Singapore Journal of Legal Studies
[September 2025 Online] 1–28

GOVERNMENT VICARIOUS LIABILITY AND THE CONCEPT OF DEEMED EQUALITY WITH PRIVATE PERSONS

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The immunity against Crown liability was abolished in the United Kingdom in 1948 based on the Diceyan notion of rule of law and deemed equality under the law between public officials and private persons. This paper analyses government vicarious liability in respect of the acts and omissions of public officers under the Singapore Government Proceedings Act with reference to the concept of deemed equality. We will discuss the scope of the statute in light of recent common law developments in vicarious liability, statutory exceptions to government vicarious liability that may be justified by the functions of the government in the discharge of military and judicial duties, the case of police duties, and whether government vicarious liability should be exempted in cases involving the exercise of public duties and prosecutorial responsibilities.

I. Introduction

Prior to the UK Crown Proceedings Act 1947 ("CPA"),[1] the Crown was immune from tortious liability at common law based on feudal ideas that the king could not be sued in his own courts and could do no wrong.[2] A 1927 committee report[3] recommended that the Crown be subject to tortious liability but the bill containing the suggested reforms was not passed by Parliament. It was only in 1948 that the Crown's immunity from liability was finally abolished.

Though tortious claims against the Crown were barred as a matter of law before 1948, the Crown could, in practice, permit an action on the basis that the alleged tortious act was committed by an identified tortfeasor (or a servant nominated by the Crown as *pro forma* defendant) in the course of his official duties. Where these circumstances were present, the Crown would normally stand behind the servant and pay the damages awarded.[4] However, the decisions as to the existence of an

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1 Crown Proceedings Act 1947 (c 44) (UK) [CPA].

2 Frederick F Blachly & Miriam E Oatman, "Approaches to Governmental Liability in Tort: A Comparative Survey" (1942) 9(2) Law and Contemporary Problems 181 at 183.

3 UK, Crown Proceedings Committee, *Crown Proceedings Committee Report* (Cmd No 2842, 1927). See also The Rt Hon Lord Hewart of Bury, *The New Despotism* (London: Ernest Benn Limited, 1929) at 162-163 [Lord Hewart].

4 Thomas Barnes, "The Crown Proceedings Act, 1947" (1948) 26(2) Can Bar Rev 387 at 388 [Barnes].

identifiable tortfeasor[5] and whether the tort was committed in the course of official duties were within the discretion of the Crown.

Notwithstanding the practice of the Crown standing behind the servant, the English courts were not satisfied with the state of affairs. The courts took on the responsibility to ensure, for the purpose of establishing Crown liability, that the nominated servant of the Crown would owe a legal duty to the victim. In the pre-CPA case of *Adams v Naylor*,[6] an injured boy and the administratrix of the estate were denied recovery of damages in negligence against an army officer[7] nominated by the Treasury Solicitor as the defendant did not owe a duty of care to the victim. Lord Simonds and Lord Uttwatt commented that legislation with respect to proceedings against the Crown in respect of torts committed by its servants was "long overdue"[8] and that the matter was "urgent".[9] Similarly, in *Royster v Cavey*,[10] the Crown-nominated defendant could not be sued in negligence or breach of statutory duty by the plaintiff, an employee who suffered personal injuries whilst working in a munitions factory in the occupation of the Ministry of Supply, because the defendant did not owe a legal duty to the plaintiff. Scott LJ[11] referred to "a crying evil" that legislation had not been passed by Parliament earlier.

With the enactment of the CPA, the Crown would be subject to liabilities in respect of torts committed by its servants or agents. This is in line with the core tenet of the rule of law that everyone is subject to the law.[12] This includes a government that is limited by law. Dicey in *The Law of the Constitution* wrote about the rights of private persons premised upon the Constitution and the rule of law.[13] In his view, public officials should have the same status and legal responsibility as private citizens:

> In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen …[14]

The impetus to abolish Crown immunity in the UK was driven in part by concerns over the "rise of the administrative state" encroaching on commercial activities and

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5 The avenue of discovery against the Crown was not available at that time: see TT Arvind, "Restraining the State through Tort? The Crown Proceedings Act in Retrospect" in TT Arvind & Jenny Steele, eds. *Tort law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford: Hart Publishing, 2013) at 409 [Arvind].

6 *Adams v Naylor* [1946] AC 543 [*Adams*].

7 The injuries sustained by the boy were "war injuries" under the Personal Injuries (Emergency Powers) Act 1939 (c 82) (UK), s 8(1) read with s 3(1).

8 *Adams*, *supra* note 6 at 552-553 (Lord Simonds) and 555 (Lord Uttwatt).

9 *Ibid* at 555 (Lord Uttwatt).

10 *Royster v Cavey* [1947] KB 204.

11 *Ibid* at 210.

12 Lord Hewart, *supra* note 3 at 24.

13 Albert Venn Dicey, *Introduction To the Study of the Law of the Constitution*, 7th ed (London: Macmillan, 1908) at 189 and 198 [Dicey].

14 *Ibid* at 189.

the legal arena.[15] Insofar as liability in tort is concerned, the CPA ushered in a form of "private law constitutionalism" to restrain the state,[16] and this idea has been imported into Singapore and other common law jurisdictions through similar statutory enactments.

The Diceyan notion of rule of law examined in this paper is intimately connected to equality, more specifically, the equal status in law between the government and private persons. This concept has found support in academic commentaries[17] as well as in court decisions.[18] On a conceptual level, equality in law is not the same as factual equality. Equality in law does not mean equal or identical treatment.[19] There may be circumstances requiring the justification of unequal treatment in dissimilar cases. As stated by Hoffmann in *Matadeen v Pointu*,[20] "treating like cases alike and unalike cases differently is a general axiom of rational behaviour".

The government and private persons, with their different functions and roles, are certainly not equal in fact.[21] Instead, the concept adopted in the statutes is akin to what we would refer to as "deemed" equality under the law based on the hypothetical comparison between the government and a private person possessing full capacity. Put in another way, it enquires about the liability of government *as if it were* a private person of full age and capacity.[22] Hence, deemed equality is but a legal fiction as the government and the private person are not truly commensurable given the difference in their roles and characteristics. Furthermore, any departures from consistency in treatment between government and private persons should be justified by recourse to coherent legal rules or principles.[23]

Like the UK, Singapore has abolished government immunity for tortious claims and treated government liability on a similar footing as that for private persons under the Singapore Government Proceedings Act[24] ("GPA"). Since the coming into force of the Singapore GPA, the common law of vicarious liability has developed

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15 Lord Hewart, *supra* note 3; and Arvind, *supra* note 5 at 411.

16 Arvind, *supra* note 5 at 414.

17 Carol Harlow, "'Public' and 'Private' Law: Definition without Distinction" (1980) 43 Mod L Rev 241 at 250 (Dicey's equality before the law as a "rational, workable and acceptable theory of governmental liability"; and against the public/private law distinction); *cf* Geoffrey Samuel, "Public and Private Law: A Private Lawyer's Response (1983) 46 Mod L Rev 558 (recognising that a public body or official ought at times to be treated similar to private persons but stressing the need to keep public and private law distinct). See also Geoffrey Samuel, "Government Liability in Tort and the Public and Private Law Distinction" (1988) 8(3) LS 277 at 278 (on the equal treatment of public bodies as private persons).

18 *Broome v Cassell & Co* [1971] 2 All E.R. 187 at 204 (CA, Eng) *per* Salmon LJ ("The cabinet minister by virtue of his office has no greater legal rights or liabilities than his humblest constituent. All are equal before the law. This surely is one of the pillars of freedom").

19 Michael Foran, "The Cornerstone of Our Law: Equality, Consistency and Judicial Review" (2022) 81(2) Cambridge LJ 249 [Foran].

20 *Matadeen v Pointu* [1999] 1 AC 98 at [9] (Privy Council decision on appeal from the Supreme Court of Mauritius).

21 See *eg*, Anthony W Bradley & J Bell, "Governmental Liability: A Preliminary Assessment" in John Bell & Anthony W Bradley, eds. *Governmental Liability: A Comparative Study* (London: United Kingdom National Committee of Comparative Law, 1991) at 2-3.

22 CPA, *supra* note 1 at s 2(1)(a).

23 Foran, *supra* note 19 at 272 (on common law adjudication that "Common law adjudication is the process of applying these rules and principles to ensure that like cases are treated alike and that departures from this general norm of equal treatment are justified").

24 Government Proceedings Act 1956 (Cap 121, 1985 Rev Ed) [GPA].

apace. Two important developments relate to the scope of relationships between the defendant and tortfeasor (employment or akin to employment) and the extent of the connection between the abovementioned relationship to the commission of the tort that may give rise to the imposition of vicarious liability. An interesting issue is how the statute, which has been in existence since Singapore's independence in 1965, should be interpreted in light of these common law developments.

The statute stipulates certain exceptions where the government enjoys immunity from tortious liability in respect of roles that are distinctive of the government, for example, in the discharge of military and judicial duties. In the recent decade, these issues have generated debates in the Singapore courts and Parliament regarding the rationales for the exceptions to government vicarious liability and the proper scope of the immunity. Questions may also be raised about the basis for the existing government immunity for the "exercise of public duties" under the Singapore GPA, and how we should address the issue of the government's prosecutorial functions.

This paper examines the concept of deemed equality as applied to government vicarious liability in Singapore. This would involve an analysis of statutory interpretation, common law principles and broader policy considerations: is government vicarious liability under the Singapore GPA consistent with vicarious liability as applied to private persons at common law? Can we justify the exceptions to government vicarious liability and deemed equality under the statute? Are there other governmental functions that may be exempted from vicarious liability? It is an opportune moment, as Singapore celebrates her 60th anniversary in 2025, to reflect on the developments in government vicarious liability under the statute since independence.

The roadmap is outlined as follows: section II will first examine the scope of government vicarious liability under the Singapore GPA and deemed equality as well as the recent common law developments. With reference to the concept, we will discuss in Section III the exceptions to government vicarious liability based on the government's distinct roles in the discharge of military and judicial duties under the GPA as well as police duties. Following this, we will query the relevance of government vicarious liability arising from acts and omissions in exercise of public duties and prosecutorial functions in Section IV. The final section V concludes.

II. Government Vicarious Liability Under the Singapore GPA and Deemed Equality

Within a decade of its enactment, the UK CPA model was imported into the common law jurisdictions of the State of Victoria in Australia,[25] Canada,[26] Malaysia and New Zealand[27] respectively. When Singapore was part of Malaysia, the Malaysian

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[25] Crown Proceedings Act 1955 (Vic).

