individuals or corporations or in respect of which officials are particularly exposed because of their functions. The exposure of public actors arising out of their exercise of public functions is something the law has been particularly sensitive to.

The reach of the state means that liability of the Crown and public bodies may be indeterminate. It may seem unfair if the “deep pockets” of public actors set them up as defendants of last recourse when intermediate actors are principally culpable. Public actors may be more constrained in their freedom to contract or held to higher standards of fairness and rationality under doctrines of common law and equity than individuals and private corporations. They may also be exposed to public law liabilities, including for breach of rights, which overlap with private law liabilities and which have not always been satisfactorily reconciled with them in the case law.

The New Zealand Act is modelled on the UK Crown Proceedings Act 1947 but it replaced earlier legislation which had removed Crown immunity. The 1950 Act arguably narrowed the scope of the pre-existing immunities.

⁴ *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, (2002) 211 CLR 540 at [12] per Gleeson CJ.

⁵ Under s 27(3) of the New Zealand Bill of Rights Act 1990

⁶ Geoffrey Palmer “A Bill of Rights for New Zealand: A White Paper” [1984–1985] I AJHR A6 at 111–112.

⁷ *Darker v Chief Constable of West Midlands Police* [2001] 1 AC 435 (HL).

⁸ At 453.

Because wide discretions are conferred on officials and public bodies to act in the public interest (a responsibility not shared by those acting in their own interests), their failure to use powers that might have protected others from harm raise in acute form questions of liability based on omission, which the common law has always found more difficult than liability based on positive action. Because choices have to be made by those acting in the public interest, the courts are often uncomfortable about the standards to be applied in judging fault and nervous about trespassing into matters of policy for which political accountability is more appropriate. Some of the remedies in private law may seem inappropriate or inconsistent with the discretionary relief available in judicial review. It is necessary sometimes to confront conflicting duties, as in the cases of harm suffered by both children and parents falsely accused of their abuse. And those exercising powers of a public nature are accountable also under the judicial review jurisdiction. So public actors are more equal for some purposes and less equal for others.

Although these challenges for the law must be acknowledged, they are not always confined to public actors and are more general issues for the law of obligations. They do not explain the incoherence and uncertainty of so much of the law and the confusion in application of public law concepts in cases where the courts are concerned with the correction of legal wrongs to individuals. Although the tort of negligence has been the main embarrassment, other areas of the law of obligations and the remedies available to meet their breach present challenges in the task of doing justice between the individual and the state in the 21st century.

There are a number of factors which bear on this. One may be the success of modern administrative law, including that developed by regulatory agencies other than courts. It has come at a time when statutory restatement and reform of much of the heartland of the law of obligation may have led to a narrowing focus on the ends and values of private law. The analogies provided by these statutes and the values they adopt did not galvanise the development of the common law, as they should have done. The development of other forms of accountability for the use of public power may have led to a view that common law accountability is largely an irrelevance.

The courts have sometime not helped. In negligence, for example, too many novel cases (and not simply those involving the exercise of public powers) have been entertained on summary applications to strike out proceedings on grounds of law, meaning that questions of breach and causation have received insufficient attention. And it may not have helped that in a number of these cases judges have succumbed to two traps described by Lord Goff: the “temptation of elegance” (the expression of a solution so beautifully that it carries too much credibility) and the “fallacy of the instant, complete solution”.⁹

⁹ Lord Goff “The Search for Principle” (1983) 69 Proceedings of the British Academy 169 at 172–173.

There are no instant solutions and I certainly do not attempt elegance. The common law needs constant attention. It is a process, as Benjamin Cardozo rightly described it.¹⁰ And in that process, in part one of continuing convergence and divergence, it is important to have a sense of the direction and values of the whole law, of which the largely judge-made law of obligations is part only.

Public and private obligations

Since *Entick v Carrington*,¹¹ liability in tort has been the principal method of vindication of the rule of law when its violation by public authorities affects the legal rights and interests of individuals. It is important to the rule of law that the servants of the Crown, except where immunity is specifically conferred, are liable for trespass, nuisance, and negligence, as citizens are to each other. As with other citizens, they are also liable for exemplary damages for behaviour which warrants it, as was established in the *North Briton* litigation.¹²

What we call public law is itself not isolated from the general body of common law from which it diverged in part in the latter half of the 20th century with judicial development of modern judicial review.¹³ The principles of administrative law were developed in tort, contract, company law, labour law, criminal law, and equity.¹⁴ As Sir Anthony Mason has pointed out, modern administrative law is founded on equitable principles and “has its roots in private law”.¹⁵

In New Zealand an appellate judge recently complained in a claim concerning fair treatment in tendering about being asked, in judicial review proceedings, to entertain a private law action in “public law drag”.¹⁶ In that case, concerning tendering, all parties accepted that the public body which had called for the tenders was amenable to judicial review.¹⁷ It is not obvious why there were concerns that judicial review was not appropriate, particularly since under New Zealand legislation the procedure may be invoked in respect of the powers exercised “under the instrument of incorporation, rules

¹⁰ Benjamin Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924) at 73.

¹¹ *Entick v Carrington* (1765) 19 StTr 1029.

¹² *Wilkes v Wood* (1763) 98 ER 489.

¹³ As scholars such as Dawn Oliver and Peter Cane have been at the forefront in pointing out: Dawn Oliver *Common Values and the Public-Private Divide* (Butterworths, London, 1999); Peter Cane “Accountability and the Public-Private Divide” in Nicholas Bamforth and Peter Leyfeld (eds) *Public Law in a Multi-Layered Constitution* (Hart Publishing, Oxford, 2003) 247.

