

SOME AUSTRALIAN REFLECTIONS ON *RONCARELLI V. DUPLESSIS*

*Mark Aronson**

Roncarelli v. Duplessis figures far more frequently in Australia's secondary literature than in its court decisions, and it is noted not for its invalidation of Prime Minister Duplessis's actions, but for its award of damages where judicial declaration of invalidity would usually be the only remedy. Invalidating Duplessis's interference with Roncarelli's liquor licence would have been the easy part of the case had it been tried in Australia. Australian statutes afforded good protection to liquor licensees, and general administrative law principles confined seemingly unfettered discretionary powers in less solicitous statutory regimes. In addition, the constitutional abolition of internal trade barriers used to be taken as banning unfettered regulatory powers over interstate traders.

Duplessis's tort liability was the hard part. His assumption of legal power was not deliberate, but it was extraordinarily indifferent to questions of legality. Justice Rand characterized this as "malice", which in turn triggered liability to a uniquely public law tort known nowadays as misfeasance in public office. That tort is likely to cover more forms of non-deliberate official misconduct in Canada than in Australia, whose High Court usually avoids open-ended legal principles, particularly those according immediate operative force to substantive conceptions of the rule of law.

En Australie, l'affaire *Roncarelli c. Duplessis* est plus souvent traitée dans la doctrine que dans la jurisprudence. Elle est connue non pas pour son invalidation des actes du Premier ministre Duplessis, mais pour son octroi de dommages-intérêts dans une situation où une déclaration judiciaire d'invalidité aurait normalement constitué le seul recours possible. Si la cause avait été entendue en Australie, l'invalidation de l'interférence de Duplessis aurait été une question facile à résoudre. Les lois australiennes offraient une forte protection aux détenteurs de permis d'alcool et les principes du droit administratif confinaient les pouvoirs discrétionnaires sans entraves aux régimes statutaires d'intérêt moindre. De plus, l'abolition constitutionnelle des obstacles au commerce international était considérée comme interdisant l'exercice de pouvoirs régulateurs sans entraves sur les commerçants effectuant du commerce entre États.

La question de la responsabilité délictuelle de Duplessis était la plus difficile. Son utilisation du pouvoir légal n'était pas délibérée, mais illustre une indifférence flagrante face aux questions de légalité. Le juge Rand a qualifié cette attitude de « malice », ce qui a engendré la responsabilité de Duplessis pour un délit propre au droit public, aujourd'hui appelé faute dans l'exercice d'une charge publique. Au Canada, ce délit est susceptible de couvrir plus de types d'inconduite non délibérée de la part d'officiers du gouvernement qu'en Australie où la High Court of Australia évite généralement les principes juridiques non limitatifs, plus particulièrement ceux qui rendent immédiatement opérationnelles les conceptions substantives de la primauté du droit.

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Introduction

For two days in September 2009, more than a dozen academics pored over different aspects of *Roncarelli v. Duplessis*,¹ debating different visions of what it might first have meant, what it might now mean, its political significance, and its legal importance, both normative and doctrinal. My contribution is to look for some of the doctrinal consequences of Justice Rand's deployment of a substantive understanding of the rule of law—a principle that he said requires “recourse or remedy” for administrative action “dictated by ... the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty.”² It is a contribution, however, that I offer with some diffidence, because it is obviously fraught for an Australian lawyer to look at a famous old Canadian case, particularly considering that Australia's courts and tribunals have given it only the briefest attention.³ A foreigner reading *Roncarelli* is ill-equipped to appreciate fully both its provenance and its trajectory, and is tempted to take its judgments at face value, as if each of its apparent issues had been of equal importance, novelty, and difficulty in its day. It might therefore be more productive if I focus largely on Justice Rand's reasons for awarding damages to Frank Roncarelli, and compare those with the likely response (both then and now) of the High Court of Australia had it been faced with evidence of such an obvious abuse of power as had occurred in *Roncarelli*.

I look first at Justice Rand's need to deploy the rule of law to get around the *Alcoholic Liquor Act*,⁴ which seemingly invested the Attorney General with unfettered power.⁵ Australian courts would have gotten around that problem without invoking the rule of law. General administrative law principles had long established some inroads into statutory grants of discretionary powers. Some statutory licensing regimes provided their own protective mechanisms, and business interests operating across state lines received constitutional protection that the High Court of Australia read as limiting administrative discretion. Second, I look at Justice Rand's appeal to the rule of law to deliver a damages remedy to Roncarelli—a remedy whose implicit predicate was the need specifically to develop public law principles of tort liability to meet those exceptional

¹ [1959] S.C.R. 121, 16 D.L.R. (2d) 689 [*Roncarelli* cited to S.C.R.].

² *Ibid.* at 142.

³ An electronic search of Australia's largest case base (Australasian Legal Information Institute <<http://www.austlii.edu.au>>) produced only seven court and tribunal decisions mentioning *Roncarelli*.

⁴ R.S.Q. 1941, c. 255.

⁵ The defendant was both prime minister and Attorney General of Quebec. The most obvious legal error the defendant made was in his capacity as Attorney General, in assuming that he could exercise a power vested in another by statute.

cases of public officials whose gross abuse of their power harms individuals without violating any of their legally protected interests. The public tort has tracked in broadly similar fashion in Canada, Britain, and Australia, but Australia's reluctance to use the language of the rule of law as an operative legal principle might soon see some significant divergence.

I. Legalism and the Rule of Law

Roncarelli needed judicial protection because the relevant statute gave him none. His annually renewable liquor licence was at the mercy of a baldly stated bureaucratic discretion: "The Commission may [cancel] any permit at its discretion."⁶ The *Alcoholic Liquor Act* required neither hearings nor reasons, and it stipulated no grounds. Despite this, Justice Rand deployed several standard interpretive techniques and one not-so-standard technique (the rule of law) to "supply the omission of the legislature."⁷

Roncarelli would have had considerably more statutory protection if he had been trading in Australia's Sydney instead of Canada's Montreal.⁸ In Australia, he would have needed a liquor "permit", which was less regulated than a publican's "licence" and easier to obtain.⁹ Annual renewals of Australian permits were virtually automatic.¹⁰ Licences could be cancelled for serious criminal convictions or for at least four lesser convictions over the previous year, and permits were revocable on the grounds of the neighbourhood's interests or any other reasonable cause. Magistrates determined all grants and revocations, with very generous appeal rights. Licences and permits passed to their holders' spouse or adult children in the event of death. The same applied where licensees were imprisoned for felony, and appropriately adapted transmission provisions also applied for both licences and permits in the event of bankruptcy and insanity. Therefore, even though they needed annual renewal, the permits and licences were a good deal more secure in Sydney than in Montreal.

⁶ *Alcoholic Liquor Act*, *supra* note 4, s. 35(1).

⁷ *Cooper v. Board of Works for the Wandsworth District* (1863), 14 C.B. (N.S.) 180 at 194, 143 E.R. 414, Byles J.

⁸ At the time of the events that gave rise to the *Roncarelli* litigation, the relevant Australian statutes were *Liquor Act 1912* (N.S.W.) (which conferred jurisdiction on the magistrates) and *Justices Act 1902* (N.S.W.) (which granted rights of appeal from the magistrates).

⁹ The criteria related to local needs and amenity, the condition of the premises, applicants' compliance with the relevant laws, and their character and reputation.

¹⁰ Although the police, local residents, and commercial competitors could lodge objections on the same grounds, that applied to objections to first-time applications.

Although Sydney's restaurateurs had greater legislative protection than their Montreal counterparts, there were other regulatory domains that appeared on their face to be as discretionary as that in *Roncarelli*.¹¹ Even these, however, would have been judicially construed so as to require that the discretions be exercised by reference only to considerations having some rational and functional connection to the legislation's regulatory objects. Furthermore, in its inimitable "dense, grinding judicial style",¹² the High Court of Australia back in *Roncarelli*'s time was interpreting a constitutional guarantee of free trade across state borders as necessarily requiring statutory limits to administrative discretion. For its part, the High Court of Australia in these cases scarcely mentioned the highest ideals of the rule of law, but it made very clear its concerns about the potential for the executive's arbitrary interference with the rights of private property.¹³ Justice Rand's judgment style is less technical than that of the High Court of Australia, but his invocation of the rule of law may have been triggered by similar concerns for middle-class status and its members' property rights.