[26] Uniform Model Act of 1950 which was enacted in Canadian provinces except in the federal jurisdiction, British Columbia and Quebec: see Peter W Hogg, Patrick J Monahan & Wade K Wright, *Liability of the Crown*, 4th ed (Toronto: Carswell, 2011) at 156-159.

[27] Crown Proceedings Act 1950 (NZ) [NZ CPA].

Government Proceedings Ordinance 1956[28] applied to the former's territory.[29] Upon her separation from Malaysia and independence in 1965, the Malaysian Ordinance remained applicable in Singapore via a constitutional instrument.[30] Thus, to this day, Singapore shares with Malaysia a similar statutory framework in respect of government proceedings and liabilities.

The starting point for analysis is s 5 of the Singapore GPA, which provides for government liability based on the wrongful act done, or neglect or default committed by the public officer:

> Subject to the provisions of this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent…

The concept and application of deemed equality can be gathered from the statutory language: government liability is to be treated "in the same manner and to the same extent" as that of a "principal, being a private person".[31] It should be noted that Government liability applies only insofar as the public officer is "acting or purporting in good faith to be acting in pursuance of a duty imposed by law".[32]

Similar statutory provisions have been imported into other common law jurisdictions.[33] For example, the Canadian statute provides for liability of the Crown for damages for which "if it were a private person of full age and capacity" would be liable in respect of a tort committed by a servant of the Crown.[34] In line with the concept of deemed equality, the Supreme Court of Canada observed that over time, the Parliament and the provincial legislatures have "gradually placed limits on [Crown] immunity in order to draw the legal position of the Crown and its servants closer to that of other Canadian litigants".[35] In Australia, the statutes in a number of states

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[28] Government Proceedings Ordinance 1956 (No 58 of 1956). The Ordinance was extended to Singapore *via* the Modification of Laws (Government Proceedings and Public Authorities Protection) (Extension and Modification) Order 1965 (GN Sp No S 28/1965).

[29] *Re Fong Thin Choo* [1991] 1 SLR(R) 774 at [16] (HC).

[30] The Republic of Singapore Independence Act 1965 (Act 9 of 1965), s 13: see *In the Estate of Lee Rui Feng Dominique Sarron, deceased v Najib Hanuk bin Muhammad Jalal* [2016] 4 SLR 438 at [26]-[27] (HC) [*Sarron*].

[31] See also *Swee Hong Investment Pte Ltd v Swee Hong Exim Pte Ltd* [1994] 3 SLR(R) 259 at [32] (CA) [*Swee Hong*].

[32] GPA, *supra* note 24, s 5. See also *Syed Suhail bin Syed Zin v AG* [2021] 4 SLR 698 at [16]-[18] (HC).

[33] See also GPA, *supra* note 24, s 5; *Suzilawati bt Ali (suing in her personal capacity, as lawful mother and dependant for Child A, a minor (deceased)) v Dr Alif Al Ain bin Mohd Fathilah (medical officer, Hospital Changkat Melintang)* [2023] 8 MLJ 110 at [50] (HC, M'sia); *Janagi a/p Nadarajah (joint estate administrator and dependent of Benedict a/l Thanilas, deceased) v Sjn Razali bin Budin* [2022] 8 MLJ 820 at [70] (HC, M'sia).

[34] Crown Liability and Proceedings Act, RSC (1985), C-50, s 3 (Can). See also Kurt JW Sandstrom, "Personal and Vicarious Liability for the Wrongful Acts of Government Officials: An Approach for Liability under the Charter of Rights and Freedoms" (1990) 24 UBC L Rev 229 at 245.

[35] *Canada (Attorney General) v Thouin* [2017] 2 SCR 184 at [1] (SC, Can).

stipulated for the same[36] or substantially similar[37] law (substantive and procedural) applicable to both the government and private persons in lawsuits. As remarked by Gleeson CJ in *Graham Barclay Oysters Pty Ltd v Ryan*,[38] this approach reflected "an aspiration to equality before the law, embracing governments and citizens" but also acknowledged that "perfect equality is not attainable".

A. *Vicarious Liability as Secondary Liability Premised on Personal Liability of "Public Officer" Who is "Employed" by the Government*

Though the purported basis of liability in s 5 is agency, it is nevertheless "[s]ubject to the provisions" of the GPA, which would include s 6. As is consistent with the doctrine of vicarious liability as secondary liability, s 6 of the Singapore GPA states that the Government would not be subject to a lawsuit for vicarious liability "unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally". Furthermore, the public officer must be "employed" by the government and paid in respect of duties as an officer of the government wholly out of government revenues or funds certified by the Minister for Finance or other certified payments.[39] Significantly, the Singapore Court of Appeal in *AG v R Anpazhakan*[40] interpreted s 5 as rendering "the Government vicariously liable for the wrongful act or neglect of any public officer in the same way as a private *employer* would be liable for the act or neglect of an *employee* [emphasis added]".[41] Hence, s 5 not only allows for the imposition of liability on the Government for the acts of public officers on the basis of agency, it can render the Government vicariously liable consistent with the concept of deemed equality with private persons.

Post-*Anpazhakan*, the Singapore Court of Appeal in the landmark decision of *Skandinaviska Enskilda Banken A B (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd*[42] enunciated the approach to vicarious liability arising from the tortious acts and omissions of employees. This was based on the "close connection" test in English[43] and Canadian[44] precedents and the extent to

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[36] *Eg*, South Australia (Crown Proceedings Act 1992 (SA), s 5), Tasmania, (Crown Proceedings Act 1993 (Tas), s 5), the Australian Capital Territory (Crown Proceedings Act 1992 (ACT), s 5) and the Northern Territory (Crown Proceedings Act 1993 (NT), s 5).

[37] The substantive and procedural law in a suit in which the Crown is a party should "as nearly as possible" be the same as in a suit between subjects *eg*, New South Wales (Crown Proceedings Act 1988 (NSW), s 5), Queensland (Crown Proceedings Act 1980 (Qld), s 9), and Victoria (Crown Proceedings Act 1958 (Vic), s 25.

[38] *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54 at [12].

[39] GPA, *supra* note 24, s 6(4).

[40] *AG v R Anpazhakan* [1999] 3 SLR(R) 810 (CA) [*Anpazhakan*].

[41] *Ibid* at [22]; see also *AHQ v Attorney-General* [2015] 4 SLR 760 at [31] (CA) [*AHQ*].

[42] *Skandinaviska Enskilda Banken A B (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd* [2011] 3 SLR 540 (CA) [*Skandinaviska*].

[43] *Lister v Hesley Hall Ltd* [2002] 1 AC 215 [*Lister*].

[44] *The Children's Foundation, the Superintendent of Family and Child Services in the Province of British Columbia and Her Majesty The Queen in Right of the Province of British Columbia as represented by the Ministry of Social Services and Housing v Patrick Allan Bazley* [1999] 2 SCR 534 (SC, Can) [*Bazley v Curry*].

which it would be fair and just, taking into account relevant policy considerations (*eg*, compensation for innocent victims and deterrence against inadequate supervision) in order to impose vicarious liability on the employer. Interestingly, the court in *Skandinaviska* implicitly rejected the agency theory as the underlying basis for vicarious liability[45] even though the presence (or absence) of the employee's authority was a relevant factor in the ultimate decision. Agency, unlike vicarious liability, is not dependent on the public officer's personal liability, but is premised on the attribution of the agent's act to the principal due to the existence of authority, whether actual, implied or apparent.

The court in *Anpazhakan* confirmed that for the Government to be vicariously liable under s 6(1), the public officer concerned must be personally liable for the act or neglect,[46] though there is no additional requirement that the public officer be specifically identified. The act or neglect may be due to two or more public officers acting in unison, a group of public officers or even a whole section or department consisting of public officers without the need for the claimant to identify the officers specifically or to apportion the blame between them.[47] The Court of Appeal of Ontario appeared to adopt a similar view of the former Proceedings Against the Crown Act, that the specific naming of government servants in the proceeding is not necessary.[48]

In contrast, the approach applied in Malaysia is stricter[49] requiring the identity and liability of the government servant to be ascertained before the government can be made liable.[50] It should be noted that the words in s 6(1) of GPA – that proceedings "would have lain against such officer personally" – do not require the public officer to be specifically identified. Further, there is no necessity that the tortfeasor must be brought to court as a party[51] in order to ascertain whether the tortfeasor would be personally liable for the tort. To require so would weaken the application of the concept of deemed equality between the public officers and private persons.

Nevertheless, the requirement of personal liability on the part of the public officer is generally consistent with the current doctrine of vicarious liability of employers as private persons at common law. It is a form of secondary liability premised on the tortious acts or omissions of their employees. The position at common law has not always been so. Historically, some of the older English decisions have implicitly

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45 *Skandinaviska*, *supra* note 42 at [63]-[64].

46 *Anpazhakan*, *supra* note 40 at [22].

47 *Ibid* at [23].

48 Proceedings Against the Crown Act, RSO 1990, c P27 (O), s 5(2) [Ontario Proceedings Against the Crown Act] (no proceeding can be brought against the Crown "unless a proceeding in tort in respect of such act or omission *may* be brought against that servant or agent"). See also *Francis v Ontario* 154 OR (3d) 498 at [145] (CA, O).

49 *Haji Abdul Rahman v Government of Malaysia* [1966] 2 MLJ 174 (FC, M'sia).

50 *Eg*, *Kerajaan Malaysia & Ors v Lay Kee Tee* [2009] 1 MLJ 1 at [16]-[17] (FC, M'sia) followed in *Government of the State of Sabah v Syarikat Raspand (suing as a firm)* [2010] 5 MLJ 717 at [36] and [40]; (CA, M'sia); and *Soon Poy Yong@Soon Puey Yong v Westport Properties Sdn Bhd* [2015] 11 MLJ 196 (HC, M'sia).

