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# Good faith protections and public sector liability

*Iain Field**

*This article examines the role that statutory good faith protections play in shaping the formal limits of public sector liability and in managing the boundaries between private and public interests. The article demonstrates that a sophisticated body of law now exists, which guides lawmakers in the drafting and construction of specific good faith protections. It also considers the practical consequences of the interpretive principles that courts apply to good faith protections for the economic interests of public servants and the Crown, and illustrates the limits that these principles might place on the scope of certain forms of good faith protection.*

## I Introduction and outline

In tort law, public sector bodies and employees might be sued for conduct that causes private entities to suffer property damage, personal injury or economic loss. Depending on the cause of action in which such a claim is framed, liability might be constrained by statute if the defendant acted in 'good faith' (or 'bona fide' 'honestly', 'without malice', and so forth). Such provisions are described here a 'good faith protections'.[1] Good faith protections might safeguard the economic interests of: (1) public sector bodies and employees, by defeating the plaintiff's cause of action entirely; or (2) public sector employees alone, by limiting or defeating their personal liability or susceptibility to suit and directing the plaintiff's loss to the relevant public body (the employer).[2]

This article represents one outcome of a broader inquiry by the author into the nature and function of good faith (and other similar) protections in tort law.[3] The purpose of the article is to demonstrate the (hitherto underappreciated) importance of good faith protections to the overall schema of public sector liability, and to expose certain statutory mechanisms (or drafting techniques) that legislatures routinely adopt to manage the impact of good faith protections upon that schema. Neither the existence nor the operation of these mechanisms is self-evident. Yet, by adopting one or more

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1 The narrower term 'defences' is avoided here, as it is debatable whether all of the provisions examined in this article are properly define as such. This point is considered further in Part II below.

2 For the purposes of this article both scenarios are treated as instances of 'public sector liability'.

3 See, in particular, I Field, 'Good Faith Defences in Tort Law' (2016) 38 *SLR* 147.

of these mechanisms, parliament is able both to limit the range of torts to which protection extends, and to determine whether loss is borne by individual public servants, the Crown, or both. It follows that a clear appreciation of these mechanisms is essential to a comprehensive understanding of public sector liability in tort law, and may be of some practical importance to public servants, public service unions, and parliamentary draftspersons in particular.

The article is structured as follows: Part II define the term 'protection' and explains why that term is adopted instead of the (perhaps more obvious term) 'defences'; Part III outlines the range of circumstances in which good faith might bear upon public sector liability in tort law, and distinguishes between good faith protections and other rules in tort law that are sensitive to bona fide and mala fides Part IV explains the meaning of good faith in tort law and illustrates the essential relationship between good faith and inculpatory fault criteria (negligence, intention and so forth); Part V examines the mechanisms adopted by the drafters of good faith protections to manage loss-shifting within the public sector — that is, between public servants and the Crown — and demonstrates that some of these mechanisms operate by displacing well-established rules of vicarious liability; and Part VI explains how subtle variations in the legislature's choice of language can alter significantl the circumstances in which a good faith protection is effective — that is, the torts to which protection extends. The article also considers, at various stages, what parliament's drafting choices might reveal about its intentions vis-à-vis a specifi class of public sector defendant.

## II What is a 'protection'?

The statutory provisions with which this article is concerned are described here as 'protections'. This term is adopted in order to avoid, insofar as possible, any taxonomical confusion or complaint that might arise if the term 'defences' were adopted. As others have noted, it is debatable whether there is any such thing as a 'defence' in tort law, as it may be impossible to draw a logical distinction between rules of liability (the elements of a tort) on the one hand, and 'exceptions' to those rules (defences) on the other.[4] Even if a logical distinction can be drawn, various definition of the term defences may be posited, which definition may or may not embrace all of the provisions with which this article is concerned. Particular difficulties arise, for example, if one takes the view that a provision must defeat all possible remedies to qualify as a defence. This is because some (perhaps most) statutory good faith provisions merely defeat a plaintiff's action in damages — they do not prevent a court from awarding injunctive relief or, perhaps, some other discretionary remedy.[5] Difficulties might also arise if one takes the (conventional) view that

4 Compare, in particular, G Williams, 'The Logic of Exceptions' (1988) 47 *CLJ* 261 at 277; J Goudkamp, *Tort Law Defences*, Hart Publishing, 2013, pp 2–3; L D d'Almeida, 'Definin "Defences"' in *Defences in Tort*, A Dyson, J Goudkamp and F Wilmot-Smith (Eds), Hart, 2015, pp 35, 52.

5 See, eg, Public Service Act 2008 (Qld) s 26C.

a provision must place the burden of proof on the defendant to qualify as a defence,[6] since there is no reason to suppose that all good faith protections operate in this way.[7]

The resolution of these issues may be important in certain contexts,[8] but they have no bearing on the current analysis. That being so, the term 'protection' is employed here to encompass *any* statutory rule that defeats liability in tort law, (1) regardless of whether that rule creates an exception to liability, or merely defeats an element of the tort in which the plaintiff sues; (2) regardless of whether that rule defeats all possible remedies; and (3) regardless of whether that rule places the onus of proof on the plaintiff or the defendant. The term 'defence' is nevertheless used to describe specifi exculpatory rules conventionally labelled as such, including (in particular) the defence of statutory authority, on which more in Part III.

One fina point to note at this stage is that good faith protections are sometimes described as 'immunities'.[9] It is debatable whether this is appropriate. As explained further in Part IV, good faith denotes a person's *motives* for acting, whereas most (perhaps all) immunities protect a particular group of defendants from liability *irrespective of* the defendant's motives.[10] The mere fact that good faith protections are sometimes described as immunities does not matter unduly for present purposes, provided that the definin qualificatio to those protections — the presence of good faith — is not ignored. What does matter, though, is that parliament and the courts would appear to accept that good faith protections are 'immunities' for the purposes of the so-called 'transferred immunity' rule — that is, the rule that 'a person who is vicariously liable for the tortious conduct of another is protected by any immunity that is available to the actual wrongdoer'.[11] Applying this rule, a good faith protection granted to a class of public servant extends — absent some contrary legislative indication — to the public body that employs those public servants. The transferred immunity rule, and the drafting techniques that parliament might adopt to circumvent that rule, are considered further in

6 E Descheemaeker, 'Tort Law Defences: A Defence of Conventionalism' (2014) 77 *MLR* 493 at 499. Compare Goudkamp, above n 4, p 6.

7 See, eg, the conflictin interpretations afforded in this respect to s 29(1) of the State Bank of South Australia Act 1983 (SA) (repealed), in *South Australia v Barrett* SASC, Perry J, SCGRG-94-456, 8 July 1994, unreported, BC9400743 on the one hand, and in *Barrett v South Australia* (1994) 63 SASR 208 at 209 per Bollen J, at 210 per Millhouse J, at 221 per Duggan J on the other.

8 These issues will be considered at length in a future enquiry by the author.

9 See, eg, Search and Surveillance Act 2012 (NZ) s 165; Mental Health Act 2013 (Tas) s 218; *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660;; 221 ALR 1; [2005] HCA 46; BC200506539 at [47] per Gleeson CJ, Gummow, Hayne and Callinan JJ; *Attrill v Richmond River Shire Council* (1996) Aust Torts Reports 81-370; BC9501777 at [5], [18] per Kirby P; J Goudkamp, 'Statutes and Tort Defences' in *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change*, J Steele and T T Arvind, Hart, 2013, pp 45–6.