There are undoubtedly several reasons why those in the liquor trade had more legislated protections in Sydney than in Montreal in the late 1940s, but it has been a long time since liquor and the rule of law formed part of the same debate in Australia. It has been so long, in fact, that no one used the language of the rule of law back then; rather, they spoke of the rights of Englishmen, and the foremost of these were the rights of person and property.

The present Chief Justice of New South Wales wrote that Australia has experienced only two periods of flagrant breach of the rule of law.¹⁴ His account of history was too kind, but his first example did involve alcohol. The event was the military overthrow of Governor Bligh (his second mutiny) in 1808, followed by an interregnum of almost two years of serious instability. It eventually became known as the Rum Rebellion, although it in fact had almost nothing to do with alcohol and a lot to do with

¹¹ For example, Regulation 9(2) of the *National Security (Economic Organization) Regulations 1944* (Cth.) invested the Treasurer "in his absolute discretion" to impose conditions upon a person seeking permission to purchase land. The High Court of Australia held that so far as it related to land transactions, the Treasurer's discretion was confined to considerations relevant to the property's value and use, and therefore could not be exercised to require purchasers to invest in war bonds: *Shrimpton v. Commonwealth* (1945), 69 C.L.R. 613, [1945] A.L.R. 125 [*Shrimpton* cited to C.L.R.] (where many of the cases concerning seemingly unfettered discretions are discussed).

¹² Hon. Sir Anthony Mason, "Justice of the High Court" in Timothy L.H. McCormack & Cheryl Saunders, eds., *Sir Ninian Stephen: A Tribute* (Carlton, Australia: Miegunyah Press, 2007) 3 at 5.

¹³ For the leading cases, see *infra* note 33.

¹⁴ Hon. James Spigelman, "Bicentenary of the Coup of 1808" (2008) 12 *Legal Hist.* 1 at 13.

rights of property, speculative development, due process, and (being Sydney) harbour views.¹⁵

Like any other country's ultimate court of appeal, the High Court of Australia is not averse to talking about the rule of law, or indeed to singing its praises. However, except where this is a rhetorical flourish, the songs are usually about identifying the structure, processes, and values of the judicial branch of Australia. The immediate aim of the High Court of Australia's version of the rule of law is the protection of the courts themselves, although, of course, it has been claimed that there are trickle-down benefits for everyone else.¹⁶ Beyond the protection of the judicial branch, and in the absence of either an entrenched or a statutory charter of rights, the High Court of Australia's hymn sheet is necessarily more brief than that of any comparable appellate court. Judicial review, for example, may deliver on rule of law values, but they have no "immediate normative operation."¹⁷ Similarly, the High Court of Australia has rejected an attempt to create a new constitutional tort of breaching the rule of law by causing intentional harm.¹⁸ This court wants rules, and the smaller and more precise the rules are, the more comfortable it feels.¹⁹ It expresses hostility to "top down" reasoning,²⁰ and its commitment to doctrinal stability is so strong that on one view, counsel needs leave before questioning a High Court of Australia precedent, at least in constitutional cases.²¹

¹⁵ See also Rt. Hon. H.V. Evatt, *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (Sydney: Angus & Robertson, 1938). The second event involved a racist colonial premier appealing to popular prejudice by refusing, for a short time, to obey a habeas corpus designed to let Chinese passengers disembark.

¹⁶ The High Court of Australia's most famous invocation of the rule of law was in *Australian Communist Party v. Commonwealth of Australia* ([1951] HCA 5, 83 C.L.R. 1 at 193). In this case, it was held that a statute with appalling consequences for civil liberties was invalid for a number of reasons, but largely for its attempt to prevent the court from having the last word on a particular issue. For a similar, more recent response to an ouster clause, see *Plaintiff S157/2002 v. Commonwealth of Australia*, [2003] HCA 2, 211 C.L.R. 476 at paras. 5, 103-104 [*Plaintiff S157/2002*].

¹⁷ *Re Minister for Immigration and Multicultural Affairs, Ex parte Lam*, [2003] HCA 6, 214 C.L.R. 1 at para. 72, 195 A.L.R. 502, McHugh and Gummow JJ.

¹⁸ *Northern Territory of Australia v. Mengel*, [1995] HCA 65, 185 C.L.R. 307, 129 A.L.R. 1 [*Mengel*] (discussed in Part II below).

¹⁹ See Hon. Justice Dyson Heydon, "Judicial Activism and the Death of the Rule of Law" (2004) 10 Otago L. Rev. 493, first published in *Quadrant* (January–February 2003) 9.

²⁰ See *Bofinger v. Kingsway Group Ltd.*, [2009] HCA 44, 239 C.L.R. 269 at paras. 90-94, 260 A.L.R. 71. See also Mark Aronson, "Process, Quality, and Variable Standards: Responding to an *Agent Provocateur*" in David Dyzenhaus, Murray Hunt & Grant Huscroft, eds., *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Oxford: Hart, 2009) 5 at 22-28.

²¹ See *Permanent Trustee Australia Ltd. v. Commissioner of State Revenue*, [2004] HCA 53, 220 C.L.R. 388 at paras. 176-81, 211 A.L.R. 18.

By the time that *Roncarelli* was decided, Australia already had a string of precedents for confining statutory discretions to considerations that are functionally relevant to the regulatory scheme in question. As importantly, many of its regulatory schemes contained the sort of protective detail that was so sadly lacking in *Roncarelli*. Indeed, so far as they affected multistate businesses, many of Australia's regulatory laws tried to avoid wide discretionary power precisely because the High Court of Australia's highly formalistic constitutional learning took the breadth of a regulatory discretion as an important indicator of constitutional invalidity.

Abolition of trade barriers between the Australasian colonies was one of the principal drivers behind the decision to join a federal union, but the constitutional expression of that ideal was very poorly drafted. Section 92 of the *Australian Constitution* provided that "trade, commerce, and intercourse among the States ... shall be absolutely free," but for almost ninety years, the biggest question was: *Free—indeed, "absolutely free"—of what?*²² *Tariffs, obviously, but what else?* After roughly 140 attempts at answering that question—attempts that, for the most part, deliberately prioritized the purity of analytical doctrine over functionality of outcome—the High Court of Australia came up with a functional test justified by reference to the section's drafting history. Business was to be free of legislative and administrative measures that discriminated between in-state and interstate trade or commerce for protectionist reasons or with protectionist effect.²³ Until that point, however, the court had propounded all sorts of confusing tests. It was obvious that section 92 was not meant to invalidate *all* laws and administrative practices that might apply to interstate business. Even laissez-faire economics of the kind leading up to the recent global financial crisis tolerated *some* law affecting markets and regulating the production and exchange of goods and services. Besides, the High Court of Australia always denied constitutionalizing laissez-faire economics²⁴ or any other theory of economics.²⁵ The High Court of Australia often held that an "ordered society"²⁶ was obviously acceptable—indeed

²² For the most entertaining (and thoroughly political) history of the High Court of Australia's treatment of s. 92, see David Marr, *Barwick* (Sydney: George Allen & Unwin, 1980) c. 6-7, 11, 17.

²³ *Cole v. Whitfield*, [1988] HCA 18, 165 C.L.R. 360 at 385, 78 A.L.R. 42 [*Cole*].

²⁴ See e.g. *Home Benefits Pty. Ltd. v. Crafter*, [1939] HCA 12, 61 C.L.R. 701 at 731-32; *Milk Board (N.S.W.) v. Metropolitan Cream Pty. Ltd.*, [1939] HCA 28, 62 C.L.R. 116 at 151.

²⁵ *North Eastern Dairy Co. Ltd. v. Dairy Industry Authority (N.S.W.)*, [1975] HCA 45, 134 C.L.R. 559 at 615, 7 A.L.R. 433.

²⁶ See e.g. *Hughes and Vale Pty. Ltd. v. New South Wales (No. 2)*, [1955] HCA 28, 93 C.L.R. 127 at 159, 171, 219 [*Hughes and Vale (No. 2)*]; *Uebergang v. Australian Wheat Board*, [1980] HCA 40, 145 C.L.R. 266 at 281, 305, 32 A.L.R. 1 [*Uebergang*]; *Miller v.*

necessary—and with no difference in meaning, this was sometimes rendered in terms of “ordered liberty”.²⁷ The real difficulties lay in defining what this might mean.