51 See WT Chu, "Vicarious Liability Of Government — Must The Employee Tortfeasor Be Identified? Haji Abdul Rahman v Government of Malaysia" (1967) 9(2) Mal L Rev 353.

relied on the master's tort theory[52] where the act rather than the liability of the servant seemed to be attributed to the master. When the CPA was enacted, it was specifically provided that the Crown was liable in respect of "*torts* committed by its servants or agents [emphasis added]"[53] which reflected the servant's tort theory as is consistent with the requirement for personal liability of public officers in the Singapore GPA. This prevailing (servant's tort) theory[54] arguably "draws a clearer distinction between primary and vicarious liability".[55]

A public officer may be personally liable under tort law if they act in a private capacity, *ie*, where the relationships between the public officer and others are governed by private law with the attendant private law remedies.[56] The key torts relevant to the personal liability of public officers (and public bodies) are breach of statutory duty, misfeasance in public office and negligence.[57] As the name suggests, misfeasance in public office targets public officials. Whilst statutory duties are a prerequisite for establishing breach of statutory duty, they may only "form the backdrop to and inform the existence (or lack thereof) of a common law duty of care" in negligence.[58] Whether a public officer owes a duty of care to the plaintiff may be impacted by the presence of countervailing policy considerations more commonly associated with public bodies or officials. Such policy concerns include potentially defensive conduct by public officers and diversion of public resources,[59] conflicts between the duties owed by public officials to the plaintiff versus to other parties[60] and statutory immunity provisions in respect of anything done in "good faith".[61] Policy decisions concerning the public budget and resources (as opposed to operational matters) and non-justiciable matters to be handled by the Executive[62] would normally be outside the realm of negligence.[63]

Another important consideration with regards to deemed equality is the meaning and scope of the term "public officer" in the GPA. The Federal Court of Malaysia held in a case related to the notorious 1MDB scandal that the term "public officer" in s 5 of the Malaysian GPA was wide enough to include Ministers in government – even

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[52] *Eg*, *Dyer v Munday* [1895] 1 QB 742 (CA, Eng); *Broom v Morgan* [1953] 2 WLR 737 at 743 (Singleton LJ); 745 (Denning LJ) (CA, Eng); *Twine v Bean's Express Ltd* [1946] 1 All ER 202 at 204 (Uthwatt J) (HC, Eng). See also Glanville L Williams, *Crown Proceedings* (London: Stevens & Sons Limited, 1948) at 43-44.

[53] CPA, *supra* note 1, s 2(1)(a).

[54] *Eg*, *Staveley Iron and Chemical Co Ltd v Jones* [1956] AC 627 at 639 (Lord Morton of Henryton) (with whom Lord Porter agreed); 643-4 (Lord Reid).

[55] Warren Swain, "A Historical Examination of Vicarious Liability: A 'Veritable Upas Tree'?" (2019) 78(3) Cambridge LJ 640 at 660.

[56] *How Weng Fan v Sengkang Town Council* [2023] 1 SLR 707 at [140] (CA) [*How Weng Fan*], citing *Swain v Law Society* [1983] AC 598.

[57] See K Oliphant, "The Liability of Public Authorities in England and Wales" in K Oliphant, eds. *The Liability of Public Authorities in Comparative Perspective* (Cambridge: Intersentia, 2016) at 127-153 [K Oliphant].

[58] *Animal Concerns Research & Education Society v Tan Boon Kwee* [2011] 2 SLR 146 at [22] (CA).

[59] *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

[60] *D v East Berkshire Community Health NHS Trust* [2005] 2 AC 373.

[61] *Eg*, Town Councils Act (Cap 329A, 2000 Rev Ed), s 52 which was discussed in *How Weng Fan, supra* note 56.

[62] UK Law Commission, *Remedies against Public Bodies: A Scoping Report* (2006) at [5.11]-[5.12].

[63] K Oliphant, *supra* note 57 at 137-141.

the Prime Minister himself.[64] Furthermore, the ministerial salaries were paid from the "public purse" and the ministers discharged their roles for a "public purpose".[65] Similar to its Malaysian counterpart, the definitional section of the Singapore GPA[66] states that the word "'officer' in relation to the Government, … includes a Minister of the Government", which may therefore point to the same interpretation.

More fundamentally, the decision to retain the broader definition of "public officer" for the common law tort was, as espoused by the Malaysian Federal Court, to ensure consistency with the rule of law:

> The doctrines of the rule of law and the separation of powers underpin and comprise the 'internal architecture' of our Constitution … So, to conclude that the definition of public officer in Malaysia excludes members of the administration such as a Prime Minister, so that members of the administration like the defendant/respondent in the instant appeals, may allegedly act with impunity, so as to knowingly and/or recklessly dissipate public funds and remain immune to civil action under this tort, is anathema to the doctrine of the rule of law and the fundamental basis of the Federal Constitution. Such a construction of the term 'public officer' which erodes the rule of law, is repugnant and cannot prevail.[67]

B. *The Common Law of Vicarious Liability, Singapore GPA and Deemed Equality*

Moving on to consider the potential impact of common law developments concerning vicarious liability, we note that the UK courts have quite recently extended vicarious liability beyond employment relationships to those akin to employment by reference to indicia such as control and integration.[68] As enunciated by Lord Phillips PSC in the UK Supreme Court decision in *Various Claimants v Catholic Child Welfare Society* ("*Christian Brothers*"):

> Where the defendant and the tortfeasor are not bound by a contract of employment, but their relationship has the same incidents, that relationship can properly give rise to vicarious liability on the ground that it is 'akin to that between an employer and an employee'.[69]

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64 *Tony Pua Kiam Wee v Government of Malaysia* [2019] 12 MLJ 1 (FC, M'sia) [*Tony Pua*] overruling *Tun Dr Mahathir bin Mohamad v Datuk Seri Mohd Najib bin Tun Hj Abdul Razak* [2018] 3 MLJ 466 (HC, M'sia) (that "public officer" did not include a Minister for the purposes of the tort of misfeasance in public office).

65 *Ibid* at [130].

66 GPA, *supra* note 24, s 2.

67 *Tony Pua, supra* note 64 at [146].

68 *Eg*, *Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319 (SC, UK); *Blackwater v Plint* [2005] 3 SCR 3 (SC, Can); and *Armes v Nottinghamshire County Council* [2018] AC 355. *Cf KLB v British Columbia* [2003] 2 SCR 403 (SC, Can) which did not adopt the approach based on relationships akin to employment.

69 *Various Claimants v Catholic Child Welfare Society* [2012] 3 WLR 1319 (SC, UK).

These incidents were stated in *Christian Brothers* as follows:

(i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
(ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
(iii) the employee's activity is likely to be part of the business activity of the employer;
(iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
(v) the employee will, to a greater or lesser degree, have been under the control of the employer.[70]

One notable case is *Cox v Ministry of Justice*[71] ("*Cox*") concerning the relationship between the prison authority and prisoners. The Ministry was held vicariously liable for the negligent act of a prisoner who injured the catering manager at the prison service, an executive agency of the Ministry. The prisoner, together with the other prisoners, was engaged in work paid by the government to prepare food to feed fellow prisoners. The relationship was adjudged as akin to employment for the following reasons: (a) the activities assigned to the prisoners by the prison service formed an "integral part of the activities which it carries on in the furtherance of its aims" to provide meals for the prisoners; (b) the risks that the prisoners would commit negligence arose from being placed by the prison service to carry out the assigned tasks; (c) the victim was injured as a result of the prisoner's negligence in carrying out the assigned tasks; and (d) the direct and immediate benefits derived by the prison service from the performance of the tasks.[72] The fact that the prisoners did not receive a commercial wage (but only incentive payments)[73] and that the prison service was under a statutory duty to provide prisoners with work[74] did not negate vicarious liability.

The approach in *Christian Brothers* and *Cox* on relationships akin to employment was adopted by the Singapore Court of Appeal in *Ng Huat Seng v Munib Mohammad Madni* ("*Ng Huat Seng*").[75] The court interpreted it as a way to "accommodate the more diverse range of relationships which might be encountered in today's context" and that these relationships "possess the same fundamental qualities as those which inhere in employer-employee relationships, and thus make it appropriate for vicarious liability to be imposed".[76] Such an approach to vicarious liability has thus far been applied in Singapore to impose vicarious liability on a private employer (an insurance company).[77]

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70 *Ibid* at [35].
71 *Cox v Ministry of Justice* [2016] AC 660 [*Cox*].
72 *Ibid* at [32]-[34].
73 *Ibid* at [37].
74 *Ibid* at [38].
75 *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074 (CA) [*Ng Huat Seng*].
76 *Ibid* at [63].
77 *Ong Han Ling v AIA* (2018) 5 SLR 549 (HC).

The extension of vicarious liability in the UK to embrace quasi-employment was not without limits. The subsequent UK Supreme Court decision of *Various Claimants v Barclays Bank plc*,[78] citing[79] the Singapore decision in *Ng Huat Seng*, observed the distinction between relationships akin to employment which can give rise to vicarious liability and relationships with independent contractors which will not. The court added that where it is clear the tortfeasor was carrying on business on his own account, there would not be any need to apply the five incidents in *Christian Brothers* on quasi-employment.[80] This "traditional position" was reinforced by the same court in *BXB v Barry Congregation of Jehovah's Witnesses*.[81]

Strictly speaking, the scenario in *Cox*, if it were to arise in Singapore, would not result in government vicarious liability under s 6 of the Singapore GPA. This is because government vicarious liability would only apply to the acts or omissions of a "public officer"[82] who was "employed" by the government at the time of the commission of the tort and paid in respect of his duties as an officer[83] of the government out of the government revenues or other certified funds or payments.[84] Section 5 of the GPA on government liability based on agency would also not apply to the facts in *Cox* as the "agent" in s 5 would have to be a "public officer". However, s 5 may conceivably impose Government liability in respect of the engagement of a public officer not as an employee but as an agent (which may include an independent contractor) of the Government.

It appears that the term "employed" in s 6 may not be interpreted in the strict legal sense under the Singapore GPA. The term is applied in the same statute vis-à-vis independent contractors who are distinct from employees:

> Except as therein otherwise expressly provided, nothing in this Act shall — … (b) subject the Government to any greater liabilities in respect of the acts or omissions of any independent contractor *employed* by the Government than those to which the Government would be subject in respect of such acts or omissions if it were a private person [emphasis added].[85]

A person who is "employed" by the government could be interpreted more broadly in the statute as being engaged or hired by the government. The statute may nevertheless cover both relationships of employment and akin to employment, subject to the similar proviso that the torts are committed by public officers engaged by the government and who are paid out of the approved funds. Thus, it would be difficult to extend the scope of vicarious liability to *fully* embrace the relationships akin to employment in order to impose government vicarious liability due to the restricted

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78 *Various Claimants v Barclays Bank plc* [2020] AC 973.

