

PUBLIC LAW BREACHES AND PRIVATE LAW WRONGS: GOVERNMENT LIABILITY IN TORT FOR ACTS BEYOND POWER

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No tort provides a direct remedy for loss arising from a flawed exercise of public power. However, it is not uncommon for a tort claim against the government to raise questions regarding compliance or noncompliance with limits applicable to a statutory power. This article demonstrates that liability in these contexts might come to turn on aspects of principle and procedure that seem more at home in public law than private, including references to administrative law's 'grounds' of review, concepts of jurisdictional error and invalidity and limitations on the availability and effect of public law relief. Appreciating these complexities can assist litigants and the courts to anticipate potential points of tension between public and private law and to better understand the implications of framing proceedings as a direct or collateral challenge to the legality of government action.

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I INTRODUCTION

The exercise of statutory power by government officials and agencies has great capacity to cause loss and damage. Sometimes that is its natural and intended consequence; taxes, fines and tolls are all ‘harmful’ forms of governance which nonetheless have a legitimate purpose.¹ Provided that those powers are exercised lawfully, neither public nor private law has any role to play. This article is concerned with the narrower subset of cases in which government action gives rise to loss or injury that Parliament does *not* contemplate or authorise, including through the unlawful exercise of powers of arrest, detention and seizure, as well as more general regulatory activities that impact individual interests. If a government actor goes beyond the scope of their powers in a manner that affects protected interests, that is a scenario that potentially engages both public and private law causes of action. Thus, a person detained pursuant to an invalid administrative decision may have options to seek remedies via public law (eg an application for the writs of certiorari or habeas corpus) or private law (eg the tort of false imprisonment) or both.² This article considers the influence of public law principles on tort liability outcomes

¹ See *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, 172 (Lord Goff) (*‘Woolwich’*); Cass R Sunstein, ‘Administrative Substance’ [1991] (3) *Duke Law Journal* 607, 611, 637–9.

² See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 7th ed, 2022) 5, 13–14, 19–20.

where causes of action from either or both spheres could potentially be brought to bear.

Part II of this article sets out the relevant public law principles that define limits on government power and the consequences of violating those limits. The administrative law grounds of review offer a catalogue of possible errors that might take an official beyond the scope of their powers, including failures to observe explicit statutory requirements (eg skipping a required procedure or not meeting a required state of satisfaction) as well as additional requirements supplied by the common law (eg obligations of procedural fairness and reasonableness). These limits are crafted to reflect the proper role of the courts in supervising the exercise of government power. Not all errors are of a type that warrants judicial intervention, with statutory interpretation principles defining the boundary between those errors and consequences Parliament can be said to have authorised and those which it has not (ie jurisdictional errors). Even if an error goes to a public officer's jurisdiction, this does not guarantee that it will be remedied, or remedied in a way that produces practical benefits for the plaintiff. In short, public law principles and remedies do not respond to every error, cannot always tell us the proper way in which power should have been exercised and are not well-equipped to 'fix' the fallout of every unlawful act.

With these principles in mind, this article examines the ways in which public law considerations arise when assessing government tort liability in claims based on the exercise of powers conferred by or authorised pursuant to statute. The question of whether a government defendant has acted within or beyond power is not always relevant to a liability claim.³ However, there are many liability scenarios that call attention to the validity or invalidity of government action. Part III of this article explores a number of these contexts, including cases in which an official's exercise of power is flawed by a public law error,⁴ where an official has relied on a source of authority that turns out to be invalid⁵ or where the liability analysis encounters areas of decision-making freedom⁶ or targets immaterial violations.⁷ A review of relevant case law demonstrates that in these types of contexts, public law considerations can sometimes influence liability so that private law outcomes mirror the character of public law's grounds and remedies.

³ *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 35 [82] (McHugh J) ('*Crimmins*').

⁴ See below Part III(A).

⁵ See below Part III(B).

⁶ See below Part III(C).

⁷ See below Part III(D).

Drawing on these observations, Part IV of this article considers the practical implications of raising public law legality issues in a private law case (collateral challenge) as opposed to ‘staging’ the public and private law aspects of a claim in separate proceedings. It demonstrates that the public law principles that might defeat a judicial review challenge can sometimes influence the assessment of liability in tort, seeing similar questions raised via different procedural means. Appreciating these possibilities allows the courts to anticipate potential points of tension and assists litigants to make more informed decisions about the structure and management of proceedings.

II THE PUBLIC LAW CONSEQUENCES OF EXCEEDING LIMITS ON POWER

The fundamental tenet that ‘all power of government is limited by law’⁸ draws on two interrelated ideas:

One is that the holder of [an] ... office cannot do anything in an official capacity except that which is authorised ... [and] [t]he other is that the holder of [an] ... office is bound by the common law ... except to the extent that non-compliance with the common law is specifically authorised or excused by statute.⁹

The effect of these twin principles is that the government must look to the law as its source of power to act and must observe the express and implied limits that it finds there.¹⁰ This article is concerned with the tort liability implications of violating one or the other of these requirements, focussing specifically on the exercise of statutory power. In order to appreciate these private law implications, it is first necessary to clarify how and when a government official will be taken to have exceeded the scope of their powers, and what the courts will do about it. The courts’ supervisory role is informed by a number of key principles of public law, including respect for the legality–merits distinction, care to avoid overtaking powers properly invested in other branches of government and acknowledgement that public law remedies are not the cure of

⁸ *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 24 [39] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (*‘Graham’*).

⁹ *Smethurst v Commissioner of Police* (2020) 272 CLR 177, 225 [111] (Gageler J) (*‘Smethurst’*).

¹⁰ *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 132 [23], 133–4 [27] (Kiefel CJ, Gageler and Keane JJ) (*‘Hossain’*).

all ills.¹¹ Part II of this article draws on these principles to explain the nature of the limits applicable to government power and the public law consequences of exceeding them. In summary:

- 1 the limits applicable to public power vary according to context, with some limits being expressly imposed by statute and others being supplied by the common law ‘grounds’ of review;¹²
- 2 the consequence of violating a limit varies according to context — some errors will render an exercise of power a retrospective nullity (jurisdictional errors), while other errors may be invalidated only going forward¹³ or be treated as immaterial breaches that do not warrant a remedy;¹⁴
- 3 irrespective of (2), the *practical* consequences of establishing a violation (eg nullifying an invalid decision) do not flow from the error but from the award of judicial remedies — these consequences therefore depend on other public law gatekeeping mechanisms such as standing rules and judicial discretion to refuse relief;¹⁵ and
- 4 even assuming relief is granted, we must distinguish between the invalidity of a decision and a secondary exercise of power taken in *reliance* on that invalid decision — one ultra vires act will not necessarily infect another, and public law relief cannot always undo what has been done.¹⁶

As this article demonstrates, each of these conclusions is underscored by principles of statutory interpretation.

A Identifying Limits on Power

Excess of power builds upon the concept of ‘jurisdiction’, referring both to the *existence* of authority to decide and also to broader limits that constrain the *manner* in which authority is to be exercised.¹⁷ Not all breaches or mistakes will

¹¹ *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–6 (Brennan J) (*‘Quin’*); *LPDT v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2024) 280 CLR 321, 329 [15] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ) (*‘LPDT’*).

¹² See below Part II(A).

¹³ See below nn 53–4 and accompanying text.

¹⁴ See below Part II(B).

¹⁵ See below Part II(C)(1).

¹⁶ See below Part II(C)(3).

¹⁷ An example of the former (existence of authority to decide) would be a civil court’s lack of power to determine a criminal matter and an example of the latter (broader limits that

take a decision-maker outside the limits of their jurisdiction.¹⁸ Knowing which do (jurisdictional errors) — and do not (non-jurisdictional errors) — is important for a number of reasons.¹⁹ For present purposes, the distinction is important because it informs the availability of relief in judicial review proceedings,²⁰ as well as certain aspects of government liability in tort. In practice, the jurisdictional error inquiry asks whether, as a matter of statutory interpretation, the legislature intended for a particular breach to result in invalidity.²¹ An error will be treated as jurisdictional (and an exercise of power as invalid) if it falls outside the permitted range of acts that Parliament can be said to have authorised.²² Jurisdictional error is thus a label for the court's conclusion about what Parliament must have 'intended' would follow if the executive did not observe the limits of its powers.²³ Because the inquiry is anchored to principles of statutory interpretation, the catalogue of mistakes that go to jurisdiction is inherently context-specific, meaning that a limit might apply to one power but not another.²⁴

constrain the manner in which authority is to be exercised) would be a decision-maker's obligation to afford procedural fairness: *Craig v South Australia* (1995) 184 CLR 163, 177–8 (Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('Craig').

¹⁸ '[N]ot ... every unlawful act is invalid': *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129, 327 [617] (Santamaria J). '[T]here are mistakes and mistakes': *Ex parte Hebburn Ltd; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416, 420 (Jordan CJ, Street J agreeing at 423).

¹⁹ For example, jurisdictional error defines the limits on Parliament's ability to exclude judicial review: see below n 65. It also indicates whether a power may be re-exercised: *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–16 [51]–[53] (Gaudron and Gummow JJ) ('*Bhardwaj*'); and informs the admissibility of evidence: *Coco v The Queen* (1994) 179 CLR 427, 435 (Mason CJ, Brennan, Gaudron and McHugh JJ, Deane and Dawson JJ agreeing at 446). See also Mark Aronson, 'Jurisdictional Error without the Tears' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 331–3 ('Without the Tears').

²⁰ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163] (Hayne J) ('*Aala*').

²¹ *Hossain* (n 10) 134–5 [28]–[31] (Kiefel, Gageler and Keane JJ).

²² *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390–1 [93] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*'). This does not explain the position for judicial review of non-statutory powers: see, eg, Amanda Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020) 68–9.

²³ This does not refer to the subjective intention of Parliament but instead signals the end product of the judicial process of statutory interpretation: *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

²⁴ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 573–4 [72]–[73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*'); *Craig* (n 17) 177–80 (Brennan, Deane, Toohey, Gaudron and McHugh JJ). For example, the obligation to afford a fair hearing is more likely to constrain judicial power than administrative power, but a court is less likely to

What, then, are the types of limits that might apply to a statutory power? Some limits will be expressly stated in the relevant statute, such as a requirement that a decision-maker can only exercise power if ‘reasonably satisfied’ of a matter, or after having followed a particular procedure.²⁵ Other limits are supplied by the common law in the form of the traditional administrative law ‘grounds’ of review.²⁶ This is because Parliament is ordinarily taken to intend that the ‘implied conditions on the exercise of [a] power ... will include rationality, reasonableness and fairness.’²⁷ Thus, assuming that the implication is consistent with the relevant statutory scheme, a decision-maker may exceed power by:²⁸

- failing to take into account relevant considerations;
- taking into account irrelevant considerations;
- acting in bad faith or for an unauthorised purpose;
- failing to afford a fair hearing;
- making a decision influenced by bias (actual or apprehended); or
- adopting a reasoning process that is legally unreasonable or irrational, or reaching a legally unreasonable outcome.

As will be clear from this list, the common law grounds of review are carefully crafted to observe the boundaries of the legality–merits distinction,²⁹ focussing primarily on errors in the *way* a decision has been made as opposed to some inherent wrongfulness in the outcome itself.³⁰ The distinction between merits and legality is particularly significant when Parliament has conferred power on

exceed its jurisdiction by wrongly deciding a question of law than an executive official: *Quinn v DPP (Cth)* (2021) 106 NSWLR 154, 159–60 [7]–[10] (Leeming JA).

²⁵ See, eg, *Migration Act 1958* (Cth) ss 63(2), 140L(1)(a)(i) (*‘Migration Act’*).

²⁶ See generally Aronson, Groves and Weeks (n 2) 20–1.

²⁷ *Assistant Minister for Immigration and Border Protection v Splendido* (2019) 271 FCR 595, 625 [106] (Mortimer J), citing *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 348–51 [23]–[29] (French CJ), 362 [63] (Hayne, Kiefel and Bell JJ), 370–1 [88]–[92] (Gageler J) (*‘Li’*), *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 549 [4] (Kiefel CJ), 564–5 [51]–[54] (Gageler J), 572–3 [80]–[82], 575 [89] (Nettle and Gordon JJ), 583 [131] (Edelman JJ).

²⁸ A full catalogue of jurisdictional errors is set out in Aronson, Groves and Weeks (n 2): at 18–19.

²⁹ *Quin* (n 11) 35–6 (Brennan J).

³⁰ The unreasonableness ground focusses on the quality of the decision made, but even in that context it reflects an assessment that the outcome ‘bespeaks error’ made somewhere along the way: *Li* (n 27) 369 [85] (Hayne, Kiefel and Bell JJ).

discretionary terms. As put by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* ('Wednesbury'), public law imposes certain expectations of rationality and fairness on the exercise of discretion, and the court has no basis to intervene provided that an official has remained 'within the four corners of those principles'.³¹ The courts' concern to avoid usurping power properly conferred on the executive branch informs not only the grounds of review but also the award of remedies, discussed in further detail below.

B *Technical Violations and Immaterial Errors*

Assuming a limit or ground of review applies to a particular power, not every violation of that limit is one that will attract a remedy. Public law regards some violations as technical or immaterial breaches. One example is where a government decision-maker erroneously exercises one source of power, when that same act is validly supported by another source. Is a decision invalid if the decision-maker mistakenly believes they have power under provision/statute/delegation A, if that same decision could be validly made using provision/statute/delegation B? In *Lockwood v Commonwealth*, Fullagar J referred to the 'settled principle that an act purporting to be done under one statutory power may be supported under another statutory power'.³² That proposition has been stated in various ways to similar effect.³³ In essence, '[v]alidity depends simply on *whether a relevant power existed*',³⁴ and provided that the conditions for the exercise of alternative power B have been met, the mistaken reference to power A 'would be ... a non-essential matter which

³¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228–9 (Singleton J agreeing at 234) ('Wednesbury').

³² (1954) 90 CLR 177, 184. Different considerations apply where a statute confers both a general and specific power that must be reconciled: *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7 (Gavan Duffy CJ and Dixon J).

³³ See, eg, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 618 (Gummow J); *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452, 487 (Williams J) ('Bevan'); *Eastman v DPP (ACT)* (2003) 214 CLR 318, 361–2 [124] (Heydon J, Gleeson CJ agreeing at 322 [1], Gummow J agreeing at 330 [32], Kirby J agreeing at 331 [34], Hayne J agreeing at 331 [35], Callinan J agreeing at 331 [36]); *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1, 16–17 [34] (French CJ, Hayne, Kiefel and Bell JJ); *Valuer-General v Sydney Fish Market Pty Ltd* (2023) 255 LGERA 415, 427–8 [39] (Leeming JA, Mitchelmore JA agreeing at 441 [109], Kirk JA agreeing at 441 [110]).

³⁴ *Johns v Australian Securities Commission* (1993) 178 CLR 408, 426 (Brennan J) (emphasis added).

would not amount to want of jurisdiction.³⁵ Of course, it is much more likely that a decision-maker will have met the essential conditions for the exercise of a power that they *intended* to exercise than one they did not, particularly if power B is conditioned on a certain state of satisfaction.³⁶ But despite not having power B in mind, it is very possible that a decision-maker may nonetheless have satisfied the requirements for its exercise.³⁷

As with all excess of power inquiries, determining whether a mistake of this sort will undermine validity is a question of statutory interpretation.³⁸ In this context, it asks

whether it was a purpose of the legislation that an act done in reliance on an inappropriate statutory power, but which could be supported by another statutory power, should be invalid.³⁹

It may be inferred that the alternative source of power cannot be relied on, for example, if the statute suggests that it is only available when explicitly cited by the decision-maker, if it is subject to different conditions precedent (that have not been met) or requires attention to materially different considerations.⁴⁰ Likewise, it may be inferred that the ‘unstated’ power cannot be relied on if it produces materially different consequences for third parties than the power in fact relied on.⁴¹ It is not the potential for consequences per se, but the potential for *different* consequences which is of interest here. Thus, unexercised power B may be relied on even if its consequence is to impose a death sentence, provided that it shares this in common with power A.⁴²

A further example of ‘technical’ invalidity reasoning is evident in the materiality principle, pursuant to which an error will not undermine legality unless ‘there is a realistic possibility that the decision that was made in fact

³⁵ *Bevan* (n 33) 487 (Williams J), citing *Moore v A-G (Irish Free State)* [1935] AC 484, 498 (Viscount Sankey LC for Viscount Sankey LC, Lords Atkin, Tomlin, Macmillan and Wright).

³⁶ See below Part III(D)(1).

³⁷ See *Bondi Beach Astra Retirement Village Pty Ltd v Assem* [2020] NSWSC 1814, [76] (Meagher JA).

³⁸ *Project Blue Sky* (n 22) 390–1 [93] (McHugh, Gummow, Kirby and Hayne JJ).

³⁹ *VAW (Kurri Kurri) Pty Ltd v Scientific Committee* (2003) 58 NSWLR 631, 639 [33] (Spigelman CJ).

⁴⁰ *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 40 FCR 409, 412 (Black CJ), 437 (Gummow J).

⁴¹ *Australian Broadcasting Tribunal v Saatchi & Saatchi Compton (Vic) Pty Ltd* (1985) 10 FCR 1, 10 (Bowen CJ).

⁴² See *Bevan* (n 33) 487 (Williams J).

could have been different if the error had not occurred.⁴³ For some categories of error, it is not necessary to ask a separate question regarding its effect to decide if the error is jurisdictional. This is because some errors are taken to be jurisdictional ‘irrespective of any effect that the error might or might not have had on the decision that was made’ or due to the fact that ‘the potential for an effect on the decision will be inherent in the nature of the error’.⁴⁴ Outside those categories, a court will assess materiality by considering what role the error has played in the decision-maker’s reasoning process.⁴⁵ That assessment is not always an easy one, but the result will be more clear in cases where the statutory or factual context leads to a conclusion that the outcome was inevitable.⁴⁶ Errors that are found to be immaterial can be framed as technical flaws that do not undermine the validity of the act or decision. They are not jurisdictional.⁴⁷

C The Public Law Consequences of Exceeding Power

As indicated by the foregoing discussion, the distinction between jurisdictional and non-jurisdictional errors occupies an important space in administrative law doctrine. While non-jurisdictional errors can sometimes attract a public law remedy,⁴⁸ a plaintiff’s position is far clearer if the error in question goes to

⁴³ *LPDT* (n 11) 327 [7] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ) (emphasis omitted), citing *Minister for Immigration and Border Protection v SZMTA* (2019) 264 CLR 421, 445 [45] (Bell, Gageler and Keane JJ) (‘SZMTA’), *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, 524 [39] (Kiefel CJ, Gageler, Keane and Gleeson JJ) (‘MZAPC’), *Nathanson v Minister for Home Affairs* (2022) 276 CLR 80, 103 [32], 107–8 [46], 113 [62] (Kiefel CJ, Keane and Gleeson JJ) (‘Nathanson’), *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Thornton* (2023) 276 CLR 136, 161 [75] (Gordon and Edelman JJ). The materiality principle was originally stated in *Hossain* (n 10): at 134–5 [29]–[31] (Kiefel CJ, Gageler and Keane JJ), 146–8 [67]–[72] (Edelman J, Nettle J agreeing at 136 [39]).

⁴⁴ *LPDT* (n 11), where bias was cited as an example of the former and unreasonableness was cited as an example of the latter: at 327 [6] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

⁴⁵ *Ibid* 329 [15] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ). A number of grounds already contain a built-in reference to the effect of the error on the decision: Ellen Rock, ‘Causation in Public Law’ (2023) 30(1) *Australian Journal of Administrative Law* 56, 68–73 (‘Causation’).

⁴⁶ See *LPDT* (n 11) 329 [16] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), 335 [36] (Beech-Jones J).

⁴⁷ See, eg, *ibid* 325 [2], 328–9 [13]–[14] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ); *MZAPC* (n 43) 543–4 [100]–[102] (Gordon and Steward JJ).

⁴⁸ Depending on the context, the writs of certiorari, injunctive and declaratory relief can extend beyond jurisdictional error: see *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 358–60 [99]–[104] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Craig*

jurisdiction.⁴⁹ Even so, the nature of public law relief offers no guarantee of a remedy, or of a remedy that will be of practical benefit to the plaintiff.