“Ordered liberty” was the term that Sir Owen Dixon used in his speech on the occasion of his swearing-in as Chief Justice of the High Court of Australia in 1952.²⁸ Sir Owen swore fealty to the rule of law, but in a passage that continues to puzzle and even outrage the academy, he claimed that the best way that the courts could enforce the rule of law was by shunning any attempt at producing “constructive” outcomes, and instead adopting a method of “strict and complete legalism.”²⁹ In an obvious reference to section 92 of the *Australian Constitution*, he said that the High Court of Australia’s administration of the rule of law “offers a reconciliation of ordered liberty with planned control.”³⁰ In those days, that meant that the scales were weighted very heavily against the administrative state and in favour of “ordered liberty”, which usually boiled down to an absolute minimum of regulatory interference with interstate trade or commerce. Despite the court’s denial of a commitment to being *laissez faire*, some of its decisions had that practical effect.³¹ One of the extensions of “ordered liberty” that the cases had allowed in those days was for “regulation”—not all regulation, but only those shown to be minimally acceptable or necessary.³² These distinctions were obviously fraught, but one approach was to invalidate any regulatory scheme that was too discretionary. To pass constitutional muster under that approach, regulatory schemes had to stipulate the considerations by which discretionary power was to be controlled, and those considerations were to exclude any reference to whether the relevant activity had an out-of-state origin.³³

TCN Channel Nine Pty. Ltd., [1986] HCA 60, 161 C.L.R. 556 at 629, 67 A.L.R. 321 [Miller]; *Cole*, *supra* note 23 at 403.

²⁷ *Duncan v. Queensland*, [1916] HCA 67, 22 C.L.R. 556 at 592, cited in *Mikasa (N.S.W.) Pty. Ltd. v. Festival Stores*, [1972] HCA 69, 127 C.L.R. 617 at 653.

²⁸ “Swearing In of Sir Owen Dixon as Chief Justice” (1952), 85 C.L.R. xi at xv.

²⁹ *Ibid.* at xiv-xv.

³⁰ *Ibid.* at xv.

³¹ See *Uebergang*, *supra* note 26 at 309-10; *Miller*, *supra* note 26 at 571, 618; *Cole*, *supra* note 23 at 403.

³² *Miller*, *supra* note 26 at 600.

³³ See *Hughes and Vale Pty. Ltd. v. New South Wales (No. 1)* (1954), 93 C.L.R. 1 at 26-27 (P.C. on appeal from H.C.A.); *Hughes and Vale (No. 2)*, *supra* note 26 at 162-63; *Ackroyd v. McKechnie*, [1986] HCA 43, 161 C.L.R. 60 at 68, 66 A.L.R. 287. As Dawson J. summarized in *Miller*, “it is clearly established that a prohibition, subject only to an unfettered executive discretion to issue or refuse a licence, goes beyond regulation which may be permissible having regard to the guarantee afforded by s. 92” (*supra* note 26 at 628).

By the time that *Roncarelli* was decided, therefore, the Australian legal context had some well-established public law constraints on the exercise of regulatory discretion. That is not to deny the prevalent fear of an ever-expanding administrative state. Nor is it to deny concerns over absolute discretionary power—the common law had not yet acquired enough self-confidence (or hubris) to confront such a concept head-on.³⁴ However, the legal landscape was already populated by various regulatory regimes in which administrative discretion was not absolute but constrained. It was constrained by judicial supervision according to generalized principles that were paying less and less heed to distinctions between privileges and rights,³⁵ and between administrative and quasi-judicial powers or functions. As in the case of restaurateurs, some intrastate businesses dependent on licences or permits were well protected by statute. Others whose regulatory regimes lacked explicit constraints were nevertheless protected by well-established techniques of statutory interpretation, whereby the judges implied functionally relevant limits to discretionary power based on the subject matter, scope, and purposes of the relevant legislation.³⁶ The same interpretive techniques were used to save legislation from constitutional invalidation for overreaching the ambit of federal legislative power. The regulation in *Shrimpton v. Commonwealth*, for example, gave the treasurer an “absolute discretion” to impose “such conditions as he thinks fit” when granting consent to certain property transfers.³⁷ However, Chief Justice Latham, Justice McTiernan, and Justice Dixon read the provision down so as to exclude arbitrary or personal considerations, or any other considerations functionally unrelated to the

³⁴ Nowadays, the High Court of Australia doubts that there can ever be truly unfettered discretion in the federal arena, because such discretion would exceed constitutional limitations on legislative competency. See *Plaintiff S157/2002*, *supra* note 16 at paras. 102-103. State legislatures have fewer limitations on legislative competency, but “very plain” words would be needed before state grants of unfettered power were to be read literally. See *Hot Holdings Pty. Ltd. v. Creasy*, [1996] HCA 44, 185 C.L.R. 149 at 171, 134 A.L.R. 469, citing *F.A.I. Insurances Ltd. v. Winneke*, [1982] HCA 26, 151 C.L.R. 342 at 368. This is particularly the case where fundamental rights or freedoms are involved. See e.g. *K-Generation Pty. Ltd. v. Liquor Licensing Court*, [2009] HCA 4, 237 C.L.R. 501 at para. 47, 252 A.L.R. 471; *R & R Fazzolari Pty. Ltd. v. Parramatta City Council*, [2009] HCA 12, 237 C.L.R. 603 at para. 43, 254 A.L.R. 1. In *Gerlach v. Clifton Bricks Pty. Ltd.*, Kirby J. thought that no Australian parliament could legislate for “[a]bsolute discretions” because they are “a form of tyranny” ([2002] HCA 22, 209 C.L.R. 478 at para. 69).

³⁵ But Barwick C.J. protected a taxi owner’s licence by treating it as a species of property: *Banks v. Transport Regulation Board (Vic.)*, [1968] HCA 23, 119 C.L.R. 222 at 230-32.

³⁶ See e.g. *R v. Trebilco, Ex parte F.S. Falkiner & Sons Ltd.*, [1936] HCA 63, 56 C.L.R. 20 at 32; *Shire of Swan Hill v. Bradbury*, [1937] HCA 15, 56 C.L.R. 746 at 757-58.

³⁷ *Shrimpton*, *supra* note 11 at 618.

proper operation of the defence power—the only relevant head of legislative power available to federal legislators.³⁸

The High Court of Australia's restrictive approach to regulatory controls on interstate business was therefore consistent with a more generalized leaning away from broad discretionary powers, although in domains protected by section 92 of the *Australian Constitution*, the High Court of Australia was able to go one step further by insisting that regulatory statutes *had* to minimize discretionary power. Where statutes challenged for violating section 92 lacked explicit restrictions on discretionary power, government counsel sometimes defended that the relevant discretion was not to be read literally because it was subject to the common law's general administrative law principles.³⁹

Considerations of class and property are not so prominent in current discussions of the rule of law,⁴⁰ but if the “rule of law” itself transitioned from the “rights of Englishmen”, then it is right to accord some room to these considerations. One suspects that in *Roncarelli's* time, money, class, and economic freedom figured at least as prominently as considerations of equality, free speech, freedom of association, and freedom from discrimination on religious grounds. Each of these considerations is an important topic, of course, but not one of them scored an explicit mention in *Roncarelli*, although they did figure in earlier installments of the mini-series dubbed the “implied bill of rights” cases.⁴¹

Justice Rand discussed only one of what we might now call *Roncarelli's* fundamental rights or freedoms, and it was an economic freedom: his freedom to continue in his chosen (indeed, inherited) vocation as a respectable upmarket restaurateur, so long as he complied with the law generally and with the rules pertaining specifically to licensed restaurants. If that looks like too narrow a description of *Roncarelli's* economic rights, I would point to the judgment itself, which stressed his respectability and middle-class qualities. He ran a restaurant of a “superior class”, and he was well-educated and of good repute.⁴² He had leased a meeting hall to the Jehovah's Witnesses for their use in Sherbrooke, but that was

³⁸ *Ibid.* at 619 (Latham C.J.), 629 (Dixon J.), 632 (McTiernan J.).

³⁹ See e.g. *Miller*, *supra* note 26 at 562-63.

⁴⁰ Murphy J. was the only High Court of Australia judge to attack legal doctrine on overtly class lines. See *Attorney-General (Commonwealth), Ex rel. McKinlay v. Commonwealth*, [1975] HCA 53, 135 C.L.R. 1 at 76, 7 A.L.R. 593; *Heatley v. Tasmanian Racing and Gaming Commission*, [1977] HCA 39, 137 C.L.R. 487 at 496, 14 A.L.R. 519; *Forbes v. New South Wales Trotting Club Ltd.*, [1979] HCA 27, 143 C.L.R. 242 at 273-76, 25 A.L.R. 1; *Neal v. R.*, [1982] HCA 55, 149 C.L.R. 305 at 316-17, 42 A.L.R. 609.