¹⁴ A point made in 1987 by DGT Williams “Criminal Law and Administrative Law: Problems of Procedure and Reasonableness” in P Smith (ed) *Criminal Law: Essays in Honour of JC Smith* (London, 1987) 170 at 171.

¹⁵ Sir Anthony Mason “The Place of Equity” (1994) 110 LWR 238 at 238.

¹⁶ *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [405].

¹⁷ Although Hammond J expressed the concern that he would not want counsel in other cases automatically to assume reviewability, on the basis of what had happened in that case: *Lab Tests Auckland Ltd v Auckland District Health Board*, above n 16, at [360].

or bylaws of any body corporate”.¹⁸ But, more importantly, the comment that the case was being dressed up in public law costume raises questions about why implication of a term to achieve equivalent fairness was not equally available in a private law suit for breach of contract.¹⁹

The outcome in the actual case may well not have been different if more equivalence between what the Court saw as private and public law principles had been adopted. But there is something wrong with the law if there is a risk of a legal black hole here.²⁰

Conversely, in an appeal from New Zealand in negligence the Privy Council expressed the view that a factor pointing against liability in negligence was that the decision of the Minister there in issue could have been judicially reviewed.²¹ (Sir Robin Cooke, writing extra judicially in 2004 has said of this decision that “the case seems to belong to a bygone era and must be of limited help as a precedent.”²²) Something similar was said more recently by the House of Lords in *Watkins*. In such cases, the private/public divide is used, in Carol Harlow’s words as “a boilerplate answer, a formalist brush off”.²³

Insistence on observance of legality, reasonableness and fairness in the conduct of public functions may be sought in judicial review by anyone with standing. The ends are vindication of law and just administration. Remedies are discretionary and procedural requirements may properly be imposed on such claims including for reasons of good administration. High policy content may in some cases set limits to judicial supervision.

Those who have claims of legal right which are personal to them are in a different position. Subject to limitation and other defences, they are entitled to the relief available under law (which may include discretionary equitable remedies). In such cases separation of powers deference has little, if any,

¹⁸ Judicature Amendment Act 1972. And see David Mullan “The State of Judicial Scrutiny of Public Contracting in New Zealand and Canada” (2012) 43 VUWLR 173 at 194.

¹⁹ The judgment of the Court of Appeal noted that there was nothing amounting to fraud, corruption or bad faith in the decision of the Board and pointed to the indications of the Privy Council in an appeal from New Zealand that “public law notions” were not to be imported into a “contractual framework”: at [60]. In *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, [2005] 2 NZLR 433 the Privy Council had been willing to imply a duty of good faith and fair dealing but only if it met the test for implication of contractual terms and, as well, such implied term was held not to be equivalent to public law standards. And in *Royal Australasian College of Surgeons v Phipps* [1999] 2 NZLR 1 (CA) the view was taken in the Court of Appeal that judicial review is not available for commercial operations or to question commercial judgments.

²⁰ As may have been the case in the Australian decision of *Griffith University v Tang* [2005] HCA 7, (2005) 221 CLR 99.

²¹ *Takaro Properties Ltd v Rowling* [1987] 2 NZLR 700 (PC) at 709–710. See also *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395 at 409.

²² Robin Cooke “The Road Ahead for the Common Law” (2004) 53 ICLQ 273.

²³ Harlow *State Liability: Tort Law and Beyond* (Oxford University Press, Oxford, 2004) at 39.

scope except perhaps in the policy choices where the courts are asked to respond to novel wrongs.

Public law litigation is concerned with public good. Private litigation is not so limited. The two bodies of doctrine are, as I have suggested, closely linked by shared principles and often the same end serves both purposes. But the responses of law to wrongs to the public good and wrongs to individuals may properly vary. When public law actions are also private law wrongs conflation or deference may erode private rights and disempower those who are wronged from seeking correction.

In the United Kingdom and in Australia it has been suggested that public bodies with statutory duties will be liable in negligence for their failure to exercise the powers only if not to do so was irrational or compellable by mandamus.²⁴ The better view seems to me that whether public bodies are liable for the negligent exercise of statutory powers does not turn on whether their use is lawful, for the reasons given by Gaudron J in *v Stevedoring Industry Finance Committee*:²⁵

Liability will arise in negligence only if there is in the circumstances a duty to act. What is in question is not a statutory duty of the kind enforceable by public law remedy. Rather, it is a duty called into existence by the common law by reason that the relationship between the statutory body and some member or members of the public is such as to give rise to a duty to take some positive step or steps to avoid a foreseeable risk of harm to the person or persons concerned. In the case of discretionary powers vested in a statutory body, it is not strictly accurate to speak, as is sometimes done, of a common law superimposed upon statutory powers. Rather the statute pursuant to which the body is created and its powers conferred operate “in the milieu of the common law”. And the common law applies to that body unless excluded. Clearly common law duties are excluded if the performance by the statutory body of its functions would involve some breach of statutory duty or the exercise of powers which the statutory body does not possess.

In *R (Lumba) v Secretary of State for the Home Department*²⁶ some of the Judges of the United Kingdom Supreme Court suggested that where a statutory power to detain had been wrongly exercised, as opposed to having been made without available authority at all, there would be “a private law claim only if the misuse amounted to an abuse of power (including but not limited to cases of misfeasance or other conscious misuse of power)”.²⁷ The majority rejected this “causation defence” and took the view that unlawful

²⁴ *Stovin v Wise* [1996] AC 923 at 952 per Lord Hoffmann, slightly modified in *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057. See also *Sutherland Shire Council v Heyman* [1985] HCA 41, (1985) 157 CLR 424.

²⁵ *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59, (1999) 200 CLR 1 at [25]–[26].

²⁶ *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, [2012] 1 AC 245.