10 See, eg, Goudkamp, above n 4, p 142; P Cane, *Responsibility in Law and Morality*, Hart, 2002, pp 89–90.

11 *Commonwealth v Griffiths* (2007) 70 NSWLR 268; 245 ALR 172; [2007] NSWCA 370; BC200710981 at [115] per Beazley JA; citing *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57–8 per Fullagar J; BC5700280; *Parker v Commonwealth* (1965) 112 CLR 295 at 301, 303 per Windeyer J; BC6500140.

Part VC. To avoid unnecessary complexity, good faith protections are described as immunities in that section.

## III The occurrence of good (and bad) faith in tort law

In contrast to other world legal systems, no common-law jurisdiction embraces an overarching 'doctrine of good faith'.[12] However, the language of good faith is hardly foreign to the ears of common-law lawyers. As Finn J explains, 'the term "good faith" (or its now less fashionable Latin equivalent "bona fide" is a protean one having longstanding usage in a variety of statutory and, for that matter, common law contexts'.[13] Good faith and bad faith are perhaps less readily associated with tort law than they are with other substantive legal departments,[14] but they do play a role.[15] It is now generally accepted, for example, that bad faith (or malice) must be proved to establish liability in the torts of misfeasance in public office[16] and malicious prosecution.[17]

It is through statute, however, that the concept of good faith makes its most significan contribution to tort law (in most common law jurisdictions).[18] Good faith might bear upon tortious liability in at least two overlapping statutory contexts. First, it might form an express or implied precondition to a defence of statutory authority and a condition upon the exercise of certain statutory powers. In *CPCF v Minister for Immigration and Border Protection*, for example, Gageler J held it to be an 'implied condition' of powers conferred on Australian maritime officers by the Maritime Powers Act 2013 (Cth) that

12 See, eg, E McKendrick, 'Good Faith: A Matter of Principle?' in *Good Faith in Contract and Property Law*, A D M Forte (Ed), Hart, 1999, p 40; J Beatson and D Friedman, 'From "Classical" to Modern Law' in *Good Faith and Fault in Contract Law*, J Beatson and D Friedman (Ed), Clarendon Press, 1995, p 15.

13 *Secretary, Department of Education, Employment, Training & Youth Affairs v Prince* (1997) 50 ALD 186 at 188; 152 ALR 127 at 130; BC9707562.

14 See, eg, the lengthy discussion of good faith as it is implied in a variety of contracts in N Sneddon, R Bigwood and E Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 10th Australian ed, LexisNexis, 2012, pp 464–79.

15 It has also been suggested that a duty of care in tort law to act in good faith will arise in certain special relationships (see, eg, P Handford, 'Victoria Puts No Faith In Good Faith Tort' (1996) 4 *TLR* 21), and an implied licence to enter upon land is ordinarily subject to the requirement that the entrance be for 'legitimate' or 'bona fide reasons (see, eg, *Lincoln Hunt Australia v Willisee* (1986) 4 NSWLR 457 at 460 per Young J). In some states in the United States, private persons motivated by malice may also be liable in tort pursuant to the so-called 'prima facie tort doctrine'. See, eg, *Beardsley v Kilmar*, 236 NY 80 (1923), 89–90 (Holmes J); *United States for Use and Benefit of Evergreen Pipeline Construction Co v Merritt Meridian Construction Corp* (1996) 95 F 3d 153 at 161.

16 *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at 191 per Lord Steyn, at 229–30 per Lord Hobhouse, at 235 per Lord Millet, at 267 per Lord Hutton); *Garrett v Attorney-General* [1997] 2 NZLR 332 at 344 per Blanchard J; *Odhavji Estate v Woodhouse* [2003] 3 SCR 263 at 274 per Iacobucci J; *Northern Territory v Mengel* (1995) 185 CLR 307 at 357; 129 ALR 1 at 26 per Brennan J; BC9506418. See also J Murphy, 'Misfeasance in a Public Office: A Tort Law Misfit? (2012) 32 *OJLS* 51 at 51.

17 *A v New South Wales* (2007) 230 CLR 500; 233 ALR 584; [2007] HCA 10; BC200701675 at [53], [117] per Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ, at [187] per Callinan J.

18 The position in the United States is slightly different, as some states afford public officials a general 'qualifie [good faith] immunity' at common law.

'the maritime officer must act in good faith'.[19] The maritime officers in question detained the plaintiff, a Tamil refugee, on board a Commonwealth vessel for a period exceeding three weeks before taking him to the Cocos (Keeling) Islands. Since there was no suggestion that the maritime officers had exercised their powers other than in good faith, and had in all other respects acted reasonably and within their powers, the detention of the plaintiff was authorised by the Act and the officers were not liable for false imprisonment.[20]

The second statutory context in which good faith might bear upon liability in tort law — and the context with which this article is principally concerned — is by providing defendants with an express protection that defeats, limits or shifts liability or susceptibility to suit if certain acts or omissions are done in good faith (a good faith protection).[21] Good faith in this context does not operate as a precondition to a defence of statutory authority, but rather forms the basis of a discrete and targeted protection in circumstances where a defendant's conduct is *not* authorised by statute, by virtue of some error in fact, law, the manner in which an actual or purported statutory function is performed, or the manner in which a statutory purpose is pursued.[22] Legislatures routinely afford good faith protections to numerous classes of public servant, including police officers,[23] firepersons[24] government

19 [2015] 255 CLR 514; 143 ALD 443; [2015] HCA 1; BC201500135 at [360] per Gageler J. See also [200] per Crennan J. The power to 'take and detain' a person under that Act is also subject to the express requirement that the maritime officer 'reasonably suspects' that the person was on a vessel or aircraft when it was detained (Maritime Powers Act 2013 (Cth) s 72(b)), and the implied limitation that the power be exercised within a 'reasonable time': at [200] per Crennan J, citing *Koon Wing Lau v Calwell* (1949) 80 CLR 533 at 573–4 per Dixon J, at 590 per Williams J; BC4900640.

20 *CPCF v Minister for Immigration and Border Protection*, ibid, at [54] per French CJ, at [229] per Crennan J, at [392]–[393] per Gageler J, at [513] per Keane J. Hayne and Bell JJ dissented (at [164]), as did Kiefel J (at [326]), although not on the issue of good faith.

21 Good faith is now ordinarily — if not invariably — an express term of protective provisions. However, good faith has also been implied when protective provisions have been silent on the point. See, eg, Dixon J's treatment of the National Security Act 1939 (Cth) s 13 in *Little v Commonwealth* (1947) 75 CLR 94 at 108; BC4700330.

22 Ibid, at 112 per Dixon J. Good faith protections are therefore exceptions to the 'the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant': *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1 at 190 per Lord Steyn, citing P H Winfield J A Jolowicz, and W V H Rogers, *Winfield and Jolowicz on Tort*, 15th ed, Sweet and Maxwell, 1998, p 55.

23 In Australia, see, eg: Police Act 1990 (NSW) s 213; Police Administration Act (NT) ss 116G and 148B; Police Powers and Responsibilities Act 2000 (Qld) ss 38, 122 and 787; Police Act 1998 (SA) s 65; Police Service Act 2003 (Tas) s 84; Police Act 1892 (WA) s 137. In New Zealand, see, eg, International Terrorism (Emergency Powers) Act 1987 (NZ) s 16; Search and Surveillance Act 2012 (NZ) s 165. In the United Kingdom, see, eg, Police Reform and Social Responsibility Act 2011 Sch 1, s 14; Serious Organised Crime and Police Act 2005 (UK) s 90.