1 ‘Nullity’ Benefits Are Not Automatic

Where a jurisdictional error is established, the usual position is that the act or decision is a ‘nullity’ in that it ‘lacks the legal force it purports to have’.⁵⁰ The labels of ‘void’ and ‘vitiated’ reflect similar ideas, namely, that an unlawful act is ‘strip[ped] ... of any special status’⁵¹ and can be regarded as ‘no decision at all’.⁵² While invalidity is usually retrospective, this is not a universal proposition because some official acts will remain valid until set aside, such as orders made by superior courts,⁵³ or by other bodies where that outcome is intended by Parliament.⁵⁴ For present purposes, the benefit of classifying an exercise of power as a nullity is that it permits a person to ‘safely ignore it’.⁵⁵ In practice,

(n 17) 174–6, 182 (Brennan, Deane, Toohey, Gaudron and McHugh JJ). So too do remedies awarded under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (‘ADJR Act’): see at s 16.

⁴⁹ This is both because some remedies are only available for jurisdictional error, and because Parliament cannot withdraw that remedial power from the courts: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 482–3 [5]–[6] (Gleeson CJ), 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (‘S157’); *Kirk* (n 24) 581 [98]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, Heydon J agreeing at 585 [113]).

⁵⁰ *New South Wales v Kable* (2013) 252 CLR 118, 138 [52] (Gageler J) (‘Kable (No 2)’).

⁵¹ Mark Aronson, ‘Nullity’ (2004) 40 (January) *Australian Institute of Administrative Law Forum* 19, 19, 21.

⁵² *Bhardwaj* (n 19) 615 [51] (Gaudron and Gummow JJ). Similar statements have been made regarding ultra vires legislation and inferior court decisions: see *Kable* (No 2) (n 50) 138 [51] (Gageler J); *Parisienne Basket Shoes Pty Ltd v Whyte* (1938) 59 CLR 369, 375 (Latham CJ).

⁵³ *Kable* (No 2) (n 50) 135 [38] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). The distinction between superior and inferior court decisions was confirmed by the majority in *Queensland v Stradford (a pseudonym)* (2025) 421 ALR 376: at 389 [53] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) (‘Stradford’). However, Edelman J rejected this distinction as a ‘historical anachronism’: at 435 [227], Steward J agreeing at 467–8 [325].

⁵⁴ *Bhardwaj* (n 19) 614 [50] (Gaudron and Gummow JJ). For examples of statutory provisions that contemplate validity: see, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 88 [104] (Gaudron J), 98 [144] (McHugh J), discussing *Migration Act* (n 25) s 69; *Ceeroose Pty Ltd v A-Civil Aust Pty Ltd [No 2]* [2023] NSWSC 345, [80]–[83] (Richmond J), discussing *Building and Construction Industry Security of Payment Act 1999* (NSW) s 32A. In *Stradford* (n 53), Gordon J held that s 17 of the *Federal Circuit Court of Australia Act 1999* (Cth) (‘Federal Circuit Court Act’) gave such effect to Judge Vasta’s previous orders in *Stradford v Stradford* [2018] FCCA 3890: see at [28]–[30]; *Stradford* (n 53) 418 [162], 419–20 [167]–[170] (Gordon J).

⁵⁵ *Posner v Collector for Inter-State Destitute Persons (Vic)* (1946) 74 CLR 461, 483 (Dixon J).

however, a person may need to be brave or foolhardy to do so.⁵⁶ A decision affected by error ‘bears no brand of invalidity upon its forehead’,⁵⁷ and there is a clear difference between *believing* a decision to be ultra vires and being sufficiently convinced to risk the legal or practical implications of ignoring it. Government officials are under no obligation to treat an invalid decision as ‘no decision at all’ until a court has confirmed that position,⁵⁸ and a person often cannot ‘in *practical terms* ... disregard’ an order, even if it cannot be legally enforced against them.⁵⁹

While describing an exercise of power as ‘invalid’ or a ‘nullity’ may be a helpful way of conceptualising limits on public power, a realistic picture of the legal consequences flowing from jurisdictional error must take account ‘not only of *who* may complain about the want of power, but also of what *remedy* may be given in response to the complaint’.⁶⁰ This is because invalidity is not ‘a quality or pathology inhering in the decision itself’.⁶¹ Its benefits stem from the award of judicial relief, meaning that these benefits are subject to various procedural handbrakes that control the award of public law writs and remedies.⁶²

Some of these handbrakes derive from deliberate attempts by Parliament to exclude access to judicial review via ‘privative’ or ‘ouster’ clauses.⁶³ Historically, these clauses were allowed to exclude judicial review subject to a baseline requirement that the government act or decision was taken in good faith and

⁵⁶ See, eg, *Woolwich* (n 1), where the plaintiff elected to comply with a demand for payment that they believed to be unlawful and later seek restitution: at 170–2 (Lord Goff).

⁵⁷ *Smith v East Elloe Rural District Council* [1956] AC 736, 769 (Lord Radcliffe) (‘*Smith*’).

⁵⁸ *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14, 48–9 [164]–[166] (Moore and Lander JJ). This is bolstered by the presumption of regularity: see *Ousley v The Queen* (1997) 192 CLR 69, 130–1 (Gummow J) (‘*Ousley*’); *Bhardwaj* (n 19) 645–6 [151] (Hayne J); *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154, 164 (McHugh JA, Kirby P agreeing at 157–8) (‘*Aboriginal Land Council*’).

⁵⁹ *R v Swansson* (2007) 69 NSWLR 406, 432 [162] (Simpson J) (emphasis added).

⁶⁰ *Kable (No 2)* (n 50) 129 [21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis in original). Mark Aronson has often warned that labels of ‘invalidity’ and ‘ultra vires’ are largely pointless until a court makes an order that the relevant decision is a ‘nullity’: Aronson, ‘Without the Tears’ (n 19) 333; Mark Aronson, ‘Jurisdictional Error and beyond’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 248, 267–9; Mark Aronson, ‘Reforming Certiorari and Messing with Nullity’ (2022) 29(2) *Australian Journal of Administrative Law* 110, 112 (‘Reforming Certiorari’).

⁶¹ Aronson, ‘Reforming Certiorari’ (n 60) 112.

⁶² *Ibid* 112–13, discussing *Smith* (n 57).

⁶³ Aronson, Groves and Weeks (n 2) provide an overview of drafting techniques for privative clauses: at 1136–7.

for an authorised purpose.⁶⁴ That baseline was raised at the turn of the century to encompass jurisdictional error more broadly.⁶⁵ As a result, ouster clauses now generally exclude review only for non-jurisdictional errors (ie legal errors an official is allowed to make without undermining validity).⁶⁶ While the content of judicial review jurisdiction is not entrenched,⁶⁷ it is thought unlikely that Parliament could ever authorise an exercise of power in a manner that fell below that original baseline requirement of good faith.⁶⁸

The structure of judicial review also imposes its own limits on access to relief that will brand a decision a nullity. For instance, public law standing rules limit the class of persons entitled to challenge an ultra vires decision,⁶⁹ and only some of that class may have the time, resources and inclination to bring a claim.⁷⁰ The courts may also sometimes adjust the ‘nullity’ outcome by altering the direction in which invalidity operates, setting a decision aside going forward but not retrospectively.⁷¹ Further, because the award of relief in public

⁶⁴ *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, 615 (Dixon J) (*‘Hickman’*). Separately, Dixon J indicated that a privative clause could not protect breaches of ‘imperative duties or inviolable limitations’: *R v Metal Trades Employers’ Association; Ex parte Amalgamated Engineering Union, Australian Section* (1951) 82 CLR 208, 248. This is broadly consistent with the modern approach to interpreting privative clauses: see Aronson, Groves and Weeks (n 2) 1147.

⁶⁵ *S157* (n 49) established jurisdictional error as the ‘entrenched minimum provision’ of the High Court’s judicial review powers: at 511–12 [98], 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). *Kirk* (n 24) set a similar baseline for state Supreme Courts: at 580–1 [96]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁶⁶ Creative drafting can extend the reach of these clauses, though they are still read restrictively. Thus, a clause may be invalid if it imposes an unreasonably short limitation period (see, eg, *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 670–2 [49]–[60] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ, Callinan J agreeing at 676 [79]) (*‘Bodruddaza’*)) or restricts access to information necessary to identify jurisdictional error (see, eg, *Graham* (n 8) 27–9 [50]–[53], 32–3 [64]–[66] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ)).

⁶⁷ See, eg, *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213, 249 [95] (Heydon J); *Graham* (n 8) 48–9 [105]–[107] (Edelman J).

⁶⁸ See *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 165 [57] (Gummow, Hayne, Heydon and Crennan JJ) (*‘Futuris’*), quoting *S157* (n 49) 508 [82] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). These comments were made in reference to the High Court’s power to issue injunctions rather than other constitutional writs: at 164–5 [55]–[57] (Gummow, Hayne, Heydon and Crennan JJ). See also Aronson, Groves and Weeks (n 2) 1174.

⁶⁹ See generally Margaret Allars, *Australian Administrative Law* (LexisNexis, 2026) ch 6.

⁷⁰ See generally Matthew Groves, ‘Equality of Arms in Administrative Review’ (2023) 46(3) *Melbourne University Law Review* 726, 742–50.

⁷¹ See, eg, *Jadwan Pty Ltd v Secretary, Department of Health and Aged Care* (2003) 145 FCR 1, where an unlawful administrative decision was quashed with only prospective effect in

law proceedings is discretionary, the courts may refuse relief for reasons such as disentitling conduct by an applicant or because awarding relief would be futile.⁷² Even prior to the adoption of the materiality principle, ‘technical’ violations could therefore be sidelined via the exercise of remedial discretion,⁷³ and similar principles continue to play a role in private law claims.⁷⁴ To summarise, the benefits deriving from legal confirmation of ‘nullity’ are not automatic, and many ‘invalid’ exercises of power remain on the record because no person has sought — or the court has denied — a remedy which confirms that status.

2 Public Law Remedies Go Only So Far

Where the courts do award remedies in judicial review proceedings, this does not ensure that the plaintiff will enjoy a favourable change to the manner in which power has been exercised. In some situations power may be conferred on narrow terms that make it possible to anticipate what outcome will follow when a flawed decision has been quashed.⁷⁵ However, many of the types of errors an official can make are procedural, meaning that they do not dictate one way or the other whether the resulting decision is one that is legally open.⁷⁶ It may well be that the same decision could be made having considered and then ignored an irrelevant consideration⁷⁷ or having botched but then afforded a fair hearing.⁷⁸ Even if those errors are found to be material and relief is awarded, it is quite possible that the power might then be lawfully re-exercised with the same unwanted outcome.⁷⁹

proceedings brought under the *ADJR Act* (n 48): at 18 [47] (Gray and Downes JJ), 27 [83] (Kenny J) (*Jadwan*).

⁷² *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 400 (Latham CJ, Rich, Dixon, McTiernan and Webb JJ).

⁷³ Some judges would have preferred to maintain that approach: see, eg, *SZMTA* (n 43) 458–9 [90] (Nettle and Gordon JJ).

⁷⁴ See below Parts III(D)(2) and IV(B)(2).

⁷⁵ See, eg, *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135, 156 [51]–[52] (Gleeson CJ, Gummow, Kirby and Hayne JJ, Gaudron J agreeing at 156 [53]) (*‘Enfield’*); *ABC Developmental Learning Centres Pty Ltd v Secretary, Department of Human Services* (2007) 15 VR 489, 495 [32] (Hollingworth J).

⁷⁶ See *Aronson, Groves and Weeks* (n 2) 401–2.

⁷⁷ See *CNY17 v Minister for Immigration and Border Protection* (2019) 286 CLR 76, 85–6 [12]–[15] (Kiefel CJ and Gageler J).

⁷⁸ See *Aala* (n 20) 88–9 [3]–[4] (Gleeson CJ), 115–17 [78]–[80] (Gaudron and Gummow JJ), 153–4 [211] (Callinan J).

⁷⁹ For example, a Nepalese refugee successfully challenged the legality of two consecutive visa refusal decisions before the High Court permitted the third to stand: *Minister for Immigration*

This unpredictability is particularly apparent where government power is conferred on discretionary terms. In such cases, ‘there may have been a range of alternative lawful decisions, one of which might include a lawful decision not to exercise the power’.⁸⁰ The award of relief in public law is sensitive to these possibilities.⁸¹ There might be little difficulty with issuing the writs of certiorari and prohibition to nullify an invalid decision and prevent its enforcement. From there, outcomes are less predictable. A writ of mandamus can compel the performance of an unperformed duty, but will not usurp a discretion. If discretionary power remains unexercised (either because the decision-maker has made no attempt to exercise it, or because the first attempt was invalid), the courts may be able to compel the decision-maker to *consider* whether to exercise the power, but will not dictate the exercise of the discretion itself.⁸² A remedy compelling a particular outcome using discretionary power would only be appropriate in rare cases such as where discretion has ‘run out’.⁸³

3 Judicial Remedies Cannot Rewrite History

A further difficulty for applicants grappling with the effects of unlawful government action is that public law relief classifying a decision as a ‘nullity’ or ‘void’ does not necessarily unwind the chain of events that has followed.⁸⁴ As explored later in this article, the ultra vires acts and decisions of government officials set the scene for many types of practical impacts, including physical and mental harm, financial loss and infringement of liberty. Up until the court’s order, an unlawful decision ‘remains at all times a thing in fact’,⁸⁵ and a finding

and Citizenship v SZGUR (2011) 241 CLR 594, 597–8 [6], 609 [45] (French CJ and Kiefel J, Heydon J agreeing at 623 [91], Crennan J agreeing at 623 [92]), 623 [90] (Gummow J, Heydon J agreeing at 623 [91], Crennan J agreeing at 623 [92])).

⁸⁰ *Lock v Australian Securities and Investments Commission* (2016) 248 FCR 547, 579 [138] (Gleeson J) (*‘Lock’*). This was a misfeasance in public office claim alleging the invalidity of a decision made in the exercise of discretionary power: at 572 [99], 574–5 [110]–[116] (Gleeson J).

⁸¹ The distinction between public and private law remedies was canvassed in *New South Wales v Paige* (2002) 60 NSWLR 371: at 404 [173]–[177] (Spigelman CJ) (*‘Paige’*).

⁸² See, eg, *Eastman v ACT Executive, Australian Capital Territory* (2013) 274 FLR 286, 293 [33]–[34], 295 [42] (Rares J).

⁸³ See, eg, *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 182 CLR 51, 88 (Brennan J, Toohey J agreeing at 103, McHugh J agreeing at 103) (*‘Royal Insurance’*).

⁸⁴ Christopher Forsyth, ‘“The Metaphysics of Nullity”: Invalidity, Conceptual Reasoning and the Rule of Law’ in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (Oxford University Press, 1998) 141, 147–50.

⁸⁵ *Kable (No 2)* (n 50) 138 [52] (Gageler J).

that the underlying exercise of power is a ‘nullity’ cannot rewrite this history.⁸⁶ What an award of relief *can* achieve (at least in some cases) is to retrospectively withdraw lawful authority:

[F]rom the moment that the order is set aside it ‘can no longer provide the lawful justification for further action’ and, depending upon the nature and statutory basis for any action taken in the interim, it will sometimes be appropriate for ‘what has been done [to] be undone’.⁸⁷

In some cases, this formal withdrawal of authority may support a tort claim to remedy the unlawfully caused harm.⁸⁸ In other cases, however, the factual consequences may have already gone too far. There are many examples of cases in which the factual existence of an invalid decision (‘primary act’) has been allowed to serve as a springboard for some other government action (‘secondary act’). The *Ruddock v Taylor* (‘*Ruddock*’) case is a prime example: the *primary* act was an invalid administrative decision which classified Mr Taylor as an ‘unlawful non-citizen’.⁸⁹ This enlivened a separate, *secondary* exercise of power by immigration officers to detain him.⁹⁰ More recently in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (‘*Moorcroft*’), the respondent was removed from Australia pursuant to an invalid administrative decision (primary act), which then enlivened a separate power to refuse her re-entry (secondary act).⁹¹ Some

⁸⁶ A writ of mandamus cannot compel a decision-maker to engage in time travel: *Hamade v Minister for Immigration and Border Protection* [2017] FCA 402, [32]–[33] (Perram J).

⁸⁷ *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 272 CLR 33, 62 [88] (Edelman J), quoting *Wilde v Australian Trade Equipment Co Pty Ltd* (1981) 145 CLR 590, 603 (Stephen, Murphy and Wilson JJ, Aickin J agreeing at 608). The High Court refused to entertain the possibility that a judicial ruling on the validity of a law could be afforded only prospective effect in *Abdel-Hady v Commonwealth* [2026] HCA 17: at [3] (Gageler CJ, Gleeson and Beech-Jones JJ), [83]–[84] (Gordon J, Steward J agreeing at [182]), [158] (Edelman J), [207] (Jagot J) (‘*Abdel-Hady*’).

⁸⁸ This assumes that nullification is retrospective and that the complaint otherwise constitutes a tort: see examples below at Part III(A). Note also that nullification need not occur prior to a tort claim: see below Part IV(B).

⁸⁹ (2005) 222 CLR 612, 663 [185]–[186], 668–9 [205]–[208] (Callinan J) (‘*Ruddock*’). There were in fact two cancellation decisions. The first was conceded to be invalid: *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 446 [164]–[165] (Gummow and Hayne JJ) (‘*Re Patterson*’). The second was found invalid following a contested hearing: at 420 [84] (Gaudron J), 455 [196] (Gummow and Hayne JJ, Gleeson CJ agreeing at 398 [1]), 504–5 [338]–[339] (Kirby J).

⁹⁰ Mr Taylor sought damages in a false imprisonment claim: *Ruddock* (n 89) 617 [3] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁹¹ (2021) 273 CLR 21, 31 [1] (Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ) (‘*Moorcroft*’). The relevant legislation classified someone who had been ‘removed’ as a ‘behaviour concern

factual chains extend even further: in *New South Wales v Kable* ('*Kable (No 2)*'), an ultra vires law (primary act) served as the foundation for a court order for Mr Kable's detention (initial secondary act), which was then relied on by prison officials to detain him (subsequent secondary act).⁹² The fact that a primary exercise of power is a 'nullity' does not necessarily infect the chain of later actions taken in reliance on it.⁹³

This is the substance of Professor Forsyth's theory of the 'second actor', which suggests that the validity of an act resting on an invalid foundation hinges on whether the 'second actor has legal power to act validly notwithstanding the invalidity of the first act'.⁹⁴ In each of the above examples, it was determined that the secondary power was not conditioned on the validity of the first: the power in *Ruddock* required only 'reasonable suspicion' that Mr Taylor met the criteria for detention;⁹⁵ the power in *Moorcroft* required only the 'historical fact' that Ms Moorcroft had been removed from Australia;⁹⁶ and the detention power in *Kable (No 2)* derived 'not from the [invalid] law ... but from the status or nature of the court making the order'.⁹⁷ In each of these cases, the factual existence of the primary act was sufficient to support the legal validity of the second, and nullification of the first act therefore did not retrospectively undermine the legality of the second.⁹⁸ This will not always be the case. Ultimately, the question is one of statutory construction; while some secondary powers will be conditioned on the valid exercise of the primary power, others will not.⁹⁹

non-citizen' for the purpose of entry: *Migration Act* (n 25) s 5(1) (definition of 'behaviour concern non-citizen').

⁹² *Kable (No 2)* (n 50) 125 [1]–[4] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁹³ See, eg, *ibid* 126 [8]–[11] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁹⁴ Forsyth (n 84) 159. See also at 144, 147–51. For discussion of this theory in the Australian constitutional context: see generally Emily Hammond, 'The "Second Actor Problem": A Chapter III Twist?' (2022) 106 (December) *Australian Institute of Administrative Law Forum* 109, 109–10.

⁹⁵ *Ruddock* (n 89) 625–6 [38]–[40] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 674–5 [228] (Callinan J). See also *Migration Act* (n 25) s 189.

⁹⁶ *Moorcroft* (n 91) 37 [19], 41 [28]–[29] (Kiefel CJ, Keane, Gordon, Steward and Gleeson JJ). See *Migration Act* (n 25) s 5(1) (definition of 'behaviour concern non-citizen').

⁹⁷ *Kable (No 2)* (n 50) 134 [36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

⁹⁸ The position is no different where the primary act is invalid for constitutional reasons: *Kable (No 2)* (n 50) 133–4 [32]–[36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Cf *Coleman v Power* (2004) 220 CLR 1, 63 [143] (McHugh J).

⁹⁹ Forsyth (n 84) 150, citing *R v Wicks* [1998] AC 92, 117 (Lord Hoffmann, Lord Browne-Wilkinson agreeing at 104).

