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# Book Review

Editor: Janet McLean

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## DAMAGES AND HUMAN RIGHTS

Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing, 2016) ISBN: 9781849463720; pages 499 (hb).

Section 92 of the Australian Constitution, as every law student knows, says that “trade, commerce, and intercourse amongst the states ... shall be absolutely free”. That is about as strong as the language of our mild-mannered Constitution gets, and for much of its 115-year history s 92 was interpreted as conferring an individual right on an Australian trader to engage in interstate trade. The right it conferred was not exactly a human right. But the right was a constitutional right conferred on traders, some of whom were human.

One of those human traders was Frederick Alexander James. Mr James was a fruit merchant. He grew and processed currants and sultanas in South Australia which he then sold into New South Wales, Victoria and Western Australia. Mr James was also a man of principle and one of our most famous and persistent constitutional litigants. When the Commonwealth Parliament enacted legislation prohibiting the carriage of dried fruit from one State to another unless the buyer and the seller were licensed, Mr James was ultimately successful in having the legislation declared invalid by the Privy Council on the basis that the legislation interfered with his constitutional right.<sup>1</sup>

Mr James should have stopped there. But, like a lot of litigants who have experienced success against the odds, Mr James decided to have another go. He brought an action for damages against the Commonwealth for having administered the legislation declared to have interfered with his constitutional right. The action was tried by Dixon J in the original jurisdiction of the High Court. This time, Mr James was unsuccessful.

The constitutional right of a trader to engage in interstate trade, said Dixon J, was a limitation on governmental power. It conferred on the trader immunity from the exercise of governmental power. That immunity did not translate into what Dixon J described as “a private right sounding in damages”. Infringement of the constitutional right or immunity would nullify an alleged statutory justification for a governmental act which was tortious at common law. But infringement of the constitutional right or immunity would not of itself give rise to a private right of action for damages.<sup>2</sup>

Dixon J’s answer to Mr James’ action for damages came later to be generalised in an answer given by the High Court to a question formally reserved for its consideration in an action brought against the Commonwealth by Aboriginal Australians forcibly removed from their families when they were children by officials acting within the authority legislatively conferred on them by ordinances of the Northern Territory.

The relief to which the plaintiffs might have been entitled was held not to extend to damages for breach of any express or implied constitutional right on which they relied. Brennan CJ explained it this way:<sup>3</sup>

The Constitution reveals no intention to create a private right of action for damages for an attempt to exceed the powers it confers or to ignore the restraints it imposes. The causes of action enforceable by awards of damages are created by the common law (including for this purpose the doctrines of equity) supplemented by statutes which reveal an intention to create such a cause of action for breach of its provisions. If a government does or omits to do anything which, under the general law, would expose it or its servants or agents to a liability in damages, an attempt to deny or to escape that liability fails when justification for the act done or omission made depends on a statute or an action that is invalid for

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<sup>1</sup> *James v Commonwealth* (1936) 55 CLR 1.

<sup>2</sup> *James v Commonwealth* (1939) 62 CLR 339, 362.

<sup>3</sup> *Kruger v Commonwealth* (1997) 190 CLR 1, 46.

want of constitutional support. In such a case, liability is not incurred for breach of a constitutional right but by operation of the general law. But if a government does or omits to do something the doing or omission of which attracts no liability under the general law, no liability in damages for doing or omitting to do that thing is imposed on the government by the Constitution.

That distinctly Australian, and distinctly constitutional, approach to thinking about an action for damages as an action for the vindication of a private right and of thinking of a private right as a right established independently of any violation of a constraint on governmental power flowed through to the design of the Victorian *Charter of Human Rights and Responsibilities*<sup>4</sup> and the Australian Capital Territory *Human Rights Act*.<sup>5</sup> Each provides to a person who is otherwise entitled to seek relief in respect of an unlawful act of a public authority the ability to seek that relief on the ground that the act is unlawful by reason of inconsistency with a human right. But each specifically denies that a person is entitled to be awarded damages for a breach of a human right.