79 *Ibid at* [26].

80 *Ibid* at [27].

81 *BXB v Barry Congregation of Jehovah's Witnesses* [2024] AC 567 at [58] [*BXB*].

82 In the Singapore Interpretation Act 1965 (2020 Rev Ed), "public officer" means the holder of any office of emolument in the service of the Government.

83 The word "officer", in relation to the Government, includes a person in the permanent or temporary employment of the Government (GPA, *supra* note 24, s 2(2)).

84 GPA, *supra* note 24, s 6(4).

85 *Ibid*, s 38(2).

language of s 6 of the Singapore GPA. In this respect, government vicarious liability is not treated on a similar footing with respect to vicarious liability for private persons in line with the concept of deemed equality.

Before we discuss the specified exceptions to government vicarious liability under the Singapore GPA, we should highlight one other point of variance between the common law and the Singapore GPA and deemed equality. In addition to the common law requirement of a relationship of employment or akin to employment, the courts will have to consider whether there is a sufficient connection between (i) the relationship between the defendant and the tortfeasor and (ii) the commission of the tort[86] such that it would fair and just to impose vicarious liability on the defendant.

Under this second stage of close connection in *Lister*,[87] which has been specifically applied to determine the scope of government vicarious liability,[88] the court would have to consider policy considerations (such as compensation for innocent victims and deterring future harms)[89] and the connection between the creation or enhancement of a risk by the employer and the tort that arose.[90] In addition, case precedents imposing vicarious liability may be applied.[91] Prior to the close connection test, cases primarily focused on the question of whether the employee was acting "in the course of employment"[92] as opposed to going on a frolic of one's own.[93] Their relevance and significance will have to be assessed in light of the more holistic requirement of close connection. More recent developments in the UK have indicated that stage 2 will not be satisfied where the tortfeasor had committed the tort in pursuit of a personal vendetta against the employer[94] or in the context of a close personal friendship that had developed between the tortfeasor and the victim that was not connected with the former's formal role on behalf of the quasi-employer.[95]

The Singapore GPA adopts a slightly different approach where it has to be shown that the public officer was "acting or purporting in good faith to be acting in pursuance of a duty imposed by law" before government vicarious liability will arise.[96] Whilst the common law doctrine of vicarious liability focuses on the scope or course of employment, the Singapore GPA is concerned with acting in accordance with a legal duty. The Singapore Police Force Act, for example, specifically refers to

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86 *Ng Huat Seng*, *supra* note 75, at [44].

87 *Lister, supra* note 43, applied in *Skandinaviska*, *supra* note 42.

88 *Eg*, *Bernard v The Attorney General of Jamaica* [2005] 2 LRC 561 (PC, UK).

89 *Skandinaviska, supra* note 42 at [76].

90 *Bazley v Curry*, *supra* note 44 at [69].

91 *Roman Catholic Episcopal Corporation of St George's v John Doe (a pseudonym) and John Doe (a pseudonym)* [2004] 1 SCR 436 (SC, Can) [*John Doe v Bennett*]; cited in *Skandinaviska, supra* note 42 at [70].

92 *Eg*, employee travelling to perform work (*Smith v Stages* [1989] AC 128); entrustment to employee of property that was stolen (*Morris v CW Martin & Sons Ltd* [1966] 1 QB 716 (CA, Eng)).

93 *Eg*, employee acting on a personal vendetta outside scope of employment (*Attorney-General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273 (CA, Eng)); *cf Mattis v Pollock* [2003] 1 WLR 2158 (CA, Eng) (employee's assault of customer linked to events that took place at the workplace).

94 *Various Claimants v Wm Morrison Supermarkets plc* [2020] AC 989 at [47].

95 *BXB, supra* note 81 at [74]-[75]. The court opined that the tort was not committed in the course of the tortfeasor performing his duties as an elder or exercising control over the victim as an elder.

96 GPA, *supra* note 24, s 5.

situations where the police officer is "deemed" to be on duty.[97] The scope of a duty imposed (or "deemed" to be imposed) by law and that of employment will likely overlap in part, but the two concepts are not synonymous.

III. Exceptions to Government Vicarious Liability Under the Singapore GPA and Deemed Equality

The UK Supreme Court in *Cox* recognised the imposition of vicarious liability on defendants with different purposes such as governments and social enterprises beyond private business enterprises:

> The defendant need not be carrying on activities of a commercial nature … It need not therefore be a business or enterprise in any ordinary sense. Nor need the benefit which it derives from the tortfeasor's activities take the form of a profit. It is sufficient that there is a defendant which is carrying on activities in the furtherance of its own interests.[98]

Though the government's aim of advancing socio-economic objectives may be distinct from that of private persons, this does not of itself translate into immunity from government vicarious liability. The Supreme Court observed, with reference to the specific defendant in *Cox*, that "[t]he fact that those aims [of the prison service] are not commercially motivated, but serve the public interest, is no bar to the imposition of vicarious liability."[99] The court argued that vicarious liability of the government was justified based on the tortfeasor's acts which were performed as an "integral part" of the defendant's activities and for its benefit, and the "risk created by the defendant" in connection with the commission of the tort.[100] The aims of the activities carried out by the prisoners were not only for their rehabilitation but also to "contribute to the cost of their upkeep by helping with the running and maintenance of the prison".[101]

Though this was not specifically mentioned by the court, the role carried out by the prison service in feeding the prisoners was one that might have been performed by private enterprises. On this basis, the general approach in *Cox* would be consistent with the concept of deemed equality. However, where there is little or no correspondence between the roles of the Government and a private person, exceptions may be called for in some instances in order to justify government immunity in tort. That the responsibilities of the Crown and private persons are distinct in certain respects is apparent from the Second Reading of the UK Crown Proceedings

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97 Police Force Act 2004 (2020 Rev Ed), s 23 [PFA] ("Every police officer is, for the purposes of this Act, deemed to be always on duty when required to act as such and has to perform the duties and exercise the powers granted to him or her under this Act or any other written law at any time and every place where he or she may be doing duty").

98 *Cox, supra* note 71 at [30].

99 *Ibid* at [32].

100 *Ibid* at [24] and [30].

101 *Ibid* at [34].

Bill, during which the then Attorney-General of the United Kingdom, Sir Hartley Shawcross, stated as follows:

> The private citizen does not have the same kind of responsibility for protecting the public, such as the Crown possesses; he does not have the care of the public safety; he does not have the defence of the realm to consider; he is not responsible for the organisation of such great services as the Post Office. … [T]he functions of the Crown, under our constitution, involve duties and responsibilities which no subject is required to undertake, and these distinctions are inevitably, necessarily and properly reflected by various provisions of this Bill. But, subject to necessary and inevitable distinctions of that kind the broad purpose and effect of this Bill is to enable the citizen to take exactly the same kind of proceedings against the Crown, and in the same circumstances, as if the Crown were a fellow citizen.[102]

Thus, the exceptions to governmental vicarious liability were, in the eyes of the UK lawmakers, justified by the differences in the duties and responsibilities of private persons and the government. Unlike the government, a private person does not have the onus to discharge judicial duties or maintain a military to defend the country. These two major exceptions under the Singapore GPA will be examined in the next two sub-sections. In the third sub-section below, we will examine the unique case of police duties.

A. *Acts and Omissions in Discharge of Responsibilities of a Judicial Nature or in Connection with the Execution of Judicial Process*

The responsibilities of a judicial nature and in connection with the judicial process would clearly be within the domain of the Singapore government and not private persons. Section 6(3) of the Singapore GPA operates as an exception to s 5 by exempting government liability "in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process".

A similar exception is found in the CPA,[103] the Hong Kong Crown Proceedings Ordinance 1957[104] and the New Zealand Crown Proceedings Act.[105] Where the

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[102] UK, House of Commons, *Parliamentary Debates* (4 July 1947), vol 439 at col 1679 (Sir Hartley Shawcross, Attorney-General).

[103] CPA, *supra* note 1, s 2(5). See also *Mendel v Jacobs* [2009] EWHC 121; *Branch v Department for Constitutional Affairs* [2005] EWHC 550; *Hinds v Liverpool County Court* [2009] 1 FCR 474 (HC, Eng); *Quinland v Governor of Swaleside Prison* [2002] 3 WLR 807 (CA, Eng); *Wood v Lord Advocate* 1996 SCLR 278 (HC, Scot).

[104] Hong Kong Crown Proceedings Ordinance 1957 (Cap 300) (HK), s 4(5); *Cheng Chen Sing v R* [1983] 2 HKC 500 at 503-504 (HC, HK)

[105] NZ CPA, *supra* note 27, s 6(5), applied in *Payne v AG* [2005] NZFLR 846 at [9] (CA, NZ); *Young v AG* [2003] NZAR 627 at [29] (HC, NZ); *Crispin v Registrar of the District Court* [1986] 2 NZLR 246 at 249-250 (CA, NZ); *Hill v AG* BC9305406 (29 Apr 1993) (HC, NZ) [*Hill v AG*]; and *Thompson v Attorney-General* [2016] 3 NZLR 206 at [39] (SC, NZ).

alleged acts and omissions do not fall within the statutory language, the Crown or the Government would be vicariously liable.[106] The UK Human Rights 1998[107] allows, in limited circumstances, a claim in damages in respect of a judicial act that is contrary to the Convention for the Protection of Human Rights and Fundamental Freedoms,[108] which may render the Crown vicariously liable for the damages.[109]

The Singapore Court of Appeal decision in *AHQ*[110] explicates the rationales for government immunity. Two appellants sued the Singapore Government in tort in respect of two separate sets of court orders previously made against each of them by judges from the Singapore State Courts and Supreme Court respectively. The Government responded with applications to strike out the statement of claim in both lawsuits. The applications to strike out succeeded before the senior assistant registrar of the Supreme Court which decision was affirmed on appeal by the High Court, taking the view that the judges and the Government were both immune from suit.