24 In Australia, see, eg, Fire Brigades Act 1989 (NSW) s 78; Fire and Emergency Act (NT) s 47; Fire and Emergency Services Act 1990 (Qld) s 153B-C; Fire Service Act 1979 (Tas) s 121; Country Fire Authority Act 1958 (Vic) s 18A; Fire and Emergency Services Act 1998 (WA) s 37. In Canada, see, eg, Transportation of Dangerous Goods Act 1992, SC 1992, c 34, s 20; Emergency 911 Act, RSNB 2011, c 146, s 8; Firefighters Protection Act, SNL 1996, c F-11.1, s 3; Fire Protection and Prevention Act, SO 1997, c 4, s 74(1). In New Zealand, see, eg, Fire Services Act 1975 (NZ) s 43; Forest and Rural Fires Act 1977 (NZ) s 56. In

auditors,[25] health care practitioners and researchers,[26] environmental or public health officers,[27] and various other local and national government employees.[28] A long-standing and demonstrative example of a good faith protection is provided by s 78 of the Fire Brigades Act 1989 (NSW):

> A matter or thing done, or omitted to be done, by the Minister, the Commissioner, any member of staff of Fire and Rescue NSW, any member of a fir brigade, any member of a community fir unit or any person acting under the authority of the Commissioner does not, if the matter or thing was done, or omitted to be done, in good faith for the purposes of executing this or any other Act, subject such a person personally, or the Crown, to any action, liability, claim or demand.

Quite aside from the effect that good faith protections have upon the formal boundaries of public sector liability (and tort law generally), their widespread availability is likely to influenc (and to have influenced the course of tort-law litigation, by discouraging plaintiffs from suing certain defendants at the expense of others. Suppose, for example, that a motorist (P) suffers injuries that are, prima facie, jointly and severally attributable to (1) the negligent driving of a police officer in pursuit of a suspect (D1), and (2) the negligent driving of another road user (D2). If D1 is the beneficiar of a good faith protection, and that protection also extends to the Crown, P might choose to sue D2 alone and to ignore entirely D1's negligence on the basis that good faith is simply too difficult to disprove (or too easy for D1 to prove).[29] After all, it makes no financia difference to P whether damages are paid by D1, D2, or both. In this way, the provision of good faith protections to certain classes of defendant might even affect the development of substantive legal principles, by limiting the opportunities for courts to shape the legal liabilities of those groups, while increasing the opportunities for courts to shape the liabilities of other groups.

If plaintiff litigation strategy is indeed influence in this way, then by

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Singapore, see Fire Safety Act (Singapore, cap 109A, 2000 rev ed) s 59(3). In the United Kingdom, see, eg, Combined Fire Authorities (Protection from Personal Liability (Wales) Order 1997 (UK) s 3.

25 See, eg: Criminal Injuries Compensation Act 2003 (WA) s 66; Corporations Act 2001 (Cth) s 184; Local Audit and Accountability Act 2014 (UK) Sch 8, s 4(3).

26 In Australia see, eg, Mental Health Act 2015 (ACT) s 265; Mental Health Act 2007 (NSW) s 191; Mental Health and Related Services Act (NT) s 164; Mental Health Act 2000 (Qld) s 536; Mental Health Act 2013 (Tas) s 218; Mental Health Act 2014 (Vic) s 77; Mental Health Act 2014 (WA) s 583. In Canada, see, eg, Human Tissue Gift Act, RSBC 1996, c 211, s 9; Human Tissue Gift Act, RSS 1978, c H-15, s 10. In New Zealand, see, eg, Land Transport Act 1998 (NZ) s 18. In Singapore, see, eg, Human Cloning and Other Prohibited Practices Act (Cap 131b, rev ed 2004) s 15.

27 See, eg, Control of Vectors and Pesticides Act (Singapore, Cap 59, 2002 rev ed) s 54; Hazardous Waste (Control of Export, Import And Transit) Act (Singapore, Cap 122A, 1998 re ed) s 43.

28 In Australia, see, eg, Local Government Act 1993 (NSW) s 733; Public Service Act 2008 (Qld) s 26C; Local Government Act 1995 (WA) s 9.56. In Singapore, see, eg, Public Transport Council Act (Singapore, Cap 259B, 2012 rev ed) s 6; National Parks Board Act (Cap 198A, 1996 rev ed) s 11. In the United Kingdom, see, eg, Public Health Act 1875 (UK) c 55, s 265.

29 Negligent driving may or may not actually be within the scope of the protection afforded to D1, depending on the legislature's choice of language, on which more in Part VI. However, if P can receive full compensation from D2 without having to argue this point, he may be well advised to do so.

affording good faith protections to certain groups and not to others, parliament is able to effectively divert economic risk from the public sector to the private sector in certain scenarios. Alternatively, parliament might seek to redistribute economic risk *within* the public sector, by limiting or defeating the personal liability of public servants, or their susceptibility to suit, and allocating that risk to the Crown (on which more in Part V).

In making these observations, this article does not mean to entertain the 'extravagant delusion that every aspect of every rule in the encyclopaedia of tort law is a product of a conscious and fully-informed design process'.[30] Indeed, Bagshaw is surely correct that:

> choices have sometimes been made by lawmakers who were apparently unaware of the significanc of their selection between options, and may even have been unaware of the range of options that were available (in the sense that they made no mention of the fact that other options were utilised elsewhere in the English law of torts).[31]

However, parliament could hardly be blind to the obvious and direct economic consequences of affording a good faith protection to a certain class of public sector defendant, even if those consequences are not their primary purpose for affording that protection.[32]

## IV The meaning and function of good faith in tort law

The precise meaning (or meanings) of good faith in tort law is analysed at length elsewhere,[33] and little would be gained by restating the minutia of that analysis here. Suffice it to state for present purposes that, in tort law, good faith usually describes one or more of a defendant's *motives* (or reasons) for acting — a subjective mind state — even though those motives may be insufficient to render his or her conduct *reasonable*. Good faith is therefore typically concerned with the ends that a defendant seeks to achieve, as opposed to the means by which he or she seeks to achieve those ends. However, and crucially, even if good faith might be interpreted as imposing an objective standard in certain instances,[34] that standard cannot be conflate with objective reasonableness (or the absence of negligence).[35] This must be so because, were it otherwise, good faith would be rendered redundant as a concept, contrary to well-established principles of statutory construction.[36]

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30 R Bagshaw, 'Balancing Defences' in *Defences in Tort*, A Dyson, J Goudkamp and F Wilmot-Smith (Eds), Hart, 2015, pp 87, 88.

31 Ibid.

32 See below Part VA.

33 See Field, above n 3, at 149–52.

34 See, eg, *Siano v Helvering* (1936) 13 F Supp 776; *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290 at 298, 299–300; 116 ALR 460 at 468, 469; BC9304964; *Barrett v South Australia* (1994) 63 SASR 208 at 209 per Bollen J.

35 It follows that statutory good faith protections and the protection of statutory authority may be further distinguished on the basis that, whereas statutory authority only provides an answer to wrongdoing if an agent also acted *reasonably* in the performance of a function authorised by statute (*Allen v Gulf Oil Refining Ltd* [1981] AC 1001 at 1011; [1981] 1 All ER 353 at 355 per Lord Wilberforce, statutory good faith protections may provide an answer to wrongdoing even if a defendant acted unreasonably in the circumstances, provided that he or she acted *within reason*.