²⁷ At [193] per Lord Walker and see Lord Scott at [170].

exercise of a power meant that there was no justification for the detention. They considered however that since the detention could have been lawfully imposed, the plaintiff was entitled to nominal damages only. But the minority suggestion carries the persistent view that invalidity must be established in judicial review and that the private law action is “collateral”.²⁸

Supervisory jurisdiction

It is worth considering the extent to which the function of the courts is constant in what we treat as private law and what we treat as public law. I start with a case that is very familiar. It has been a favourite of mine since law school days when it and I were very young and the law was almost exclusively male.

In *Nagle v Fielden* a woman trainer was denied a licence by the Jockey Club except through the subterfuge of her “head lad”.²⁹ She had no contract with the Club. Nevertheless, the Court of Appeal considered that the courts have jurisdiction to make a declaration of right wherever justified. The rule under which the Jockey Club acted was arguably contrary to public policy and the right to work of the plaintiff was affected. Lord Denning held that when an association exercised “a predominant power over the exercise of a trade or profession, the courts may have jurisdiction to see that this power is not abused”.³⁰ Danckwerts LJ considered that the courts “have the right to protect the right of a person to work when it is being prevented by the dictatorial exercise of powers by a body which holds a monopoly”.³¹ And, referring to the argument that the courts have no power to intervene, Salmond LJ said, witheringly:³²

This is a familiar argument on behalf of anyone seeking to exercise arbitrary power free from any control by the courts. One of the principal functions of our courts is, whenever possible, to protect the individual from injustice and oppression.

The supervisory jurisdiction of the courts is most familiar today in public law. And today we would probably classify *Nagle v Fielden* as a public law case. But before *Ridge v Baldwin* and the development of modern administrative law, things were not so categorical. Indeed, many of the principles and values drawn on by Lord Reid in *Ridge v Baldwin*³³ were taken from cases we would treat as private law cases.

²⁸ *Boddington v British Transport Police* [1999] 2 AC 143 (HL). In New Zealand, challenge in criminal proceedings to the validity of bylaws and other delegated legislation has been well established but there are suggestions that such challenges may be coming to be regarded as “collateral”, with judicial review seen as the correct route: *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at fn 255.

²⁹ *Nagle v Feilden* [1966] 2 QB 633 (CA).

³⁰ At 647.

³¹ At 650.

³² At 654.

³³ *Ridge v Baldwin* [1964] AC 40 (HL).

The common law has always paid close attention to power and its abuse wherever it is found and modern administrative law simply throws up new aspects of familiar conflicts earlier dealt with in tort and equity and in exercise of a supervisory jurisdiction not confined to public law. (The amenability of non-statutory bodies to judicial review remains a work in progress in some jurisdictions,³⁴ but not in Scotland, where the supervisory jurisdiction of the Court is available irrespective whether the powers checked are in statute, contract, or other instrument³⁵, and in New Zealand, where broader jurisdiction has been exercised³⁶)

The supervisory jurisdiction is concerned with discretion – with the choices legitimately available to those whose conduct may affect the rights of others. When reasonableness or other standards are preconditions for liability under statute or common law, the court is undertaking essentially the same supervisory function as in the case where it holds those exercising public powers within bounds that are reasonable. These essentially supervisory standards are applied throughout the private law actions with which the law of obligations is concerned. They are behind terms implied into contracts, the business judgment rule applied to directors, the scope permitted to trustees, the imposition of fiduciary obligations, and the recognition of duties of care and what amounts to their breach. And, in turn, the doctrine applied in exercising supervision in these areas of law is helpful across the categories and in public law supervision also.

The measures used in supervision according to the interests engaged are most commonly the standards of reasonableness, fairness, or unconscionability. What is unreasonable or unfair or unconscionable depends on context.³⁷ In matters of very great moment affecting rights it may be that even a supervisory jurisdiction requires something close to a standard of correctness, as the Canadians have recognised.³⁸ In others, where choices are entirely open it may require little more than check to exclude bad faith or unconscionable conduct. This range is encountered in private law as in public law.

The nature and responsibilities of government and public bodies are inevitably important context in considering their liabilities to private law suits. A sense of what is public is therefore important in private law. But so is a sense of what is private right.

Private law actions

Unless they have immunities, public authorities are liable in private law suits for breach of contract, tort and other obligations. I want to touch briefly on some straws in the wind in relation to some of these sources of enforceable obligations. In addition, I add a few points about duty of care and all that.

³⁴ *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 (CA) remains an outlier in the United Kingdom and Australia..

³⁵ *West v Secretary of State for Scotland* [1992] SLT 636.

³⁶ *Finnigan v New Zealand Rugby Football Union* [1985] 2 NZLR 159 (CA).

³⁷ *Minister for Immigration and Citizenship v Li* (2013) HCA 18.

³⁸ *Dunsmuir v New Brunswick* 2008 SCC 9, [2008] 1 SCR 190.

(i) *contract*

The extent to which the modern state relies on contracting poses significant challenges for administrative law. It also throws up the importance of the private remedies available both to those who contract with public agencies and those who are the recipients of entitlements under service contracts between public bodies and providers under relaxed privity doctrine. Beatson pointed out some years ago that the issues raised by good faith and fairness in pre-contractual duties and long term or relational contracts can usefully be illuminated by public law principles.³⁹ That has added urgency given the contracting out of many of the functions of public bodies.