Taken together, this overview of public law principles demonstrates that (a) not every violation of limits on public power will attract a remedy; and (b) for those that do, the consequences depend on complex interactions between points of parliamentary intention, factual chains of cause and effect, the limitations of public law remedies and the court's capacity and willingness to intervene. Against that background, the difficulty of drawing lines between invalidity and tort liability should start to become clear.

III LIABILITY AND EXCESS OF POWER

Tort liability attaches to government action in a variety of different ways, reflecting differing conceptions of 'government' as well as the functions that it shares in common with — and in contrast to — private individuals.¹⁰⁰ This article is concerned with the subset of liability rules that apply in contexts where government officials and agencies may be exercising the types of more uniquely 'public' powers that are not (usually) conferred on private parties,¹⁰¹ such as powers to detain, arrest, enter property and more generally regulate areas of activity in ways that can affect individuals.¹⁰² Where a statute confers powers of this sort, both public and private law have potential roles to play. The complex interaction of public and private law principles is a topic that has attracted significant academic attention,¹⁰³ including detailed analysis of the circumstances in which an invalid exercise of power ought to sound in tort damages.¹⁰⁴ A variety of difficulties arise at this intersection, including

¹⁰⁰ See, eg, Peter Cane, 'Tort Law and Government Liability in the Administrative State' in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 83, 83–4, 87, 94 ('Tort Law and Government Liability').

¹⁰¹ It is not uncommon for the government to outsource the exercise of powers in ways that can give rise to complex liability issues, though this is not the subject of this article: see, eg, *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217, 226 [36], 261 [213], 272 [265] (Finn J).

¹⁰² See, eg, *Crimes Act 1958* (Vic) ss 459–459A. See also Kit Barker, 'Public Power, Direction and the Duty of Care' in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 207, 207.

¹⁰³ A small selection includes Paul Craig, 'Public Law and Control over Private Power' in Michael Taggart (ed), *The Province of Administrative Law* (Hart Publishing, 1997) 196, 196–7, 204; Cane, 'Tort Law and Government Liability' (n 100) 97–8; Carol Harlow, 'Public and Private Law: A Redundant Divide' in Jason NE Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart Publishing, 2019) 315, 321–3; Jason NE Varuhas, 'The Socialisation of Private Law: Balancing Private Right and Public Good' (2021) 137 (January) *Law Quarterly Review* 141, 141–4.

¹⁰⁴ See, eg, PP Craig, 'Compensation in Public Law' (1980) 96 (July) *Law Quarterly Review* 413, 426–8 ('Compensation'); Enid Campbell, 'Liability to Compensate for Denial of a Right to a

concerns about potential incoherence between public and private law duties,¹⁰⁵ problems in reconciling the procedural character of public law errors with the private law principles of causation and quantification of damages,¹⁰⁶ and the risk of judicial overstep in usurping power conferred on the executive branch.¹⁰⁷ As will be seen, many of these concerns are implicit in the approach adopted by the courts in the cases explored below.

As a starting point, it is important to recognise that invalidity and liability are discrete categories that do not need to overlap. The tort of negligence offers a clear example; in the oft-quoted words of McHugh J, ‘the negligent exercise of a statutory power is not immune from liability simply because it was within power, nor is it actionable in negligence simply because it is ultra vires’.¹⁰⁸ For those torts that engage more directly with excess of power issues,¹⁰⁹ invalidity is never determinative.¹¹⁰ Even the much-maligned *Beautesert* tort did not go that far.¹¹¹ Its promise of a remedy for harm caused by ‘unlawful, intentional and positive acts’ did not capture invalidity in the public law sense described in Part II, but instead spoke of acts ‘forbidden by law’.¹¹² More than 50 years later, it remains the case that ‘a purported exercise of power is not necessarily

Fair Hearing’ (1989) 15(3–4) *Monash University Law Review* 383, 406–8; Peter Cane, ‘Damages in Public Law’ (1999) 9(3) *Otago Law Review* 489, 506–7; Rossana Panetta, ‘Damages for Wrongful Administrative Decisions’ (1999) 6(4) *Australian Journal of Administrative Law* 163, 168; Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004) 89 n 4; Ellen Rock and Greg Weeks, ‘Monetary Awards for Public Law Wrongs: Australia’s Resistant Legal Landscape’ (2018) 41(4) *University of New South Wales Law Journal* 1159, 1160–1; Sir David Foxton, ‘Public Law Illegality in Private Law Claims: Some Recent Developments’ (2021) 26(2) *Judicial Review* 114, 127–9 [32]–[34], discussing *R (Lumba) v Secretary of State of the Home Department* [2012] 1 AC 245 (*‘Lumba’*), *Bostridge v Oxeas NHS Foundation Trust* [2015] EWCA Civ 79; *Parker v Chief Constable of Essex Police* [2017] EWHC 2140 (QB), *Parker v Chief Constable of Essex Police* [2019] 1 WLR 2238.

¹⁰⁵ See, eg, *Paige* (n 81) 404 [177] (Spigelman CJ).

¹⁰⁶ See, eg, Craig, ‘Compensation’ (n 104) 438–9.

¹⁰⁷ See, eg, Panetta (n 104) 172–3.

¹⁰⁸ *Crimmins* (n 3) 35 [82].

¹⁰⁹ The tort of misfeasance in public office is the most notable example, but excess of power issues also arise in the context of other torts where the cause of action is premised on misuse of statutory power: see generally below Parts III(A)–(D).

¹¹⁰ See Rock and Weeks (n 104) 1175–6.

¹¹¹ *Beautesert Shire Council v Smith* (1966) 120 CLR 145, 155–6 (Taylor, Menzies and Owen JJ) (*‘Beautesert’*), which was eventually overruled: *Northern Territory v Mengel* (1995) 185 CLR 307, 345 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ, Brennan J agreeing at 354–5), 370 (Deane J) (*‘Mengel’*). The *Beautesert* rule provided a remedy to ‘a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another’: *Beautesert* (n 111) 156 (Taylor, Menzies and Owen JJ).

¹¹² *Mengel* (n 111) 336–7 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

wrongful because it is ultra vires,¹¹³ and ‘the mere invalidation of an administrative decision does not provide a cause of action or a basis for an award of damages’.¹¹⁴

If invalidity does not determine tort liability, what is the relationship between the two inquiries? For a particular tort, is the invalid exercise of power an element of the claim, or is the valid exercise of power a defence?¹¹⁵ Does the conferral of a power in a particular case have the effect of redefining the meaning of wrongdoing, or justifying otherwise wrongful acts, or excusing a defendant from liability for their wrongful acts?¹¹⁶ It will not always be readily apparent which type of arrangement is in play, with the boundaries between the categories being admittedly porous.¹¹⁷ Even if those boundaries were more clear, it should not be assumed that public law principles can always be neatly squared with the terminology of tort law, and attempts to do so may risk mischaracterisation.¹¹⁸ As Gaudron J warned in *Crimmins v Stevedoring Industry Finance Committee*, the public law context of a claim is not merely background scenery upon which the common law of tort is ‘superimposed’.¹¹⁹ Bearing this warning in mind, this part explores a number of typical contexts in which the public law considerations outlined in Part II may feature in tort liability claims, including cases in which (a) an official’s exercise of power is flawed on public law grounds; (b) an official has relied on an invalid source of power; (c) the liability claim encounters an area of decision-making freedom; and (d) the plaintiff complains of an error that public law would regard as immaterial.

¹¹³ See *ibid* 356 (Brennan J). His Honour used ‘wrongful’ in this context to refer to tortious conduct: at 354, 356.

¹¹⁴ *Chan Yee Kin v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 29, 41 (Einfeld J).

¹¹⁵ Alternative characterisations include ‘answers’: Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 89–92. They also include ‘privileges’: Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 225–8.

¹¹⁶ For discussion of the differences between denials of wrongdoing, justifications of acts and excusals of wrongdoing: see, eg, John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) ch 4; James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 39–44; Graham Virgo, ‘Justifying Necessity as a Defence in Tort Law’ in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing, 2015) 135, 139–43.

¹¹⁷ Goudkamp (n 116) 1–5.

¹¹⁸ See below n 169 and accompanying text.

¹¹⁹ *Crimmins* (n 3) 18 [26].

A Public Law Flaws in the Exercise of Coercive Power

Government actors can infringe individual rights and interests only where such a power is conferred by law.¹²⁰ ‘Liberty ends where the power of arrest begins’,¹²¹ and the same can be said of other sources of authority to interfere with interests in property and bodily autonomy.¹²² There are numerous examples of such statutory conferrals. Some specifically authorise an ad hoc incursion of rights, such as warrants of search or arrest.¹²³ Other conferrals constitute a standing power to infringe rights, such as statutory powers to detain suspected unlawful non-citizens,¹²⁴ to administer treatment to involuntary mental health patients¹²⁵ or to seize dangerous animals.¹²⁶ Where an official remains within the scope of their legal authority, an individual has no recourse for loss or infringement, other than in the rare circumstances where Parliament has chosen to provide a right to compensation.¹²⁷ Beyond the limits of authority, each of these acts is of a tortious character, constituting battery, false imprisonment and trespass to land or goods. An official exercising these types of powers will be ‘acting lawfully only to the extent that his conduct is justified’ by law.¹²⁸ This makes it essential for an official exercising a power of these types to adopt a correct interpretation of the scope of the power and the limits that apply to its exercise.

¹²⁰ See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ, Mason CJ agreeing at 10, Gaudron J agreeing at 53) (*‘Chu Kheng Lim’*); *Smethurst* (n 9) 225 [111] (Gageler J). In addition to statutory power, officials also enjoy limited authority at common law, such as authority to arrest without warrant: see, eg, David Rolph et al, *Balkin & Davis Law of Torts* (LexisNexis, 6th ed, 2021) 215–17 [6.37]–[6.39].

¹²¹ *Webster v McIntosh* (1980) 32 ALR 603, 607 (Brennan J).

¹²² See, eg, *Entick v Carrington* (1765) 2 Wils KB 275; 95 ER 807, 817 (Lord Camden CJ); *Secretary, Department of Health and Community Services (NT) v JWB* (1992) 175 CLR 218, 309–10 (McHugh J).

¹²³ See, eg, warrants issued pursuant to *Crimes Act 1914* (Cth) ss 3E(1)–(2); *Extradition Act 1988* (Cth) s 12(1).

¹²⁴ See, eg, *Migration Act* (n 25) s 189.

¹²⁵ See, eg, *Mental Health Act 2007* (NSW) s 84.

¹²⁶ See, eg, *Companion Animals Act 1998* (NSW) s 18.

¹²⁷ See, eg, *Metropolitan Water, Sewerage and Drainage Board v OK Elliott Ltd* (1934) 52 CLR 134, considering the effect of the *Metropolitan Water, Sewerage and Drainage Act 1924* (NSW) s 32. A plaintiff might pursue common law damages in circumstances where the defendant has exceeded the scope of such a compensation provision: at 143–4 (Starke J), 150–1 (Dixon J, Rich J agreeing at 141), 154 (McTiernan J, Evatt J agreeing at 151).

¹²⁸ *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 528 (Deane J), cited in *Chu Kheng Lim* (n 120) 63 (McHugh J).

Given the inherently context-specific nature of the statutory interpretation process,¹²⁹ it is understandable that well-meaning officials will sometimes get the answers wrong. The Governor in *R v Governor of Brockhill Prison; Ex parte Evans [No 2]* is an example of one of the unlucky ones.¹³⁰ Even the courts had initially failed to correctly interpret the statutory rules which defined the proper duration for the plaintiff's imprisonment, and the Governor 'cannot be criticised' for adopting that same (incorrect) interpretation.¹³¹ However, the Governor's power to detain was restricted to a legally correct interpretation of the law, and the failure to meet that exacting standard exposed the Governor to liability for the tort of false imprisonment.¹³²

Recalling the summary of public law principles outlined in Part II, an official who exercises power to engage in otherwise tortious acts must ensure they comply with (a) any *express* limits that attach to the exercise of the power, as well as (b) any additional *implied* obligations sourced via the common law principles of statutory interpretation.¹³³ The express limits that apply to a power will sometimes be readily apparent. For example, a police officer cannot rely on a warrant to support the arrest of a person not named in the warrant¹³⁴ or a search power that does not apply during the time period in question.¹³⁵ Some powers may be expressly limited by more malleable requirements, such as a power conditioned on an official's 'belief' or 'suspicion' of something on 'reasonable grounds'¹³⁶ or that the exercise of the power is 'reasonably necessary'.¹³⁷ Authority to engage in tortious conduct may also have a temporal element, with once valid authority falling away due to changing

¹²⁹ See above n 24 and accompanying text.

¹³⁰ [2001] 2 AC 19 ('*Evans*').

¹³¹ Ibid 26 (Lord Slynn).

¹³² Ibid 26 (Lord Slynn, Lord Hobhouse agreeing at 49), 27 (Lord Browne-Wilkinson, Lord Hobhouse agreeing at 49), 28–9 (Lord Steyn, Lord Hobhouse agreeing at 49), 35 (Lord Hope, Lord Hobhouse agreeing at 49).

¹³³ See above Part II(A).

¹³⁴ See *Money v Leach* (1765) 3 Burr 1692; 97 ER 1050, 1088 (Lord Mansfield).

¹³⁵ See, eg, *Myer Stores Ltd v Soo* [1991] 2 VR 597, in which a search pursuant to a warrant allowing search by day was continued at night: at 612 (O'Bryan J).

¹³⁶ The meaning of these states of mind was considered in *George v Rockett* (1990) 170 CLR 104, 112, 115–16 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); and *Ruddock* (n 89) 625–6 [38]–[40] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 632–7 [70]–[92] (McHugh J), 661–2 [179]–[180] (Kirby J), 673 [223], 675 [230] (Callinan J).

¹³⁷ See, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99(1)(b).

circumstances.¹³⁸ Thus, a prison warden who continues to detain a prisoner after the expiry of their sentence may become liable in false imprisonment,¹³⁹ as may an immigration official who no longer ‘reasonably suspects’ a person to be an unlawful non-citizen.¹⁴⁰

In addition to express requirements, an official may also go off track by violating the types of implied limits on power outlined in Part II, commonly referred to as the grounds of judicial review.¹⁴¹ Affected parties seldom use judicial review proceedings to directly challenge the legality of an exercise of an arrest or detention power,¹⁴² and the wrongful exercise of such powers is not usually described in terms of ‘jurisdictional error’.¹⁴³ However, public law rules regarding excess of power can inform tort liability in this context. For example:

- 1 If an official fails to comply with an express requirement stated in the conferral of power (eg to inform an arrestee of the reason for their arrest or to consider a mandatory consideration conditioning a power of arrest), the consequences of noncompliance (ie invalidity and unlawfulness) derive from the same principles applied in public law cases. Thus, liability may be determined by asking whether Parliament intended for noncompliance to undermine the validity of the exercise of power.¹⁴⁴

¹³⁸ *Thoms v Commonwealth* (2022) 276 CLR 466, 488–9 [58] (Gordon and Edelman JJ) (*‘Thoms’*). This is to be distinguished from circumstances in which one power (eg an arrest) is exercised validly and another (eg handcuffing) is then exercised invalidly. The latter act’s invalidity does not necessarily undermine the validity of the former: see, eg, *Kumar v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 28 FCR 128, 133–4 (Lockhart J) (*‘Kumar’*).

¹³⁹ *Evans* (n 130) 35–6 (Lord Slynn).

¹⁴⁰ *Thoms* (n 138) 488–9 [58] (Gordon and Edelman JJ).

¹⁴¹ Many of the types of interests protected by private law inform principles of statutory interpretation. See, eg, *Disorganized Developments Pty Ltd v South Australia* (2023) 410 ALR 508, discussing the obligation to afford procedural fairness in respect of statutory powers affecting property rights: at 516 [28] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

¹⁴² As opposed to challenging the validity of a decision or instrument which authorised detention (eg a warrant or court order): see below Part III(B). Examples of judicial review challenges to the exercise of discretionary arrest powers include *Grech v Featherstone* (1991) 33 FCR 63, 63, 67 (Heerey J) (*‘Grech’*); *Kumar* (n 138) 129–30 (Lockhart J); *Simonsz v Minister for Immigration and Ethnic Affairs* (1995) 56 FCR 492, 495 (Branson J) (*‘Simonsz’*).

¹⁴³ *Grech* (n 142) 68 (Heerey J); *Kumar* (n 138) 129 (Lockhart J); *Simonsz* (n 142) 500 (Branson J).

¹⁴⁴ *New South Wales v Randall* [2017] NSWCA 88, [31]–[32] (Basten JA) (*‘Randall’*), citing *Project Blue Sky* (n 22) 388–9 [91] (McHugh, Gummow, Kirby and Hayne JJ). The remaining judges refused the State of New South Wales’ appeal on liability but agreed with Basten JA’s statements of principle: at [69] (Sackville AJA), [142] (McDougall J). See also *Bugmy v*

- 2 As with all government power, coercive powers are conferred in the expectation that they will be exercised in good faith and for the purposes contemplated by the relevant statute.¹⁴⁵ This means a power conferred for one purpose (eg to bring the arrestee before the courts) may not be exercised for another (eg to investigate potential criminal activity). The latter exercise is for an ‘improper purpose and is unlawful’.¹⁴⁶
- 3 Where a coercive power is premised on a decision-maker’s state of satisfaction (eg a requirement that the officer suspects or is satisfied of a matter), this can be framed in public law terms as a ‘jurisdictional fact’¹⁴⁷ that operates as an essential precondition for the valid exercise of that power.¹⁴⁸ In judicial review proceedings, the court’s function in assessing the legal exercise of such a power is limited to confirming that the state of mind has been formed ‘reasonably and on a correct understanding and application of the applicable law’.¹⁴⁹ Similar restraint is evident in tort proceedings. Thus, the court is permitted to adopt its own assessment of the *objective* criteria that enliven these types of coercive powers (eg the presence of ‘reasonable grounds’ sufficient to induce suspicion in the mind of a reasonable officer).¹⁵⁰ However, an attack on the *subjective* state of satisfaction may be more curtailed — ‘error is not established merely because the Court itself would not have reached that satisfaction’.¹⁵¹ Depending on the statute, it may be necessary to show that the official’s state of satisfaction violates public law standards of legality, including that it

Director of Public Prosecutions (NSW) (2024) 113 NSWLR 567, 577–8 [44] (Leeming JA, Mitchelmore JA agreeing at 588 [91]), 589 [97] (Basten AJA).

¹⁴⁵ *New South Wales v Smith* (2017) 95 NSWLR 662, 690 [107] (McColl JA).

¹⁴⁶ *New South Wales v Robinson* (2019) 266 CLR 619, 655 [63] (Bell, Gageler, Gordon and Edelman JJ), citing *Bales v Parmeter* (1935) 35 SR (NSW) 182, 188–90 (Jordan CJ).

¹⁴⁷ *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 179–80 [57] (French CJ), cited in *Thoms* (n 138) 485 [49] (Gordon and Edelman JJ).

¹⁴⁸ *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, 651 [130]–[131] (Gummow J) (*‘Eshetu’*).

¹⁴⁹ *Hossain* (n 10) 136 [34] (Kiefel CJ, Gageler and Keane JJ).

¹⁵⁰ This is an objective matter for assessment by the court: *Randall* (n 144) [13] (Basten JA); *Prior v Mole* (2017) 261 CLR 265, 270 [4] (Kiefel and Bell JJ).

¹⁵¹ *Hrdavec v New South Wales* [2021] NSWSC 560, [33] (Walton J), affd [2022] NSWCA 52, [116] (Bell P, Basten and White JJA).

was ‘manifestly unreasonable ... arbitrary, capricious, irrational, or not bona fide’.¹⁵²

- 4 Many coercive powers are discretionary, in the sense that an official ‘may’ exercise the power if particular conditions are met.¹⁵³ Public law proceeds on the assumption that Parliament grants discretionary powers with the intention that they be exercised reasonably.¹⁵⁴ The content of legal unreasonableness is context-specific,¹⁵⁵ but has been found to constrain the types of coercive powers considered here.¹⁵⁶ Recognising the public law origins of this rule is critical because the official’s exercise of power cannot be attacked merely on the basis that it is ‘inappropriate’, but instead only where the exercise of discretion has miscarried so far as to make it ‘unlawful’.¹⁵⁷

As in public law, the question of whether or not an implied limit attaches to the exercise of a power is one of interpretation, requiring close attention to the context of the relevant statutory scheme. Sometimes the nature of coercive powers makes them ill-suited to the common law limits that typically constrain administrative powers. It would be ‘surprising’, for example, if an arrest power was subject to an implied statutory obligation to afford the arrestee prior notice and an opportunity to be heard.¹⁵⁸ The courts are also live to the fact that

¹⁵² *Randall* (n 144) [13] (Basten JA), citing *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* (No 2) (1944) 69 CLR 407, 432 (Latham CJ); *Eshetu* (n 148) 652–4 [134]–[137] (Gummow J). See also *AD v New South Wales* [2023] NSWCA 115, [26] (Basten AJA), [120] (Griffiths AJA). The approach adopted by Basten JA has been approved in later decisions: *Reeves v New South Wales* [2024] NSWCA 125, [121], [123]–[124] (Bell CJ); *Emde v New South Wales* [2025] NSWCA 41, [82] (McHugh JA). It was also recently considered in *New South Wales v Dennis* (2025) 117 NSWLR 404: at 413–4 [35]–[36] (Kirk JA).