⁴¹ See Eric M. Adams, “Building a Law of Human Rights: *Roncarelli v. Duplessis* in Canadian Constitutional Culture” (2010) 55 McGill L.J. 437.

⁴² *Roncarelli*, *supra* note 1 at 130.

categorically irrelevant (as an unimpeachable right of property).⁴³ Importantly, it seems, he had not himself distributed any of the tracts that had so upset the general public on religious grounds,⁴⁴ nor the one that appeared to have upset the government on more self-serving grounds.⁴⁵ The only possible marks against his character, therefore, were the facts that he was himself a Jehovah's Witness and that he had stood bail for his co-religionists many times—both being perfectly legal and utterly irrelevant to the way he conducted his business.⁴⁶ The Attorney General had deliberately destroyed “the vital business interests of a citizen,”⁴⁷ and sentenced him to “vocational outlawry.”⁴⁸ As for the business perspective, the licences may legally have been a “privilege”, but they were vital to a “superior class restaurant”, and licensees invested considerable money and effort into their businesses on the assumption that their licences would continue.⁴⁹ Importantly, Roncarelli's citizenship status⁵⁰ would in previous times have allowed him to conduct his perfectly “ordinary”⁵¹ and “legitimate”⁵² business activities free of state interference, and *that* was a major driver of Justice Rand's judgment. Licensing legislation was steadily enveloping “occupations and businesses of this nature” previously free of it;⁵³ indeed, “economic activities” more generally were coming under regulatory control.⁵⁴ “Privileges” they may have been, but Justice Rand thought it essential that their grant, administration, and revocation be not arbitrary but impartial and governed by considerations relevant only to the licensed or regulated activity in question.⁵⁵

An ungenerous reader might read Justice Rand as having taken a stand for the middle class, self-employed, small business person, who is so vital to economic life and so much in need of protection from the administrative state. And he had been able to do this without having to turn Ron-

⁴³ *Ibid.* at 132.

⁴⁴ *Ibid.*

⁴⁵ This was the tract that accused the government of “savage persecution” (*ibid.* at 133).

⁴⁶ *Ibid.* at 132.

⁴⁷ *Ibid.* at 137.

⁴⁸ *Ibid.* at 141.

⁴⁹ *Ibid.* at 139-40.

⁵⁰ *Ibid.* at 141.

⁵¹ *Ibid.* at 144.

⁵² *Ibid.* at 140.

⁵³ *Ibid.*

⁵⁴ *Ibid.* at 142.

⁵⁵ *Ibid.* at 140.

carelli's liquor licence into a species of "property".⁵⁶ In a telling qualification, he even added that his judgment was not intended to protect government workers.⁵⁷ Their rights were doubtless left to labour law, which was a more elaborately protective affair those days than now.

If Justice Rand had been concerned only with Roncarelli's economic rights, then his judgment would have been little more (and perhaps a little less) than what was then a popular justification for a rapid expansion of judicial review doctrine to catch up with and counterbalance an administrative state that had grown fearfully large in most common law jurisdictions. But it would clearly be unfair to treat Justice Rand as a Canadian version of Lord Denning, who was ever-protective of middle-class virtue whilst denying it to the working class (particularly if they were unionized).⁵⁸ Roncarelli's middle-class status and virtues, and even his ill-defined citizenship, can lead one to different places. Most obviously, they might have placed him in the category of a "deserving" claimant. But Lord Denning would never have thought him deserving; Roncarelli rocked the boat, challenged police,⁵⁹ frustrated the forces of law and order, and did all this with profits derived from government beneficence in the form of a discretionary licence.⁶⁰

Justice Rand's style was less concerned with analytical precision of doctrine than that of Justice Dixon, although they each saw the rule of law as something that could help civilize the burgeoning regulatory state's interference with legitimate business interests, which had previously been free of bureaucratic impediment. And Justice Rand was more generous than Justice Dixon when it came to the question of remedies. Justice

⁵⁶ However, Rand J. did state that the permit's transferability (usually a hallmark of "property") was "most pertinent" (*ibid.*). *Cf. ibid.* at 159, Martland J.; *ibid.* at 170, Cartwright J.

⁵⁷ *Ibid.* at 142. Government employees still rank very low in the pecking order of administrative law. See e.g. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 291 D.L.R. (4th) 577.

⁵⁸ See Paul Davies & Mark Freedland, "Labour Law" in J.L. Jowell & J.P.W.B. McAuslan, eds., *Lord Denning: The Judge and the Law* (London, U.K.: Sweet & Maxwell, 1984) 367.

⁵⁹ At least in the context of the Birmingham Six and the Guildford Four, Lord Denning thought it better to maintain public confidence in the justice system than to acknowledge that innocent people were in prison because of police lies. He even suggested that it would have been better to hang them all. All the major media ran the stories. See e.g. Andrew Culf, "Remarks on Guildford Four Bring Legal Action Threat: Repentant Denning Says He Was Misled" *The Guardian* (17 August 1990) 9; Nick Cohen & Will Bennett, "Guildford Four consider suing Former Master of the Rolls" *The Independent* (17 August 1990); "Lord Denning Claims Remarks in the Spectator Were Taken Out of Context" *The Times* (23 August 1990).

⁶⁰ Cartwright J., in dissent, thought that this last consideration was permissible (*Roncarelli*, *supra* note 1 at 164).

Dixon would have had no trouble in invalidating the Attorney General's actions. In Australia, Roncarelli would have been spoiled for choice in terms of grounds of invalidity. The permit cancellation was based on impermissible considerations, taken for an impermissible purpose, and taken either by the wrong person or by the right person acting under the Attorney General's dictation. The lifelong ban on Roncarelli would have been invalid on the same grounds and also because it attempted to fetter the future exercise of a discretionary power. None of that would have been remarkable. But Justice Rand upheld Roncarelli's right to damages, and from an Australian perspective, that was indeed exceptional. I suspect that in both countries, damages for unlawful licence cancellation would still be exceptional.

II. Malice, Damages, and the Rule of Law

My purpose in this part of the paper is to ask why Justice Rand stated that the Attorney General had behaved maliciously or in bad faith. Those are very serious conclusions and at first glance, one might wonder whether they were necessary, especially because Justice Rand defined them so broadly as to strip them of any necessary connection with dishonesty or lack of public purpose. Furthermore, the other majority judgments refrained from such conclusions.

Justice Rand's definition of malice started out unremarkably: "Malice in the proper sense is simply acting for a reason and purpose *knowingly* foreign to the administration."⁶¹ But it was clear that the Attorney General thought that he was acting in the public interest *and* that his powers were unfettered. He did *not* know that his reasons and purpose were ultra vires, and so Justice Rand quickly expanded his definition to include conduct that the Attorney General *should* have known was unauthorized:

"Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.⁶²

It is doubtful that Justice Rand invoked malice to outflank what would otherwise have been the immunity of quasi-judicial functions from damages actions,⁶³ because his preference was to treat the Attorney General's

⁶¹ *Ibid.* at 141 [emphasis added].

⁶² *Ibid.* at 143.

⁶³ See *ibid.* at 141. Here, Rand J. referred to the dissentients in *McGillivray v. Kimber* ((1915), 52 S.C.R. 146, 26 D.L.R. 164).

functions as administrative.⁶⁴ Further, only Justice Cartwright (in dissent) had thought that the characterization of the Attorney General's functions was important.⁶⁵ It was submitted that the importance of "malice" for Justice Rand was that he saw it as far more egregious in a public official than a private person, and it was that perception which underpinned his assertion that Roncarelli could avail himself of a wholly public tort.

Of the majority, only Justice Rand fully acknowledged the difficulty in theorizing a basis for awarding damages to Mr. Roncarelli, and even he left some fairly big question marks. I agree with David Mullan's observation that one cannot be entirely sure how Justice Rand connected the two components of an excess of discretionary power on the one hand (something more obviously relevant had the case been brought against the Liquor Commissioner), and on the other hand, the Attorney General's usurpation of a power that belonged only to the Liquor Commissioner.