The need to address the contracting state seems likely to advance the long-term project of bringing law and equity properly together. If so, it will offer opportunities to build on Australian experience with fiduciary doctrine and estoppel and New Zealand experience with the full range of remedies derived from common law, equity, or statute to fit the needs of the case and do practical justice.⁴⁰

The adaptation of contract in matters such as the implication of terms to secure values of fairness and reasonableness as well as good faith, remains a work in progress in the United Kingdom, Australia, and New Zealand. Analogies with statutes protective of the vulnerable or concerned with fair treatment are likely to be increasingly used to providing content to such terms, for the reasons given by Lord Diplock,⁴¹ Cooke P⁴² and Lord Steyn.⁴³ because they are helpful in bringing the law into line with community expectations.

(ii) *liability for breach of fiduciary obligations*

In restating the principles on which relief for breach of fiduciary obligations will arise in *Alberta v Elder Advocates of Alberta Society*, the Supreme Court of Canada accepted that liability may attach to governments as well as to private actors.⁴⁴ It considered however that the special characteristics of governmental responsibilities and functions meant that fiduciary obligations would arise only in limited and special circumstances.⁴⁵ In *Alberta* itself the Supreme Court held that there was no duty in relation to increases in charges for residents of nursing homes. The duty was to fulfil the statutory care obligations, which has not been breached. The setting of the accommodation charge in that case was a regulatory function the Court

³⁹ J Beatson "Judicial Review in Contract" in J Beatson and D Friedmann (eds) *Good Faith and Fault in Contract Law* (Oxford University Press, Oxford, 1995) at 263.

⁴⁰ *Mouat v Clark Boyce* [1992] 2 NZLR 559 (CA) at 565–6; *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 (CA); *Day v Mead* [1987] 2 NZLR 443 (CA). And see Sir Anthony Mason "The place of equity and equitable remedies in the contemporary common law world" (1994) 110 LQR 238 at 241–242.

⁴¹ *Erven Warnink BV v J Townsend & Sons (Hull) Ltd* [1979] AC 731 at 743.

⁴² *South Pacific Manufacturing Co Ltd* [1992] 2 NZLR 282 (CA) at 298.

⁴³ *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 at 52–53.

⁴⁴ *Alberta v Elder Advocates of Alberta Society* 2011 SCC 24, [2011] 2 SCR 261.

⁴⁵ At [37]

acknowledge it would be slow to interfere with. How to fund health care required the balancing of competing interests; the Crown could not meet its wider obligations if a fiduciary obligation were imposed.

Other jurisdictions have yet to follow the Canadian example in applying the fiduciary principle outside the area of economic interests,⁴⁶ although Kirby J in the High Court of Australia was prepared to accept that child abuse could amount to a breach of fiduciary duty⁴⁷ and the New Zealand Court of Appeal has been prepared to proceed on that assumption, without deciding the point.⁴⁸ Of particular interest to us in New Zealand are the Canadian decisions holding that the Crown is under fiduciary obligations to Indian bands, the latest being *Tsilhqot'in Nation v British Columbia*⁴⁹ That approach has produced some sympathetic dicta in New Zealand cases concerning claims by Maori, but has not yet been further developed although a case is pending in the Supreme Court in which such claims are made.⁵⁰

(iii) Misfeasance in public office, breach of statutory duty, false imprisonment and breaches of rights

The ancient tort of misfeasance in public office has been given new life in major decisions in Australia,⁵¹ New Zealand,⁵² England⁵³ and Canada.⁵⁴ In its most recent restatement by the Canadian Supreme Court it has been defined as “deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff”.⁵⁵

In jurisdictions with remedies for breaches of rights, the basis of reconciliation of the tort with remedies for breach of the right remains uncertain. New Zealand breaches of the Bill of Rights Act have been treated as a category of public law compensation. A path not taken was to build on the tort. If so, the remedy would not have been discretionary. An open question is whether in cases of misfeasance in public office which also entail breaches of the Bill of Rights Act the Bill of Rights Act breach can be taken into account in the damages awarded and, if so, whether proof of damage will remain necessary irrespective of the breach of the right, as the House of Lords has affirmed for the England and

⁴⁶ *Breen v Williams* [1996] HCA 57, (1996) 186 CLR 71.

⁴⁷ *Williams v Minister, Aboriginal Land Rights Act* (1994) 35 NSWLR 497 where Kirby (at 510) and Priestley JA (at 510–511) held that child abuse could be actionable as breach of fiduciary duty.

⁴⁸ The Court of Appeal proceeded on the basis that the abuse suffered by a child placed in foster care was in breach of a fiduciary obligation assumed by the Superintendent and Director of Child Youth and Family, but found that the claim had been rightly rejected by the High Court because there was no disloyalty or bad faith on the part of the officials: *S v Attorney-General* [2003] 3 NZLR 450 (CA).

⁴⁹ 2014 SCC 42.

⁵⁰ *Paki v Attorney-General* [2010] NZSC 88 (leave).

⁵¹ *Mengel v Northern Territory* [1995] HCA 65, (1995) 185 CLR 307.

⁵² *Garrett v Attorney General* [1997] 2 NZLR 332 (CA).

⁵³ *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 (HL).

⁵⁴ *Odhavji Estate v Woodhouse* 2003 SCC 69, [2003] 3 SCR 263.

⁵⁵ At [23].

Wales in *Watkins v Secretary of State for the Home Department*⁵⁶ At present, it seems that Bill of Rights compensation stands apart.

Although breach of statutory duty is often said to be simply a matter of statutory interpretation, its status as a tort empowers those who are wronged by non-observance of a duty the statute confers upon them. Wade and Forsyth have suggested that Human Rights damages which are available under the UK Act can be seen as a species of breach of statutory duty. That path was also not taken in New Zealand, where the statute was silent on the provision of such a remedy and the legislative history indicated that had been a deliberate decision.⁵⁷ Nor has the idea been picked up in England and Wales.