¹⁵³ See, eg, *Migration Act* (n 25) ss 189(2), (3A)–(4). These powers can be contrasted with the power contained in s 189(1) which was construed as non-discretionary in *Ruddock* (n 89): see at 623 [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 631–7 [65]–[92] (McHugh J), 652 [144] (Kirby J), 673 [223], 662 [183], 674–5 [228]–[231] (Callinan J).

¹⁵⁴ *Li* (n 27) 362 [63] (Hayne, Kiefel and Bell JJ); *Kruger v Commonwealth* (1997) 190 CLR 1, 36 (Brennan CJ).

¹⁵⁵ *Li* (n 27) 364 [67] (Hayne, Kiefel and Bell JJ).

¹⁵⁶ See, eg, *Holgate-Mohammed v Duke* [1984] AC 437, 443 (Lord Diplock, Lords Keith, Bridge, Brandon and Brightman agreeing at 446) (*Holgate-Mohammed*), discussed in *Zaravinos v New South Wales* (2004) 62 NSWLR 58, 68 [28] (Bryson JA); *AW v New South Wales* [2005] NSWSC 543, [641] (Bell J); *DPP (NSW) v SB* (2020) 238 A Crim R 369, 392 [78] (Walton J) (*SB*).

¹⁵⁷ This distinction was fatal to the applicant’s submissions in *SB* (n 156): see especially at 399–400 [105], [107] (Walton J).

¹⁵⁸ *Grech* (n 142) 67 (Heerey J).

decisions about whether (and how) to exercise coercive powers in the policing context must be made in ‘the agony of the moment’¹⁵⁹ and subject to pressures not often faced when making garden-variety administrative decisions.¹⁶⁰ For that reason, implied limits on the exercise of power may apply differently to arrest and detention powers.¹⁶¹ It is correct to say that coercive powers are interpreted strictly,¹⁶² but the courts will also bear in mind that the execution of such powers is a ‘practical exercise carried out by police officers who, though trained in their task of law enforcement, are generally not qualified lawyers.’¹⁶³

For those torts where it is relevant,¹⁶⁴ statutory authority is ordinarily raised as a defence to rebut liability. While correct as a principle of pleading, describing the conferral of power as a ‘defence’ is not a complete explanation of its potential effect. As noted above, a statutory conferral might affect tort liability in different ways, including justifying otherwise tortious conduct, or excusing a person who has engaged in a tortious act from liability.¹⁶⁵ In many cases the classification will not alter the ultimate outcome of a claim (ie liability or no liability). However, the primacy of statutory interpretation makes it important to pay close attention to whether a provision is intended to ‘shew[] that the defendant was authorized by law’ to act as they did,¹⁶⁶ or to operate as a ‘bar to [the] enforcement of a right’.¹⁶⁷ To take an example, immigration officials in *Ruddock* relied on a statutory detention power as a defence to liability for the tort of false imprisonment.¹⁶⁸ A majority of the High Court was critical of counsel’s assumption that this provision operated as an immunity provision, which was to ‘misstate’ its operation:

¹⁵⁹ *Woodley v Boyd* [2001] NSWCA 35, [37] (Heydon JA).

¹⁶⁰ *Ibid*, quoting *McIntosh v Webster* (1980) 43 FLR 112, 123 (Connor J).

¹⁶¹ See, eg, *SB* (n 156) 392 [78] (Walton J).

¹⁶² *Ruddock* (n 89) 632 [70], 637 [90]–[91] (McHugh J), 655 [154], 662 [180] (Kirby J).

¹⁶³ *Dunesky v Commonwealth* (1996) 89 A Crim R 372, 383 (Lockhart J).

¹⁶⁴ Statutory authority is not a defence to every tort: see above n 108.

¹⁶⁵ See above nn 115–17 and accompanying text.

¹⁶⁶ See *Benning v Wong* (1969) 122 CLR 249, 306 (Windeyer J), speaking of the defence of statutory authority in the context of the rule stated in *Rylands v Fletcher* [1868] LR 3 HL 330: at 338–9 (Lord Cairns LC), 340 (Lord Cranworth).

¹⁶⁷ *Stradford* (n 53) 453 [275] (Edelman J).

¹⁶⁸ *Ruddock* (n 89) 628–9 [54] (McHugh J).

It is *not an excusing provision*. Treating s 189 as an excusing provision distracts attention from what the section does. It *both authorised and required* officers to detain certain persons. The resulting detention cannot be unlawful.¹⁶⁹

Rather than reading the detention provision according to the function it might serve in tort litigation, the High Court indicated that it should be interpreted in its statutory context as empowering or even obliging government officials to take action that infringes individual liberties.¹⁷⁰ To similar effect, a statutory power authorising the use of ‘reasonable force’ by police ‘makes lawful action that would otherwise constitute a battery. If the police officer’s conduct satisfies the terms of [the provision], there was no battery’.¹⁷¹ In these situations, an official does not act tortiously if they remain within the legal boundaries of the conferral of power. Stepping beyond those boundaries exposes the official to liability.

The foregoing types of provisions can be contrasted with those that excuse (rather than justify) otherwise tortious conduct by government officials. A common mechanism for achieving this effect is via the conferral of statutory immunities. Such statutory provisions are usually interpreted as limited to acts that require statutory authority (including powers of arrest and detention) as opposed to ‘functions of an ordinary character’.¹⁷² An official who has remained within the legal scope of their authority has no need to resort to an immunity because they are protected for the reasons discussed above. The effect of an immunity provision is to protect the potentially *unlawful* exercise of power,¹⁷³ provided that an official has acted (at a minimum) in good faith.¹⁷⁴ Consistent with the longstanding baseline applied in the equivalent public law context,¹⁷⁵

¹⁶⁹ Ibid 623 [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (emphasis added). See also at 640 [105] (McHugh J), 661–2 [180] (Kirby J).

¹⁷⁰ Ibid 623 [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

¹⁷¹ See, eg, *New South Wales v McMaster* (2015) 91 NSWLR 666, 709 [230] (Beazley P).

¹⁷² *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105, 109–10 (Dixon CJ) (‘*Ardouin*’). This article is concerned with immunity provisions designed to reduce the scope of liability, rather than ‘liability-shifting’ provisions which allow a claim to proceed against an official’s employer: see generally Iain Field, ‘Good Faith Protections and Public Sector Liability’ (2016) 23(3) *Torts Law Journal* 210, 220–2.

¹⁷³ An immunity would be ‘illusory’ if it were limited to the valid exercise of power: *Webster v Lampard* (1993) 177 CLR 598, 605–6 (Mason CJ, Deane and Dawson JJ) (‘*Webster*’).

¹⁷⁴ A requirement of good faith is implied even if the provision is silent on a mental criterion: *Little v Commonwealth* (1947) 75 CLR 94, 109–10 (Dixon J) (‘*Little*’). Other more generous provisions may protect an official who has acted ‘without reasonable care’: Field (n 172) 224.

¹⁷⁵ See the discussion on privative clauses at nn 63–64. The parallel is evident in Dixon J’s approaches in *Little* (n 174) 112 and *Hickman* (n 64) 615.

immunities of this sort are not available unless an act is taken ‘in the *bona fide* belief that it is authorised by the Act and in a *bona fide* attempt to give effect to’ the statute.¹⁷⁶ The effect of a statutory immunity provision is to redraw the usual connections between excess of power and liability. In *Board of Fire Commissioners (NSW) v Ardouin*, for example, Kitto J indicated that immunity provisions operate

to extend every power conferred by the [statute] by removing the otherwise inherent limit of due care provided only that the exercise is really for the purpose for which the power exists.¹⁷⁷

If an official has failed to satisfy an express or implied statutory condition, an immunity provision does not alter the reality that their act is ‘not actually authorised by law’.¹⁷⁸ However, they enjoy protection based on the assumption that ‘the statute *would otherwise have authorised*’ the relevant act.¹⁷⁹ Whether a statutory immunity operates as a justification or an excuse depends on its terms.¹⁸⁰ On either interpretation, its effect is to circumvent liability where an official has stepped beyond the legal boundaries attaching to their powers.¹⁸¹

One tort (the ‘only truly public law tort’)¹⁸² is more directly concerned with flawed exercises of public power: the tort of misfeasance in public office. One of the ingredients of that tort is an ‘invalid or unauthorised’ exercise of power,¹⁸³ which is understood in its public law sense to include errors going to validity.¹⁸⁴ Provided that the demanding mental elements of the tort are made out (at a minimum, that the defendant was reckless as to the validity of the act

¹⁷⁶ *Trobridge v Hardy* (1955) 94 CLR 147, 156 (Fullagar J) (emphasis added) (*‘Trobridge’*). See also *Webster* (n 173) 605–6 (Mason CJ, Deane and Dawson JJ).

¹⁷⁷ *Ardouin* (n 172) 115–16.

¹⁷⁸ *Trobridge* (n 176) 156 (Fullagar J). See also *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575, 588 [35] (McHugh J) (*‘Puntoriero’*).

¹⁷⁹ *Puntoriero* (n 178) 588 [35] (McHugh J) (emphasis added).

¹⁸⁰ See *ibid* 588 [34] (McHugh J); *Mengel* (n 111) 358 (Brennan J).

¹⁸¹ See, eg, *Ardouin* (n 172) 115–16 (Kitto J).

¹⁸² Mark Aronson, ‘Misfeasance in Public Office: Some Unfinished Business’ (2016) 132 (July) *Law Quarterly Review* 427, 428. See also Donal Nolan, ‘Tort Law and Public Law: Overlapping Categories?’ (2019) 135 (April) *Law Quarterly Review* 272, 275 (*‘Overlapping Categories’*).

¹⁸³ *Mengel* (n 111) 370 (Deane J).

¹⁸⁴ *Ibid* 356 (Brennan J). The tort ought not be confined to ‘invalidity’ of the judicial review variety, however: see, eg, Mark Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’ (2011) 35(1) *Melbourne University Law Review* 1, 50; Robert J Sadler, ‘Intentional Abuse of Public Authority: A Tale of Three Rivers’ (2001) 21(2) *Australian Bar Review* 151, 168–9; Aronson, Groves and Weeks (n 2) 1273–4.

and the harm that it would cause),¹⁸⁵ the tort can apply to more garden-variety administrative law errors such as irrationality or failure to take into account mandatory considerations.¹⁸⁶ In such cases, the misfeasance tort provides a remedy for harm caused by ‘conscious maladministration’.¹⁸⁷ In the more egregious misfeasance cases of targeted malice, the malice element of the tort likewise reflects excess of power.¹⁸⁸ This is because an official who acts for the sole or dominant purpose of causing harm will likely be acting for an ‘improper’ purpose: an error going to validity.¹⁸⁹ Both limbs of the misfeasance tort are closely aligned with the public law functions of controlling excess of power and abuse of power,¹⁹⁰ and given its restricted application to public officials, it is the closest the law presently comes to offering a damages remedy for the violation of public law norms.¹⁹¹

B *Reliance on an Invalid Source of Power*

The foregoing discussion focusses on the lawfulness of an exercise of power. Additional complexity arises when the source of power *itself* suffers from some legal defect. For example, how does excess of power affect tort liability when an official purports to execute an invalid warrant, or makes an arrest for an offence contained in an invalid law, or gives effect to an order or decision made in

¹⁸⁵ *Obeid v Lockley* (2018) 98 NSWLR 258, 293–7 [153]–[172] (Bathurst CJ) (*‘Lockley’*).

¹⁸⁶ These were the errors alleged in *Lock* (n 80) 573 [104]–[105], 585 [169] (Gleeson J). See Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 118–21.

¹⁸⁷ *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 376 [124] (Gummow J) (*‘Pyrenees’*). See also *Futuris* (n 68) 153–4 [11]–[15] (Gummow, Hayne, Heydon and Crennan JJ).

¹⁸⁸ Donal Nolan, ‘A Public Law Tort: Understanding Misfeasance in Public Office’ in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 177, 179–80.

¹⁸⁹ *Nyoni v Shire of Kellerberrin* (2017) 248 FCR 311, 328 [81], 330 [91] (North and Rares JJ), affd *Hamilton v State of New South Wales* [2020] NSWSC 700, [216]–[222] (Walton J). Malice is also an ingredient of the malicious prosecution tort, which six members of the High Court have described as calling up ‘echoes of the administrative law principles respecting improper purpose’, though warned against taking these ‘parallels’ too far: *A v New South Wales* (2007) 230 CLR 500, 532 [93]–[94] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). The malicious prosecution tort is one of few options for ventilating the argument because prosecutorial discretion generally cannot be attacked directly in judicial review proceedings: see *Likiardopoulos v The Queen* (2012) 247 CLR 265, 279–80 [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹⁹⁰ Nolan, ‘Overlapping Categories?’ (n 182) 284.

¹⁹¹ Nolan suggests a ‘public law’ conception of the tort might justify developing it with public law principles in mind: *ibid* 290–1.

excess of jurisdiction?¹⁹² As described at Part II(C)(3), there are numerous examples of situations in which a ‘second actor’ may rely on an invalid primary decision or instrument when taking action that impacts individual rights and interests. Public law principles come to the fore when determining whether invalidity in that primary instrument infects the secondary exercise of power.

As a starting point, it is important to recall that retrospective nullity is not a universal proposition. Superior court orders are valid until set aside, and it is possible for Parliament to confer power on terms that produce a similar effect for other decision-makers.¹⁹³ The bald assumption that a decision or instrument made in excess of jurisdiction can *never* be a valid source of legal authority to infringe individual rights is for that reason overly simplistic. If an order is regarded as valid until set aside, an official who relies on it continues to enjoy the type of bypass to tort liability discussed at Part III(A) up until the point at which the court gives it an ‘invalid’ status.¹⁹⁴ Even where nullification *does* operate retrospectively, to describe an invalid decision as ‘no decision at all’¹⁹⁵ does not delete its existence, and it does not mean that any action taken in reliance on it is automatically unlawful.¹⁹⁶ The execution of inferior court orders is a good example. The prevailing view is that these are subject to retrospective invalidity,¹⁹⁷ but an officer implementing a defective inferior court order or warrant made in the course of judicial process has the benefit of a common law defence justifying their otherwise tortious acts.¹⁹⁸ That defence does not extend to the types of executive or administrative orders (eg search

¹⁹² A civil claim based on the invalidity of the underlying act is a collateral challenge: Amnon Rubinstein, *Jurisdiction and Illegality: A Study in Public Law* (Clarendon Press, 1965) 46. See also below Part IV(B).

¹⁹³ See above nn 53–4.

¹⁹⁴ *Kable (No 2)* (n 50) 135 [38]–[39] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

¹⁹⁵ *Bhardwaj* (n 19) 614–15 [51] (Gaudron and Gummow JJ).

¹⁹⁶ *Kable (No 2)* (n 50) 138–9 [52] (Gageler J). Different considerations arise when an official is relying on an invalid law rather than an invalid administrative instrument: see *Abdel-Hady* (n 87) [3] (Gageler CJ, Gleeson and Beech-Jones JJ), [76] (Gordon J, Steward J agreeing at [182]).

¹⁹⁷ See above nn 53–4 and accompanying text. In *Stradford* (n 53), Edelman J held that inferior court orders should, like superior court orders, be regarded as valid until set aside: at 435 [227], Steward J agreeing at 467–8 [325]. As his Honour later observed in *Abdel-Hady* (n 87), that reasoning would have offered a shorter answer to the Commonwealth’s submissions regarding the recognition of a new and broader defence outside the context of enforcement of court orders: at [160]–[167], discussing *Stradford* (n 53).

¹⁹⁸ *Stradford* (n 53) 408–10 [128]–[132] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

warrants) and statutory powers which are the focus of this article.¹⁹⁹ However, a similar end result can in some cases be reached via Forsyth's theory of the second actor.

Professor Forsyth's second actor theory sees liability determined not by reference to the invalidity of the underlying instrument, but the second actor's authority to rely on that instrument. That is, an official might be authorised to rely on the *factual existence* of the instrument to avoid liability even where the *legal validity* of that instrument is unsound.²⁰⁰ Again, this requires close attention to the scope and terms of the official's power, and will lead to different results in different cases. As this section makes clear, there are many circumstances in which a second actor's power may include authority to rely on a decision or instrument later discovered to be invalid. Sometimes Parliament might make this explicit by expressly authorising or excusing a second actor who relies on an invalid instrument.²⁰¹ A statute might also *imply* a similar intention, ascertained via the process of statutory interpretation.²⁰²

A common example is where an official's power is enlivened based on their knowledge or belief, where that state of belief is to be formed based on the content of another administrative instrument. This was the case in *Ruddock*, where immigration officers had detained Mr Taylor based on the apparent effect of the Minister's visa cancellation decision.²⁰³ The Minister's decision was later confirmed to be invalid on administrative law grounds, but a majority of the Court indicated that, in such circumstances, 'it does not automatically

¹⁹⁹ Ibid 409–10 [131] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ). In *Abdel-Hady* (n 87), the High Court rejected the Commonwealth's invitation to expand this defence to cover circumstances where an executive official was enforcing a constitutionally invalid law in the belief that it was valid according to previous High Court authority: see at [24]–[28], [51] (Gageler CJ, Gleeson and Beech-Jones JJ), [71]–[74], [118] (Gordon J, Steward J agreeing at [182]), [166]–[167], [181] (Edelman J), [194]–[195], [230] (Jagot J).

²⁰⁰ Forsyth (n 84) 147.

²⁰¹ See, eg, *Terrorism (Police Powers) Act 2005* (SA) s 24(a), which protects an officer from liability where they are executing a special powers authorisation affected by an 'irregularity or defect' (emphasis added). See also *Marshall v Watson* (1972) 124 CLR 640, 644 (Barwick CJ), in which s 103 of the *Mental Health Act 1959* (Vic) ('*Mental Health Act*') protected an officer who relied on 'any recommendation order or other document *apparently given or made*' under the *Mental Health Act* (n 201) (emphasis added). More general good faith immunities can also protect second actors who execute invalid administrative instruments: see, eg, *Rumble v Liverpool Plains Shire Council* [2012] NSWDC 95, [189]–[191] (Mahony DCJ) ('*Rumble*'), discussing *Local Government Act 1993* (NSW) s 731.

²⁰² See, eg, *Ruddock* (n 89) 621–3 [22]–[28], 625 [36]–[37] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

²⁰³ Ibid 617 [3] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

follow that the resulting detention is unlawful'.²⁰⁴ The invalid cancellation decision (primary power) was able to serve as a factual foundation for the lawful exercise of the power to detain based on 'reasonable suspicion' (secondary power). This is because 'what were reasonable grounds for effecting the respondent's detention did not *retrospectively* cease to be reasonable' when the unlawfulness of the cancellation decision was discovered.²⁰⁵ For similar reasons, an invalid decision to cancel a prisoner's parole (primary power) can serve as a factual foundation to lawfully issue an arrest warrant or to calculate the revised time the prisoner must remain in custody (secondary power).²⁰⁶ Further, an invalid decision to subject a person to involuntary mental health treatment (primary power) can serve as a factual basis to enliven a separate power to decide that treatment should continue (secondary power).²⁰⁷ Once the primary act or decision has been confirmed invalid by the courts, it can no longer support the secondary power, but it can potentially justify the actions taken by the second actor in the interim.²⁰⁸

An important qualification to this reasoning occurs where an official is on notice of the legal defect in the primary instrument. In describing the second actor theory, Forsyth was concerned with situations in which 'those *unaware of* [an act's] invalidity ... act on the assumption that these acts are valid'.²⁰⁹ A second actor is generally not obliged to second-guess the validity of the primary instrument they are relying on.²¹⁰ But the position is quite different where the second actor is aware that there is a legal defect in the primary instrument. That is because while many 'secondary powers' authorise an official to give effect to an apparently valid instrument, few of these explicitly contemplate the liability

²⁰⁴ Ibid 622 [28] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also at 674–5 [228]–[230] (Callinan JJ).