On further appeal, the Singapore Court of Appeal endorsed, first and foremost, the long-standing common law principle of judicial immunity with a view to ensuring judicial independence.[111] Historically, at common law, judges of superior courts enjoyed immunity for acts done within as well as outside the ambit of their jurisdiction whilst the immunity for inferior courts applied only to acts done within the limits of their jurisdiction.[112] The distinction is, however, no longer significant in light of special statutory immunity clauses[113] conferring judicial immunity on District Court judges, Magistrates, Registrars and Deputy Registrars,[114] judicial officers in the Supreme Court[115] and judges of the Family Court or the Youth Court[116] for acts done in discharge of their judicial duties regardless of whether they were acting within the limits of jurisdiction. The court also noted that the purpose of judicial immunity was to safeguard the administration of justice and the finality of the judicial process, and not for the personal benefit of the judges.[117]

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[106] *Eg*, *Simpson v Attorney-General* [1994] 3 NZLR 667 (HC, NZ); and *Kirvek Management and Consulting Services Ltd v Attorney General of Trinidad and Tobago* [2002] 1 WLR 2792 (PC, UK) at [30]-[31].

[107] UK Human Rights 1998 (c 42) (UK), ss 8 and 9.

[108] Convention for the Protection of Human Rights and Fundamental Freedoms (4 Nov 1950), European Treaty Series No 5, Art 5(5) (entered into force 3 Sep 1953).

[109] *Mazhar v Lord Chancellor* [2018] 2 WLR 1304 (HC, Eng).

[110] *AHQ, supra* note 41.

[111] *Sirros v Moore* [1975] QB 118 (CA, Eng); applied in *Hinds v Liverpool County Court* [2009] 1 FCR 474 (HC, Eng); *Gallo v Dawson* (1988) 82 ALR 401 at 402 (HC, Aust). See recent decision of the High Court of Australia in *Queensland v Stradford (Pseudonym)* [2025] HCA 3 at [12] (on the immunity of judges of courts referred to in s 71 of the Australian Constitution in respect of civil suit arising out of acts done in the exercise, or purported exercise, of their judicial function or capacity).

[112] *Re McC (a minor)* [1985] AC 528 at 550 (Lord Bridge of Harwich).

[113] *Nagaenthran a/l K Dharmalingam v PP* [2019] 2 SLR 216 at [48] (CA) [*Nagaenthran*].

[114] State Courts Act (Cap 321, 2007 Rev Ed), s 68(1).

[115] Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), s 79(1).

[116] Family Justice Act 2014 (2020 Rev Ed), s 45(1).

[117] *AHQ, supra* note 41 at [27].

Based on the constitutional principle of separation of powers,[118] the Government should not interfere with the judges and judicial process;[119] as such, the Government should not be vicariously liable for the acts of judges over which they do not (and should not) have any "control or influence".[120] Thus, the default principle in s 5 of the GPA based on deemed equality cannot apply insofar as acts and omissions in discharge of judicial responsibilities are concerned.

In tandem with the separation of powers argument, the High Court judges who made the judicial decisions referred to in *AHQ*, being Supreme Court judges, were constitutional appointees vested with security of tenure until 65 years of age,[121] enjoyed protected remuneration,[122] and could only be removed from office on limited grounds upon recommendation by a tribunal.[123] Judicial commissioners, senior judges and international judges hold the same powers and enjoy the same immunities as High Court judges, though they may be appointed only for a fixed term or to hear specific cases.[124] However, the separation of powers rationale in *AHQ* might not have applied with the same force to judicial officers in the State Courts and Supreme Court, who have no security of tenure. Previously, such judicial officers, as officers belonging to the Singapore Legal Service, were subject to transfers to the legal branch of the Executive to serve as a legal officer in the Attorney-General's Chambers or in one of the government ministries. This practice has since been discontinued with the establishment of a separate Singapore Judicial Service and Judicial Service Commission from January 2022 to oversee the judicial officers.[125]

With respect to the connection between government liability and that of private persons, an interesting parallel was drawn between the court's point regarding non-interference with the judges and judicial process and the private employment context. In this regard, the court cited Barnes' commentary[126] on the rationale underlying s 2(5) of the CPA (which was *in pari materia* with s 6(3) of the Singapore statute). The argument that the Crown should not be liable for judicial acts because it should not, in the first place, interfere with the exercise of judicial functions was linked to the proposition that "a master's vicarious liability is the power of the master to control and direct the servant".[127]

Thus, the above analogy with the master-servant relationship based on "control" was utilised to justify government immunity in respect of acts done in discharge of judicial responsibilities. That being said, in modern employment practices, the employer may not always be in a position to "control" the employee's work or

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[118] See William Wade & Christopher F Forsyth, *Administrative Law* (Oxford: Oxford University Press, 2014) at 697 (cited in *AHQ*, *supra* note 41 at [14]).

[119] The Singapore Court of Appeal in *AHQ*, *supra* note 41 at [35] cited the High Court of Ireland case of *Kemmy v Ireland* [2009] IEHC 178.

[120] *AHQ*, *supra* note 41 at [35].

[121] Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) [Constitution], Art 98(1) and (2).

[122] *Ibid,* Art 98(8).

[123] *Ibid*, Art 98(3).

[124] *Ibid*, Art 95(7) and (8).

[125] See Constitution of the Republic of Singapore (Amendment) Act 2021 (No 32 of 2021); and Judicial Service (Miscellaneous Amendments) Act 2021 (No 33 of 2021).

[126] Barnes, *supra* note 4 at 391-392.

[127] *AHQ, supra* note 41 at [13].

methods of working;[128] instead, other grounds such as the integration[129] and enterprise liability[130] tests have been utilised to support the existence of an employment relationship.

Be that as it may be, it would appear that there are two main arguments in support of the acts done in discharge of responsibilities of a judicial nature as an exception to governmental vicarious liability: primarily, the constitutional principle of separation of powers between Executive and Judiciary; and subsidiarily, the parallel between judicial responsibilities and the control element in private employment. Indeed, this twofold rationale was reflected in *dicta* from the New Zealand Supreme Court decision of *Attorney-General v Chapman*[131] that, in connection with s 6(5) of the New Zealand Crown Proceedings Act 1950,[132] the independence of the judiciary would be perceived as "inconsistent with judges being employees or agents of the Crown".

B. *Acts and Omissions of Members of the Armed Forces in Connection with Execution of Duties*

A distinct role undertaken by the government is the operation and management of military forces. Under this exception to government vicarious liability, the Singapore GPA (s 14) exempts a member of the armed forces ("perpetrator")[133] and the Government from tortious liability for any acts or omissions of the perpetrator that resulted in the personal injury or death of a fellow member of the forces ("victim"). This is provided the victim was at that time (i) on duty as a member of the forces; or (ii) though not on duty as a member of the forces, the victim was on any land, premises, ship, aircraft or vehicle being used for the purposes of the forces, or on any journey necessary to enable him to report for duty or to return home after such duty.[134] Exemption from liability would also depend on the issuance of a certificate by the Minister for Finance that the victim's suffering has been or would be treated as "attributable to service".[135] There would be no exemption, however, if the perpetrator's act or omission was *not* connected with the execution of his duties as a member of the forces.[136] This issue of exemption from government vicarious liability in connection with military duties has provoked much debate both in Singapore and the UK.

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[128] *Cassidy v Ministry of Health* [1951] 2 KB 343 (CA, Eng).

[129] *Stevenson, Jordan & Harrison Ltd v MacDonald & Evans* [1952] 1 TLR 101 (CA, Eng).

[130] *BNM v National University of Singapore* [2014] 4 SLR 931 at [29] (CA); *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 184 (HC, Eng).

[131] *AG v Chapman* [2012] 1 NZLR 462 at [175] (SC, NZ), *per* McGrath and William Young JJ (cited in *AHQ*, *supra* note 41 at [15]).

[132] NZ CPA, *supra* note 27. This is similar to s 6(3) of the Singapore GPA, *supra* note 24.

[133] *Sarron*, *supra* note 30; *Nagaenthran, supra* note 113 at [47].

[134] GPA, *supra* note 24, s 14(1)(a).

[135] GPA, *supra* note 24, s 14(1)(b); and *Abdul Rahman v AG* [1985-1986] SLR(R) 705 (HC). For the UK, see *Matthews v Ministry of Defence* [2003] 2 WLR 435 (HL, UK).

[136] *Sarron, supra* note 30 at [55].

In Singapore, though the victim cannot sue the Government under the GPA, he or she would be entitled under the Singapore Armed Forces (Pensions) Regulations[137] to be compensated by the Government if he or she is injured in connection with the service as a result of performing his duty, or when on his way to work or on his way home after work.[138] This entitlement to compensation also applies to members of the Singapore Police Force.[139]

During the Second Reading of the Malaysian Government Proceedings Bill 1956, the Attorney-General[140] stated that government immunity to claims for personal injuries or death by the victim was justified generally on public policy grounds against suits for negligence arising from military training in battle conditions. The provision in the Malaysian Ordinance was in turn derived from s 10 of the CPA providing for similar exemption of government liability. During the parliamentary debate on the UK Crown Proceedings bill,[141] the then Attorney-General, Sir Hartley Shawcross noted the different roles of the Government versus the private citizen including the "the defence of the realm".

Sir Hartley Shawcross had also commented in 1947 on the necessity in the course of military training to carry out "highly dangerous" operations in "battle conditions" which would render it "impossible to apply the ordinary law of tort in regard to them, or make the Crown liable for any injury which, unhappily, results".[142] The relevant statutory provision in Singapore and the UK respectively did not, however, specify battle conditions or dangerous operations from which the personal injury or death to the victim may have resulted. That the victim was on military duty or travelling to and from such duty as stated in the Singapore statute did not necessarily mean he or she was subject to such battle conditions or dangerous operations.

Subsequently, the Minister of State for Defence[143] in the Singapore Parliament in 1986 reiterated the point concerning the difference in roles between the government and the private citizen and added that "to sue the Government under such cases would be destructive to the morale, discipline and efficiency of the service". A Member of Parliament had queried about the discrimination in the recovery of damages between the families of personnel employed in the armed forces and other ordinary citizens in respect of injuries or death occurring *outside* the Singapore Armed Forces. The exception to government vicarious liability under s 14 to reflect the government's distinct role in operating and managing a military force appeared to have resulted in a different form of perceived inequality between two groups of victims. As mentioned above, the victims who were members of the armed forces and their families would be entitled to compensation under the Singapore Armed

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[137] Singapore Armed Forces (Pensions) Regulations (2001 Rev Ed).

[138] See *Singapore Parliament Debates, Official Report* (11 Dec 1996), vol 66 at cols 972-974 (RAdm Teo Chee Hean, Second Minister for Defence).

[139] GPA, *supra* note 24, s 14(5).

[140] Federation of Malaya, Legislative Council, *Legislative Council Debates, Official Report* (8 Nov 1956), cols 1746–1751 (Thomas Vernor Alexander Brodie, Attorney-General).