36 *R v Berchet* (1688) 1 Show KB 106; 89 ER 480, quoted in *Commonwealth v Baume* (1905)

If this definitio of good faith is accepted, it follows that a good faith protection might be available to a defendant whose motives for acting are *good*, even though he or she satisfie the fault criterion of the tort in which the plaintiff sues.[37] Suppose, for example, that a public health officer (D) were to enter a vessel docked in Singapore without the consent of its owner (P) in order to spray that vessel with a pesticide (conduct that would otherwise constitute trespass) in accordance with ss 21(2) and 35 of the Control of Vectors and Pesticides Act (Singapore, Cap 59, 2002 rev ed) (the CVP Act).[38] Suppose, further, that D is motivated to carry out that spraying by a desire to fulfi her statutory functions and to prevent the escape of an insect-born disease, but that she carries out that spraying negligently, causing physical damage to P's vessel. If P were to commence an action in trespass or negligence against D, she might seek the protection of s 54 of the CVP Act, which provides as follows:

> No suit or other legal proceedings shall lie against the Director-General or authorised officer or any other person acting under the direction of the Director-General for anything which is in good faith done in the execution or purported execution of this Act.

Since D's reasons for engaging in the spraying (her ends) are likely to satisfy the definitio of good faith, s 54 is likely to protect her from suit — in both trespass and negligence — notwithstanding that the manner in which she sought to achieve those ends (her means) was negligent.[39]

Whether a good faith protection is effective, and the range of torts to which it might provide an answer, will nevertheless depend upon the *nature* of the fault criterion comprised within the plaintiff's cause of action. Thus, if a public officer were to satisfy the fault element of the tort of misfeasance in public office, by acting in bad faith in the performance of his or her functions so as to injure a member of the public, he could not at the same time claim to have acted in good faith to that end.[40] Similarly, a public officer who was reckless in the performance of his or her functions could not claim to have acted in good faith (since a person who acts recklessly does not act for *any* legitimate purpose).[41] For this reason, good faith is also unlikely to provide an answer to

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2 CLR 405 at 414 Griffith CJ; BC0500058; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490; [1998] HCA 28; BC9801389 at [71] per McHugh, Gummow, Kirby and Hayne JJ.

37 This observation, and those that follow, is also expounded at length elsewhere. See Field, above n 3, at 161–78.

38 To the author's knowledge these provisions have not received any judicial analysis, thus it remains a matter of interpretation whether they do in fact authorise what would otherwise constitute trespass. This point is considered in greater length in Part VIA below. For the purposes of this hypothetical example, though, it is assumed that these provisions do authorise otherwise trespassory conduct.

39 While there does not appear to be any direct Singaporean on this point, or indeed on the operation of good faith protections generally, it seems highly likely that the Singaporean courts would adopt the same interpretive principles as have courts in the United Kingdom and Australia, on which more below.

40 *Northern Territory v Mengel* (1995) 185 CLR 307 at 357; 129 ALR 1 at 26–7; BC9506418. See also *Sanders v Snell* (1998) 196 CLR 329; 157 ALR 491; [1998] HCA 64; BC9805142 at [42] per Gleeson CJ, Gaudron, Kirby and Hayne JJ.

41 Field, above n 3, at 162, 167–8.

the tort of deceit, even if the representor is merely reckless as to the truth of his or her representation (as opposed to knowingly deceitful).[42]

It is possible that good faith might provide an answer to torts that require proof of intention as to outcome, since a defendant might intend one outcome (such as interfering with contractual relations) yet be motivated to act for a good reason (such as ensuring the supply of essential goods and services).[43] It is far more common, however, for good faith to be invoked as an answer to claims in trespass (whether to person or property) or negligence — as in the case of our public health officer, above. Trespass and negligence are unconcerned with a defendant's reasons for acting, hence conduct that satisfie the definitiona elements of these causes of action is more likely to be justifie (or excused)[44] by a *good* reason than is conduct that is intended to cause harm. For the sake of simplicity, therefore, the remainder of this article focusses exclusively on good faith as an answer to trespass and negligence. It is nevertheless crucial to appreciate that not all good faith protections are capable of defeating liability in both trespass *and* negligence. This is because the choice of legislative language adopted might restrict the scope of a good protection to one or other of these bases of liability, on which more in Part VI.

## V Good faith, vicarious liability, and the allocation of loss within the public sector

### A Public and private interests

Good faith (and other similar) protections might serve numerous purposes, some of which might go beyond the protection of economic interests.[45] But whatever these purposes might be, all good faith protections also give effect — whether expressly or impliedly — to the strong public interest in freeing certain public servants from 'technical difficulties in conducting their defence [and] from the heavy costs which must follow a verdict against them'.[46] This public interest must, of course, be balanced against the private interests

42 *Derry v Peek* (1889) 14 App Cas 337 at 374; *Tresize v National Australia Bank Ltd* (2005) 220 ALR 706; [2005] FCA 1095; BC200505749 at [38]. But see Lord Toulson's statement in *Hayward v Zurich Insurance Company Plc* [2016] All ER (D) 138 (Jul); [2016] 3 WLR 637; [2016] UKSC 48 [58]: 'it must be shown that the defendant dishonestly made a material false representation which was intended to, and did, induce the representee to act to its detriment'. If this is correct, which seems doubtful, liability in deceit cannot be founded on recklessness, since a person must (presumably) actually know information to be wrong if he or she intends another to rely upon it to their detriment.

43 Field, above n 3, at 167.

44 It is debatable whether a tort law defendant may be 'excused' and, if so, what distinction (if any) might be drawn between excuses and justifications See, eg, A Dyson, J Goudkamp and F Wilmot-Smith, 'Central Issues in the Law of Tort Defences' in Dyson et al, above n 30, pp 19, 22. However, this debate need not be explored here.

45 For example, good faith protections might protect public interests in the administration of justice by limiting the number of law suits. They might also seek to encourage officers to pursue their functions fearlessly, or to 'innovate and improve service delivery without the concern of being sued and the accompanying financia risk'. (Explanatory Notes, Public Service and Other Legislation (Civil Liability) Amendment Bill 2013 (Qld).) The author is grateful to the anonymous reviewer for highlighting this point.

46 *Thomas v Stephenson* (1853) ER 709 at 712 per Campbell LJ.

affected by the protection afforded.[47] In some instances, parliament might determine that the public interest in releasing both the Crown *and* its employees from prospective liability is sufficiently strong to extinguish private interests entirely (provided the public servant acted in good faith). In other instances, however, parliament might seek to protect private interests, while at the same time freeing public servants from economic risks, by allocating the public servant's obligation to pay damages to the Crown. This allocation may be achieved by (1) shifting liability for a public servant's wrong entirely to the Crown (a liability-shifting protection); (2) defeating the personal liability of the public servant while preserving the vicarious liability of the Crown (a liability-saving protection); or (3) indemnifying a public servant 'who is sued for tortious conduct arising out of his or her employment'[48] (an indemnity).[49] In all instances, the protection afforded may require that the public servant acted in good faith, reasonably, with utmost care, or in accordance with any other exculpatory criterion that parliament sees fit

The manner in which parliament chooses to protect public servants may be important because, applying traditional canons of statutory construction, courts are more likely to afford a liberal interpretation to provisions that protect private rights or interests (regardless of the particular loss-allocating mechanism employed) than they are to protections that defeat or curtail private rights or interests.[50] It might be, therefore, that by affording public servants a degree of protection at the Crown's expense, parliament provides those public servants with a more robust protection than it would if it were to extend that protection to the Crown as well.