²⁰⁵ Ibid 626 [40] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (emphasis added).

²⁰⁶ *Tulloh v Chief Executive Officer of the Department of Corrective Services* [2018] WASC 105, 18 [49] (Le Miere J), affd [2020] WASC 10, 47 [138] (Murphy, Beech and Pritchard JJA); *Abdulrahim v Adult Parole Board (Vic)* (2023) 71 VR 169, 196 [78]–[79] (Dixon J) ('*Abdulrahim*'). Cf *Evans* (n 130), in which the imprisonment calculation undertaken by the Governor was a primary exercise of power informed by incorrect legal guidance from subsequently overruled court decisions: at 26 (Lord Slynn, Lord Hobhouse agreeing at 49).

²⁰⁷ *JL v Mental Health Tribunal* (2021) 67 VR 426, 446 [70], 447 [73] (Ginnane J).

²⁰⁸ See, eg, *Abdulrahim* (n 206) 196 [78]–[81] (Dixon J). Cf *Jadwan* (n 71) 16 [42] (Gray and Downes JJ), citing *Bhardwaj* (n 19).

²⁰⁹ Forsyth (n 84) 159 (emphasis added).

²¹⁰ *Kable (No 2)* (n 50) 135–6 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ). Note also the presumption of regularity: *Ousley* (n 58) 108–9 (McHugh J).

consequences that might follow.²¹¹ A generally stated ‘secondary power’, including one premised on ‘reasonable suspicion’, does not equate to a power to *knowingly* execute an invalid instrument.²¹² Thus, the sheriff in *Ward v Murphy* was entitled to rely on an apparently valid writ unless he had ‘knowledge of the absence of jurisdiction’,²¹³ and the immigration officers in *Ruddock* were entitled to rely on the apparently valid visa cancellation decision as there was no suggestion they ‘had acted in bad faith’ in doing so.²¹⁴ In contrast, an official may not be taken to ‘reasonably’ suspect something that is supposedly established by a primary instrument if they are ‘on notice that [it] is irregular or ineffective’.²¹⁵

This reasoning can potentially be extended to capture officials who *ought* to be aware of a legal defect in their jurisdiction. This might be the case if an official executes a warrant that is not in regular form,²¹⁶ or where the content of the instrument is ‘objectively and obviously defective’ such that the officer ‘could reasonably be expected to see the fault’.²¹⁷ Other than in the more obvious cases where the problem is readily apparent on the face of the instrument, difficult questions are likely to arise in setting expectations on this front. It may be difficult, for example, to determine how much an official should be taken to understand regarding the niceties of their jurisdiction,²¹⁸

²¹¹ See above n 201 and accompanying text for examples of provisions directed at liability.

²¹² See below n 215.

²¹³ *Ward v Murphy* (1937) 38 SR (NSW) 85, 97 (Davidson J).

²¹⁴ *Ruddock* (n 89) 628 [50]–[51] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

²¹⁵ *Okwume v Commonwealth* [2016] FCA 1252, [130] (Charlesworth J) (*‘Okwume (Trial)’*), discussed in *Commonwealth v Okwume* (2018) 263 FCR 604, 627 [81] (Besanko J) (*‘Okwume (Appeal)’*). In *Okwume (Appeal)* (n 215), Besanko J noted that the second actor was also the *author* of the invalid primary instrument, and so had better reason to be on notice of the defects: at 631–2 [137]. However, reliance can also potentially be unreasonable in other situations: see, eg, *Guo v Commonwealth* (2017) 258 FCR 31, 44 [43] (Jagot J). In the Canadian case of *Alberta (Minister of Public Works, Supply and Services) v Nilsson* (2002) 220 DLR (4th) 474 (Alberta Court of Appeal), it was found that officials could be held liable for misfeasance in public office after enforcing an invalid regulation in circumstances where they were ‘consciously aware’ of the defects: at 512 [110], 513–14 [117], [119] (Russell and Wittmann JJA and Watson J), discussed in Chamberlain (n 186) 119.

²¹⁶ See, eg, *Smethurst* (n 9) 205–6 [43]–[44] (Kiefel CJ, Bell and Keane JJ).

²¹⁷ See *Kamal v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 200, [59] (Mortimer J). Her Honour referred to the content of legal advice relied on by an official rather than an administrative instrument: at [59].

²¹⁸ The common law defence available to those executing invalid judicial orders and warrants does not extend to situations where the officer was on notice of defects, but those members of the High Court who explicitly addressed the issue left open how much an official could be taken

particularly in respect of requirements not expressly set out in the relevant statute.²¹⁹

C *Liability and Decision-Making Freedom*

In both public and private law, matters are usually simpler where Parliament has issued clear guidance as to the manner in which power should be exercised and the consequences of failing to do so. If an official is charged with a clearly framed public law duty to act or to deliver a particular outcome, judicial review remedies can issue to enforce that result.²²⁰ If consistent with Parliament's intention, failure to do so may also be actionable in private law via the tort of breach of statutory duty.²²¹ Those are rare cases.²²² Far more often, powers are conferred on discretionary terms that permit a decision-maker to decide whether and how the power should be exercised, leaving a range of possible (legal) methods of execution.²²³ As noted above, public law's grounds of review and its remedies are designed to avoid encroaching on the merits of decision-making or usurping the exercise of discretion. Where a decision-maker has been accorded freedom of choice in the exercise of a power, public law will not indicate which of those choices is most preferable.²²⁴ Similar considerations can sometimes feature in tort claims.

1 *How Would Power Have Otherwise Been Exercised?*

One situation in which these types of concerns might arise is where a tort claim — such as misfeasance in public office — requires a plaintiff to establish that the defendant's invalid act has caused them harm.²²⁵ If the defendant has no real discretion as to whether or how a power is exercised, it may be straightforward to conclude that the flawed exercise of power is causally linked

to know about the niceties of jurisdiction: *Stradford* (n 53) 416 [153] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 448–9 [265] (Edelman J).

²¹⁹ The express statutory obligation to afford procedural fairness simplified the inquiry in *Okwume (Appeal)* (n 215) 631 [137] (Besanko J).

²²⁰ *S157* (n 49) 482–3 [5] (Gleeson CJ).

²²¹ See, eg, Neil Foster, 'The Merits of the Civil Action for Breach of Statutory Duty' (2011) 33 *Sydney Law Review* 67, 68, 71–2.

²²² See *ibid* 82.

²²³ A distinction is drawn between discretion in the sense of a decision-maker's exercise of *judgment* (which is not the focus of this article) and the conferral of more general freedom of choice in the exercise of a power: Barker (n 102) 210, 213.

²²⁴ See above Part II(C)(2).

²²⁵ *Mengel* (n 111) 370 (Deane J).

to the plaintiff's harm.²²⁶ However, many public law errors are of a procedural kind (eg breach of procedural fairness, failure to consider a mandatory consideration) that do not reveal whether the same decision could have been validly made.²²⁷ As noted at Part II(C)(2), the range of lawful alternative options might even include a lawful decision not to exercise the power at all.²²⁸ If a plaintiff suffers harm following an invalid decision of that type, can we say that the act or omission has 'caused' the harm?²²⁹ The public law materiality principle does not purport to answer that ultimate question, asking only 'could, not would' the result have been different in the absence of the error.²³⁰ Causal reasoning in private law does not have the luxury of stopping at the possibility of 'could'.²³¹ The task is not merely to consider whether alternative pathways are open, but to try and determine which one would have been taken.²³² In the public law context, the High Court has warned that even the less demanding materiality ('could') test is difficult to apply to procedural errors:

In those cases, it is 'no easy task' for the court to be satisfied that the loss of such an opportunity did not deprive the person of the possibility of a successful outcome. Importantly, a court called upon to determine whether the threshold has been met must be careful not to assume the function of the decision-maker: the point at which the line between judicial review and merits review is crossed may not always be clear, but the line must be maintained.²³³

If a tort claim requires counterfactual analysis of what would have transpired in the absence of a procedural error, similar concerns can arise.²³⁴ As in public

²²⁶ See Ellen Rock, 'Misfeasance in Public Office: A Tort in Tension' (2019) 43(1) *Melbourne University Law Review* 337, 355 ('Tort in Tension'), citing *Lock* (n 80) 579 [138] (Gleeson J).

²²⁷ See above Part II(A). This difficulty is commonly raised in discussions regarding the expansion of damages awards for administrative errors: see, eg, Craig, 'Compensation' (n 104) 438–9; Peter W Hogg, Patrick J Monahan and Wade K Wright, *Liability of the Crown* (Carswell, 4th ed, 2011) 207.

²²⁸ See above n 80 and accompanying text.

²²⁹ *Lock* (n 80) 579 [138] (Gleeson J). Establishing the malice element of the tort may overcome these difficulties in some cases: see above n 189.

²³⁰ *LPDT* (n 11) 328 [14] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), citing *Nathanson* (n 43) 103 [32] (Kiefel CJ, Keane and Gleeson JJ), 107–8 [46] (Gageler J), 113 [63] (Gordon J). See also Rock, 'Causation' (n 45) 64.

²³¹ Assessing damages on a 'loss of chance' basis is by no means straightforward: Aronson, Groves and Weeks (n 2) 1272.

²³² *Lock* (n 80) 579 [138] (Gleeson J).

²³³ *LPDT* (n 11) 329 [15] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

²³⁴ *Lock* (n 80) 579 [138] (Gleeson J). In *Brett Cattle Company Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337, Rares J concluded that but for the unlawful act, the Minister would have

law, the courts may be more comfortable answering these types of questions if the exercise of discretion has ‘run out’,²³⁵ or where the decision-maker has already offered an alternative valid justification for their decision,²³⁶ or where the outcome can be regarded as ‘inevitable’.²³⁷ Otherwise, assessing whether a procedurally flawed exercise of discretionary power has caused harm may be more problematic.²³⁸

2 Negligent Exercise of Discretion

A related concern has sometimes surfaced in negligence claims, though not without controversy. At various times the English courts have toyed with the use of public law tests of invalidity as a form of precondition to,²³⁹ or measure of,²⁴⁰ negligence liability, including in cases of negligent omission to exercise a discretionary power.²⁴¹ While the English courts continued to grapple with

adopted the ‘obvious and compelling’ option of exercising the available discretion in a particular way: at 434–5 [405]. It is difficult to appreciate how that does not run into the merits of the Minister’s decision-making power.

²³⁵ *Royal Insurance* (n 83) 88 (Brennan J, Toohey J agreeing at 103, McHugh J agreeing at 103).

²³⁶ See, eg, *Hossain* (n 10) 129 [10] (Kiefel CJ, Gageler and Keane JJ), 149–50 [79] (Edelman J, Nettle J agreeing at 136 [39]).

²³⁷ *LPDT* (n 11) 329 [16] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), 335 [36] (Beech-Jones J).

²³⁸ See generally Rock, ‘Tort in Tension’ (n 226) 354–7.

²³⁹ One such example is that a plaintiff must show that the defendant’s act ‘was not within the limits of a discretion bona fide exercised, *before he can begin* to rely upon a common law duty of care’: *Anns v Merton London Borough Council* [1978] AC 728, 755 (Lord Wilberforce) (emphasis added). Another is that ‘the public law concept of ultra vires has replaced the civil law concept of negligence as the test of the illegality, and consequently of the *actionability* of the exercise of [a statutory power]’: *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1067 (Lord Diplock) (emphasis added). Excess of power never really found favour as a ‘preliminary test’ of this sort: *Barrett v Enfield London Borough Council* [2001] 2 AC 550, 586 (Lord Hutton).

²⁴⁰ For example, the public law *Wednesbury* unreasonableness formula could determine whether ‘the allegations of breach of duty ... [fell] within the ambit of the local authority’s statutory discretion’: *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 749 (Lord Browne-Wilkinson). While some aspects of the decision have since been cast in doubt, this point remains in favour: see *N v Poole Borough Council* [2020] AC 780, 832 [53], 833 [56] (Lord Reed DPSC, Baroness Hale PSC, Lords Wilson and Hodge and Lady Black JJC agreeing).

²⁴¹ In *Stovin v Wise* [1996] AC 923, Lord Hoffmann suggested that irrationality (understood according to its ‘public law meaning’) was a ‘minimum precondition’ for imposing a duty of care for failure to exercise discretionary power: at 951–3 (*Stovin*). In a later case, Lord Hoffmann described his reasoning in *Stovin* (n 241) as ‘ill-advised’ speculation and doubted that a common law duty could ever ‘be founded simply upon the failure (however irrational)’ to confer a benefit: *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, 1065–6 [26], 1067 [32].

these issues,²⁴² the Australian courts had shifted away from ‘special’ public law rules in favour of managing any uniquely public concerns within the ordinary common law principles of negligence.²⁴³ An act or omission might be regarded as negligent whether or not it violated administrative law criteria of validity, or would have justified intervention in a public law case.²⁴⁴ Concerned that the common law offered insufficient protections to public authorities, in the early 2000s, the Australian states and territories introduced additional liability hurdles via a suite of non-uniform civil liability legislation.²⁴⁵ These reforms apply generally to government liability in tort but with some variations in scope.²⁴⁶

²⁴² Aronson, Groves and Weeks (n 2) 1127–9. See especially at 1228 n 395.

²⁴³ See, eg, *Pyrenees* (n 187) 376–7 [125]–[126] (Gummow J); *Crimmins* (n 3) 35 [82] (McHugh J), 78–9 [218] (Kirby J). In this respect, Brennan CJ had been an outlier: see, eg, *Pyrenees* (n 187) 346–7 [22]–[25]; *Romeo v Conservation Commission (NT)* (1998) 192 CLR 431, 443 [18]–[19], citing *Pyrenees* (n 187) 346 (Brennan CJ).

²⁴⁴ Barker (n 102) 227–8. See also above n 108. Particular difficulties may arise where a plaintiff alleges negligence in the performance of administrative decision-making functions: see, eg, *Precision Products (NSW) Pty Ltd v Hawkesbury City Council* (2008) 74 NSWLR 102, 128–9 [117], [119]–[120], discussing *Protection of the Environment Operations Act 1997* (NSW) s 91 (Allsop P, Beazley JA agreeing at 147 [199], McColl JA agreeing at 147 [200]) (*‘Precision Products’*).

²⁴⁵ The reforms have been canvassed in detail elsewhere: see, eg, Mark Aronson, ‘Government Liability in Negligence’ (2008) 32(1) *Melbourne University Law Review* 44, 46–50 (*‘Government Liability’*); Justine Bell-James and Kit Barker, ‘Public Authority Liability for Negligence in the Post-*Ipp* Era: Sceptical Reflections on the “Policy Defence”’ (2016) 40(1) *Melbourne University Law Review* 1, 22; Margaret Allars, ‘Private Law Remedies and Public Law Standards: An Awkward Statutory Intrusion into Tort Liability of Public Authorities’ (2020) 14(1) *Florida International University Law Review* 5, 15 (*‘Statutory Intrusion’*).

²⁴⁶ For example, the *Civil Liability Act 2002* (NSW) (*‘NSW Civil Liability Act’*) contains a number of provisions designed to limit public authority liability: at pt 5. However, s 3B specifically excludes acts taken with the intention to cause injury, meaning that the protections have limited application to cases involving intentional torts such as battery and false imprisonment: see, eg, *Croucher v Cachia* (2016) 95 NSWLR 117, 139–40 [117]–[119] (Leeming JA); *New South Wales v Madden* (2024) 113 NSWLR 509, 542 [133], 546 [146]–[147], 547 [151]–[152] (Bell CJ); Joachim Dietrich, ‘Intentional Conduct and the Operation of the Civil Liability Acts: Unanswered Questions’ (2020) 39(2) *University of Queensland Law Journal* 197, 202. Some protections are expressly limited to a particular form of claim: see, eg, *NSW Civil Liability Act* (n 246) s 43, applying to breach of statutory duty. Even generally worded protections may have limited application outside the tort of negligence. For example, the *NSW Civil Liability Act* (n 246) s 43A applies to negligence claims: see, eg, *Curtis v Harden Shire Council* (2014) 88 NSWLR 10, 71 [274] (Basten JA); *Queensland Bulk Water Supply Authority v Rodriguez & Sons Pty Ltd* (2021) 393 ALR 162, 199–200 [123]–[124] (Basten, Meagher and Leeming JJA) (*‘Seqwater’*). However, the protection likely does not apply to claims in nuisance because the structure of s 43A of the *NSW Civil Liability Act* (n 246) presupposes a duty and standard of care: *Transport for NSW v Hunt Leather Pty Ltd* (2024) 115 NSWLR 489, 493 [3], 525 [161], 528 [175]–[176], [179] (Bell CJ, Leeming and Mitchelmore

One style of provision, introduced in a number of jurisdictions, specifically targeted cases of nonfeasance. These provided that there could be no liability for failure to exercise ‘regulatory function[s]’ if the defendant ‘*could not have been required*’ to exercise the function in proceedings instituted by the plaintiff.²⁴⁷ The apparent effect of these provisions was to tie tort liability for certain categories of omissions to the availability of mandatory relief in public law (eg a writ of mandamus compelling the exercise of power).²⁴⁸ Early case law suggested these provisions would set a low hurdle, requiring a plaintiff to establish only that they would have had standing to seek mandatory relief to compel the exercise of the power.²⁴⁹ Later cases have confirmed that the threshold is rather higher, drawing on public law invalidity principles so that a mandamus provision ‘precludes a right to compensation in respect of a refusal to act that is an *otherwise lawful and valid decision*’.²⁵⁰ For cases involving discretionary power, this brings tort liability in close alignment with the public law approach. As noted in Part II(C)(2), it is a fundamental principle of public law that the courts will not usurp a discretion. The courts may compel a decision-maker to *consider* whether to exercise a power, but will not dictate that the discretion must be exercised, or exercised on particular terms.²⁵¹ A public law remedy ordering the decision-maker merely to ‘consider’ the exercise of discretionary power will not be sufficient to overcome a mandamus provision because the plaintiff must demonstrate that the failure to exercise the power ‘falls outside of the permissible area of decisional freedom reposed in the decision-maker’.²⁵² While novel in their form,²⁵³ these provisions do not curb negligence liability outcomes in a meaningful way. It should be recalled that the courts have never demonstrated any enthusiasm for re-reading public law

JJA). On appeal, the High Court overturned Bell CJ, Leeming and Mitchellmore JJA’s findings of liability but confirmed their Honours’ approach to s 43A: *Hunt Leather Pty Ltd v Transport for NSW* (2025) 426 ALR 621, 626–7 [9], 642 [63], 664–5 [144]–[146] (Gordon and Edelman JJ, Gageler J agreeing at 627 [10]–[11], Jagot J agreeing at 677 [193], Beech-Jones J agreeing at 706 [300]).

²⁴⁷ *NSW Civil Liability Act* (n 246) s 44(1) (emphasis added). See also *Civil Law (Wrongs) Act 2002* (ACT) s 112(1); *Civil Liability Act 2002* (Tas) s 41(1).

²⁴⁸ Aronson, ‘Government Liability’ (n 245) 75–6; Allars, ‘Statutory Intrusion’ (n 245) 16.

²⁴⁹ See, eg, *Warren Shire Council v Kuehne* (2012) 188 LGERA 362, 394 [150] (Whealy JA); *Meyers v Commissioner for Social Housing* [2019] ACTCA 19, [21] (Elkaim J) (‘*Meyers*’), diverging from the majority on this point: at [2]. In public law, standing is afforded to those with a ‘special interest’: see above n 69.

²⁵⁰ *Meyers* (n 249) [139] (Charlesworth J) (emphasis added).

²⁵¹ See above n 82 and accompanying text.

²⁵² *Meyers* (n 249) [137], [170], [176] (Charlesworth J).

²⁵³ See Aronson, ‘Government Liability’ (n 245) 73–6.

powers as private law duties.²⁵⁴ The introduction of ‘mandamus-style’ provisions has served only to formalise that reticence under an alternative public law label.