False imprisonment is committed when someone is detained or imprisoned without lawful justification.⁵⁸ The tort is one of strict liability so is not excused by belief that the detention is lawful.⁵⁹ Although not confined to public office holders, officials are those principally exposed to liability under the tort. Wrong calculation of release dates⁶⁰ or undue delay in bringing a prisoner before the court⁶¹ will trigger false imprisonment.

Some cases in England have considered whether mistreatment or more stringent confinement than is authorised by law constitutes false imprisonment. To date, the view has been taken that these do not constitute false imprisonment on the basis that there is no entitlement to release and no residual liberty interests in those circumstances.⁶²

Whether the reluctance to extend liability in tort will ease under the influence of the Human Rights Act is not clear. That may depend on whether remedy under the Act is considered to be sufficient. That was the view tentatively expressed by the New Zealand Court of Appeal in a claim for negligence as well as Bill of Rights compensation.⁶³ On the other hand, in *Baigent's case*, Gault J (who dissented from the decision of the Courts to grant a remedy in damages for breach of the Bill of Rights Act) thought that the tort of false imprisonment might well have to develop under the influence of the Bill of Rights Act to deal with cases of failure to charge promptly, or provide access to counsel, or other breaches of rights.⁶⁴ So far, that suggestion has not been taken up.

⁵⁶ *Watkins v Secretary of State for the Home Department* [2006] UKHL 17, [2006] 2 AC 395.

⁵⁷ Nevertheless, in *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) the Court of Appeal awarded public law damages for breach of the New Zealand Bill of Rights Act 1990. But such damages are discretionary and available only where other remedies are not sufficient to mark the breach of rights.

⁵⁸ *Willis v Attorney-General* [1989] 3 NZLR 574 (CA) at 579.

⁵⁹ *R v Governor of Brockhill Prison ex parte Evans* [2001] 2 AC 19.

⁶⁰ *R v Governor of Brockhill Prison ex parte Evans* [2001] 2 AC 19.

⁶¹ *Whithair v Attorney-General* [1996] 2 NZLR 45.

⁶² *R v Deputy Governor of Parkhurst Prison, ex parte Hague; Weldon v Home Office* [1992] 1 AC 58 (HL). The New Zealand Court of Appeal indicated some support for the decision in *Hague* in *Zaoui v Attorney-General* [2005] 1 NZLR 577 (CA) at [101].

⁶³ *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at 350.

⁶⁴ *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 (CA) at 711.

In both Australia and New Zealand the character of the plaintiff has had a significant effect on the damages awarded for the torts of false imprisonment or misfeasance in public office.⁶⁵ On the other hand, exemplary damages may be appropriate where the conduct of the defendant has been high-handed or abusive. Reluctance to give undeserving plaintiffs windfalls and fears of indeterminate liability when many have been affected by the same policy characterised as high-handed are likely to curb the availability of such damages. And if, as in New Zealand, exemplary damages are confined to cases of conscious wrongdoing, their role may shrink even further.⁶⁶

It must be expected that in many cases where officials are liable in tort there will be associated Bill of Rights Act breaches. The compensation awarded in New Zealand under the Bill of Rights Act is discretionary and available only where other remedies (declarations, exclusion of evidence and so on) are not sufficient to mark the breach of rights.

In *Taunoa*,⁶⁷ a case where prisoners were subjected to a strict regime held to be unlawful and in breach of rights, the only claim made was for Bill of Rights compensation. The New Zealand Supreme Court emphasised the public law nature of the compensation remedy adopted in *Baigent's case*. Three of the judges thought that compensation might be appropriate to mark the public interest in vindication of rights even if full compensation had been provided in tort to the person wronged. A majority of the Judges considered that compensation for Bill of Rights breach should be "moderate" and should not "generally approach the level of damages in tort".⁶⁸ Where there has been failure to comply with the minimum standards of criminal procedure in the Bill of Rights Act there has been some disagreement in first instance decisions in New Zealand about whether the measure of damages for breach may differ according to whether there was for example no power to arrest or whether an arrest failed to follow the correct procedure,⁶⁹ echoing the debate that exercised the United Kingdom Supreme Court in *Lumba*.

Under the Canadian Charter, too, remedies for breach of the Charter rights are those the court considers "just and appropriate in the circumstances".⁷⁰ The Supreme Court of Canada has made it clear that the existence of a claim in tort does not bar a claimant from obtaining damages under the Charter. But such damages must not lead to a doubling up of compensation and seem also to be modest.⁷¹ The remedy is positioned in public law. The Supreme Court has described damages awarded under s 24(1) of the Charter as serving the objectives of "(1)

⁶⁵ *Manga v Attorney-General* [2000] 2 NZLR 65 (HC); *Spautz v Butterworth* (1996) 41 NSWLR 1 (CA).

⁶⁶ *Couch v Attorney-General* (No 2) [2010] NZSC 27, [2010] 3 NZLR 149.

⁶⁷ *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429.

⁶⁸ At [265] and [258] per Blanchard J.

⁶⁹ *Attorney-General v Niania* [1994] 3 NZLR 106 and *Caie v Attorney General* [2005] NZAR 703 (HC).

⁷⁰ Canadian Charter of Rights and Freedoms, s 24(1).