Statutory good faith indemnities operate by shifting loss from one party (such as a public officer) to another party (such as the Crown) *without* transferring liability for the firs party's wrong. For example, s 43 of the Local Government Act 2002 (NZ) provides as follows:

> (1) A member of a local authority is indemnifie by that local authority for—
>
> (a) costs and damages for any civil liability arising from any action brought by a third party if the member was acting in good faith and in pursuance (or intended pursuance) of the responsibilities or powers of the local authority

47 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116 per Kitto J; BC6100550.

48 Queensland Law Reform Commission, *Vicarious Liability*, Report No 56, 2001, p 84 n 390. See, eg, Ambulance Service Act 1991 (Qld) s 39;

49 Whether the firs and third of these protections are properly classifie as 'defences' is a question that will be considered at length in a future enquiry by the author.

50 See, eg, *Smith v East Elloe Rural District Council* [1956] 1 AC 736 at 764–5; [1956] 1 All ER 855 at 868 per Lord Smith; *Benning v Wong* (1969) 122 CLR 249 at 256 per Barwick CJ; BC6900610; *Morris v Beardmore* [1981] AC 446 at 463–4; [1980] 2 All ER 753 at 763 per Lord Scarman; *Wheeler v Leicester City Council* [1985] AC 1054 at 1065 per Lord Brown-Wilkinson; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; 93 ALR 207 at 215 per Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ; BC9002906; *Coco v R* (1994) 179 CLR 427 at 436–8; 120 ALR 415 at 418–20 per Mason CJ, Brennan, Gaudron and McHugh JJ; BC9404609; *Kartinyeryi v Commonwealth* (1998) 195 CLR 337; 152 ALR 540; [1998] HCA 22; BC9800961 at [89] per Gummow and Hayne JJ.

Since good faith indemnities such as s 43 do not defeat liability in any sense, they are in principle entirely unconnected to — and say nothing about — the law of vicarious liability. In contrast, liability-shifting protections and liability-saving protections operate by circumventing or displacing certain common law rules that would otherwise *prevent* the imposition of vicarious liability on the Crown. The purpose of the remainder of this part is to explain those rules, to demonstrate the effect that certain good faith protections might have upon them, and to reveal what the operation or exclusion of those rules might mean for public servants in certain instances.

## B Liability-shifting protections and the 'independent duty' rule

At common law, when a public officer 'is executing an independent duty which the law casts upon him, the Crown is not liable for the wrongful acts he may commit in the course of his execution' (the independent duty rule).[51] This rule appears to have developed primarily as a means of distancing the Crown from the tortious acts of police officers.[52] However, it has also been applied in Australia in the context of other public officers, including a ship's pilot,[53] a Crown prosecutor,[54] a legal aid officer,[55] a tax commissioner,[56] a magistrate,[57] a prison guard[58] and a customs officer.[59]

The independent duty rule is much maligned, for two reasons in particular. First, its policy rationale is far from clear. Since claims against public officers rarely involve any challenge to policy-level decision-making, there is no obvious reason why a government employer ought to be treated differently in such circumstances to a private employer,[60] or why the ordinary principles of vicarious liability ought not to apply.[61] Second, the independent duty rule originates in the now generally disfavoured 'master's tort' theory of vicarious

51 *Field v Nott* (1939) 62 CLR 660 at 675 per Dixon J; BC3990106; applying *Enever v R* (1906) 3 CLR 969; BC0600036. See also *Tobin v R* (1864) 143 ER 1148; *Stanbury v Exeter Corporation* (1905) 2 KB 838; *Cubillo v Commonwealth* (2000) 103 FCR 1; 174 ALR 97; [2000] FCA 1084; BC200004514.

52 See, eg, *Enever v R*, ibid, *Fisher v Oldham Corporation* [1930] 2 KB 364; *Attorney-General (NSW) v Perpetual Trustee Co* (1952) 85 CLR 237; BC5200100; *Shulze v R* (1974) 47 DLR (3d) 131; *Irvin v Whitrod* [1978] Qd R 27; *Griffiths v Haines* [1984] 3 NSWLR 653.

53 *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626; 66 ALR 29; BC8601438 (*Oceanic Crest*).

54 *Grimwade v Victoria* (1997) 90 A Crim R 526; Aust Torts Reports 81-422; BC9700017.

55 *Field v Nott* (1939) 62 CLR 660; BC3990106.

56 *Carpenter's Investment Trading Co Ltd v Commonwealth* (1952) 69 WN (NSW) 175; 5 AITR 538.

57 *Thompson v Williams* (1914) 32 WN (NSW) 27.

58 *Thorne v Western Australia* [1964] WAR 147.

59 *Baume v Commonwealth* (1906) 4 CLR 97; BC0600026.

60 It has been suggested that the independent duty rule might, in fact, protect private companies: *Oceanic Crest* (1986) 160 CLR 626 at 648; 66 ALR 29 at 41 per Wilson J; BC8601438. However, this view does not appear to have gained general acceptance.

61 It has been argued that independent duties are vested in public officers — and that the independent duty rule is therefore necessary — because the Crown lacks the capacity to control the exercise of those duties: ibid, at CLR 638; ALR 34 per Dawson J. However, Deane J is surely correct that this view insists 'upon a degree of control as a prerequisite of an employer's vicarious liability in tort which is simply inconsistent with contemporary law': at CLR 679; ALR 62.

liability[62] — that is to say, the theory that a master 'is to answer for the [servant's] act as it if it were his own'.[63] Accepting this theory, so the argument goes, if parliament chooses to vest a duty directly in a public officer, it cannot intend the Crown to answer in its own right for acts done in the furtherance of that duty. Some judges have even suggested that the relationship between public officers and the Crown cannot, in such circumstances, be characterised as one of master-servant.[64] In contrast, if vicarious liability is said to arise for a breach of duty 'resting on another and broken by another'[65] — the 'servant's tort' theory — then the mere fact that a duty is, in terms, cast upon a public officer in his or her personal capacity says nothing about whether parliament intended the Crown to be strictly liable for a breach of that duty, or whether the Crown and that public officer are properly to be regarded as falling within a master-servant relationship.

Liability-shifting protections circumvent the independent duty rule by imposing strict (vicarious) liability upon the Crown for losses arising out of duties vested in, and broken by, public servants. Liability-shifting protections might therefore be seen as endorsing the servant's tort theory of vicarious liability, and as rationalising the liability of the Crown with the vicarious liability imposed upon private employers in similar circumstances. An example of a liability-shifting protection that circumvents the independent duty rule can be seen in s 84 of the Police Service Act 2003 (Tas):

> A police officer does not incur any personal liability for any act or omission done or made in good faith in the exercise or performance, or purported exercise or performance, of any powers or duties at common law or under this or any other Act or law.

A liability that, but for subs (1), would lie against a police officer, lies against the Crown.[66]

Of course, the legal effect of a liability-shifting protection is not to place the public officer on the same footing as if the Crown were vicariously liable for his or her conduct at common law. This is because the findin that an employer is vicariously liable for the conduct of an employee does not, strictly speaking, defeat the liability of the employee; rather, both parties are classifie as joint tortfeasors and both are, in theory, liable to contribute to any award in damages.[67] In contrast, a liability shifting protection transfers liability to the

62 See, eg, C Sappideen and P Vines (Eds), *Fleming's the Law of Torts*, 10th ed, Lawbook Co, 2011, p 447; H Luntz et al, *Torts: Cases and Commentary*, 7th ed, LexisNexis Butterworths, 2013, pp 890–5.