A second style of civil liability provisions, applying to cases of both misfeasance and nonfeasance, also appeared at first glance to invoke public law concepts of invalidity. Drawing on the public law language of *Wednesbury* unreasonableness,²⁵⁵ these provisions exclude liability in certain cases unless a public authority’s act or omission was ‘*so unreasonable that no authority ... could properly consider [it] to be a reasonable exercise*’ of its functions.²⁵⁶ If these provisions had operated as a public law precondition in the sense suggested by some earlier English authorities, that may have invoked public law notions of decision-making freedom as a precursor to the assessment of tort liability. However, the courts have declined to interpret the provisions in that way. Instead, the test has been subsumed within the liability inquiry to prescribe an ‘attenuated standard of care’.²⁵⁷ While noting the public law origins of the statutory language, courts have indicated that it would ‘invite error’ to read in subsequent doctrinal developments in the unreasonableness ground of review.²⁵⁸ The *Wednesbury* provisions do not conflate public and private law standards of rationality and reasonableness in a way that equates invalidity with

²⁵⁴ Aronson describes Lord Hoffmann’s concern in *Stovin* (n 241) as a ‘distraction’ for this reason: Aronson, ‘Government Liability’ (n 245) 67, citing *Stovin* (n 241) 953. For discussion of the underlying difficulties: see, eg, Donal Nolan, ‘The Liability of Public Authorities for Failing to Confer Benefits’ (2011) 127 (April) *Law Quarterly Review* 260, 265–70; Hanna Wilberg, ‘In Defence of the Omissions Rule in Public Authority Negligence Claims’ (2011) 19(3) *Torts Law Journal* 159, 184–8.

²⁵⁵ *Wednesbury* (n 31) 230 (Lord Greene MR). There are many reasons for misgivings about the insertion of this public law test into private law: see, eg, S H Bailey and M J Bowman, ‘The Policy/Operational Dichotomy: A Cuckoo in the Nest’ (1986) 45(3) *Cambridge Law Journal* 430, 435, 440; Stephen Bailey and Michael Bowman, ‘Public Authority Negligence Revisited’ (2000) 59(1) *Cambridge Law Journal* 85, 114–15; Stephen Bailey, ‘Public Authority Liability in Negligence: The Continued Search for Coherence’ (2006) 26(2) *Legal Studies* 155, 165.

²⁵⁶ *NSW Civil Liability Act* (n 246) ss 43–43A (emphasis added) (applying to ‘functions’ and ‘special statutory powers’ respectively). See also *Civil Liability Act 2003* (Qld) s 36 (applying to ‘functions’); *Civil Liability Act 2002* (WA) s 5X (applying to ‘policy decision[s]’). Despite differences in language, courts have generally read these provisions as applying to similar types of powers in accordance with the rationale in *Ardouin* (n 172) described above at n 172: see *Seqwater* (n 246) 197 [113]–[115] (Basten, Meagher and Leeming JJA).

²⁵⁷ *Doyle’s Farm Produce Pty Ltd v Murray Darling Basin Authority [No 2]* (2021) 106 NSWLR 41, 43 [3] (Bell P), 49 [32] (Leeming JA); *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360, 432 [352], 434 [359]–[360] (Campbell JA); *Southern Properties (WA) Pty Ltd v Executive Director, Department of Conservation and Land Management* (2012) 42 WAR 287, 310 [114] (McLure P).

²⁵⁸ *Seqwater* (n 246) 203 [137] (Basten, Meagher and Leeming JJA).

liability. However, they do instruct the courts to adopt a public law-tinted ‘standard of legal scrutiny’ when assessing liability for the categories of powers encompassed by these provisions.²⁵⁹

D *Liability for Immaterial Violations*

As noted at Part II(B), an apparent violation of public law limits might not affect the validity of an exercise of power if the breach was not sufficiently ‘material’, or if the flawed act is saved by an alternative source of power. For tort claims which rest on the invalidity of the defendant’s act, the immateriality of an error may impact the scope of liability.

1 *Saved by an Alternative Source of Power*

Administrative law has long recognised that an act purportedly taken pursuant to one source of power (power A) may be validly supported by another (power B). The mistaken or flawed exercise of power A is not fatal to validity provided that the relevant essential conditions for alternative power B have been met.²⁶⁰ In circumstances where a potentially invalid act is saved by a ‘bonus’ source of power, this may circumvent tort liability.²⁶¹ At first glance, this outcome might appear at odds with the orthodoxy that liability is to be determined by reference to the *actual* use of power in a particular case rather than the *possible* ways power could have been exercised. For example, in *R (Lumba) v Secretary of State for the Home Department* (‘*Lumba*’), Lord Dyson JSC confirmed that the executive could not

render lawful what is in fact an unlawful authority to detain, by reference to how the executive could and *would have* acted if it had acted lawfully, as opposed to how it *did in fact* act ... [and] [i]n [his] view, the law of false imprisonment does not permit history to be rewritten in this way.²⁶²

²⁵⁹ Ibid 205 [140] (Basten, Meagher and Leeming JJA). In *S157* (n 49), Gleeson CJ drew an analogy between this standard and standards of scrutiny in judicial review cases: at 485 [13]. Resort to public law was not necessarily needed here, as private law has also developed its own deferential standards at different times (eg the *Bolam* standard): see Barker (n 102) 216–17, 235.

²⁶⁰ See above Part II(B).

²⁶¹ See below nn 264–6 and accompanying text.

²⁶² *Lumba* (n 104) 274 [62] (Lord Dyson JSC) (emphasis in original).

This remains true.²⁶³ However, different considerations apply where an official is not arguing that they *could* have acted lawfully if they had acted differently, but that they *were* acting lawfully, albeit authorised by a different source of power to that which the official had in mind.

Government defendants have leveraged unexercised heads of power in a range of cases involving the legality of law enforcement activities. For example, the execution of an irregular search warrant (power A) may not be invalidated if a general warrant (power B) was also applicable to that search;²⁶⁴ an arrest made pursuant to an inapplicable provision in one statute (power A) may not be invalidated if a provision in another statute (power B) applies to the same situation;²⁶⁵ and undertaking a search for a reason that turns out to be inapplicable (power A) may not be invalidated if that same search was otherwise authorised (power B).²⁶⁶ As in public law, we must pay close attention to both sources of power to decide whether they share sufficient common ground to allow an official to later justify their act by reference to power B. If the two powers do not materially differ in terms of when they can be exercised and what effect they produce, the mistaken reliance on power A may not undermine the validity of the act.²⁶⁷ Conversely, a mistaken exercise of one power will not be saved by another whose purpose is quite different. For example, if police have had enough time to obtain a warrant (power A), allowing police to save a failed execution of that warrant by reference to a second power premised on a need to act urgently *without* a warrant (power B) would be incoherent.²⁶⁸

The effect of these principles is to extend the benefits of compliance with statutory power described in Part III(A) to include situations in which an official *accidentally* exercises a power. The fact that an official was not aware of,

²⁶³ See *Lewis v Australian Capital Territory* (2020) 271 CLR 192, 212–13 [45] (Gordon J) ('*Lewis*').

²⁶⁴ *Middlin-Hannah v The Queen* (2020) 137 SASR 366, 374 [17] (Kourakis CJ). See *R v Romeo* (1982) 30 SASR 243, 277 (Cox J) ('*Romeo*').

²⁶⁵ See, eg, *Warke v Daire* (1983) 32 SASR 321, 327–8 (Zelling J); *Follett v Mann* (2019) 278 A Crim R 117, 121 [14]–[15] (McWilliam AsJ); *Nobbs v Hackett* [1999] NSWSC 379, [6]–[8] (Adams J) ('*Nobbs*').

²⁶⁶ See *Police (SA) v Grozev* (2006) 47 MVR 193 ('*Grozev*'). The officer exercised power to take a blood alcohol test under one provision based on the mistaken belief that a driver had committed an offence, but under another provision no justification was needed because the events took place during a holiday period: at 194–5 [7]–[14], 205–6 [67]–[69] (Doyle CJ), discussing *Australian Road Rules* (SA) rr 150(1), 153(1), *Road Traffic Act 1961* (SA) s 47E(2a)(b).

²⁶⁷ See, eg, *ibid* 205–6 [67]–[69] (Doyle CJ); *Nobbs* (n 265) [6]–[8] (Adams J).

²⁶⁸ *Hartnett v New South Wales* [1999] NSWSC 265, [35] (Dunford J).

or did not believe, that they could act pursuant to the alternative source of power may not necessarily prevent the official from later relying on it.²⁶⁹ The official may not have ‘advert[ed] to’²⁷⁰ or ‘turned his mind’²⁷¹ to the alternative power, or may have been ‘ignorant of’ its existence²⁷² or thought it was ‘of no use ... in the circumstances’.²⁷³ Though the officer is ‘clearly not relying on’²⁷⁴ or ‘intend[ing] to exercise’²⁷⁵ power B, this does not of itself ‘disqualify the officer retrospectively relying on’ it.²⁷⁶ That is consistent with the observation that an official may still be executing an Act ‘although he did not know precisely what the law was’.²⁷⁷ However, the fact that an official is not intending to exercise power B does decrease the likelihood of complying with its essential requirements. For example, if the alternative power requires an official to hold a state of satisfaction as to a particular issue,²⁷⁸ or to produce their source of authority on request²⁷⁹ or to be acting in a particular capacity,²⁸⁰ the official may struggle to meet those requirements when they do not have the correct power source in mind.

2 Relief for Immaterial Harm

‘Inevitable’ false imprisonment cases are another example of the impact of technical unlawfulness on tort liability. A plaintiff is not required to prove loss in order to establish liability for false imprisonment.²⁸¹ However, inability to do

²⁶⁹ In *Binsaris v Northern Territory* (2020) 270 CLR 549, the defendant had not argued reliance on an ‘alternative source’ of power to use tear gas until the time of the High Court appeal: at 561–2 [23]–[27] (Gageler J). In dissent, Gageler J found that power to be an available source of lawful authority: at 564 [32]–[33]. Cf at 560 [19]–[20] (Kiefel CJ and Keane J), 586 [109] (Gordon and Edelman JJ).

²⁷⁰ *Grozev* (n 266) 205 [63] (Doyle CJ).

²⁷¹ *Holder v South Australia* [2018] SADC 83, [232] (Judge Millstead) (‘Holder’).

²⁷² *Ibid* [234] (Judge Millstead).

²⁷³ See *Romeo* (n 264) 276 (Cox J).

²⁷⁴ *Ibid* 277 (Cox J).

²⁷⁵ *Grozev* (n 266) 205 [63] (Doyle CJ).

²⁷⁶ See *Holder* (n 271) [234] (Judge Millstead).

²⁷⁷ *Romeo* (n 264) 277 (Cox J), citing *Read v Coker* (1853) 13 CB 850; 138 ER 1437, 1442 (Jervis CJ), 1442 (Maule J, Cresswell and Talfourd JJ agreeing at 1442).

²⁷⁸ *Holder* (n 271) [232] (Judge Millstead). See *Su v Commonwealth* (2016) 307 FLR 357, 369 [44] (Hamill J).

²⁷⁹ See, eg, *Nobbs* (n 265) [7] (Adams J).

²⁸⁰ See, eg, *McKenna v Hunter and New England Local Health District* (2014) Aust Torts Reports ¶82–158, 67,035 (Macfarlan JA, Beazley P agreeing at 67,001).

²⁸¹ *Lewis* (n 263) 200 [3], 201 [6] (Kiefel CJ and Keane J).

so may curtail access to meaningful relief.²⁸² The High Court of Australia has endorsed the path taken by the Supreme Court of the United Kingdom in *Lumba*,²⁸³ where the claimants were denied compensation on the basis that if they had not been unlawfully detained pursuant to an unpublished government policy, they would still have been lawfully detained pursuant to the published one.²⁸⁴ In *Lewis v Australian Capital Territory*, this principle was applied to refuse compensatory damages to a prisoner whose lenient weekend detention arrangement was invalidly revoked in favour of a full-time custodial sentence.²⁸⁵ The revocation decision was unlawful because Mr Lewis had not received notice of the hearing.²⁸⁶ However, it was only *technically* unlawful because there was ‘no doubt’ that the same decision would have been made whether or not he had been present.²⁸⁷ The invalidity of the decision therefore ‘made no difference to the outcome’ that followed.²⁸⁸ This reasoning did not alter the question of liability, in that Mr Lewis was unlawfully detained.²⁸⁹ But it affected his entitlement to relief for that wrong — having suffered no compensable loss, Mr Lewis was entitled only to nominal damages.²⁹⁰

²⁸² The argument has also been run (though unsuccessfully) in the context of trespass to land: *Rumble* (n 201) [18] (Mahony DCJ).

²⁸³ *Lewis* (n 263) 210 [38] (Gageler J), 225 [89]–[91] (Gordon J), 260 [176] (Edelman J, Kiefel CJ and Keane J agreeing at 200 [2]).

²⁸⁴ *Lumba* (n 104) 281–2 [95], 301 [169] (Lord Dyson JSC). The claimants were limited to nominal damages: at 281–2 [95] (Lord Dyson JSC, Lord Collins JSC agreeing at 320–1 [237]), 303 [176] (Lord Hope DPSC), 313 [212] (Baroness Hale JSC), 325 [256] (Lord Kerr JSC), 351 [335] (Lord Phillips PSC). In applying the counterfactual analysis required in *Lumba* (n 104), courts in the United Kingdom have adopted an irrebuttable presumption that an officer would otherwise have acted lawfully: *Varuhas* (n 103) 151.

²⁸⁵ *Lewis* (n 263) 210 [38], 211 [42] (Gageler J), 225 [89]–[91], 234 [122] (Gordon J), 260 [176], 238 [135], 264 [185] (Edelman J, Kiefel CJ and Keane J agreeing at 200 [2]). The High Court rejected the suggestion that damages could be awarded for ‘vindication’: at 229 [104] (Gordon J, Gageler J agreeing at 206 [22]), 248–9 [153] (Edelman J, Kiefel CJ and Keane J agreeing at 200 [2]).

²⁸⁶ See *ibid* 216 [59] (Gordon J), 236 [129] (Edelman J).

²⁸⁷ *Ibid* 219 [74] (Gordon J).

²⁸⁸ *Ibid* 247 [151] (Edelman J).

²⁸⁹ *Ibid* 216 [59] (Gordon J), discussing *Lewis v Chief Executive, Department of Justice and Community Safety (ACT)* (2013) 280 FLR 118 (*‘Lewis (Trial)’*).

²⁹⁰ *Ibid* 211 [42] (Gageler J), 234 [122] (Gordon J), 264 [185] (Edelman J, Kiefel CJ and Keane J agreeing at 205 [20]).

IV OPERATIONALISING PUBLIC LAW PRINCIPLES IN A PRIVATE LAW CASE

Cases that involve both excess of power and liability issues may come before the courts via different paths. The ultimate shape of proceedings will depend in large part on choices made by a litigant at the outset. For example, a plaintiff might choose to first raise a public law question via judicial review proceedings with a view to bringing a later tort claim,²⁹¹ or choose to bring concurrent proceedings seeking both public and private law remedies,²⁹² or choose to wait and raise questions of invalidity within the confines of a tort claim (ie a collateral challenge).²⁹³ Irrespective of the way the claim is initially framed, it is also possible for public law issues within a claim to be ‘brought forward’ by steps taken by the defendant, and more generally pursuant to the court’s case

²⁹¹ For example, Mr Taylor successfully sought orders quashing the two visa cancellation decisions that authorised his detention before commencing his false imprisonment claim in *Ruddock* (n 89): at 617 [2]–[3] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also above n 89 and accompanying text. A more recent example of a plaintiff raising a public law question via judicial review proceedings with a view to bringing a later tort claim is *Kitchen v Quinlivan* [No 3] [2025] QSC 351, a misfeasance in public office case commenced after judicial review proceedings in which declaratory relief was awarded by consent: see at [4]–[6]; *Kitchen v Director of Professional Services Review* [2023] FCAFC 160, [22]–[23] (Charlesworth, Derrington and Downes JJ).

²⁹² See, eg, *Flanagan v Commissioner of Australian Federal Police* (1996) 60 FCR 149, involving a judicial review challenge to three search warrants and claim of misfeasance in public office: at 153, 156–7, 180 (Beaumont, Ryan and Lindgren JJ) (*‘Flanagan’*); *Saïtta Pty Ltd v Commonwealth* [2001] FCA 817, involving application for a declaration of invalidity alongside a claim in negligence: at [21], [31] (Gray J); *Forbes v Boston* [1999] NSWSC 1217, involving an application to set aside a decision for denial of natural justice alongside a claim of misfeasance in public office: at [1] (Windeyer J); *Tallott v City of Stirling* [No 2] (2015) 213 LGERA 254, concerning an application for a declaration of invalidity alongside a claim of false imprisonment: at 257 [6] (Chaney J). The issues need not be determined concurrently: see, eg, *Flanagan* (n 292) 219–20 (Beaumont, Ryan and Lindgren JJ).

²⁹³ See, eg, *Okwume (Appeal)* (n 215), where the plaintiff’s false imprisonment claim was premised on the allegation that his visa cancellation decision was affected by jurisdictional errors: at 608 [3]–[4] (Besanko J), discussing *Okwume (Trial)* (n 215); *Cowell v Corrective Services Commission (NSW)* (1988) 13 NSWLR 714, where the appellant’s false imprisonment claim was premised on the unlawfulness of his detention, which could have been remedied by a writ of habeas corpus or declaratory relief: at 747 (Clarke AJA, Priestley JA agreeing at 717); *Obeid v Ipp* (2016) 338 ALR 234, where the plaintiffs’ misfeasance in public office claim against the Independent Commission Against Corruption (*‘ICAC’*) ‘fail[ed] at the outset’ based on the finding that there was no denial of procedural fairness by ICAC, a point that was not pressed in the subsequent unsuccessful appeal in relation to the liability of other defendants: see at 238 [16]–[17], 282 [252]–[253], 280 [260] (Hammerschlag J); *Lockley* (n 185) 261 (Bathurst CJ).

management functions and powers to regulate the conduct of proceedings.²⁹⁴ This may be thought appropriate in a case where the entirety of the liability claim stands or falls on the question of unlawfulness.²⁹⁵ The final part of this article looks at how the reasoning set out in Part III may feature in these different forms of litigation, highlighting the implications of dealing with invalidity upfront versus within the assessment of tort liability.

A Determining Invalidity as a Preliminary Matter

The most direct way to challenge the validity of a government act or decision is via judicial review proceedings. Where invalidity is relevant to liability, a plaintiff who intends to seek damages in tort might elect to bifurcate the elements of their claim, first bringing a judicial review challenge as a precursor to a later tort claim.²⁹⁶ For example, a plaintiff might seek orders quashing an instrument that authorises their detention on grounds of denial of procedural fairness, or a declaration that an official has exercised an arrest power irrationally or unreasonably.²⁹⁷ The fact that a plaintiff might be planning a later damages claim does not necessarily oblige them to raise it at the same time as a challenge to legality.²⁹⁸

By ‘staging’ the claim, a plaintiff is able to build momentum towards their intended goal of monetary relief, either via a subsequent tort claim or through settlement negotiations. Success or failure in the judicial review challenge will operate either to reinforce or undercut that possibility because principles of *res*

²⁹⁴ For example, the public law issue may be stated as a separate question pursuant to a power such as that contained in the *Federal Court Rules 2011* (Cth) r 30.01. The public law aspects of a claim may also be remitted to an alternative forum for preliminary resolution: see, eg, *Abdel-Hady* (n 87), where the plaintiff’s proceedings in the High Court’s original jurisdiction sought declaratory relief regarding the lawfulness of his detention and damages for false imprisonment: at [9] (Gageler CJ, Gleeson and Beech-Jones JJ). The judicial review questions were remitted to the Federal Circuit and Family Court of Australia which awarded declaratory relief by consent, following which the High Court heard and determined a special case concerning the Commonwealth’s proposed defence to liability in tort: at [10]–[11], [15]–[16], [18]–[20] (Gageler CJ, Gleeson and Beech-Jones JJ), [61] (Gordon J). The damages component of the claim remains unresolved at the time of this article’s publication.

²⁹⁵ See, eg, *BVZ21 v Commonwealth* [2022] FCAFC 122, [37] (Markovic, Thomas and Halley JJ).

²⁹⁶ See Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020) 233–4.

²⁹⁷ See, eg, *Grech* (n 142) 67–9 (Heerey J).