There was no obviously applicable private law tort, and the House of Lords had established in *Allen v. Flood*⁶⁶ that in the absence of a conspiracy (and none was pleaded in *Roncarelli*), the intentional and malicious infliction of economic harm upon a plaintiff was perfectly acceptable market behaviour. But the Attorney General had acted as a public official, not as a player in the market, and that was Justice Rand's critical distinction. When tort doctrine invoked a distinction between public and private functions (or defendants), it was usually in order to reduce government liability. By contrast, Justice Rand's distinction served to take him in the opposite direction.

Justice Rand distinguished *Allen v. Flood* in one or possibly two ways. His first distinction was that *Roncarelli* was a public law matter:

Here the act done was in relation to a public administration affecting the rights of a citizen to enjoy a public privilege, and a duty implied by the statute toward the victim was violated. The existing permit was an interest for which the appellant was entitled to protection against any unauthorized interference, and the illegal destruction of which gave rise to a remedy for the damages suffered. In *Allen v. Flood* there were no such elements.⁶⁷

In other words, malice in the sense of the intentional infliction of harm was actionable if (but only if) there was either a conspiracy (as per *Allen v.*

⁶⁴ *Roncarelli*, *supra* note 1 at 141.

⁶⁵ Indeed, for Cartwright J., the characterization of the Attorney General's actions presented Roncarelli with a "Catch-22" dilemma. The defendant's discretion was either "administrative" and therefore unfettered, or else it was quasi-judicial and therefore immune from a damages action in the absence of malice (*ibid.* at 167-69).

⁶⁶ (1897), [1898] 1 A.C. 1, [1895-99] All E.R. Rep. 52 [*Allen v. Flood*].

⁶⁷ *Roncarelli*, *supra* note 1 at 143.

Flood), or if the tortfeasor was a public official acting beyond his or her powers. The plaintiff had also argued that the defendant might have been liable for intentional interference with the plaintiff's permit even if there had been no excess of power. Apart from noting that such a tort would need to be confined to public functions if it were to avoid conflicting with *Allen v. Flood*,⁶⁸ Justice Rand did not pursue this intriguing possibility, but his language in the passage quoted above betrays his uncertainty about the nature of his public law tort, and an ambivalence as to the subject matter of the tort's protection.

The "rights of a citizen to enjoy a public privilege" are odd rights indeed, and their correlative "duty implied by the statute" is even more curious.⁶⁹ Justice Rand was not treating the liquor permit as a property right. It is suggested that Justice Rand might have had in mind the obvious assumptions and expectations underlying the commercial viability of any occupational licensing scheme. The licences might need annual renewal, but investors would naturally expect the scheme's administration to be run on commercially predictable (and therefore stable) lines. The stable (as opposed to arbitrary) administration of the licensing scheme might well be described as a right to enjoy such licences as they have been granted, although it is suggested that Justice Rand's tort and its successor (known as the tort of misfeasance in public office) are best approached not as mechanisms to protect legal rights or interests, but as mechanisms to discipline public officers for abuses of public power that they knew were inexcusable.⁷⁰ Roncarelli had no *right* to maintain or renew his permit, nor any right to a stable economic environment free of government interference; that is why his damages award focused on disciplining arbitrary public behaviour. It may also go some way to explaining why the quantum of that award was so obviously inadequate, and the reasoning offered in support of that quantum so unconvincing.⁷¹ The Supreme Court of Canada was obviously torn between a torts model of damages assessment that

⁶⁸ *Ibid.* at 144.

⁶⁹ See *supra* note 67 and accompanying text.

⁷⁰ Robert Stevens has argued that the misfeasance tort is not a regular tort at all, because it does not protect pre-existing rights or interests: Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 218, 242-43. Stevens regards it as a "regulatory" mechanism (*ibid.* at 218). The tort remains exceptional even if one were to see torts as creating and vindicating rights and correlative duties. See Peter Cane, Book Review of *Torts and Rights* by Robert Stevens, (2008) 71 Mod. L. Rev. 641.

⁷¹ David Mullan notes the cursory reference to compensation for lost "goodwill": David Mullan, "*Roncarelli v. Duplessis* and Damages for Abuse of Power: For What Did It Stand in 1959 and For What Does It Stand in 2009?" (2010) 55 McGill L.J. 587. See also *Roncarelli*, *supra* note 1 at 187, Abbott J. The overall sum awarded came nowhere near what would have been needed if Roncarelli were truly to be compensated for what Rand J. had called "vocation outlawry" (*ibid.* at 141), and there was no pretence at estimating the cost of future vicissitudes.

focuses on the plaintiff and seeks to put him or her in the same position as if he or she had not been wronged, and the legal form of the liquor scheme with its annual timelines and broad discretionary power. Roncarelli's damages award may have sufficed to denounce the defendant's conduct, but it is hard to believe that it compensated him for his loss.

Roncarelli appears in most histories of the evolution of a specifically public law tort of misfeasance in public office, although no such label appeared in the case itself. It will be recalled that Justice Rand's version of the rule of law required the Court to afford Roncarelli "recourse or remedy"⁷² for the defendant's extraordinary behaviour. There is an obvious similarity to Chief Justice Holt's famous reasoning in *Ashby v. White*⁷³ that the plaintiff's rights having been breached, the law simply had to create a damages remedy as a means of vindication.⁷⁴ The restrictions inherent in the more traditional (i.e., private law) torts combined in Justice Rand's judgment with a strong sense of the need to vindicate Roncarelli's rights to drive the development of what we would now call the tort of misfeasance in public office. This public law tort is a fallback for what one hopes to be rare cases where private law torts are manifestly inadequate. Australia also sees misfeasance as a residual, backup tort.⁷⁵

Australian tort law operates for the most part on a private-sector model, whose primary function is to focus on and adjust the competing interests of plaintiffs and defendants to the extent that their activities collide. Government parties to tort actions can usually make the same claims and are usually subject to the same liability rules as would be made or applied in an action between subjects. This equality principle is highly prized. Dicey treated it as a critical aspect of his rule of law,⁷⁶ and more often than not, its common law and statutory exceptions are bitterly contested,⁷⁷ usually on the ground that they are unjustified reductions of the government's exposure to liability principles or damages awards. The equality principle's flip side, however, is that with only one exception,

⁷² *Ibid.* at 142.

⁷³ (1703), 1 Sm. L.C. (13th ed.) 253 at 273, 92 E.R. 126.

⁷⁴ See also Carol Harlow, "A Punitive Role for Tort Law?" in Linda Pearson, Carol Harlow & Michael Taggart, eds., *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Oxford: Hart, 2008) 247.

⁷⁵ *Mengel*, *supra* note 18 at 348.

⁷⁶ His version of the rule of law required such disputes to be adjudicated in the "ordinary courts": A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 9th ed. (London, U.K.: Macmillan, 1939) at 193.

⁷⁷ For a discussion of the common law and statutory exceptions to the equality principle, see Mark Aronson, "Government Liability in Negligence" (2008) 32 *Melbourne U.L. Rev.* 44.

there is no special tort that only governments can commit.⁷⁸ The exception is the tort of misfeasance in public office—an exception that seeks its justification on the basis that there is something especially wrong about malice or dishonesty when it comes from a public official.

Individuals who suffer loss as a result of government action found to have been unconstitutional cannot get damages in Australia on that score alone; plaintiffs must bring their claims within the standard private law causes of action, because the High Court of Australia refused to create constitutional torts. That precedent was set in *James v. Commonwealth*,⁷⁹ in which the plaintiff had sought compensation following his successful challenge⁸⁰ to the validity of Commonwealth legislation that severely limited the interstate sale of his dried fruits. The court allowed him compensation for the seizure of goods en route for interstate sale, but that was because the facts fell within the established tort of conversion. There had been a direct interference with his rights of property, and the good faith of the public officials was no defence because conversion is a tort of strict liability.

However, the High Court of Australia denied the greater part of James's claim for compensation. He had lost interstate business opportunities because he had found it difficult to secure the services of common carriers, who feared the prospect of prosecution. But the implicit threats to the carriers constituted no tort. Even if one assumed conspiracy's "agreement",⁸¹ the threats would not have amounted to a tortious conspir-

⁷⁸ Public officials are the usual defendants in actions for malicious prosecution, but it remains a private law tort.