63 *Dansey v Richardson* (1854) 3 El & Bl 144 at 162; approved in *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 62 per Kitto J; BC5700280.

64 See, eg, *Enever v R* (1906) 3 CLR 969 per O'Connor J; BC0600036. But see *Oceanic Crest* (1986) 160 CLR 626 at 638; 66 ALR 29 at 34 per Gibbs CJ.

65 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57 per Fullager J; BC5700280. See also *Commonwealth v Griffiths* (2007) 70 NSWLR 268; 245 ALR 172; [2007] NSWCA 370; BC200710981 at [115] per Beazley JA.

66 See also: Police Act 1998 (SA) s 65; Public Sector Act 2009 (SA) s 74; Public Service Act 2008 (Qld) s 26C.

67 See, eg, *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 585; [1957] 1 All ER 125 at 138 per Lord Morton, at AC 596-7; All ER 145 per Lord Somerville; *Broom v Morgan* (1953) 1 QB 597 at 608; [1953] 1 All ER 849 at 854 per Denning LJ; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574 at 580; 141 ALR 1 at 4 per

Crown and defeats the liability of the employee entirely (provided, of course, that he or she acted in good faith or in accordance with some other prescribed exculpatory criterion).

## C Liability-preserving protections and the 'transferred immunity' rule

The second rule that might be displaced by a good faith protection is the 'transferred immunity' rule. The transferred immunity rule holds that 'a person who is vicariously liable for the tortious conduct of another is protected by any immunity that is available to the actual wrongdoer'.[68] This rule would appear to support the servant's tort theory because, if a master's liability were his or her own, it would (presumably) remain unaffected by any immunity afforded specificall to a servant.[69] As noted in Part II, parliament and the courts would appear to accept that good faith protections are susceptible to this rule (that they are 'immunities' in the relevant sense), and it is convenient therefore to describe good faith protections as immunities for the purposes of this section.

In practice, the application of the transferred immunity rule is likely to turn on the language of the immunity itself, assuming it is statutory. This is because the rule extends only to substantive immunities from liability — that is, immunities that extinguish the plaintiff's cause of action entirely — as opposed to procedural immunities from suit (such as spousal immunity), which merely prevent a plaintiff from pursuing, but which do not extinguish, his or her cause of action against a defendant.[70] This limitation upon the operation of the transferred immunity rule is logical if one accepts the servant's tort theory, as in the absence of any liability on the servant's behalf — that liability being negated by a substantive immunity — there can be no liability to impose upon the master. In contrast, if the immunity is merely a procedural one the servant's liability survives — though it is unenforceable by action[71] — and may be transferred strictly to the master.

If the preceding conclusions are correct, then the simplest way to preserve the Crown's liability, while protecting the economic interests of public servants, would be to grant the latter an immunity from suit (as opposed to an immunity from liability). This might explain the language adopted the Singaporean Legislature in a number of provisions, including s 54 of the

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Brennan CJ, Toohey and Dawson JJ; American Law Institute, *Restatement of the Law — Agency Restatement (Third) of Agency* § 7.01.

68 *Commonwealth v Griffiths* (2007) 70 NSWLR 268; 245 ALR 172; [2007] NSWCA 370; BC200710981 at [115] per Beazley JA; citing *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57–8 per Fullagar J; BC5700280; *Parker v Commonwealth* (1965) 112 CLR 295 at 301, 303 per Windeyer J; BC6500140. See also *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 181 ALR 263; [2001] HCA 44; BC200104558 at [37] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ; *Majrowski v Guy's and St Thomas' NHS Trust* [2007] 1 AC 224; [2006] 4 All ER 395; [2006] 3 WLR 125; [2006] UKHL 34 at [12]–[15] per Lord Nicholls. Compare *Broom v Morgan* (1953) 1 QB 597; [1953] 1 All ER 849.

69 *Broom v Morgan*, ibid, at QB 609; All ER 854 per Denning LJ.

70 Ibid, QB 609–10; All ER 854–5; *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, 686; [1964] 2 All ER 999 at 1012 per Lord Pearce.

71 *Broom v Morgan*, ibid.

CVP Act, outlined above (no 'suit or other legal proceedings shall lie personally against').[72] However, this is not the only way in which legislatures might seek to circumvent the transferred immunity rule. For example, s 5AD of the Civil Liability Act 2002 (WA) — which might apply to public servants and private citizens alike — states as follows:

> A good samaritan does not incur any personal civil liability in respect of an act or omission done or made by the good samaritan at the scene of an emergency in good faith and without recklessness in assisting a person in apparent need of emergency assistance.
>
> A medically qualifie good samaritan does not incur any personal civil liability for advice given in good faith and without recklessness about the assistance to be given to a person in apparent need of emergency assistance.
>
> This section does not affect the vicarious liability of any person for the acts or omissions or advice of the good samaritan or medically qualifie good samaritan.

The protections afforded to good Samaritans in all other Australian jurisdictions,[73] with the exception of New South Wales,[74] are silent as to whether the protection afforded extends to employers. As such, it seems reasonable to conclude that the transferred immunity rule survives in these jurisdictions in such cases, extinguishing entirely a plaintiff's rights against good samaritans and their employers (whether or not the Crown).

## VI The manner of wrong to which protection extends

Another drafting technique (or mechanism) that parliament might adopt in order to limit the scope of a good faith (or other similar) protection, is to frame that protection as applying only to (1) acts done '*pursuant to*' (or 'in the exercise of', 'in the discharge of', and so forth)[75] particular statutory functions, or (2) acts done for the '*purposes of*' the relevant statute. As Williams J has explained:

> The pattern emerges that there is a distinction between an act which can only lawfully be done if done pursuant to an expressed power conferred by an Act, and

72 See also National Parks Board Act (Singapore, Cap 198A, 1996 rev ed) s 11; Hazardous Waste (Control of Export, Import And Transit) Act (Singapore, Cap 122A, 1998 re ed) s 43; Human Cloning and Other Prohibited Practices Act (Singapore, Cap 131b, rev ed 2004) s 15. Confusingly, however, these provisions are also described by their respective statutory heading as affording 'Protection from personal liability'.

73 See: Civil Law (Wrongs) Act 2002 (ACT) s 5 (honestly); Personal Injuries (Liability and Damages) Act 2003 (NT) s 8; Civil Liability Act 2003 (Qld) s 26; Civil Liability Act 1936 (SA) s 74; Civil Liability Act 2002 (Tas) s 35B; Wrongs Act 1958 (Vic) s 31B.

74 Section 3C of the Civil Liability Act 2002 (NSW) affirms the transferred immunity rule, and notionally extends that rule to private employers, by stating that any 'provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort'. Thus, s 57 of the Civil Liability Act 2002 (NSW) provides a complete protection to good Samaritans and their employers. Section 39 of the Civil Liability Act 2003 (Qld), which affords protection to volunteers in that jurisdiction, was interpreted to similar effect in *Goodhue v Volunteer Marine Rescue Association Incorporated* [2015] QDC 29; BC201511309 at [171]–[175].

75 The same effect may be achieved by adopting various other similar phrases. See *Webster v Lampard* (1993) 177 CLR 598 at 605; 116 ALR 545 at 550 per Mason CJ, Deane and Dawson JJ.