Not so in the United Kingdom, where the *Human Rights Act* expressly provides that damages may be awarded for proven violations of human rights.<sup>6</sup> Not so also in the United States, in Canada, in New Zealand, in South Africa, in Ireland and in a number of the Caribbean states. In each of those essentially common law jurisdictions, damages can at least sometimes be awarded for violations of human or constitutional rights.

*Damages and Human Rights* is concerned specifically with damages for violations of human rights under the United Kingdom *Human Rights Act*. It examines possible approaches to conceptualising and quantifying awards of damages under that Act and it provides cogent reasons as to why a particular approach should be considered preferable. It is a significant work of original scholarship specifically about the domestic law of the United Kingdom, but one which (like many ancient and modern works of original scholarship on topics of English domestic law) draws inspiration from a comparative analysis of the law of other jurisdictions.

For a work of this nature, by a New Zealand author now based in Melbourne, to be reviewed in an Australian legal periodical is an illustration of the tension and the ambiguity inherent in our lived experience of what the late Professor Michael Taggart liked to refer to as Australian exceptionalism. The work is on a topic which currently engages the attention of courts in almost every major common law jurisdiction except Australia.

Professor David Feldman, who supervised the doctoral thesis at Cambridge on which the book was based, makes the bold prediction in the foreword that *Damages and Human Rights* will quickly become the standard point of reference in its field. My own opinion must be expressed subject to the qualification that, as an Australian domestic lawyer, I am not in the field. For what my opinion is worth, judged solely on the depth of its research, the breadth of its vision and the cogency of its reasoning, I have no reason other than to concur.

Of the range of possible approaches to damages for violations of human rights, the author gives close attention in the book to two approaches which have to date found favour in the English courts. He points out their flaws.

One approach he labels the “mirror approach”.<sup>7</sup> It involves attempting to do in London what is done in Strasbourg. The author rejects the mirror approach in part because what is done in Strasbourg at a supra-national level is in principle no guide to what should be done in London at a national level. He also rejects the mirror approach in part because what is done in Strasbourg is pretty muddled stuff. Muddled is my word, not his. What he says, by way of summary, with much more delicacy and erudition is this:<sup>8</sup>

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<sup>4</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39.

<sup>5</sup> *Human Rights Act 2004* (ACT) s 40C.

<sup>6</sup> *Human Rights Act 1998* (UK) s 8.

<sup>7</sup> See, eg *R (Greenfield) v Secretary of State for the Home Department* [2005] 1 WLR 673.

<sup>8</sup> Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing, 2016) 471.

The mirror approach cannot be supported on a practical level. The Strasbourg jurisprudence is riddled with problems. It lacks principle, coherence, consistency and is largely unreasoned. Domestic courts have struggled to interpret and apply the Strasbourg jurisprudence, and very little meaningful guidance can be divined from it.

The second approach to have found traction in the English courts is given by the author the label of “interest-balancing”.<sup>9</sup> The interest-balancing approach is an adaption of an approach which has found favour in many other common law jurisdictions. It treats a violation of a human right as a violation of a right that is special or even unique. It treats the imposition and quantification of damages for a violation of a human right as requiring a balance to be struck in each case between the interests of the victim that are protected by the right and such interests of the public as may be seen to underlie the governmental action found to violate the right.

The author has many criticisms of the interest-balancing approach. The main criticisms, as I read the book, are: that the “interest” bit of interest-balancing undervalues the normative importance of human rights and unjustifiably diminishes their practical protection; and that the “balancing” bit of interest-balancing undermines a Diceyan notion of the rule of law and violates what an Australian (although perhaps not an Englishman) would think of as the separation of judicial power.

The alternative approach for which the author contends is one which delves deep into the well of the common law. A violation of human rights, he argues, should be equated for the purpose of determining an appropriate legal remedy with a tort which is actionable per se, such as trespass or false imprisonment.

The author is in this respect in the company of common law greats. In particular, he is in the company of Lord Chief Justice Holt, of whom Lord Campbell said in his *Lives of the Chief Justices of England* that he was:

a man of unsullied honour, of profound learning, and of the most enlightened understanding, who held the office of Lord Chief Justice for twenty-two years – during the whole of which period, often in circumstances of difficulty and embarrassment, he gave an example of every excellence which can be found in a perfect magistrate.<sup>10</sup>

In 1702 Holt LCJ found himself in the lonely position of being in dissent in a panel of four judges in the Court of Kings Bench, only to be upheld the following year on appeal to the House of Lords by a majority of 50 to 16. The case was one brought by a man named Ashby.