²⁹⁸ For example, Mr Taylor was not obliged to claim damages at the same time as challenging the validity of his visa cancellation decision, as ‘there was not the slightest chance that the High Court would have done anything about it if he had’: *Ruddock v Taylor* (2003) 58 NSWLR 269, 285 [82] (Meagher JA).

judicata and issue estoppel will generally prevent it being re-agitated at a later time.²⁹⁹ Thus, Mr Taylor,³⁰⁰ Mr Kable,³⁰¹ and Mr Lewis³⁰² each successfully challenged the validity of the decisions or instruments authorising their detention before later relying on those findings to support a claim for damages for false imprisonment. We only see *successful* examples of that strategy proceed to the second stage, with unsuccessful applicants consigned to the history books as failed judicial review cases.³⁰³ There are likely many thwarted tort claims sitting behind public law judgments ruling that a decision is not invalid, or that there is no obligation to exercise a power or duty, or that an error is immaterial, or that relief should be refused on discretionary grounds.³⁰⁴

Of course, success at the public law stage does not ensure that this outcome will benefit the plaintiff in a subsequent tort claim. Part III of this article offers various examples of the ill fit between public law findings of invalidity and the assessment of tort liability. Recalling Mr Taylor and Mr Kable, each discovered in their tort claims that their original judicial review challenges had targeted the wrong government act.³⁰⁵ They had each succeeded in establishing that one of the steps leading to their respective imprisonments was legally invalid.³⁰⁶ However, as discussed at Part III(B), the act of imprisonment itself was independently supported and valid, a question not raised or considered during

²⁹⁹ *Heiner v Minister for Home Affairs* [2021] FCA 212, [51] (Anastassiou J); *McKay v Findex Group Ltd* [2022] ACTSC 191, [71] (McWilliam AsJ) (concerning Anshun estoppel: at [46], [50], [70]–[71]); *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 146 FCR 10, 17 [36]–[37] (Emmett, Conti and Selway JJ).

³⁰⁰ *Re Patterson* (n 89) 420 [84] (Gaudron J), 455 [196] (Gummow and Hayne JJ, Gleeson CJ agreeing at 398 [1]), 504–5 [338]–[339] (Kirby J); *Ruddock* (n 89) 620–1 [18]–[20] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

³⁰¹ *Kable v DPP (NSW)* (1996) 189 CLR 51, 99 (Toohey J), 108 (Gaudron J), 124 (McHugh J), 144 (Gummow J) (*'Kable (No 1)'*); *Kable (No 2)* (n 50) 127 [14] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

³⁰² *Lewis (Trial)* (n 289) 183 [394] (Refshauge ACJ); *Lewis* (n 263) 216 [59] (Gordon J).

³⁰³ See, eg, *Carroll v Mijovich* (1991) 25 NSWLR 441, 444 (Kirby P). Occasionally an invested litigant might attempt the second stage despite loss at the first: see, eg, *Cosenza v Magistrates Court (SA)* [2016] SASC 181, [2]–[3], [55], [58] (Bampton J); *Cosenza v South Australia* [2024] SASC 97, [484], [520], [538] (McDonald J).

³⁰⁴ That type of finding would be particularly problematic for tort claims in which a 'mandamus provision' applies: see above n 247 and accompanying text.

³⁰⁵ See *Ruddock* (n 89) 621 [23], [25] (Gleeson CJ, Gummow, Hayne and Heydon JJ); *Kable (No 2)* (n 50) 126–7 [12], 136 [41], [43] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

³⁰⁶ *Re Patterson* (n 89) 420 [84] (Gaudron J), 455 [196] (Gummow and Hayne JJ, Gleeson CJ agreeing at 398 [1]), 504–5 [338]–[339] (Kirby J); *Kable (No 1)* (n 301) 99 (Toohey J), 108 (Gaudron J), 124 (McHugh J), 144 (Gummow J).

the earlier judicial review cases. Thus, the public law findings of invalidity in those cases did not neatly translate into an outcome of liability.³⁰⁷

Mr Lewis struck upon a different problem in his false imprisonment claim. Like the others, he had succeeded in establishing that the instrument authorising his detention was invalid on public law grounds (namely, breach of procedural fairness).³⁰⁸ However, the operation of the statutory regime was to the effect that his detention was ‘inevitable’, which significantly curtailed Mr Lewis’ quantum of relief.³⁰⁹ It is interesting to consider whether a claim of this type could have been forestalled at the public law stage on the basis that the breach was immaterial.³¹⁰ While the High Court has suggested that a breach of procedural fairness will generally be taken to have affected the decision-making process in a material way,³¹¹ an error can still be classed as immaterial if the outcome was ‘inevitable’.³¹² In such a case, relief might be refused either on grounds of immateriality,³¹³ or because awarding a remedy would be futile in the sense that the same outcome would ensue in any event.³¹⁴ There are clear differences between these various outcomes, however — the public law outcome is a finding of no infringement at all, while the private law outcome is a finding of an infringement that does not justify a meaningful remedy. There may be practical and vindicatory benefits arising from the latter

³⁰⁷ *Ruddock* (n 89) 628 [50]–[51] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 674–5 [228]–[230] (Callinan J); *Kable (No 2)* (n 50) 136 [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 147 [78] (Gageler J). This can be contrasted with the outcome in *Abdel-Hady* (n 87), in which the invalid statute was the sole source of the power to detain: at [215] (Jagot J), discussing *Al-Kateb v Godwin* (2004) 219 CLR 562 (*‘Al-Kateb’*).

³⁰⁸ *Lewis (Trial)* (n 289) 118, 152–3 [205]–[206] (Refshauge ACJ).

³⁰⁹ *Lewis* (n 263) 200 [2]–[3], 202–3 [11], 204–5 [17] (Kiefel CJ and Keane J), 211 [40]–[42] (Gageler J), 226–7 [94]–[96] (Gordon J), 236 [128], 261 [179], 263 [183] (Edelman J). See also the discussion above in Part III(D)(2).

³¹⁰ See above Part II(B).

³¹¹ *Nathanson* (n 43) 103 [33] (Kiefel CJ, Keane and Gleeson JJ). See also at 108 [47] (Gageler J).

³¹² *LPDT* (n 11) 329 [16] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ), 335 [36] (Beech-Jones J).

³¹³ *Ibid.*

³¹⁴ Futility is discussed in *Shrestha v Minister for Immigration and Border Protection* (2017) 251 FCR 143, 153–4 [41]–[44] (Bromwich J). The procedural fairness ground has always accommodated the possibility that relief could be refused if no different decision would have been reached in the absence of the error: *Aala* (n 20) 108–9 [57]–[58] (Gaudron and Gummow JJ).

outcome,³¹⁵ but in both cases concepts of immateriality preclude access to compensatory damages.

A counterfactual assumption that an official would otherwise have exercised power for the plaintiff's benefit can also create tensions in other contexts. For example, if a misfeasance claim rests on the invalidity of a government defendant's decision, invalidity can be directly established by way of judicial review proceedings as a precursor to the tort claim.³¹⁶ However, if the power in question is discretionary, the outcome of the judicial review claim might fall short of confirming whether the official's act is relevantly unauthorised for the purpose of the misfeasance tort. As Gleeson J observed in *Lock v Australian Securities and Investments Commission*, it is quite possible that powers of this sort could be validly re-exercised in a different manner or not at all.³¹⁷ Unless there are other factors that narrow down the possibilities, it may not be possible for a court to conclude that an act found to be invalid in judicial review proceedings has caused the plaintiff compensable harm in a later misfeasance claim.³¹⁸

B Determining Invalidity within a Tort Claim

Rather than first testing the legality of a government act or decision in a direct judicial review challenge or via concurrent proceedings that seek specific public law relief alongside damages in tort, a plaintiff may elect to *indirectly* contest legality by way of a collateral challenge.³¹⁹ The effect of a collateral challenge is to create a 'trial within a trial',³²⁰ determining the public law validity of a government act or decision within a private law tort claim.³²¹ Prior to the development of modern judicial review remedies, collateral challenge of this sort was 'the regular and, very often, the only remedy' for establishing

³¹⁵ For example, in some cases the private law outcome will entitle the plaintiff to their costs: GE Dal Pont, *Law of Costs* (LexisNexis, 4th ed, 2018) 231–4 [8.40]–[8.42]. See Rock, 'Causation' (n 45) on the implications of each approach: at 78–9.

³¹⁶ In *Golden v Vlandys* (2016) 339 ALR 610, the plaintiff's judicial review challenge based on apprehended bias succeeded on appeal: at 627 [119] (Payne JA, McColl JA agreeing at 611 [1], Leeming JA agreeing at 611 [2]). The misfeasance claim failed on the mental elements of the tort: at 632 [149] (Payne JA, McColl JA agreeing at 611 [1], Leeming JA agreeing at 611 [2]).

³¹⁷ See above n 80 and accompanying text.

³¹⁸ See above Part II(C)(1).

³¹⁹ *Ousley* (n 58) 98–9 (McHugh J).

³²⁰ *Director of Housing v Sudi* (2011) 33 VR 559, 567 [35] (Warren CJ) ('*Sudi*').

³²¹ See above n 293 for relevant examples.

invalidity.³²² It remains the case that tort claims sometimes determine ‘significant questions of public law, including those respecting ultra vires activities of public officers’.³²³

Collateral challenge is not an automatic entitlement. There are various reasons why it might be considered inappropriate for a plaintiff to be permitted to indirectly attack the legality of an administrative decision or instrument in a civil claim, including because the validity of the instrument concerns third parties who are not involved in those civil proceedings, or because allowing the collateral challenge would circumvent the limits applicable in a ‘direct’ judicial review challenge.³²⁴ Conversely, collateral challenge is more likely to be considered appropriate in circumstances where the government has itself put the matter in issue by relying on an apparently valid decision or order to justify its actions.³²⁵ The prevailing view is that access to collateral challenge should be determined according to the intention of Parliament, assessed via a process of statutory construction.³²⁶ The statute might imply that collateral challenge is inappropriate if that result would sit uneasily with the statutory regime (eg by undermining a detailed scheme for administrative review already provided for).³²⁷ A statute might also expressly point against the availability of collateral challenge via an ouster clause that restricts challenges to legality. Usually, a generally worded privative clause would not be interpreted to preclude

³²² Rubinstein (n 192) 54.

³²³ *Enfield* (n 75) 143–4 [17] (Gleeson CJ, Gummow, Kirby and Hayne JJ).

³²⁴ Additional factors that may be considered when determining whether to permit a collateral challenge were highlighted in *Jacobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568: at 593–4 [93] (Besanko J) (*‘OneSteel’*), citing Mark Aronson, ‘Criteria for Restricting Collateral Challenge’ (1998) 9(4) *Public Law Review* 237, 246, Enid Campbell, ‘Collateral Challenge of the Validity of Government Action’ (1998) 24(2) *Monash University Law Review* 272, 275–6 (*‘Collateral Challenge’*). See also Ellen Rock, ‘Resolving Conflicts at the Interface of Public and Private Law’ (2020) 94(5) *Australian Law Journal* 381, 391–3.

³²⁵ See *Hinton Demolitions Pty Ltd v Lower [No 2]* (1971) 1 SASR 512, 549 (Wells J) (*‘Hinton’*), quoted in *Sudi* (n 320) 599 [232] (Weinberg JA).

³²⁶ See *A-G (Cth) v Breckler* (1999) 197 CLR 83, 116 [60] (Kirby J) (*‘Breckler’*). This is consistent with public law’s approach to ascertaining the validity of government action more broadly: see above Part II.

³²⁷ Enid Campbell, ‘Collateral Challenge’ (n 324) 281–4.

collateral challenge via a tort claim,³²⁸ but it may be possible for a strongly worded clause to do so.³²⁹

Part III of this article demonstrates that it is not uncommon for tort claims to run into invalidity questions, either directly or indirectly.³³⁰ If the validity of an administrative decision or instrument is indirectly raised as a collateral point within the context of a tort claim, there is a greater potential for tension between public and private law principles. Examples of procedural tension can arise in relation to issues of jurisdiction,³³¹ in allocating the burden of proof and in the award of relief. The following discussion addresses the latter two issues.

1 *Proving Invalidity*

As a general proposition, the burden of proof in a civil claim rests on the moving party,³³² meaning that proof of invalidity will depend on the function it serves in the relevant cause of action. Depending on the type of claim and relief sought, both public and private law sometimes require the plaintiff to show that the defendant has acted unlawfully, or the defendant to show their act was lawful. In a direct judicial review challenge in which a plaintiff seeks orders to quash or prohibit the execution of an invalid administrative decision,

³²⁸ See, eg, *Bodruddaza* (n 66) 662–3 [21]–[25] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Plaintiff S99/2016 v Minister for Immigration and Border Protection* (2016) 243 FCR 17, 124 [433] (Bromberg J); *Minister for Home Affairs v DLZ18* (2020) 270 CLR 372, 392–5 [26]–[35] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ) (*‘DLZ18’*).

³²⁹ See, eg, *Breckler* (n 326) 108 [36]–[37] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398, 424 [66] (Gummow, Hayne, Crennan, Kiefel and Bell JJ). That would require clear and unmistakeable language: *Shergold v Tanner* (2002) 209 CLR 126, 136–7 [34] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ), cited in *DLZ18* (n 328) 392–3 [28] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ). Different considerations may arise depending on whether or not the error in question is jurisdictional: see, eg, *Secretary, Ministry of Health v New South Wales Nurses and Midwives’ Association* (2022) 320 IR 249, 317 [205] (Walton J) (*‘Nurses and Midwives’ Association’*).

³³⁰ For example, some ‘mandamus-style’ civil liability provisions expressly contemplate an assessment of the unlawfulness of a failure to act, even if they do not demand a formal order to that effect: see above n 245 and accompanying text.

³³¹ For example, where a claim asks the court to address a matter that falls outside its jurisdiction or within the exclusive jurisdiction of another court: see, eg, *Precision Products* (n 244) 113 [40]–[47] (Allsop P, Beazley JA agreeing at 147 [199], McColl JA agreeing at 147 [200]); *Connor v Smith Hire Service (Casino) Pty Ltd* [2017] NSWLEC 7, [11]–[18] (Robson J). I am grateful to Leeming JA for this suggestion.

³³² See *Watts v Rake* (1960) 108 CLR 158, 159 (Dixon CJ).

the onus of establishing invalidity rests squarely on the plaintiff.³³³ That burden extends to demonstrating the materiality of the error,³³⁴ which, while ‘undemanding’, puts the onus on the plaintiff to argue that the violation has deprived them of the possibility of a different result.³³⁵ The presumption of regularity, whose ‘natural home’ is public law,³³⁶ likewise confirms that the plaintiff should demonstrate legal error in an administrative act before the court will confirm its invalidity. Otherwise, it may be presumed that relevant preconditions for the valid exercise of power have been fulfilled.³³⁷ The presumption does not carry so far as ‘affording all administrative acts and decisions *validity and binding effect* until they are set aside’, but instead sets an evidentiary onus, requiring a party to raise ‘proof of some invalidating feature before a conclusion of invalidity may be reached.’³³⁸

Public law proceedings do not always put the entirety of the burden of establishing invalidity on the applicant. In an application for the writ of habeas corpus,³³⁹ the defendant bears the ultimate burden of showing cause to detain.³⁴⁰ In this respect, it resembles its private law cousin, the tort of false imprisonment. However, unlike in a false imprisonment case,³⁴¹ this does not mean that the plaintiff need do nothing more than establish the fact of their imprisonment. Instead, it is necessary for the plaintiff to do something which requires ‘the detainer to justify the detention by proving its lawful character,’³⁴²

³³³ *MZAPC* (n 43) 524 [39] (Kiefel CJ, Gageler, Keane and Gleeson JJ).

³³⁴ *Ibid.*

³³⁵ *LPDT* (n 11) 328–9 [13]–[15] (Gageler CJ, Gordon, Edelman, Steward, Gleeson and Jagot JJ); *Nathanson* (n 43) 103 [32]–[33] (Kiefel CJ, Keane and Gleeson JJ), citing *MZAPC* (n 43) 524 [39] (Kiefel CJ, Gageler, Keane and Gleeson JJ). See also *Nathanson* (n 43) 123 [93] (Edelman J).

³³⁶ *Aboriginal Land Council* (n 58) 164 (McHugh JA).

³³⁷ *Ibid.*

³³⁸ *Bhardwaj* (n 19) 645–6 [151] (Hayne J) (emphasis added).

³³⁹ An application for the writ of habeas corpus is a species of collateral attack: see, eg, Judith Farbey, RJ Sharpe and Simon Atrill, *The Law of Habeas Corpus* (Oxford University Press, 3rd ed, 2011) 22.

³⁴⁰ *Ibid* 54, 84–7.

³⁴¹ See, eg, *Lewis* (n 263) 238 [134] (Edelman J). Even in a false imprisonment claim, a plaintiff might sometimes be expected to do something that puts lawful justification in issue in order to satisfy the court that there is a basis for bringing the cause of action: see, eg, the strikeout application in *AKW22 v Commonwealth* [No 2] [2023] FCA 332, [26]–[34] (Colvin J) (‘AKW22’), affd *AKW22 v Commonwealth* [2024] FCAFC 22, [22] (Derrington, Goodman and Raper JJ).

³⁴² *McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 602, 619 [60] (Allsop CJ) (‘McHugh’).

imposing on the plaintiff ‘at least an evidential burden of establishing that there is a reason to suppose that his detention’ is or has become unlawful.³⁴³ At that point, the burden will ‘shift absolutely’ to the defendant.³⁴⁴ Relevant for present purposes, that is particularly apposite in the ‘more complicated’ category of case in which a defendant relies on a purportedly valid underlying administrative order or instrument to support a secondary detention power, but the plaintiff contests that instrument’s legal validity.³⁴⁵

In tort law, the burden of proof is generally allocated so that a plaintiff bears the onus of making out the elements of their case, while the defendant bears the onus of proof in respect of any defence on which they intend to rely.³⁴⁶ The onus of establishing excess of power therefore depends to some extent on the function that it serves within the relevant tort. If unlawfulness is an element of the cause of action (eg the tort of misfeasance in public office), it will fall to the plaintiff to plead and prove that the defendant has acted in excess of power. In a false imprisonment claim, in contrast, the defendant will bear the onus of establishing lawful authority.³⁴⁷ While unlawfulness is an element of that tort,³⁴⁸ the burden of proof is allocated so that a plaintiff is responsible for establishing a *prima facie* case of imprisonment, following which it falls to the defendant to justify the act of detention by reference to lawful authority ‘if he could.’³⁴⁹

The foregoing means that public and private law will sometimes agree on which party bears the burden of proving that government action is lawful (or unlawful) and sometimes not. Where the two are in agreement, the structure of proceedings does not much matter. For example, a plaintiff bears the onus of establishing excess of power irrespective of whether they bring a judicial review

³⁴³ *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285, 299–300 [39] (Kiefel CJ, Keane, Nettle and Edelman JJ). The weight of that burden is context-specific, requiring a far lower threshold to be satisfied in cases where knowledge is within the defendant’s exclusive possession (eg a detention power premised on an official’s state of ‘reasonable suspicion’ in *McHugh* (n 342)): at 619–20 [60]–[61] (Allsop CJ). Cf a warrant or committal, which ‘speak[s] for itself’: at 663 [273] (Mortimer J).

³⁴⁴ See *Yoxon v Secretary, Department of Justice* (2015) 50 VR 5, 14 [38] (Forrest J).

³⁴⁵ See *ibid* 14 [36] (Forrest J).

³⁴⁶ See above n 333.

³⁴⁷ See, eg, *Ruddock* (n 89) 651 [140] (Kirby J); *Lewis* (n 263) 206 [24] (Gageler J).

³⁴⁸ It is constituted by ‘detention in combination with unlawfulness’, protecting liberty against ‘those restraints for which “lawful authority” cannot be shown’: *Lewis* (n 263) 206 [24] (Gageler J) (citations omitted). This makes a defence of lawful authority different from a defence of consent, as lack of consent is not part of the tort: see *AKW22* (n 341) [29] (Colvin J).

³⁴⁹ *Trobridge* (n 176) 152–3 (Fullagar J), cited in *McHugh* (n 342) 618 [54] (Allsop CJ).

challenge as a precursor to a misfeasance claim, or wait to argue it within the context of the civil proceedings.³⁵⁰ However, in cases where public and private law disagree about the burden of proof, the structure and form of proceedings may have more immediate implications. For example, there are cases that suggest that a plaintiff whose goods have been seized may be in a stronger position if they bring a civil claim for conversion compared with an application for declaratory relief — in the former, the onus of establishing lawful authority rests on the defendant, while in the latter the plaintiff must impugn the validity of the seizure decision.³⁵¹

The potential for complexity is compounded in cases in which a government defendant exercises secondary powers of the types discussed at Part III(B). It is not uncommon for these claims to raise the legality of an underlying primary decision or instrument as a collateral point, and it will not always be readily apparent which party is responsible for addressing it. Taking the false imprisonment tort as an example, it can be accepted that the onus is firmly on the government defendant to justify the lawfulness of the detention, requiring it to establish the essential criteria that engage the relevant secondary power (eg that an official reasonably suspected the plaintiff to be an unlawful non-citizen).³⁵² But does this also require the defendant to unpack and confirm the validity of an underlying primary decision or instrument that has *informed* the official's state of reasonable suspicion (eg an administrative decision to cancel the plaintiff's visa)? In *Commonwealth v Okwume*, Besanko J thought it was incumbent on the plaintiff to impugn the validity of an 'apparently valid decision' relied on by the defendant when exercising a secondary 'reasonable suspicion' power.³⁵³ If the plaintiff did nothing to put the legality of the underlying decision in issue (eg by alleging it was tainted by a breach of procedural fairness), there was no impetus for the defendant to negative that proposition.³⁵⁴ A distinction may need to be drawn, therefore, between the task of establishing lawful authority to detain, and verifying (or challenging) administrative decisions that lie further upstream. In cases where the defendant

³⁵⁰ See above nn 333–49 and accompanying text.