> an act done in furtherance of the purposes of the legislation which does not require the conferral of power in order for it to be done lawfully.[76]

Again, the nature of the distinction between these phrases has been examined elsewhere,[77] but its importance for public servants cannot be overstated. This is because, in choosing one or other (or, perhaps, both)[78] of these phrases, parliament indicates the range of acts (and thus the range of torts) to which it intends the protection in question to extend. The purpose of this part is to explain why this is so, and to demonstrate the possible implications of this distinction for public servants.

## A Protections that extend to acts done 'pursuant to' specific functions

An example of a good faith protection that extends to acts done *pursuant to* specifi functions can be seen in s 65 of the Police Act 1990 (SA):

> A member of SA Police does not incur any civil or criminal liability for an honest act or omission in the exercise or discharge, or the purported exercise or discharge, of a power, function or duty conferred or imposed by or under this Act or any other Act or law.

Protections such as s 65 are most likely to provide an answer to trespass or — if an authorised statutory function, power or duty[79] is exercised without reasonable care — negligence.[80] This is because, in interpreting the scope of a statutory protection that affects individual rights, the legislature is taken to have 'chosen its words with complete precision, not intending that such [a protection], granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow'.[81] This presumption reflect the general policy of the law, enunciated in Part V above, which is protective of private rights. Applying this presumption, the courts have (with rare exception)[82] held that the range of acts that may be done wrongfully yet *pursuant to* a statute — and thus fall within the scope of the protection afforded — is ordinarily limited to acts that require some *special authority* to perform.[83]

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76 *Colbran v Queensland* [2007] 2 Qd R 235; [2006] QCA 565; BC200610674 at [10]. See, to similar effect, the reasons of Jerrard JA at [34], and Philippides J at [55].

77 See Field, above n 3, at 155–8.

78 See, eg, Plant Protection Act 1989 (Qld) s 28 (repealed), interpreted in *Colbran v Queensland* [2007] 2 Qd R 235; [2006] QCA 565; BC200610674.

79 It is possible that the scope of an authorised might be interpreted differently depending upon whether it is expressed as a duty, power or function, respectively, but this possibility is not explored further here.

80 Field, above n 3, at 157.

81 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 116 per Kitto J; BC6100550.

82 See, eg, *Board of Fire Commissioners (NSW) v Rowland* (1959) 76 WN 538.

83 See, eg, *Marriage v East Norfolk Rivers Catchment Board* [1949] 2 All ER 1021 at 1025; [1950] 1 KB 284 at 292 per Tucker LJ, at All ER 1035; KB 309 per Jenkins LJ; *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 109 per Dixon CJ, at 117 per Kitto J, at 124 per Taylor J, at 127 per Windeyer J; BC6100550; *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575; 165 ALR 337; [1999] HCA 45; BC9905662 at [16]–[18] per Gleeson CJ and Gummow J, at [34]–[35] per McHugh J.

Clearly, an act is most likely to require special authority to perform if it is otherwise trespassory (such as physically restraining a suspect).[84] However, since an act that requires special authority to perform might be performed without reasonable care (such as spraying water onto private property),[85] a provision such as s 65 might also provide an answer to a claim in negligence. Importantly, though, provisions framed in this way are highly *unlikely* to provide an answer to negligence that occurs in the course of conduct that does not require special authority to perform, such as driving a fir engine,[86] entering into a contract,[87] or interfering with property in the course of a consensual dealing.[88]

To be clear, this interpretive approach does not mean that an otherwise wrongful act must actually be authorised to fall within the scope of a protection such as s 65.[89] However, since parliament does not routinely prescribe *all* of the functions that a public servant might engage in — and typically says nothing at all about functions that do not otherwise interfere with private rights or interests — a provision that extends only to acts done pursuant to specifi functions will ordinarily only protect a public servant if (1) the impugned act required special authority to perform and was in fact directly authorised by the relevant statute,[90] albeit not the wrongful mode in

84 *Little v Commonwealth* (1947) 75 CLR 94; BC4700330.

85 *Hamcor Pty Ltd v Queensland* [2015] QCA 183 (2 October 2015) [40] (Gotterson JA). Similar language is adopted by s 43A of the Civil Liability Act 2002 (NSW):

> (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority.
>
> (2) A 'special statutory power' is a power: (a) that is conferred by or under a statute, and (b) that is of a kind that persons generally are not authorised to exercise without specifi statutory authority.
>
> (3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.

It would appear that this provision is intended to provide defendant's with a protection from liability, as opposed to modifying the elements of liability (breach of duty) (*Roads and Traffic Authority of NSW v Refrigerated Roadways Pty Ltd* (2009) 77 NSWLR 360; 53 MVR 502; [2009] NSWCA 263; BC200908690 at [359]–[360] per Campbell JA. That being so, were a specifi good faith protection available to a public servant in the same circumstances as a protection under s 43A, that public servant could escape liability by demonstrating (1) that he or she acted in good faith; (2) that he or she did not act unreasonably in the Wednesbury sense, or both. However, as discussed in Part IV, above, good faith would ordinarily be easier to prove. The author is grateful to Neil Foster for his advice and comments on the operation s 43A.

86 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 110 per Dixon J; BC6100550.

87 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575; 165 ALR 337; [1999] HCA 45; BC9905662 at [37] per McHugh J.

88 *Colbran v Queensland* [2007] 2 Qd R 235; [2006] QCA 565; BC200610674.

89 *Little v Commonwealth* (1947) 75 CLR 94 at 108, 111 per Dixon J; BC4700330.

90 Clearly, the question of whether an act is directly authorised (and if so whether it is expressly or impliedly authorised) might also be a matter of construction, to be determined having regard to (among other things) the object of the legislation in question and the impact of a given construction on private rights or interests. It is for this reason more likely that a broad (inclusive) interpretation would be adopted in respect of good faith protections that

which that act was done; or (2) the impugned act required special authority to perform and the public servant mistakenly but in good faith *believed* it to be so authorised.

Of course, interpretive presumptions only apply when the meaning of a statutory provision is uncertain. That being so, and although it is not entirely clear in the authorities,[91] it seems axiomatic that when a defendant engages in an act that, but for its wrongful mode, is *expressly* authorised by statute, a protection framed as extending to acts done 'pursuant to' that statute will apply *even though* that act does not require special authority to perform.[92] There is, after all, nothing to prevent parliament from authorising any act that it wishes,[93] and in some instances it may be prudent to expressly authorise an act (so as to ensure that a public servants are shielded by a good faith protection) even if — whether by its very nature or fate of circumstance — that act does not require special authority to perform.[94] Thus, for example,

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preserve private rights (see Part V above) than it is in respect of good faith protections that defeat liability entirely. This does not necessarily mean, however, that (in respect of liability-defeating protections) an act must be specificall designated by a statute to be authorised. For example, in *Hamcor Pty Ltd v Queensland* [2016] 1 Qd R 271; [2015] QCA 183; BC201509601 at [45], Gotterson J accepted that, 'as a principle of statutory interpretation, a statutory immunity for acts done pursuant to a statute is to be construed as extending only to acts directly authorised by the statute. However, I would reject, as a companion proposition, that in order to be directly authorised by a statute, an act must be specificall listed in it as authorised by it. In my opinion, an act will be directly authorised by a statute if it falls within a broad description of acts authorised by the statute'. Applying that reasoning, Gotterson J concluded that the Queensland Fire and Rescue Service was authorised by s 53(1) of the Fire and Rescue Service Act 1990 (Qld) to spray water onto a fire because this was 'a reasonable measure to protect persons, property or the environment from danger or potential danger caused by a fir or a hazardous materials emergency'.