[141] United Kingdom, House of Commons, *Parliamentary Debates* (4 July 1947), vol 439 at cols 1675–1753 (Sir Hartley Shawcross, Attorney-General).

[142] *Ibid.*

[143] *Singapore Parliament Debates, Official Report* (19 March 1986), vol 47 at cols 741–742 (BG Lee Hsien Loong, Minister of State for Defence).

Forces (Pensions) Regulations albeit based on a different scale from monetary compensation under tort law.

In 2017, a Member of Parliament argued in a parliamentary motion[144] for a change to the Singapore GPA to allow for civil suits by servicemen and next of kin for torts arising from "any conduct by any officer during training that conspicuously violates safety protocols, procedures, and regulations" but not for operations. According to him, training is by design subject to control measures, whilst operations are riskier and more unpredictable. The Minister for Defence, in response, referred to the High Court decision in *Sarron*[145] that the "Government and the members of the armed forces are shielded from liability in tort in order to ensure the efficiency, discipline, effectiveness and decisiveness of the armed forces in both training and operations" and that compensation is provided under the SAF Pensions regulations. The Minister was also concerned that the fear of litigation amongst members of armed forces would compromise training standards. The final outcome of the debate was to maintain the status quo, *ie*, the immunity from civil liability against members of the armed forces and the Government under s 14 of the Singapore GPA.

The UK had taken a different turn by repealing s 10 of the CPA via the enactment of the Crown Proceedings (Armed Forces) Act 1987.[146] This was prompted by concerns similar to those raised in the Singapore Parliament in 1986 relating to the injustice and discrimination between the victims who were members of the armed forces and ordinary citizens in terms of their entitlement to and the quantum of damages.[147] The repeal has led to numerous tortious actions against the UK Government initiated by soldiers injured in battle or family members of soldiers killed in action[148] not as part of military training. Tort claims by foreigners in respect of acts committed outside the UK in the course of military operations are subject to a defence based on the doctrine of Crown act of state.[149] The UK House of Commons' Defence Committee[150] observed in 2014 the "reputational risk to Armed Forces personnel and the fear that they and their legitimate actions are exposed to extensive and retrospective legal scrutiny" leading to the undermining of the "willingness of personnel to accept responsibility and to take necessary risks with the consequent impact on operational effectiveness".

The situation created by the 1987 UK statute was temporary or contingent. There was a carve-out for the Secretary of State to revive the effect of s 10 of the CPA if

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[144] *Singapore Parliament Debates, Official Report* (9 January 2017), vol 94 (Dennis Tan Lip Fong, Non-Constituency Member).

[145] *Sarron, supra* note 30.

[146] UK Crown Proceedings (Armed Forces) Act 1987 (c 25) (UK), s 1 [UK Armed Forces CPA].

[147] United Kingdom, House of Commons, *Parliamentary Debates* (13 February 1987), vol 110 at cols 567-609, (Winston Churchill, Member for Davyhulme). See also the Third Reading: United Kingdom, House of Commons, *Parliamentary Debates* (24 April 1987), vol 114 at col 925 (Winston Churchill, Member for Davyhulme).

[148] *Eg*, *Smith v The Ministry of Defence* [2013] 3 WLR 69 (SC, UK) [*Smith*]; *R (on the application of Al-Saadoon and others) v Secretary of State for Defence* [2017] 2 All ER 453 (CA, Eng).

[149] *Mohammed v Ministry of Defence; Rahmatullah v Ministry of Defence; Iraqi Civilians v Ministry of Defence* [2017] 2 WLR 287 (SC, UK).

[150] UK, Defence Committee, "UK Armed Forces Personnel and the Legal Framework for Future Operations", <https://publications.parliament.uk/pa/cm201314/cmselect/cmdfence/931/93102.htm> at [6] of "Conclusions and Recommendations".

it "appears to him necessary or expedient to do so" in specified circumstances.[151] Indeed, in the wake of the lawsuits against the UK Government, there have been calls by Policy Exchange, the UK think-tank, to revive Crown immunity from legal actions in respect of "all future 'warlike operations' overseas" under the 1987 statute.[152] One key concern is with the increased judicialisation of war.[153] The commentators argued that the courts are not the proper body "to hold the Government and the armed forces to account for the way that war is waged – by retrospectively reviewing their purchasing, training and combat decisions".[154] Instead, they proposed that the UK government should compensate injured personnel on active service regardless of fault.

C. *Acts and Omissions of Police Officers*

In contrast to the two exceptions above, there is no specific exemption from Government vicarious liability in respect of the acts and omissions of police officers under the Singapore GPA. The Singapore Police Force ("SPF") performs statutory functions – to maintain law and order, preserve public peace, prevent and detect crimes, apprehend offenders and to exercise any functions conferred on it under written law[155] – that would appear to be distinct from those typically undertaken by private persons. Yet, we note that there are Auxiliary Police Forces ("APF"),[156] private companies licensed by the SPF, that undertake similar activities. *Prima facie*, this would appear to support the principle of deemed equality between government and private persons. Nevertheless, we should note that auxiliary police officers are subject to supervision and control by the Commissioner of the SPF in respect of the examinations to be passed, schemes of training and criteria for promotions.[157]

Statutory immunity provisions limit the personal liability of police officers and, consequently, the scope of government vicarious liability. A police officer or member of the Special Constabulary (designated as a special police officer)[158] is immune from liability when acting in good faith and with reasonable care, does or omits

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[151] UK Armed Forces CPA, *supra* note 146, s 2(1).

[152] See Thomas Tugendhat & Laura Croft, *The Fog of War: An introduction to the legal erosion of British fighting power* at 12 <https://policyexchange.org.uk/publication/the-fog-of-law-an-introduction-to-the-legal-erosion-of-british-fighting-power/> [*The Fog of War*]; and Richard Ekins, Jonathan Morgan & Tom Tugendhat, *Clearing the Fog of Law* at 8 <https://policyexchange.org.uk/publication/clearing-the-fog-of-law-saving-our-armed-forces-from-defeat-by-judicial-diktat/> [*Clearing the Fog of War*]. The Policy Exchange report also raised issues relating to the European Convention on Human Rights which are not applicable to Singapore and beyond the scope of this paper.

[153] *Smith*, *supra* note 148 at [150] *per* Lord Mance; and *The Fog of War*, *ibid* at 10.

[154] *Clearing the Fog of Law*, *supra* note 152 at 7.

[155] PFA, *supra* note 97, s 4(1).

[156] *Eg*, Certis CISCO Auxiliary Police Force, SATS Auxiliary Police Force and Aetos Auxiliary Police Force. See Auxiliary Police Forces (GN No 2337/2023).

[157] Auxiliary Police Forces Regulations 2004, Rg 2, 4 and 6(5).

[158] PFA, *supra* note 97, s 66(2) and 67(1)(c). The Special Constabulary comprise full-time national servicemen enlisted in the Special Constabulary, operationally ready national servicemen enlisted in the Special Constabulary, and volunteers and volunteer ex-NSmen enrolled as members of the Special Constabulary.

to do anything, in the execution or purported execution of the Police Force Act or any other written law.[159] This is in addition to specific provisions on the immunity of police officers and members of the Special Constabulary (designated as special police officers)[160] with respect to acts done in compliance with a warrant purporting to be issued by any competent authority according to the Police Force Act.[161] These special police officers, when mobilised for active service, have the same protection and immunities as police officers of similar rank.[162] Under the Mental Health (Care and Treatment) Act,[163] police officers and special police officers have immunity from civil proceedings with respect to any act done under the statute unless they have acted in bad faith or without reasonable care. Hence, where the police officer acts in bad faith in apprehending an individual under the statute, the police officer would not be legally protected.[164]

Auxiliary police officers who are employed by the APF possess the same powers, privileges and immunities as police officers.[165] More specifically, auxiliary police officers (as well as police and public officers) are protected from legal liability for anything done or omitted to be done in good faith and with reasonable care in the execution or purported execution of Infrastructure Protection Act 2017.[166] A "public officer" may be appointed as an auxiliary police officer,[167] but the Police Force Act makes it clear that government vicarious liability does not arise if the auxiliary police officer is not employed by the government.[168]

Hence, the case of government vicarious liability arising from alleged tortious acts and omissions of police officers presents a unique "middle of the road" approach. The roles of policing are not considered exclusive to the government but may be performed by private persons, albeit with supervision and control exercised by the public sector. There is no specific exemption from government vicarious liability in the GPA, but its scope is limited by certain statutory immunity provisions applicable to police officers and auxiliary police officers.

IV. Gaps in the Application of Deemed Equality?

The distinction in functions between the government and private persons highlighted above may not be the only justification for exempting government liability in tort. As we will discuss below, an exception has been made in the GPA even in respect of tasks undertaken by the government that are capable of being (and which have been) carried out by private persons. On the converse side of the coin, we will

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159 *Ibid*, pursuant to the Police Force (Amendment) Act 2021 (No 21 of 2021), s 114A.
160 *Ibid*, s 66(2) and 67(1)(c).
161 *Ibid*, s 25.
162 *Ibid*, s 67(3).
163 Mental Health (Care and Treatment) Act 2008 (2020 Rev Ed), s 25(1).
164 *Mah Kiat Seng v AG* [2024] 5 SLR 1180 (HC).
165 Subsidiary Legislation Supplement No S 626/2004 under the PFA, *supra* note 97. See also *Simon Suppiah Sunmugam v Chua Geok Teck* [2012] SGHC 73 at [80].
166 Infrastructure Protection Act 2017 (2020 Rev Ed), s 81.
167 PFA, *supra* note 97, s 92(2).
168 *Ibid*, s 105(2).

also enquire whether the concept of deemed equality can justify the imposition of vicarious liability on the government even with respect to roles that are generally performed by the government (*eg*, prosecutorial functions). We will discuss two potential gaps in the application of deemed equality below.