⁷¹ See *Vancouver (City) v Ward* 2010 SCC 27, [2010] 2 SCR 28, where the award of \$5,000 to mark the Bill of Rights breach in respect of a strip search was upheld in addition to the \$5,000 in general damages for false imprisonment.

compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches”.⁷² She considered that vindication underlines the seriousness of the harm to the claimant, but is also marks “the harm the *Charter* breach causes to the state and to society”.⁷³

In *Lumba* the United Kingdom Supreme Court divided on the question whether breach of the Human Rights Act should be marked by an award of “vindicatory damages” in addition to the nominal damages award made in respect of the claimant’s false imprisonment.⁷⁴ The Judges in the minority would have made a modest conventional award of £1,000. Despite majority rejection of the “causation defence” to liability for false imprisonment, a majority in the Supreme Court considered that the fact that the detention would inevitably have been lawfully imposed meant that the plaintiff was entitled to nominal damages only. They were of the view that there was no occasion to introduce a new category of “vindicatory damages” to the established categories of compensatory damages (including nominal damages for a trespassory tort where no loss could be shown) and exemplary damages. Lord Dyson explained that the “unruly horse” of “vindicatory damages” was not one to be set loose on “our law”.⁷⁵

“It is one thing to say that the award of compensatory damages, whether substantial or nominal, serves a vindicatory purpose: in addition to compensating a claimant’s loss, it vindicates the right that has been infringed. It is another to award a claimant an additional award, not in order to punish the wrongdoer, but to reflect the special nature of the wrong. As Lord Nicholls made clear in *Ramanoop*, discretionary vindicatory damages may be awarded for breach of the Constitution of Trinidad and Tobago in order to reflect the sense of public outrage. ... It is a big leap to apply this reasoning to any private claim against the executive.

... In my view, the purpose of vindicating a claimant’s common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved; (ii) where appropriate, a declaration in suitable terms; and (iii) again, where appropriate, an award of exemplary damages. There is no justification for awarding vindicatory damages for false imprisonment to any of the [plaintiffs].

Whether over time the view that tort damages and Bill of Rights responses are different will remain is open to question. As is the evolution of the private law torts to better reflect the private human right.

⁷² At [31].

⁷³ At [28].

⁷⁴ *R (Lumba) v Secretary of State for the Home Office* [2011] UKSC 12, [2012] 1 AC 245.

⁷⁵ At [100]–[101].

(iv) non-delegable duties of care

The important decision of the United Kingdom Supreme Court in *Woodland v Essex County Council*⁷⁶ builds on Australian authority⁷⁷ in holding that non-delegable duties of care are owed, outside the hazard cases, where the defendant has a pre-existing relationship under which it owes a vulnerable or dependent claimant placed in its care a duty of protection and a third party to whom it delegates the care causes harm through the performance of the very function delegated to him. A non-delegable duty of this nature can only arise where it is fair just and reasonable to impute it: “the courts should be sensitive about imposing unreasonable financial burdens on those providing critical public services”.⁷⁸

Significantly Lord Sumption, who delivered the principal decision, pointed out that it was “important to bear in mind that until relatively recently, most of the functions now routinely delegated by schools to independent contractors would have been performed by staff for whom the authority would have been vicariously liable”.⁷⁹ This diverges from the approach of the High Court of Australia.

In *State of New South Wales v Lepore*,⁸⁰ cited by Lord Sumption, Gaudron J had adverted to categories of those especially vulnerable, in respect of whom a non-delegable positive duty to protect was appropriate. They involved institutions for the young or vulnerable, such as “schools, prisons, nursing homes, old peoples’ homes and geriatric wards”.⁸¹

In New Zealand the Supreme Court has yet to consider non-delegable duties of care. Liability for harm suffered by children placed in foster homes was imposed on the Crown in extension of vicarious liability.⁸² The non-delegable duty of care may provide a more principled basis for further development.

(v) duty of care and its breach

Whether a duty of care not to cause harm to the plaintiff arises is inevitably a judgment. Much comfort, better predictability, and some efficiency is to be gained from proceeding by analogy with cases previously decided. That is common law methodology after all, and is good policy. In novel cases, the only sure method is close attention to the features of the case from which the judgment is made: in other words, as the Australians would have it, the “salient features”.⁸³ Sooner, rather than later, it is better to focus on the facts

⁷⁶ *Woodland v Essex County Council* [2013] UKSC 66, [2014] 1 AC 557.

⁷⁷ *Commonwealth v Introvigne* (1982) 150 CLR 258 (HCA); *Kondis v State Transport Authority* [1984] HCA 61, (1984) 154 CLR 672 (HCA); *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511 (HCA).

⁷⁸ *Woodland v Essex County Council* [2013] UKSC 66, [2014] 1 AC 557 at [25].

⁷⁹ At [25].

⁸⁰ *New South Wales v Lepore* [2003] HCA 4, (2003) 212 CLR 511 (HCA).

⁸¹ At [123], quoting *Lister v Hesley Hall Ltd* [2002] 1 AC 215 at 250 per Lord Millett.

⁸² *S v Attorney-General* [2003] 3 NZLR 450 (CA).

⁸³ *Perre v Apand Pty Ltd* [1999] HCA 36, (1999) 198 CLR 180 at 253 per Gummow J; and *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, (2002) 211 CLR 540 at 597–

because, as Peter Birks said “no right can be understood without understanding the events which bring it into being”.⁸⁴

You owe me five farthings! The immediate response is “why?”, meaning because of what facts. This is the very heart of the law of obligations. Upon what facts do obligations arise? Or, synonymously, what are their causative events?