³⁵¹ *Commissioner of Australian Federal Police v Craven* (1989) 20 FCR 547, 550 (Bowen CJ), 550 (Sheppard J).

³⁵² *Okwume (Appeal)* (n 215) 626–8 [106]–[113] (Besanko J).

³⁵³ *Ibid*, drawing connections to the presumption of regularity: *Bhardwaj* (n 19) 645–6 [151] (Hayne J); *Ousley* (n 58) 130–1 (Gummow J).

³⁵⁴ But see *Okwume (Trial)* (n 215), where Charlesworth J was satisfied that the facts were sufficiently well-established to find a violation of procedural fairness without expressly putting either party to the task of proving or disproving compliance: at [180]. This approach was held to be available on appeal: *Okwume (Appeal)* (n 215) 628–9 [116] (Besanko J).

has authority to rely on the upstream instrument irrespective of its validity, that distinction may not much matter.³⁵⁵ But in the subset of cases where it *does* matter, collateral challenge can raise complex questions about which party is expected to establish matters going to validity, and at what point in proceedings that should occur.

Putting questions regarding the allocation of the evidentiary and legal burden to one side, it should also be noted that the available scope of review in a collateral challenge remains unsettled. As set out in Part II of this article, the legality of administrative decisions can be impugned in direct judicial review proceedings on a wide range of grounds, including failure to observe procedural fairness and exercise of power for an unauthorised purpose or in an irrational manner. It remains unclear whether this full suite of public law errors applies in tort claims based on collateral challenge, with some cases suggesting that collateral challenge may be restricted to matters of “facial” or “patent” invalidity³⁵⁶ as opposed to excess of power more broadly.³⁵⁷ There are reasons to doubt that narrow approach, or perhaps to limit its application to particular contexts.³⁵⁸ As with many questions of public law, it is likely that the courts will continue to develop the scope of collateral challenge under the auspices of statutory interpretation, allowing for a variable approach that permits recourse to broader grounds of judicial review in some contexts, but not in others.³⁵⁹

2 Discretion To Refuse Relief

Collateral challenge also draws attention to the different approaches to relief in public and private law. As discussed in Part II of this article, the fact that a government decision has been unlawfully made does not automatically invalidate its existence.³⁶⁰ The practical benefits of ‘nullity’ status are established by court order, which presupposes both that an individual with

³⁵⁵ See, eg, *LSA v Queensland* [2024] QSC 102, [206] (Cooper J) (‘LSA’).

³⁵⁶ *Sudi* (n 320) 604 [261] (Weinberg JA). The majority approach in *Ousley* (n 58) appeared to limit review to jurisdictional error on the face of the warrant: at 79–80 (Toohey J), 87–8 (Gaudron J), 123–4 (Gummow J).

³⁵⁷ *Ousley* (n 58) 100 (McHugh J); *Frugtniet v A-G (NSW)* (1997) 41 NSWLR 588, 602 (Beazley JA). *Nurses and Midwives’ Association* (n 329) lists further examples: at 318–19 [214]–[220], 321 [233] (Walton J).

³⁵⁸ See Aronson, Groves and Weeks (n 2) 816–17, discussing *Ousley* (n 58); Jules O’Donnell, ‘Re-Evaluating the Collateral Challenge in the Era of Statutory Interpretation’ (2020) 48(1) *Federal Law Review* 69, 78–85. *Stradford* (n 53) provides further discussion in the context of judicial orders: at 454–6 [277]–[283] (Edelman J).

³⁵⁹ See, eg, *Housing Authority v Garlett* [2025] WASC 125, [9]–[10], [189]–[190] (Howard J).

³⁶⁰ See especially above Part II(C)(3).

standing is inclined to challenge the exercise of power and that the court is inclined to grant a remedy. Where a plaintiff elects to 'stage' proceedings by pursuing public law writs and remedies as a precursor to a tort claim, the unavailability of public law relief will forestall access to remedies in private law. We do not see those thwarted tort cases play out.³⁶¹ In a collateral challenge, however, these events may unfold in real time. *Soh v Commonwealth* ('Soh') offers an example.³⁶² Mr Soh's false imprisonment claim attacked the legality of a decision to transfer his detention location without a fair hearing.³⁶³ Justice Madgwick agreed that the decision was likely made in breach of procedural fairness,³⁶⁴ which would ordinarily give it the status of 'no decision at all'.³⁶⁵ As foreshadowed above, that conclusion of itself changes nothing because the benefits of stamping a decision as a nullity do not accrue automatically and instead derive primarily from judicial recognition of that fact.³⁶⁶ Therefore, Madgwick J saw the conclusion on the procedural fairness point as 'not the end of the problem but the beginning of another':³⁶⁷

[W]here illegality of the decision is sought to be made a sword in an action for damages, a denial of natural justice will not of itself invalidate the applicant's detention ... unless I make a formal declaration to that effect.³⁶⁸

Given Mr Soh's lengthy delay (eight years) in raising his complaint, Madgwick J indicated that he would decline to make any such declaration, and accordingly the detention decision 'should not now be considered to have such illegality as to make his detention ... unlawful'.³⁶⁹

The outcome in *Soh* would at first glance seem at odds with the private law approach, apparently requiring the *plaintiff* to successfully establish a lack of authority to detain and denying a remedy for failure to do so. It is decidedly 'public' in flavour, reflecting what would have been the outcome had the case been resolved via judicial review.³⁷⁰ If Mr Soh had staged his claim by directly

³⁶¹ See above nn 303–4 and accompanying text.

³⁶² See *Soh v Commonwealth* (2008) 220 FCR 127, 129–30 [1] (Madgwick J) ('Soh').

³⁶³ *Ibid.*

³⁶⁴ *Soh* (n 362) 147 [98], 148 [100] (Madgwick J), citing *Bhardwaj* (n 19) 616 [53] (Gaudron and Gummow JJ), 618 [63] (McHugh J), 646–7 [152] (Hayne J).

³⁶⁵ *Bhardwaj* (n 19) 614–15 [51] (Gaudron and Gummow JJ).

³⁶⁶ See above Part II(C)(1).

³⁶⁷ *Soh* (n 362) 148 [99].

³⁶⁸ *Ibid* 148 [101].

³⁶⁹ *Ibid* 148–9 [102]–[103].

³⁷⁰ *Ibid* 148 [102] (Madgwick J).

challenging the validity of the detention decision, he would likely have failed at that first hurdle due to the operation of a limitation period or based on the exercise of judicial discretion to refuse relief.³⁷¹ That determination would then have prevented his being permitted to re-agitate the question in subsequent civil proceedings.³⁷² Drawing on that reasoning, Madgwick J relied on the discretionary character of public law relief to reject the invitation to transform nascent invalidity into a legally meaningful plank in Mr Soh's claim.³⁷³ To the extent that a collateral challenge is a 'trial within a trial',³⁷⁴ his Honour's approach is consistent with the alternative ways in which that sub-trial (ie judicial review) could have been determined in independent proceedings.³⁷⁵

The collateral framing employed by Madgwick J has not been adopted with any regularity,³⁷⁶ though other judges have reiterated that 'it should not be assumed that ordinary remedies in judicial review proceedings would follow axiomatically in ... proceedings where a collateral attack is brought'.³⁷⁷ Given that concerns about 'by-pass[ing]' the limits of judicial review are one of the reasons why the courts may be hesitant to entertain a collateral challenge in the first place,³⁷⁸ it may be conceptually neater to resolve such questions on that basis. It is also not entirely clear that a tort claim based on a collateral challenge would actually require the court to award declaratory relief of the type Madgwick J was contemplating to be able to treat the decision as invalid when

³⁷¹ Ibid.

³⁷² This was the case in *LSA* (n 355) [207] (Cooper J).

³⁷³ *Soh* (n 362) 148 [102].

³⁷⁴ *Sudi* (n 320) 567 [35] (Warren CJ).

³⁷⁵ *Soh* (n 362) 148 [102] (Madgwick J).

³⁷⁶ See, eg, *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority* [No 22] [2019] NSWSC 1657. In this negligence case, the government defendant had attempted to avoid liability by raising a collateral challenge to the validity of its own power to mitigate flooding — if it lacked any authority to act then it could not be blamed for failure to do so: at ch 5 [69] (Beech-Jones J). Justice Beech-Jones was critical of that strategy and indicated that even if there were grounds to conclude that the exercise of power was invalid, his Honour would decline to recognise it for the purpose of supporting a defence to tort liability: at ch 5 [69]–[73]. The appeal was decided on other grounds: *Seqwater* (n 246) 103 [7], 105 [10]–[12] (Basten, Meagher and Leeming JJA).

³⁷⁷ *Nurses and Midwives' Association* (n 329) 373 [504] (Walton J). His Honour granted liberty to apply for a declaration: at 373 [504].

³⁷⁸ *OneSteel* (n 324) 593–4 [93] (Besanko J). See also *Hinton* (n 325) 520–1 (Bray CJ), 533 (Wells J).

adjudicating the balance of the claim.³⁷⁹ In any event, even a successful collateral challenge may have been of limited benefit to Mr Soh — the procedurally unfair decision operated for only a short period of time,³⁸⁰ and he would have remained in some form of custody throughout.³⁸¹

V CONCLUSION

The fact that a government official has acted within the limits of their powers does not exclude the possibility that they may have acted tortiously. Nor does the fact that an official has exceeded their powers pave a direct path to liability in tort. Public law breaches and private law wrongs are distinct categories that do not always overlap, meaning that the considerations discussed in this article are not always relevant to government liability. There are, however, a variety of situations in which a tort claim might invite consideration of the lawfulness of government acts, drawing in aspects of public law principle and procedure such as its grounds of review, concepts of jurisdictional error and invalidity, and the character of its writs and remedies. In such cases, public law reasoning may inform the outcome of a tort claim, determining whether a particular error has undermined the lawfulness of an act and the legal and practical outcomes that have followed. Public law sometimes gives clear guidance on the legality of government action in a way that supports a finding of liability. However, this article has demonstrated that there are many cases in which private law asks questions that public law is not designed to answer.

These conclusions have implications for legal practice because questions may be framed in different ways depending on the manner in which proceedings are managed. Sometimes the effects will operate invisibly — where a potential tort claimant chooses to first bring a direct judicial review challenge, the theoretical liability claim may be cut short at the public law stage (eg because an error is deemed immaterial, or relief is refused on discretionary grounds). If invalidity is instead raised by way of collateral challenge, it is sometimes possible to see public law principles and reasoning impact the

³⁷⁹ For example, no formal order of invalidity was made in *Okwume (Trial)* (n 215) or *Okwume (Appeal)* (n 215): see *Okwume (Trial)* (n 215) [200], [218] (Charlesworth J); *Okwume (Appeal)* (n 215) 631–2 [137] (Besanko J, White J agreeing at 666 [284]).

³⁸⁰ The subsequent decisions to detain him in prison were not challenged: *Soh* (n 362) 148 [102], 149 [104] (Madgwick J).

³⁸¹ *Soh* (n 362) 149 [104] (Madgwick J). See also the discussion of the reduction of damages for ‘inevitable’ imprisonment: see above Part III(D)(2). The location of imprisonment can potentially affect its lawfulness in some circumstances, but the evaluation is inherently context-specific: see the authorities discussed in *Campbell v Northern Territory [No 3]* (2021) 295 A Crim R 1, 89–92 [449]–[459] (White J).

assessment of liability in a more direct way. Appreciating these possibilities helps to explain the way the courts reconcile tensions between public and private law principles and allows litigants to make informed decisions about the most appropriate way to structure a liability claim based on a flawed exercise of public power.

VI POSTSCRIPT

While this article was in press, the High Court handed down its decision in the false imprisonment case of *Abdel-Hady v Commonwealth* ('*Abdel-Hady*').³⁸² This is the first major case considering the potential liability implications of the High Court's 2023 judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'), in which the High Court ruled that statutory provisions authorising immigration detention were invalid insofar as they applied to a person who had no real prospect of being removed from Australia in the reasonably foreseeable future.³⁸³ The effect was to undermine the legality of the practice of indefinite detention which had 20 years earlier been upheld by the High Court in *Al-Kateb v Godwin*.³⁸⁴

Mr Abdel-Hady suffers from a medical condition that restricted his deportation from at least July 2022.³⁸⁵ Based on *NZYQ*, the Commonwealth accepted that Mr Abdel-Hady's detention had become unlawful at that time.³⁸⁶ He was released in February 2024.³⁸⁷ With the legality of the detention resolved by consent orders, the sole question considered by the High Court was whether or not the Commonwealth should be entitled to rely on a defence to liability for the period preceding the change of affairs brought about by *NZYQ*.³⁸⁸ References have been added to relevant footnotes in this article, though the

³⁸² See above n 87.

³⁸³ (2023) 280 CLR 137, 157 [41] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) ('*NZYQ*').

³⁸⁴ See *Al-Kateb* (n 307) 580–1 [31], 581 [33]–[35], 584 [45], 585–6 [48]–[49] (McHugh J), 648 [256], 650–1 [267]–[268] (Hayne J, Heydon J agreeing at 662–3 [303]), 661–2 [298] (Callinan J).

³⁸⁵ *Abdel-Hady* (n 87) [10] (Gageler CJ, Gleeson and Beech-Jones JJ), [61] (Gordon J), [190] (Jagot J).

³⁸⁶ *Ibid* [190] (Jagot J).

³⁸⁷ *Ibid* [10] (Gageler CJ, Gleeson and Beech-Jones JJ), [61] (Gordon J).

³⁸⁸ *Ibid* [11] (Gageler CJ, Gleeson and Beech-Jones JJ), [61] (Gordon J).

case warrants more detailed consideration than is possible in that abridged commentary.³⁸⁹

Briefly, *Abdel-Hady* poses a different scenario from the no-liability cases discussed in Part III(B) of this article. In *Ruddock*, there was no liability because the (valid) statutory provision authorising detention was framed in terms that permitted officers to rely on an (invalid) administrative decision.³⁹⁰ In *Kable (No 2)*, the detention legislation was invalid, but the government was detaining Mr Kable pursuant to a superior court order made under that legislation, and that order was to be regarded as valid until set aside.³⁹¹ The situation also differs from that in *Queensland v Stradford (a pseudonym)* (*'Stradford'*). That case involved the execution of an inferior court order which meant that it was retrospectively invalid.³⁹² However, because it was a court order, the majority nonetheless considered that a defence was available in order to protect 'the authority of judicial proceedings'.³⁹³ In contrast, the only potential source of authority to detain in *Abdel-Hady* lay in the statute itself, and in the fact that the validity of that statute had previously been considered and upheld by a majority of the High Court in *Al-Kateb*.³⁹⁴ Because a ruling (and overruling) on the invalidity of legislation operates retrospectively,³⁹⁵ *NZYQ* had the effect of wiping out this apparent source of authority. The Commonwealth asked the High Court to recognise a new defence in circumstances where the executive was giving effect to its 'deeper duty' to

³⁸⁹ Ellen Rock, 'Government Liability for False Imprisonment: Relying on Past Reasoning from the High Court Is No Excuse' *AUSPUBLAW* (Blog Post, 19 June 2026) <<https://www.auspublaw.org/blog/2026/6/government-liability-for-false-imprisonment-relying-on-past-reasoning-from-the-high-court-is-no-excuse>>, archived at <<https://perma.cc/J2M5-52TQ>>.

³⁹⁰ See above n 203. This assumes, of course, that the detention power in s 189 of the *Migration Act* (n 25) validly applied to Mr Taylor, in the sense that there was a reasonably foreseeable prospect of his deportation during his detention. At trial, the Commonwealth presented evidence that there was 'no known impediment' to Mr Taylor's removal, but neither the parties nor the court had the benefit of the later judgment in *NZYQ* (n 383): see *Taylor v Ruddock* (District Court of NSW, Judge Murrell, 18 December 2002) [34].

³⁹¹ See above n 93.

³⁹² See above nn 53–4. See also above n 197 regarding the differing approach adopted by Edelman J in *Stradford* (n 53), with Steward J agreeing at 467–8 [325].

³⁹³ *Stradford* (n 53) 415 [149] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

³⁹⁴ See *Al-Kateb* (n 307) 584 [45], 585–6 [48]–[49] (McHugh J), 648 [256], 650–1 [267]–[268] (Hayne J, Heydon J agreeing at 662–3 [303]), 661–2 [298] (Callinan J).

³⁹⁵ *Abdel-Hady* (n 87) [3] (Gageler CJ, Gleeson and Beech-Jones JJ). See also at [37] (Gageler CJ, Gleeson and Beech-Jones JJ), [217] (Jagot J).

comply with the law, being the law as it had been declared in *Al-Kateb*.³⁹⁶ The Commonwealth suggested that such a defence was analogous to the outcome in *Stradford*, in the sense that in both scenarios the executive was acting in reliance on a ruling by the courts.³⁹⁷

All members of the High Court refused to recognise any such defence.³⁹⁸ Relying on a binding court order (as in *Kable (No 2)* and *Stradford*)³⁹⁹ is a very different thing to relying on the court's explanation of the meaning of the law to inform executive decisions and conduct going forward. To excuse the government from liability because it had been relying on past case law (ie *Al-Kateb*)⁴⁰⁰ would have given the Court's reasons in that case 'an authority they do not possess'.⁴⁰¹ As noted in the opening passages of Part II of this article, the executive bears the onus of ascertaining and complying with the limits of the law at all times.⁴⁰² The High Court has confirmed in *Abdel-Hady* that this duty cannot be discharged by relying on guidance from court decisions that are susceptible to overruling.⁴⁰³ In circumstances where constitutional principle dictates that any infringement of liberty can only be carried out in accordance with lawful authority, the proposed defence was thought to 'amount to an inversion, if not a perversion, of constitutional principle'.⁴⁰⁴

³⁹⁶ See especially *Abdel-Hady* (n 87) [57] (Gordon J), quoting *Transcript of Proceedings, Abdel-Hady v Commonwealth* [2026] HCATrans 75, [172] (SP Donaghue). See also above n 87.

³⁹⁷ *Abdel-Hady* (n 87) [24]–[26] (Gageler CJ, Gleeson and Beech-Jones JJ).

³⁹⁸ *Ibid* [51] (Gageler CJ, Gleeson and Beech-Jones JJ), [118] (Gordon J, Steward J agreeing at [182]), [181] (Edelman J), [230] (Jagot J).

³⁹⁹ See *Kable (No 2)* (n 50) 135–6 [38]–[41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Stradford* (n 53) 419–21 [168]–[174] (Gordon J), discussing *Federal Circuit Court Act* (n 54) ss 16–17.

⁴⁰⁰ *Abdel-Hady* (n 87) [38]–[39] (Gageler CJ, Gleeson and Beech-Jones JJ).

⁴⁰¹ *Ibid* [44] (Gageler CJ, Gleeson and Beech-Jones JJ).

⁴⁰² See above nn 8–10 and accompanying text.

⁴⁰³ See *Abdel-Hady* (n 87) [3]–[5], [38]–[39] (Gageler CJ, Gleeson and Beech-Jones JJ), discussing *NZYQ* (n 383), *Al-Kateb* (n 307), [80]–[81], [89] (Gordon J, Steward J agreeing at [188]), discussing *Al-Kateb* (n 307), *NZYQ* (n 383), [152]–[155] (Edelman J, Steward J agreeing at [188]), discussing *Evans* (n 130), [212]–[215] (Jagot J), discussing *Stradford* (n 53), *Al-Kateb* (n 307), *NZYQ* (n 383).

⁴⁰⁴ *Ibid* [34] (Gageler CJ, Gleeson and Beech-Jones JJ).