A. *Acts or Omissions of Public Officers in the Exercise of Public Duties*

It is argued that not all exceptions to governmental liability involve duties that are peculiar to or are generally reserved for the government. The construction or maintenance of public transport, public infrastructure, public buildings and housing projects and so on – responsibilities which could conceivably be undertaken by private enterprises – is a case in point. Private corporations have been engaged in construction projects awarded by the Singapore Land Transport Authority, a statutory board, to construct lines for the Mass Rapid Transit, a public railway system in Singapore.[169] Certain public housing projects[170] under the charge of the Housing and Development Board, another statutory board, have been undertaken by private developers. Furthermore, the former Public Works Department belonging to the Government, which had undertaken public works in the past, has been privatised since 1999.[171]

Nevertheless, it is provided in s 7(1) of the Singapore GPA that the Government will not be liable in tort for the act or omission of a public officer in the exercise of the public duties of the Government.[172] The term "exercise of the public duties" includes:

> (a) the construction, maintenance, diversion and abandonment of railways, roads or bridges; (b) the construction, maintenance and abandonment of schools, hospitals or other public buildings; (c) the construction, maintenance and abandonment of drainage, flood prevention and reclamation works;[173] and (d) the maintenance, diversion and abandonment of the channels of rivers and waterways.[174]

In essence, s 7 operates as an exception to government vicarious liability in s 5 as discussed above. The original provision was enacted during the colonial period

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[169] *Eg*, Ssangyong, "Ssangyong E&C's Experience-Backed Expertise Captivates Singapore", 22 March 2020 <https://www.ssyenc.co.kr/en/mobile/promote/ssyenc_info_view.asp?seq=3827>; and Railway Technology, "Thomson-East Coast Line", 30 November 2015 <https://www.railway-technology.com/projects/thomson-east-coast-line/>.

[170] *Eg*, the HDB Design and Build scheme: National Library Board, "Design and Build Scheme is introduced" <https://www.nlb.gov.sg/main/article-detail?cmsuuid=16832579-04f7-4578-bf4d-65bc2d55cf90>; and the Design, Build and Sell scheme: National Library Board, "Introduction of Design, Build and Sell Scheme (DBSS) by HDB" <https://www.nlb.gov.sg/main/article-detail?cmsuuid=4a43df93-2199-4907-b31d-de216e111a22>.

[171] It was renamed as PWD Corporation and later as CPG Corporation in 2002.

[172] *Obiter dicta* in *Government of Malaysia v Lim Kit Siang and United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12 (FC, M'sia).

[173] *Bayangan Sepadu Sdn Bhd v Jabatan Pengairan dan Saliran Negeri Selangor* [2021] 1 MLJ 322 at [188] (FC, M'sia).

[174] GPA, *supra* note 24, s 7(2).

when the Crown typically undertook "works which, in England, are usually performed by private persons".[175] Thus, the statutory exception could be justified at that time based on the distinct role of the Crown from that of private persons.

On the face of it, the exception and the scope of government immunity in tort would appear to be very broad due to the word "includes" in the definition of "exercise of the public duties" in s 7(2). Notwithstanding this, the Court of Appeal has interpreted the term "public duties" restrictively and limited it to the duties enumerated in s 7(2)(a) to (d) above.[176] According to the court, to interpret the words "public duties" in their "popular sense" would lead to "intolerable uncertainties".[177] The government counsel's alternative interpretation that "public duties" are duties which the Government is obliged to carry out would not be helpful, given the different possible bases for the obligation, whether legal, moral or political.[178]

The court's adoption of a restrictive definition of "public duties" is welcomed. It restricts the scope of government immunity in tort for duties that could well be undertaken by private persons. Nevertheless, the government would continue to enjoy immunity in respect of the exercise of the enumerated public duties in s 7(2) from a range of tortious claims. Aggrieved victims would not be entitled to sue the government in torts such as nuisance, the rule in *Rylands v Fletcher*,[179] and breach of statutory duty for the acts and omissions of the government and public officers in the exercise of the enumerated public duties. Only claims arising from negligence or trespass in the execution of works of construction or maintenance undertaken by the Government in the exercise of its public duties are permitted against the Government under s 7(3).

There does not appear to be any clear grounds to differentiate the above tortious claims for which the government would be immune from the claims in negligence and trespass. Furthermore, even though it is recognised that the enumerated public duties relate to works on public infrastructure and buildings, the reality is that unlike the government, private persons, including corporations engaged in similar public works, would not be immune from the abovementioned tortious claims. In this sense, there is a doubt as to the consistency of application of the concept of deemed equality between the government and private persons. In view of the present involvement of private corporations in public construction works and the privatisation of erstwhile government departments that had undertaken public works, the statutory provision would seem to be out of step with the times.

B. *Prosecutorial Responsibilities*

On the possible gaps in the application of deemed equality, one pertinent issue is whether government vicarious liability can arise from tortious claims made against prosecutors. If we accept that the prosecutorial function is a governmental function

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[175] *The Attorney-General of the Straits Settlements v Wemyss* (1888) 13 AC 192 at 197.
[176] *Swee Hong*, *supra* note 31 at [38]-[39].
[177] *Ibid* at [40].
[178] *Ibid* at [40].
[179] *Rylands v Fletcher* (1868) LR 3 HL 330.

not generally performed by private persons,[180] there is justification for exempting the government from vicarious liability. However, the Singapore GPA does not explicitly endorse this position.

First and foremost, the wide scope of prosecutorial discretion is generally acknowledged in common law jurisdictions such as the UK[181] and Canada,[182] based on the doctrine of separation of powers.[183] In a similar vein, in Singapore, the power vested in the Attorney-General to "institute, conduct or discontinue any proceedings for any offence" under the Constitution[184] is broad though not absolute.[185] The Singapore judiciary has taken the position that "all legal powers, even a constitutional power, have legal limits. The notion of a subjective or unfettered discretion is contrary to the rule of law".[186] This legal position was endorsed in Malaysia[187] which has a similar constitutional provision on prosecutorial discretion.[188] There is no immunity conferred on the Singapore Attorney-General if the prosecutorial power was exercised in bad faith for an extraneous purpose, or where its exercise contravened constitutional rights.[189] In addition, an accused person who has been acquitted is entitled to seek monetary compensation against the Public Prosecutor directly for "frivolous or vexatious" prosecution.[190] We will have to consider if the acts or omissions of prosecutors may give rise to tortious liability and whether the Government may be vicariously liable. Relevant tort claims include malicious prosecution and misfeasance in public office but not negligence.[191] In Canada, whilst the Crown prosecutors and Attorney-General may be sued in tort (for malicious prosecution) by *accused persons* in respect of their decision to prosecute,[192] the Crown

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[180] Private prosecutions may be initiated by an individual for summary cases before a Magistrates' Court in respect of offences with imprisonment for a term not exceeding three years or punishable with a fine only (Criminal Procedure Code 2010 (2020 Rev Ed), s 11(10) [CPC]). The Public Prosecutor may by fiat permit an individual to pursue private prosecution (CPC, s 12). However, the Public Prosecutor has the power to take over the conduct of the prosecution at any stage of the proceedings and continue or discontinue the prosecution (CPC, s 13).

[181] *Eg*, *R v Director of Public Prosecutions ex parte C* [1995] 1 Cr App R 136 (HL, UK); *R (Bermingham) v Director of the Serious Fraud Office* [2007] 2 WLR 635 (HC, Eng).

[182] *Eg*, *Kostuch v Attorney General of Alberta* (1995) 128 DLR (4th) 440 (CA, Alta).

[183] *R v Power* (1994) 89 CCC (3d) 1 at [39] (SC, Can); and *R (Corner House Research) v Director of the Serious Fraud Office (JUSTICE intervening)* [2009] 1 AC 756 at [31] (Lord Bingham).

[184] Constitution, *supra* note 121, Art 35(8).

[185] *Law Society of Singapore v Tan Guan Huat Neo Phyllis* [2008] 2 SLR 239 at [146] (HC) [*Tan Guan Huat Neo Phyllis*]; and *Lim Chit Foo v PP* [2020] 1 SLR 64 at [22] (CA).

[186] *Tan Guan Huat Neo Phyllis, ibid* at [149], citing *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86] (CA).

[187] *Peguam Negara v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan)* [2019] 3 MLJ 443 at [76] (FC, M'sia).

[188] Federal Constitution (2010 Reprint), Art 145(3).

[189] *Tan Guan Huat Neo Phyllis, supra* note 185 at [149]. Other Singapore cases include *Ramalingam Ravinthran v AG* [2012] 2 SLR 49 (CA); *Quek Hock Lye v PP* [2012] 2 SLR 1012 (CA); and *Gobi a/l Avedian v AG* [2020] 2 SLR 883 at [47] (CA). For Malaysia, see *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail* [2014] 11 MLJ 48 at [99] (HC); *Dato' Pahlawan Ramli bin Yusuff v Tan Sri Abdul Gani bin Patail* [2015] 7 MLJ 763 at [74] and [76] (HC).

[190] Criminal Procedure Code (Cap 68, 2012 Rev Ed), s 359(3). The statutory limit prescribed is S$10,000. See also *Parti Liyani v PP* [2021] SGHC 146 at [116] and [126].

[191] *Elguzouli-Daf v Metropolitan Police Commissioner* [1995] 2 WLR 173 (CA, Eng) [*Elguzouli-Daf*].

[192] *Proulx v Quebec (Attorney General)*, 2001 SCC 66; [2001] 3 SCR 9 (SC, Can); *Miazga v Kvello Estate* [2009] 3 SCR 339 (SC, Can).

enjoyed immunity from suit on the basis that the decision to prosecute was a "judicial" decision under the Ontario Proceedings Against the Crown Act.[193] The latter statute, which has since been repealed,[194] contained statutory language similar to s 6(3) of the Singapore GPA. McIntyre J in *Nelles v Ontario*[195] cited the old case of *The Queen v Comptroller-General of Patents, Designs, and Trade Marks*,[196] which appeared to regard the exercise of discretion by the Attorney-General as similar to exercising a "judicial" function. More recently, the majority in the Supreme Court of Canada in *Ontario v Clark*[197] refused to allow *police officers* to sue the Crown prosecutors in misfeasance in public office for fear of undermining prosecutorial independence and objectivity and jeopardising the accused's interests. There was therefore no government vicarious liability.

The central question is whether the Attorney-General's exercise of prosecutorial discretion and/or undertaking of prosecutorial functions amounting to a tortious act or omission would qualify as discharging responsibilities of a "judicial nature" under s 6(3) of the Singapore GPA. Extrapolating from McIntyre's judgement in *Nelles* discussed above, does the fact that the role involves an exercise of discretion in connection with prosecutorial functions imply that it discharges responsibilities of a "judicial nature"? At first blush, we may note similarities between the exercise of prosecutorial discretion[198] and judicial decision-making[199] in that both would normally encompass legal reasoning in the exercise of discretion and take account of public interest.