Further control for floodgates concerns than is provided by a test of foreseeability alone in establishing whether a duty of care exists is necessary to meet the “untidy complexity of life” and considerations of “practical justice”.⁸⁵ But now that a little distance has been achieved from *Anns* and *Murphy*, perhaps it may be said that it is hard to see what all the fuss was really about. In New Zealand it was never thought that Lord Wilberforce’s formulation of a two-step test had omitted considerations of proximity.⁸⁶

While duty of care remains an important filter, greater focus on breach was overdue. Some considerations may equally be relevant to duty of care or breach. While it may not matter greatly in cases that go to trial whether a policy factor is considered in connection with duty of care or its breach, on a threshold question of duty of care it may matter a great deal.⁸⁷

Questions such as the defendant’s knowledge of risk (which, as is illustrated by *Pyrenees Shire Council v Day*,⁸⁸ may be critical to liability) may well be unsuitable for determination on summary consideration. Similarly, whether budgetary constraints which make it necessary to prioritise expenditure and effort (and which apply equally to private defendants) counter the existence of a duty of care are often better taken into account in determining breach rather than duty of care, as Cory J suggested in *Just v British Columbia*.⁸⁹ The categorical responses given in cases where public authorities owe duties which may conflict as in the care of children cases, may have been decided on a more principled basis if the obligations had been addressed in the context of breach. If, as has been suggested, the High Court of Australia has moved to place greater emphasis on breach, such a move seems to me one to be welcomed.⁹⁰

In New Zealand, as in Canada and Australia, the fact that loss is economic only is relevant to but does not control the question whether it is

598 per Gummow and Hayne JJ.

⁸⁴ Peter Birks “Definition and division: a meditation on Institutes 3.13” in P Birks (ed) *The Classification of Obligations* (Oxford University Press, Oxford, 1997) at 17.

⁸⁵ *Smith v Littlewoods Organisation Ltd* [1987] UKHL 18, [1987] AC 241 at 511 per Lord Goff.

⁸⁶ *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 at 294–295 per Cooke P.

⁸⁷ *Barrett v Enfield London Borough Council* [2001] 2 AC 550 at 587 per Lord Hutton; *Lonrho v Fayed* [1992] 1 AC 448 (HL) at 470 per Lord Bridge.

⁸⁸ *Pyrenees Shire Council v Day* (1998) 192 CLR 330.

⁸⁹ *Just v British Columbia* [1989] 2 SCR 1228.

⁹⁰ See *Brodie v Singleton Shire Council* [2001] HCA 29, (2001) 206 CLR 512 at 577–578 (Gaudron, McHugh and Gummow JJ) and at 601 (Kirby J).

sufficiently proximate to found a duty of care. Sir Robin Cooke, speaking of Lord Denning's "impossible distinction", said of pure economic loss that "[e]xemplary and nominal damages aside, a plaintiff awarded monetary redress for damage to his property is essentially being compensated for economic loss. It is in his pocket, not in his person, that he has suffered". That is the approach we have taken. Duties of care to successive owners of property have not prompted us to consider the sort of "transference" proposed by Lord Goff.⁹¹ We have prepared a more direct approach to questions of proximity, as the Supreme Court has confirmed, but as was explained years before by Sir Robin Cooke:⁹²

The point is simply that, *prima facie*, he who puts into the community an apparently sound and durable structure, intended for use in all probability by a succession of persons, should be expected to take reasonable care that it is reasonably fit for that use and does not mislead. He is not merely exercising his freedom as a citizen to pursue his own ends. He is constructing, exploiting or sanctioning something for the use of others. Unless compelling grounds to the contrary can be made out, and subject to reasonable limitations as to time or otherwise, the natural consequences of failure to take due care should be accepted.

In New Zealand, as in other jurisdictions, consequential financial loss is a question for application of remoteness principles.⁹³ Relational financial loss (claims based on damage to the property of others) has been allowed in New Zealand,⁹⁴ as in Canada⁹⁵ and Australia.⁹⁶ In New Zealand we have followed the more open Australian approach in *Perre v Apand*⁹⁷ and formerly followed in Canada⁹⁸ rather than the more recent classification adopted in Canada in *Bow Valley Husky*.⁹⁹

⁹¹ *Leigh and Sillavan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1986] AC 785 (HL).

⁹² Sir Robin Cooke "An Impossible Distinction" (1991) 107 LQR 46 at 70.

⁹³ In *Taupo Borough Council v Birnie* [1978] 2 NZLR 397 (CA) it extended to loss of profits.

⁹⁴ *Williams v Attorney-General* [1990] 1 NZLR 646 (CA); *Riddell v Porteous* [1999] 1 NZLR 1 (CA).

⁹⁵ *Canada National Railway Co v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021.

⁹⁶ *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529.

⁹⁷ *Perre v Apand Pty Ltd* [1999] HCA 36, (1999) 198 CLR 180 (sale of infected potato seed, as a result of which the plaintiffs were unable to export potatoes to Western Australia), declining to depart from *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529. And see *Barclay v Penberthy* [2012] HCA 40, (2012) 291 ALR 608 (loss suffered by a business as a result of injury to employees in plane provided for business purposes by defendant).

⁹⁸ *Canada National Railway Co v Norsk Pacific Steamship Co Ltd* [1992] 1 SCR 1021.

⁹⁹ In *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd* [1997] 3 SCR 1210 it was held that relational economic loss could be recovered in special cases. The three recognised categories were cases of "transferred" loss, cases where there was a common adventure between the claimant and the party suffering direct physical loss, and shipping cases involving the law of general average. While other categories were not ruled out if policy pointed in favour of recognition of a duty, in that case any duty based on proximity was cancelled out by the fact that recognition of a duty on those facts would set up potentially indeterminate liability.

(vi) *public duties and powers*

In *Stovin v Wise* Lord Nicholls found proximity in the functions of the authority conferred by legislation.¹⁰⁰ “Parliament”, he said, “confers powers on public authorities for a purpose”:¹⁰¹

An authority is entrusted and charged with responsibilities, for the public good. The powers are intended to be exercised in a suitable case. Compelling the public authority to act does not represent an intrusion into private affairs in the same way as when a private individual is compelled to act.

And that was the conclusion also reached earlier by Mason J in *Sutherland Shire Council*:¹⁰²

It scarcely needs to be mentioned that the reasons which lie behind the common law’ general reluctance to require an individual to take positive action for the benefit of other have no application to a public authority with power to take positive action for the protection of others by avoiding a risk of injury to them.