⁷⁹ [1939] HCA 9, 62 C.L.R. 339 [*James (H.C.A.)* cited to C.L.R.]. Dixon J. said that it would be "ridiculous" to analogize an action in constitutional tort to an action for breach of statutory duty (*ibid.* at 362). The High Court of Australia continues to deny the availability of an action for breach of constitutional rights: *Lange v. Australian Broadcasting Corporation*, [1997] HCA 25, 189 C.L.R. 520 at 563, 145 A.L.R. 96; *Kruger v. Commonwealth of Australia*, [1997] HCA 27, 190 C.L.R. 1 at 124-26, 146-48, 146 A.L.R. 126; *British American Tobacco Australia Ltd. v. Western Australia*, [2003] HCA 47, 217 C.L.R. 30 at para. 40, 200 A.L.R. 403. Kirby J. accepted that current authority was against constitutional causes of action, but protested his disagreement as a matter of principle (*ibid.* at paras. 118-37). See also *Mulholland v. Australian Electoral Commission*, [2004] HCA 41, 220 C.L.R. 181 at para. 180, 209 A.L.R. 582. The High Court of Australia acknowledges that its position is at odds with the following cases: *The State (Quinn) v. Ryan*, [1965] I.R. 70; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999 (1971); *Simpson v. Attorney-General (Baigent's Case)*, [1994] 3 N.Z.L.R. 667 (C.A.).

⁸⁰ *James v. Commonwealth of Australia*, [1936] A.C. 578, 55 C.L.R. 1 (P.C. on appeal from H.C.A.).

⁸¹ The rationales for the two conspiracy torts (namely, lawful but malicious acts and intent to harm by unlawful means) are much debated. Accepting for the moment that an agreement between two or more people rightly "tortifies" something that would not be

acy because “unlawful” means had not been used; threatening a prosecution was not relevantly unlawful. Nor did the threats amount to the tort of intentionally inducing common carriers to breach their common law duties to accept James’s business. First, the passage of an act was not an “inducement” by the executive, but a prior step taken by the legislative branch for which the executive should not be held tortiously responsible.⁸² Secondly, inducements would not by themselves have been sufficient; there should have been more evidence that the inducements succeeded in the sense that they resulted in actual breaches of the carriers’ duties.⁸³ Thirdly, no express or implied threats to prosecute carriers could count as inducements unless they had been made in the knowledge that the legislative measures were unconstitutional.⁸⁴ As for the threats not to his carriers, but to James personally, the Commonwealth might have been liable in other circumstances for intentionally harming his business through threats of further illegal seizures.⁸⁵ But the trouble for James was that he had been too plucky; the implicit threats had not in fact diminished his determination.⁸⁶ Although not addressed directly, it is clear that the Commonwealth would not have been liable for threatening to take James to court, provided it had acted in good faith.⁸⁷

If one were to fast-forward to the present, one would have to conclude that certainly in England and probably in Australia, the relevant private law torts are at least as demanding as they were in the times of *James* and *Roncarelli*. In its recent magisterial review of two of the more bewildering economic torts in a trilogy of appeals generally cited as *OBG Ltd. v. Allan*,⁸⁸ the House of Lords unanimously and decisively rejected more than a century of speculative judgments and scholarship that had urged various extensions of the torts in question. *OBG* rejected the contention that there was (or even should be) a single, grand principle to unite the tort of knowingly inducing a breach of contract with the tort of intentionally harming the plaintiff’s trade or business interests by unlawful means. The two torts had too many principled differences to allow them to be re-

actionable if done solo, one might question why proof of agreement is needed in the case of large organizations, such as corporations or bureaucracies.

⁸² *James (H.C.A.)*, *supra* note 79 at 371-72.

⁸³ *Ibid.* at 372.

⁸⁴ *Ibid.* at 372-73.

⁸⁵ See *Mengel*, *supra* note 18 at 351. The intimidation tort is usually tripartite, in that the unlawful action (or threat of it) is against a third person, with the intent of causing harm to the plaintiff. Two-party intimidation presents fewer challenges of principle, and the House of Lords put it to one side in *OBG Ltd. v. Allan* ([2007] UKHL 21, [2008] 1 A.C. 1 at para. 61, [2007] 4 All E.R. 545 [*OBG*]).

⁸⁶ *James (H.C.A.)*, *supra* note 79 at 375.

⁸⁷ *Mengel*, *supra* note 18 at 351, 371-73.

⁸⁸ *OBG*, *supra* note 85.

packaged beneath a unified (and grander) principle. A majority also rejected a proposal to extend the strict liability tort of conversion beyond its protection of chattel interests, to include the misappropriation of choses in action. A larger majority also tightened the definition of what might amount to unlawful means for the purposes of the tort of deliberately harming the plaintiff's interests by unlawful means. Such means must in the future not only be actionable at the suit of the third person against whom they were directed;⁸⁹ they must also interfere with that person's freedom to deal with the plaintiff.⁹⁰ Lord Hoffmann stressed that the elements of intention and unlawfulness were important control devices built into the economic torts in order to minimize the common law role in "devising rules of fair competition," and its role in stipulating "basic standards of civilised behaviour in economic competition, between traders or between employers and labour."⁹¹ That is why his definition of "unlawful means" required that they be both actionable at the instance of the third person (thereby excluding means that were unlawful only because they were in breach of a criminal or regulatory statute),⁹² and used for the very purpose of harming the plaintiff's economic interests.⁹³

It might be interpolated at this point that to some extent, the High Court of Australia anticipated *OBG's* retraction of "unlawful means" by almost a decade.⁹⁴ It held that *if* there is an economic tort of interfering with a person's trade or business interests by unlawful means, then the means will not be relevantly unlawful simply because they were unauthorized or ultra vires. One reason was that were it otherwise, the economic tort would render redundant the tort of misfeasance in public office. Defendants to claims for interference by unlawful means need not have known that they were acting unlawfully or have been recklessly indifferent about it. More importantly, the High Court of Australia pointed out that the economic and misfeasance torts have different defendants, and their tortfeasors have different intentions. Individual economic tortfeasors

⁸⁹ One qualification was added, namely, that the means (e.g., intimidation) might be unlawful even if the third person suffered no loss only because he or she yielded to the defendant's pressure (*ibid.* at para. 49).

⁹⁰ *Ibid.* at para. 51.

⁹¹ *Ibid.* at para. 56.

⁹² *Ibid.* at para. 57.

⁹³ *Ibid.* at paras. 56-61. For criticism of *OBG's* requirement that the unlawful means be independently actionable, see Simon Deakin & John Randall, "Rethinking the Economic Torts" (2009) 72 Mod. L. Rev. 519 at 544-50. Aside from the criticism that it is difficult to square *OBG* with earlier precedent that it failed to overrule, the authors stated that the requirement narrowed the tort unduly, and lost sight of its function, which was to set limits to direct interference with recognized trade or business interests.

⁹⁴ *Sanders v. Snell*, [1998] HCA 64, 196 C.L.R. 329 at paras. 36-37, 157 A.L.R. 491 [*Sanders*] (note the references to "unlawful acts").

will usually transmit vicarious liability to their employers without much difficulty, because they will have acted for their employers' benefit. Individual misfeasance tortfeasors, on the other hand, will by definition have acted beyond their authority and will be more likely to have acted in pursuit of their own ends (as opposed to those of their employers). That will make it more difficult (but not impossible)⁹⁵ to pin their employers with vicarious liability.⁹⁶ As for different intentions, economic tortfeasors usually intend to inflict economic loss on their competitors, and that is perfectly acceptable, because it "is central to competition."⁹⁷ By contrast, the intentional (and unlawful) infliction of harm by government actors is often said to be sufficient in itself to establish misfeasance.⁹⁸

If *OBG*'s economic torts are all about devising "basic standards of civilised behaviour" in the marketplace,⁹⁹ the misfeasance tort is (or at least, should be) all about defining the exceptional circumstances in which government illegalities will be actionable in tort, not just because they were unlawful (because judicial review is normally sufficient), but because they violated basic standards of civilized behaviour in the exercise of public power. That, surely, is why Justice Rand fell back on something as broad as the rule of law, and also why he fudged his definition of malice. He took malice to go beyond spite, dishonesty, and even beyond a deliberate excess of power. He took it to include intentional harm at the hands of a public officer whose ignorance of the law's limits to his powers was so profound that he must not have cared. His illegality may have been neither intentional nor subjectively reckless, but the illegality was both so obvious and so outrageous that it was inexcusable in a prime minister and Attorney General.