However, there is a difference between the objective of prosecution, which is to determine whether there are circumstances justifying the initiation of criminal proceedings and that of judging in order to ascertain the truth of the matter brought

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[193] Ontario Proceedings Against the Crown Act, *supra* note 48, s 5(6) ("No proceeding lies against the Crown under this section in respect of anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in the person or responsibilities that the person has in connection with the execution of judicial process"); on Proceedings Against the Crown Act, RSO 1980, c 393 (O), s 5(6), see *Nelles v Ontario* [1989] 2 SCR 170 at [5] (Lamer J delivering the judgement of Dickson CJ and Lamer and Wilson JJ)(with whom La Forest J agreed); and [65] (McIntyre J) (with whom Heureux-Dube J agreed) (SC, Can) [*Nelles*].

[194] Repealed as of 1 July 2019, and has since been replaced by the Crown Liability and Proceedings Act 2019 SO 2019 Sch 17, c 7 (O). s 9(2)(b) states: "Nothing in this Act subjects the Crown to a proceeding in respect of, … (b) anything done or omitted to be done by a person while discharging or purporting to discharge responsibilities of a judicial nature vested in the person or responsibilities that the person has in connection with the execution of judicial process".

[195] *Nelles*, *supra* note 193.

[196] *The Queen v Comptroller-General of Patents, Designs, and Trade Marks* [1899] 1 QB 909 at 913-14 (AL Smith LJ) (CA, Eng).

[197] *Ontario v Clark* 2021 SCJ No 18 at [40] and [58]-[59] (Wagner CJ and Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin and Kasirer JJ; Côté J dissenting) (SC, Can).

[198] See Lucien Wong, Attorney-General of Singapore, "Prosecution in the Public Interest" at Singapore Law Review Annual Lecture 2017: (combination of reasonable prospect of securing convictions based on the evidence and law (at [9]) and public interest considerations which include the following: "First, prosecutions are conducted in the name of the public, offences are prosecuted for the good of the public. Thirdly, proceedings are conducted according to values expected by the public, and finally, action is taken in the eye of the public" – see [14]).

[199] *PP v Norzian bin Bintat* [1995] 3 SLR(R) 105 at [44], [46], [52] and [55] (HC) (judicial discretion to grant consent to composition of offence based on rules of reason and justice, the provisions of the law and the public interest).

before the courts.[200] On the latter role, judges have to observe the principle of *audi alteram partem*,[201] maintain detachment and objectivity in the assessment of evidence from litigating parties,[202] and provide reasons for its decision on questions of law as well as fact.[203]

On the other hand, in view of the wide berth of prosecutorial discretion stipulated in the Singapore Constitution, the government should not, consistent with the constitutional separation of powers, interfere with the Attorney-General's exercise of prosecutorial discretion that may give rise to tortious liability. This can be compared with the principle of non-interference in respect of the judge's decision-making in court proceedings in *AHQ*. Furthermore, it cannot be said that the Attorney-General, in exercising prosecutorial discretion, was acting on behalf of the government. These arguments would incline against imposing government vicarious liability in respect of the tortious acts and omissions of the prosecutors. Hence, based on the macro rule of law considerations, it is fitting that government vicarious liability be exempted in respect of the tortious acts and omissions of the prosecutor.

At common law, there exists the independent discretion rule that exempts the government from vicarious liability in respect of the acts of a public officer who is charged with "a discretion and responsibility in the execution of an independent legal duty".[204] This rule thus operates as an exception to vicarious liability provided the officer or employee was exercising or fulfilling an independent duty or power.[205] The scope of the discretionary duty depends largely on the nature of the powers vested in the public officer by statute.[206] The rule, which had been primarily applied to the acts of the police,[207] has also been extended to other public officers.[208] Insofar as prosecutors are concerned, the independent discretion rule has been utilised to exempt the UK Crown Prosecution Service ("CPS") from vicarious liability in respect of the duties imposed on CPS prosecutors by statute and at common law.[209] In Australia, as the Crown prosecutors were regarded as exercising an "independent discretion" without interference from the State, the latter would not be liable in respect of the prosecutors' alleged misfeasance.[210]

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[200] *Mann v O'Neill* (1997) 145 ALR 682 (HC, Aust) at 689 cited by Singapore Court of Appeal in *Goh Lay Khim* v *Isabel Redrup Agency Pte Ltd* [2017] 1 SLR 546 at [75] (CA).

[201] See *PP v Dato Yap Peng* [1987] 2 MLJ 311 (SC, M'sia). Salleh Abas LP (dissenting) stated that the court has to "listen to both parties before deciding to exercise" discretion whilst for the Public Prosecutor, he is "completely guided by the evidence available before him and consideration of public interest".

[202] *Mohammed Ali bin Johari v PP* [2008] 4 SLR (R) 1058 (CA); *Yuill v Yuill* [1945] P 15 at 20 (CA, Eng).

[203] *Thong Ah Fat v PP* [2012] 1 SLR 676 at [14]-[15] (CA); *Lim Tion Choon (Lin Changchun) v PP* [2024] SGHC 303.

[204] *Little v Commonwealth* (1947) 75 CLR 94 (HC, Aust) (Dixon J). See also *Field v Nott* (1939) 62 CLR 660 at 675 (HC, Aust) (Dixon J) [*Field v Nott*].

[205] *Cubillo v Commonwealth of Australia (No 2)* (2000) 174 ALR 97 (FC, Aust) (O'Loughlin J). The appeal against the decision was dismissed in *Cubillo v Commonwealth of Australia* (2001) 183 ALR 249 (Full Court of the Federal Court, Aust).

[206] Joachim Dietrich & Iain Field, "Statute and Theories of Vicarious Liability" (2019) 43(2) Melbourne UL Rev 515.

[207] *Enever v The King* (1906) 3 CLR 969 (HC, Aust); *R v Metropolitan Police Commissioner Ex p Blackburn* [1968] 2 WLR 893 (CA, Eng).

[208] *Eg*, *Field v Nott, supra* note 204.

[209] *Elguzouli-Daf, supra* note 191 at 184 (Steyn LJ), citing *Field v Nott, ibid* at 675 (Dixon J).

[210] *Grimwade v State of Victoria* (1997) Australia Torts Reports 81 (SC, Vic).

The rule has, however, been subject to critique.[211] To the extent that the independent discretion rule constitutes an exception to vicarious liability in respect of the acts of public officers only,[212] it will result in a gap in the application of deemed equality with private persons.[213] The practical effect would be to exempt the government from vicarious liability in similar situations where private persons might be found liable. To date, Singapore has not adopted the independent discretion rule. It is suggested that the principle of independent discretion should only be applied within narrow boundaries to justify the exemption of government vicarious liability for prosecutorial functions in Singapore, and not public officers generally. The arguments for the narrow application may be based on the separation of powers doctrine and the wide scope of prosecutorial discretion vested in the Attorney-General under the Singapore Constitution. As proposed above, the policy considerations include the following: that the exercise of prosecutorial discretion constituting tortious acts or omissions should be outside the control of and not be subject to interference by the Government, and that the prosecutor performs a function distinct from that of private persons.

For public officers generally, the scope of the independent discretion rule, if it were applicable in Singapore, would be limited in any event by s 5 of the Singapore GPA which states that "any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government". Thus, where the public officer purports to act in good faith under a legal duty but commits a tort within the scope of or in the course of employment, the Government should remain vicariously liable on the basis of a "deemed agency" similar to the position in the UK[214] and New Zealand.[215]

V. Conclusion

The concept and application of deemed equality have been influential (though not exclusively so) in shaping the scope of government liability and immunity in tort in the CPA and the Singapore GPA. The concept underpins government vicarious liability as a form of secondary liability based on the tortious acts and omissions of public officers as employees of the government under the GPA in line with developments at common law applicable to private persons generally. Nonetheless, specific statutory language would likely prevail over inconsistent common law developments. The recent common law extension of vicarious liability to embrace

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[211] Susan Kneebone, "The Independent Discretionary Function Principle and Public Officers" (1990) 16(2) Monash UL Rev 184; Paul Finn & Kathryn J Smith, "The Citizen, the Government and "reasonable expectations"' (1992) 66 ALJ 139 at 145; M R Goode, "The Impositions of Vicarious Liability to Torts of Police Officers: Considerations of Policy" (1975) 10 Melbourne UL Rev 47.

[212] But the rule has been applied albeit on an exceptional basis to exempt the liabilities of private companies in *Oceanic Crest* (1986) 160 CLR 626 at 648 (HC, Aust).

[213] See Iain Field, "Good Faith Protections and public sector liability" (2016) 23 TLJ 210 at 220.

[214] CPA, *supra* note 1, s 2(3).

[215] NZ CPA, *supra* note 27, s 6(3). See *Osgoode v AG* (1971) 13 MCD 4, cited in *Hill v AG*, *supra* note 105 at 17.

relationships "akin to employment" would appear to have limited application to government vicarious liability under s 6 of the Singapore GPA premised on the personal liability of public officers.

The exception to government vicarious liability in respect of responsibilities of a judicial nature and execution of judicial process are generally justified by the distinct governmental role in the running of the judiciary. As enunciated in the *AHQ* decision, the position is further supported by important values undergirding the legal system such as the principle of judicial immunity, separation of powers and non-interference by the government in judicial decisions. As for government immunity to tort for personal injuries and death caused to a member of the armed forces by a fellow member discharging or in the course of discharging military duties, the government has, despite the calls for changes to the GPA in Parliament, remained firm in their conviction that military commanders engaged in military training or battle should not have to worry about looming lawsuits in negligence. In the unique case of police duties, which are discharged by both the public police force and private auxiliary police forces in Singapore, there is no exemption from government vicarious liability though the scope is restricted by statutory immunity clauses limiting the personal liability of the officers in specified circumstances.

As public duties cover the construction and maintenance of public infrastructure and facilities that can be undertaken by the government and private corporations alike, there are no clear reasons under the concept of deemed equality why the government (but not the private corporations) should be immune from tortious claims for carrying out such public duties save in negligence and trespass. Thus, not all exceptions to government liability in the GPA can be fully explained by the differences in functions between the government and private persons. Prosecutorial functions have not been clearly designated as an exception to government vicarious liability in the GPA even though they are generally performed by the government. Nevertheless, rule of law considerations (separation of powers and non-interference of the government in prosecutorial discretion) should incline against imposing government vicarious liability in respect of the tortious acts and omissions of the prosecutor.