Liability in tort where public bodies fail to use such powers has variously been put on the basis of a duty to act in the circumstances and the general reliance that members of the community are entitled to place on performance of the functions. In Australia and in the United Kingdom there has been a retreat from a concept of general reliance in finding a duty of care in the context of statutory responsibilities.¹⁰³ But how statutory responsibilities are treated by a community is inevitably highly material to questions of proximity. While the fiction may not be necessary, the metaphor (as Kirby J described it) is surely useful. Where there is no real choice but to rely on those with statutory responsibilities to perform their obligations with reasonable care, imputing indirect reliance is a commonsense approach “at least if the factors point otherwise to a duty of care”, as Cooke P was careful to point out.¹⁰⁴

The statute may of course be inconsistent with a duty of care. And close attention to the statutory scheme is important. In a statutory system of interlocking checks, itself legislative response to perceived vulnerability, I do not think it is right to criticise this as imposing “leapfrog liability,”¹⁰⁵ for the reasons given by Wilson J in Canada in *Kamloops*:¹⁰⁶ those with duties to check were set up to protect against the very risk that in these cases has eventuated.

¹⁰⁰ *Stovin v Wise* [1996] 1 AC 923 (HL).

¹⁰¹ At 935.

¹⁰² *Sutherland Shire Council v Heyman* [1985] HCA 41, (1985) 157 CLR 424 at [37].

¹⁰³ *Pyrenees Shire Council v Day* (1998) 192 CLR 330; and *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057.

¹⁰⁴ *South Pacific Manufacturing Co Ltd* [1992] 2 NZLR 282 (CA) at 297.

¹⁰⁵ *Harlow State Liability: Tort Law and Beyond* (Oxford University Press, Oxford, 2004) at 16–17.

¹⁰⁶ *Kamloops v Nielsen* [1984] 2 SCR 2 at 33.

In *Invercargill City Council v Hamlin*, the Privy Council referred to the fact that new building legislation in New Zealand had not sought to change the approach taken to liability in the case law.¹⁰⁷ It treated that circumstance as justifying departure from *Murphy v Brentwood City Council*¹⁰⁸ in New Zealand conditions. If anything, the Privy Council understated the effect of the new legislation, which replaced the earlier and more open ended responsibilities of local authorities to regulate the construction of buildings with a system of assurance of building code compliance which included as an element recognition of tortious liability. The legislature seems to agree that liability of local authorities suits New Zealand conditions.

Despite *Hamlin*, the extensive widespread failure in New Zealand of buildings to meet weather-tightness standards and further legislative changes have meant that the Supreme Court has had occasion to revisit *Hamlin* and to consider its limits on a number of occasions since 2008. We have confirmed the approach followed in New Zealand for 30 years,¹⁰⁹ declined to confine it to modest homes (which would have set up asymmetry between the liability of local authorities and the liability of private certifiers¹¹⁰) and have applied it to buildings with mixed residential and commercial purposes.¹¹¹ We have, by majority, declined to recognise a duty of care on the part of the regulatory authority which supervised local authorities in their functions and set building standards.¹¹²

Different jurisdictions will not always reach the same outcomes in such cases, as is illustrated in relation to the liability of public bodies in building cases. They turn in part on the values preferred in different societies. And New Zealand divergence in such cases is partly explained by local legislation. But I do not think the latest destination each of us has arrived at turns on the path followed – two-step, three step, incrementalist, or atomist. Since negligence is a relational wrong, proximity is a good enough label for connection (as long as not limited to spatial and temporal connections). And what is “fair, just, and reasonable” is inevitably a judgment of policy. Justice Gummow is surely right that the search for some overall principle to serve as a test is a mirage.¹¹³

Concluding thoughts

Divergence between private and public in law needs to be justified. The law of obligations, which attaches to public officials and public bodies, serves the rule of law. A sense of what is public is necessary in the law of obligations.

¹⁰⁷ *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 522.

¹⁰⁸ *Murphy v Brentwood District Council* [1991] 1 AC 398 (HL).

¹⁰⁹ *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289.

¹¹⁰ *McNamara v Auckland City Council* [2012] NZSC 34, [2012] 3 NZLR 701. Private certifiers could not under the legislation contract out of liability for negligence.

¹¹¹ *Body Corporate No 207624 v North Shore City Council [Spencer on Byron]* [2012] NZSC 83, [2013] 2 NZLR 297.

¹¹² *North Shore City Council v Attorney-General North Shore City Council v Attorney-General* [2012] 3 NZLR 341, [2012] 3 NZLR 341.

¹¹³ *Vairy v Wyong Shire Council* [2005] HCA 62, (2005) 223 CLR 422 at 445.

So too, however, is the private interest in correction of wrongs or the fulfilment of promises or the redress of what is unfair or unreasonable or unconscionable. The law of obligations should not cede the ground to public law where the interests in issue are private interests, not public ones. The common law needs to be kept fit for purpose to respond to claims of private right and the needs of the societies we live in. That will not be done by shining a more powerful light on a diminishing body of doctrine. It is necessary to engage with the values of legislation and the scope changes in enacted law leave for the common law.

It has been a great privilege to attend this conference. The work of scholars of the calibre assembled here is of the greatest help to judges in all jurisdictions. Judges dealing with the press of cases, responding to actual controversies, need such help in understanding the architecture of the law, so that they do not get lost in the thicket of the single instances. And for final courts of appeal, the critiques of judgments and the windows provided into comparative legal reasoning, is essential. It is good to be able to put faces to so many whose work I have found immensely valuable and to say to your faces how much it is appreciated.