Perhaps the most fundamental choice confronting the House of Lords in *OBG* was whether to describe the limits of the private law tort of inter-

⁹⁵ It was obvious that if the Bank of England's officers had been misfeasance tortfeasors in *Three Rivers District Council v. Bank of England (No. 3)* ((2000), [2003] 2 A.C. 1 (H.L.) [*Three Rivers (No. 3)*]), then the bank itself would also have been liable because none of the relevant individuals were pursuing their own personal interests. The House of Lords may be more disposed than the High Court of Australia to allowing vicarious liability for deliberate misconduct: *Racz v. Home Office* (1993), [1994] 2 A.C. 45, [1994] 2 W.L.R. 23; *Three Rivers (No. 3)*, *supra* at 191.

⁹⁶ *Mengel*, *supra* note 18 at 347; *Sanders*, *supra* note 94 at para. 38. See also J.L.R. Davis, "Misfeasance in Public Office, Exemplary Damages and Vicarious Liability" in *Australian Institute of Administrative Law Forum*, No. 64 [forthcoming in 2010]. The High Court of Australia was unable to propound an authoritative test for determining the extent of vicarious liability for misbehaving school teacher employees in *New South Wales v. Lepore* ([2003] HCA 4, 212 C.L.R. 511, 195 A.L.R. 412).

⁹⁷ *Sanders*, *supra* note 94 at para. 37, Gleeson C.J., Gaudron, Kirby, and Hayne JJ.

⁹⁸ This is "targeted malice", the so-called first limb of the misfeasance tort, discussed below (see *infra* note 106ff.).

⁹⁹ See *supra* note 91 and accompanying text.

ference by unlawful means in terms that were tightly defined or open-ended. The open-ended model would have amounted to an endorsement of what is known in America as a *prima facie* tort, defined as an intention to inflict harm without just cause or excuse.¹⁰⁰ Despite the eminence of some of its proponents,¹⁰¹ the House of Lords balked at an approach whose definition of unlawful means would have required the judges to determine in every case what is unjust or inexcusable; that was thought to be too uncertain for a tort designed to regulate marketplace behaviour.¹⁰²

The case for certainty is less compelling when it comes to misfeasance, and that might explain why Justice Rand fudged his definition of malice. Malice currently figures prominently in most accounts of misfeasance, but the tort's expansion from deliberate wrongdoing to reckless indifference has made "malice" a slippery word. It has been said that "malice" has been subject to a "regrettable exuberance of definition,"¹⁰³ and that the word has caused "more confusion in English law than any judge can hope to dispel."¹⁰⁴ That is certainly true of its use in the misfeasance cases, where its definitions range from narrow to broad. Starting with improper *motives* (such as ill will, spite, and revenge), one can also find definitions that extend by degrees to improper *intentions* as to outcomes (such as the intentional infliction of harm),¹⁰⁵ action taken in the knowledge that it was beyond lawful authority, and circumstances in which public officials were recklessly indifferent as to whether they had the necessary lawful authority.

One currently popular definition of misfeasance in public office splits into two alternative limbs. Various two-limbed versions have been pro-

¹⁰⁰ See Hazel Carty, *An Analysis of the Economic Torts* (Oxford: Oxford University Press, 2001) at 109. It is also noted that the American doctrine has limited application (*ibid.* at 109, n. 84).

¹⁰¹ For example, J.D. Heydon argues that the toleration in *Allen v. Flood* (*supra* note 66) of intentional harm caused by "intolerable conduct" was a short-term expedient to protect trade unions. He argues that had *Allen v. Flood* gone the other way, "[m]uch race relations legislation would have been less necessary": J.D. Heydon, *Economic Torts*, 2d ed. (London, U.K.: Sweet & Maxwell, 1978) at 28 [Heydon, *Economic Torts*]. See also Philip Sales & Daniel Stilitz, "Intentional Infliction of Harm by Unlawful Means" (1999) 115 *Law Q. Rev.* 411.

¹⁰² *OBG*, *supra* note 85 at para. 14.

¹⁰³ *British Railway Traffic and Electric Co. Ltd. v. The C.R.C. Co. Ltd.* (1921), [1922] 2 K.B. 260 at 268, 38 T.L.R. 190, McCardie J.

¹⁰⁴ *Shapiro v. La Morta* (1923), 40 T.L.R. 201 at 203, Scrutton L.J. These quotations from McCardie J. and Scrutton L.J. also appear in Heydon's *Economic Torts* (*supra* note 101 at 83). See also Peter Cane, "Mens Rea in Tort Law" (2000) 20 *Oxford J. Legal Stud.* 533 at 539-41 [Cane, "Mens Rea"].

¹⁰⁵ See Peter Cane, *The Anatomy of Tort Law* (Oxford: Hart, 1997) at 35 (people's *motives* are their reasons for acting and their *intentions* are the consequences that they hope to cause; the two need not coincide).

pounded, but a broad overview is sufficient for present purposes.¹⁰⁶ In each limb, the relevant act or omission of the public officer must have been a purported exercise of a public power or function that was invalid either for being in excess of power for any of the standard administrative law reasons, or because it was wholly lacking in lawful authority from the outset. The difficulties of detail in that proposition will not be pursued. Nor is it necessary here to examine the implications of Canada's extension of the tort beyond coercive powers to encompass deliberate breach of statutory duties.¹⁰⁷ The concern of this part of the paper is to focus on the tort's mental elements.

The only mental element in the first limb is that the officer must have specifically intended to harm the plaintiff, and that is sometimes called "targeted malice". The second limb is more complicated because it addresses two issues: the extent of the officer's awareness that his or her act lacked lawful authority, and the extent of the officer's awareness of the relevant act's probable consequences for the plaintiff.¹⁰⁸ On each of those second-limb issues, the plaintiff must establish either actual knowledge or reckless indifference.

Although the cases repeat the two-limb account endlessly, not everyone subscribes to it. In England, for example, Lord Hobhouse treated the first limb not as an ingredient of the misfeasance tort, but as a proposition of evidence. In his view, an officer who sought to inflict harm on a particular person was "extremely" unlikely to have believed that he or she was acting with lawful authority.¹⁰⁹ Lord Millett went further: he treated *both* limbs as no more than propositions of evidence. For him, the ultimate fact in issue was "abuse of power", which "involves other concepts, *such as*

¹⁰⁶ This account draws upon only a handful of leading appellate decisions: *Mengel*, *supra* note 18; *Garrett v. Attorney-General* (1996), [1997] 2 N.Z.L.R. 332 (C.A.) [*Garrett*]; *Sanders*, *supra* note 94; *Three Rivers (No. 3)*, *supra* note 95; *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, 233 D.L.R. (4th) 193 [*Odhavji*]; *Hobson v. Attorney-General* (2006), [2007] 1 N.Z.L.R. 374 (C.A.) [*Hobson*]. *Hobson* went to the Supreme Court of New Zealand, but not on misfeasance: *Couch v. Attorney-General*, [2008] NZSC 45, [2008] 3 N.Z.L.R. 725. See also *New Zealand Defence Force v. Berryman*, [2008] NZCA 392 [*Berryman*].

¹⁰⁷ See *Odhavji*, *supra* note 106 (involving the duty of police officers to co-operate with an internal investigation). This issue was discussed inconclusively in *Berryman* (*supra* note 106) and went unnoticed in *Garrett* (*supra* note 106).

¹⁰⁸ This being an intentional tort, defendants are liable only for the harm that they either intend or deliberately choose to ignore. The Supreme Court of Canada put this differently in *Odhavji*, in terms of requiring a nexus between the parties such that the defendant owes the plaintiff a duty (*supra* note 106 at para. 29). The plurality in *Mengel* did not resolve whether the misfeasance defendant needs to have breached a duty owed to the plaintiff (*supra* note 18 at 346-47). Brennan J. opposed the idea (*ibid.* at 357).