91 See, eg, the following statement of Mason CJ, Deane, Toohey and Gaudron JJ in *Australian National Airlines Commission v Newman* (1987) 162 CLR 466; 70 ALR 275; BC8701767, which would appear to suggest that the presumption applies *even if* an act is expressly authorised: 'Freedom under the common law to engage in conduct requires no grant of statutory power to confir it, and a limitation provision which affects liability for things done or purportedly done "under" the statute does not affect liability for things which are and can be done without reliance on a statutory power to do them'.

92 According to Kitto J, eg, there 'can be no *implication* of a grant of power to do, in the performance of the duty, what is in any case lawful': *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105 at 119; BC6100550 (emphasis added). To similar effect, in *Colbran v Queensland* [2007] 2 Qd R 235; [2006] QCA 565; BC200610674 at [35], Jerrard J explained that the 'High Court has consistently held for at least the last 50 years against *construing* an immunity granted when exercising power to take steps "under" an enactment to include an immunity for acts or things done or able to be done without any need for the exercise of a statutory power' (emphasis added). Note, however, that this does not appear to be the way in which s 43A of the Civil Liability Act 2002 (NSW) operates, as in order for that provision to apply the power wrongly exercised must be (1) conferred by or under a statute *and* (2) of a kind that requires special authority to perform.

93 As Barwick CJ has explained, 'a statute only authorizes those acts which it expressly nominates and those acts and matters which are necessarily incidental to the acts so expressly authorized or to their execution': *Benning v Wong* (1969) 122 CLR 249 at 256; BC6900610.

94 See, eg, Local Government Act 1995 (WA) s 9.56(3): 'The protection given by this section applies even though the thing done in the performance or purported performance of a function under this Act or under any other written law may have been capable of being done whether or not this Act or that law had been enacted'. A different conclusion is properly reached, however, if the function in question is not expressly authorised. See, eg, *Colbran*

there would be nothing to prevent parliament from explicitly authorising 'driving an ambulance' and affording specifi protection to those who negligently (but in good faith) perform this function.

The preceding observations may be demonstrated by reference to the scenario postulated earlier of the Singaporean health inspector (D), who enters a vessel without the consent of its owner (P).[95] Since entering and spraying pesticide within a vessel without consent are acts that require special authority to perform — and 'entering' and 'spraying' are (presumably) for this reason specificall authorised by ss 21(2) and 35 of the CVP Act — s 54 of that Act is likely to protect D from liability. That provision, it will be recalled, provides as follows:

> No suit or other legal proceedings shall lie against the Director-General or authorised officer or any other person acting under the direction of the Director-General for anything which is in good faith done in the execution or purported execution of this Act.

Section 54 is likely to protect D from liability because, although she was negligent in the manner in which she carried out the spraying, she nevertheless acted in good faith 'in the execution or purported execution' of functions under that Act.[96] Suppose, however, that D was *invited* by P to enter its vessel to spray a pesticide. Entering and spraying pesticide inside a vessel at the invitation of its owner are *not* acts that require special authority to perform. However, before it would be open to a court to conclude that the protection afforded by s 54 is unavailable to D on this basis, it would firs need to conclude that, properly construed, ss 21(2) and 35 do not directly authorise 'entering' and 'spraying' in general terms — that is, regardless of whether these acts are done with or without consent. If these provisions are construed as providing authority to enter a vessel and spray a pesticide irrespective of any authority provided by the owner of that vessel — and it may well be that this is what parliament intended — then the protection would presumably still apply.[97]

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*v Queensland* [2007] 2 Qd R 235; [2006] QCA 565; BC200610674 at [14] per Williams JA; at [30] per Jerrard JA; at [58] per Philippides J.

95 See Part IV above.

96 Control of Vectors and Pesticides Act (Singapore, Cap 59, 2002 rev ed) s 54.

97 The description afforded by the court to D's conduct might also be important and might differ according to, among other things, the benefi (if any) that D stood to gain from the impugned activity. For example, if D were to perform the spraying for a fee, it seems likely (and appropriate) that a court would describe her act narrowly, so that it falls outside the acts (entering and spraying) authorised by the act. A similar conclusion is likely to be reached if the Crown retained D's fee (eg, her act might be described as 'entering and spraying for a fee according a commercial arrangement'). On the other hand, if D were to carry out the spraying gratuitously, in the belief that it was necessary to prevent the release of a vector — and all the more so if she were instructed to do so by the Crown — it is more likely that a court would adopt a broad description of her act, which falls within the statutory meaning of entering and spraying.

### B Protections that extend to acts done for the purposes of specific functions

What, then, of good faith (and other similar) protections that extend to acts (or, perhaps omissions) done for the *purposes of* a statute? An example of such a protection is provided in s 106 the Freedom of Information Act 1992 (WA):

> (1) A matter or thing done or omitted to be done by—
>
> (a) an agency or the principal officer of an angency; or
>
> (b) a person acting under the direction of an agency or the principal officer of an agency,
>
> does not subject the principal officer or any person so acting personally to any action, liability claim or demand so long as the matter or thing was done in good faith for the purposes of giving effect to this Act.[98]

Although there is little direct authority on the matter, it would appear that the range of conduct that might be engaged in for the *purposes of* a statute is limited to conduct that *does not* — but for the wrongful mode of its performance — require some special authority to perform.[99] A provision framed in this way might therefore apply in precisely those circumstances that the provisions examined in the preceding section do not (such as driving a fir engine, entering into a contract, or interfering with property in the course of a consensual dealing).[100]

Again, this interpretative approach reflect the presumption in favour of private rights and interests because protections that extend only to conduct engaged in for the *purposes of* a statute are *not*, in terms, connected to the performance of functions that require special authority to perform, and which are therefore specificall authorised by the legislature. A protection that extends generally to acts done for the purposes of an act contains no language whatsoever — let alone clear language — to indicate that parliament intends to authorise otherwise unlawful conduct. It follows that protections framed in this manner could never defeat liability for tortious conduct that, by its very nature, involves an interference with private rights or interests (namely trespass), and that such protections are limited to tortious conduct that does not, but for its wrongful mode, involve any interference with private rights or interests (namely negligence).

## VII Conclusion

This article has shown that good faith protections play (and have played) an important role in shaping the boundaries of public sector liability and in managing the boundaries between private and public interests. It has argued that the widespread availability of good faith protections is likely to influenc

98 See also, eg, Drug misuse and Trafficking Act 1985 (NSW) s 36P; Young Offenders Act 1997 (NSW) s 72; Coroners Act 2009 (NSW) s 101O.

99 *Colbran v Queensland* [2007] 2 Qd R 235; [2006] QCA 565; BC200610674 at [2]–[11] per Williams J, at [34] per Jerrard JA, at [54] per Philippedes J.

100 See above nn 87–9. Note, however, that protections that extend to acts done 'for the purposes of' a statute are commonly afforded concurrently with protections that extend to acts done 'pursuant to' a statute. See, eg, the protections identifie above n 98. See also the Plant Protection Act 1989 (Qld) s 28 (repealed), interpreted in *Colbran v Queensland*, ibid.

(and to have influenced the course of tort-law litigation, by discouraging plaintiffs from pursuing protected defendants, encouraging plaintiffs to pursue alternate defendants, or both. The article has also demonstrated that, despite the outward similarity of most good faith protections, subtle variations in parliament's choice of language can alter significantl (1) the scope of a specifi good faith protection; and (2) the manner in which that protection allocates liability, economic risk, or both, between public servants and the Crown.