¹⁰⁹ *Three Rivers (No. 3)*, *supra* note 95 at 230.

dishonesty, bad faith, and improper purpose.”¹¹⁰ Analogizing to trust law, Lord Millett said that the plaintiff had to show in one way or another, that the defendant officer did not believe that he or she was acting for the benefit of at least some of those for whom such officer was required to act. Lord Millett acknowledged that one consequence of his approach would be to exonerate an officer who deliberately acted in excess of power if he or she believed that it was for the plaintiff’s benefit.¹¹¹

In Australia, an intermediate appellate court unearthed another problem with the first limb.¹¹² The defendant minister’s acts fell squarely within a literal reading of the first limb. His good faith breach of natural justice had meant that he had acted unlawfully, and he had definitely intended to harm the plaintiff: he had sought his dismissal from a statutory agency. The trouble was that harming the plaintiff was the very purpose of the power; perhaps unusually, that was lawful.¹¹³ The court exonerated the minister because he had not acted dishonestly. Rather, he had sought the plaintiff’s dismissal for the permissible purpose of cleaning up what he had believed to have been an incompetent agency within the minister’s portfolio of responsibilities. It appears likely that the Supreme Court of Canada would have reached the same result on those facts.¹¹⁴

Perhaps the first-limb problems could be somewhat reduced by insisting on the distinction between improper motives and improper purposes. That would be consistent with administrative law doctrine, which focuses on purposes rather than motives. But these are more than just tricky doctrinal difficulties with the two-limb approach. They flow from the difference between defining misfeasance in terms of tight rules or more flexible principles. There is an obvious parallel with *OBG*’s policy choice between closed rules or a prima facie tort, but the call of principle is stronger in the misfeasance arena, in which government is meant at all times to behave with more altruism and personal detachment. Justice Rand’s principle was the rule of law, which warranted a damages award for the intentional infliction of harm by a public officer who Justice Rand believed was malicious, but the Attorney General’s malice consisted only of honest yet egregious ingredients. First, there was hubris or stupidity. Even a cub lawyer should have realized that the power lay with the Liquor Commissioner,

¹¹⁰ *Ibid.* at 235 [emphasis added]. See also *Watkins v. Secretary of State for the Home Department*, [2006] UKHL 17, [2006] 2 A.C. 395 at paras. 12, 73, 2 W.L.R. 807.

¹¹¹ *Three Rivers (No. 3)*, *supra* note 95 at 235. The same view appears in *Garrett*, where a policeman had deliberately broken the rules, but quite possibly for what he had mistakenly seen as the plaintiff’s benefit (*supra* note 106 at 350).

¹¹² *Sanders v. Snell*, [2003] FCAFC 150, 198 A.L.R. 560 at para. 108. This was the end of the line in an extremely protracted litigation saga.

¹¹³ Brennan J. foresaw this possibility in *Mengel* (*supra* note 18 at 356).

¹¹⁴ *Odhavji*, *supra* note 106 at para. 28.

not the Attorney General. And secondly, powers that were all about liquor were used for purposes that were all about crushing lawful political and religious dissent. To make matters worse, they were used to close down a perfectly respectable small business, the regulation of which might well be regarded as an exercise in red tape.

The leading misfeasance cases all make frequent appeals to principle. Perhaps the principles most frequently voiced are knowing want of power, dishonesty, and the failure to make an “honest attempt”¹¹⁵ to use power lawfully. These are all principles focused on the putative tortfeasor’s mental state—a state ranging fairly narrowly from knowledge and the deliberate infliction of harm, to reckless indifference (which probably translates as knowledge of the risk of illegality or harm to the defendant or both) and indifference as to whether the risk will materialize.¹¹⁶ One could offer several reasons why misfeasance claims are exceptional, and why their success is even more exceptional. However, the centrality of the defendant’s mental state must surely count as one of the principal explanations, partly because its proof will usually be extraordinarily difficult. Defendants are unlikely to acknowledge moral impropriety,¹¹⁷ and reliable written proof will be rare. Furthermore, proof of the requisite mental state might well carry with it an implicit suggestion that the defendant is unfit for office,¹¹⁸ which would mean that in practical terms, there will be a tougher standard of proof.¹¹⁹

The rule of law also figures in the English¹²⁰ and Canadian¹²¹ judgments as one of the principles informing the misfeasance tort, but the High Court of Australia was distinctly hostile¹²² to a lower court’s attempt¹²³ to sidestep the niceties of the misfeasance tort by creating a new

¹¹⁵ *Mengel*, *supra* note 18 at 357, Brennan J.

¹¹⁶ Cane, “*Mens Rea*”, *supra* note 104 at 535.

¹¹⁷ Few officials would publicly boast as Duplessis had done. Indeed, it was evidently difficult to determine whether his boasts had claimed too much credit for himself and too little for the Liquor Commissioner.

¹¹⁸ There is a parallel with judicial review challenges for bias. Australian doctrine allows but actively discourages challenges for actual bias, diverting most challengers to the less pejorative ground of “reasonable apprehension” of bias: Mark Aronson, Bruce Dyer & Matthew Groves, *Judicial Review of Administrative Action*, 4th ed. (Sydney: Thomson Reuters, 2009) at 641-46.

¹¹⁹ See *Briginshaw v. Briginshaw*, [1938] HCA 34, 60 C.L.R. 336. Deakin and Randall are critical of the House of Lords’s failure in *OBG* to use a “presumption” that people intend the probable consequences of their acts (Deakin & Randall, *supra* note 93 at 538-40). The misfeasance torts, however, have never wavered in their insistence on strict proof.

¹²⁰ *Three Rivers (No. 3)*, *supra* note 95 at 190.

¹²¹ *Odhavji*, *supra* note 106 at para. 26.

¹²² *Mengel*, *supra* note 18 at 352-53.

¹²³ See *Northern Territory v. Mengel*, [1994] NTSC 37, 95 N.T.R. 8 at paras. 12-15, Angel J.

tort—a constitutional tort of breaching the rule of law. As formulated, the new tort would have rendered actionable every harm intentionally inflicted by officers unwittingly acting beyond their powers. Further, it would have been more demanding of government than a negligence-based duty of care to stay within its lawful authority—a duty that the Australian courts incidentally reject as a step too far for the tort of negligence.¹²⁴ On the surface, the High Court of Australia’s objections were not to the rule of law language, but to a judgment that had slipped too easily from a requirement of government legality to a requirement of a remedy in damages. This judgment had understandably¹²⁵ drawn support in this respect from the majority judgments in *Roncarelli* other than that of Justice Rand. At a deeper level, however, I suspect that Justice Rand and the High Court of Australia had different understandings of the rule of law. In Mark Walters’s typology,¹²⁶ Justice Rand went beyond the rule of law as order, as an abstraction from the mass of common law cases validated largely by its descriptive accuracy, its explanatory power, and its coherence. Rather, Justice Rand’s understanding conformed to Walters’s model of the rule of law as reason, a distinctly substantive and normative conception that drew on legal and political ideals, which is why it had (and still has) such transformative potential.

Conclusion

It would be easy to exaggerate the differences between Justice Rand’s approach to the issues in *Roncarelli* and the way in which the High Court of Australia would have dealt with the same issues. Small differences in judicial styles, however, can produce larger consequences over time. A court that is reluctant to give normative bite to rule of law principles will find it correspondingly difficult to define a role for a tort designed only for the public sphere.

So far as the case involved the issue of the validity of the decision to cancel Roncarelli’s liquor licence, Justice Rand used the language of the rule of law where an Australian court would have seen no need. Had he been in Sydney, Roncarelli’s decision makers would have been courts, not a minister; the criteria for making decisions would have been narrower; and he would have had backup protection on any one of a number of grounds via judicial review. In the judicial review arena, the High Court

¹²⁴ The court said in *Precision Products (N.S.W.) Pty. Ltd. v. Hawkesbury City Council* ([2008] NSWCA 278) that a duty to take care to act *intra vires* would have required the courts to set public sector management standards, which would be both difficult and a violation of the separation of powers.

¹²⁵ See Mullan, *supra* note 71.

¹²⁶ Mark D. Walters, “Legality as Reason: Dicey, Rand, and the Rule of Law” (2010) 55 McGill L.J. 563.

of Australia had grown accustomed to reading down statutory grants of broad discretionary powers, sometimes because that was the only way to save a federal law from invalidation, but usually because the court's general administrative law principles were increasingly invoked to read down apparently unlimited grants of discretionary power.

More notable for Australians, therefore, was *Roncarelli's* decision to uphold the trial judge's decision to award damages. Based on the rule of law and appealing to a normative distinction between liability for private and public action, Canada's misfeasance tort is now heading toward an open-textured concept of morally blameworthy *public behaviour*. Australia's misfeasance tort is probably heading in the opposite direction. Although this is not yet clear, the odds are that it will end up focusing only on the abuse of *public power*, and being defined in minimalist and rule-focused terms, as would befit its perceived function as a very occasional fallback for the private torts.