Mr Ashby was a man who had something that was quite rare in 1702: a right to vote in the election of a Member of Parliament. Mr Ashby’s ultimately successful action was an action for damages at common law against Mr White, a returning officer who had refused to admit Mr Ashby to vote. Mr Ashby on one view suffered no loss because the candidate for whom he wanted to vote had been elected in any event. On another view, the whole matter was one of parliamentary privilege within the exclusive jurisdiction of the House of Commons. Not so, said Holt LCJ. Mr Ashby had a legal right to vote. Being hindered by Mr White in the exercise of that legal right, the common law gave Mr Ashby the remedy in damages he claimed against Mr White on the simple basis that a person who has a legal right must of necessity have the legal means of vindicating it. The appropriate means of vindication was an action on the case and the remedy provided by an action on the case was damages.<sup>11</sup>

The quantification of damages at common law was then, and would remain until the middle of the 19th century, a jury question. There was no occasion for Holt LCJ to address the jury’s quantification of damages. The jury had in fact awarded Mr Ashby damages in the princely sum of 200 pounds.

Arguably there are some difficulties with the generality of the reported holding in *Ashby v White*. The notion that every legal right must of necessity be capable of vindication by the provision of a legal remedy when it is violated certainly became a theme of *Blackstone’s Laws of England*. But it

<sup>9</sup> See, eg *Anufrijeva v Southwark London Borough Council* [2004] QB 1124.

<sup>10</sup> Lord Campbell, *The Lives of the Chief Justices of England* (Fred D Linn & Co, 1881) Vol 3, 1.

<sup>11</sup> *Ashby v White* (1703) 2 Ld Raym 938; 92 ER 126.

was used by Blackstone really only to make sense of the forms of action which then dominated common law methodology. The common law used particular forms of action to obtain particular remedies, Blackstone was saying, but each remedy in a common law action was properly to be seen as a means of vindicating a right.

There are and were in the 18th century many fields in which the law provided measures of protection in much less black and white terms. The whole of equity is one example.

On one view, *Ashby v White* turned on Holt LCJ assuming that Mr White acted with malice. That was the view taken of *Ashby v White* in the 19th century when it came to be thought of as progenitor of the specific and peculiar tort of misfeasance in public office. Holt LCJ did not mention malice in his original report of the case. He added a reference in the version he tidied up for transmission to the House of Lords.<sup>12</sup>

The author nevertheless presents a strong argument that what I will call the wider and unrevised version of *Ashby v White* provides a principled and workable basis for thinking about the exercise of a statutory power to order damages for breach of a human right in a common law context. The approach can, he cogently argues, guide not only the question of whether damages should be awarded in a particular case but also how such damages as may be awarded should be quantified.

Importantly, he shows that the approach can provide a basis for distinguishing in a case of non-pecuniary damages between a normative component (the quantum of which is based on the objective seriousness of the violation independently of the consequences to the victim) and what might be labelled a compensatory component (the quantum of which is based on the subjective consequences for the victim). That, I suspect, will be one of the book's more immediate and specific contributions to its field.

At a more general and deeper level, I cannot help but to have the feeling that the book is destined to be instrumental in changing the perception of human rights as lying in a realm of public law, and of tort as lying in a separate realm of private law. When damages for a violation of a human right are conceived of as a tortious remedy, the violation itself is more readily conceived of as a species of a civil wrong, and the whole public-private divide is made to seem less relevant.

On any view, this is a book that is likely to be read, widely and often. It is going on a shelf in my library that is notionally labelled "reference". If Australian exceptionalism becomes relevantly less exceptional, this book will be back on my desk.

*Stephen Gageler*  
*Justice of the High Court of Australia*

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<sup>12</sup> See generally Mark Aronson, "Misfeasance in Public Office: A Very Peculiar Tort" (2011) 35 *Melbourne University Law Review* 1, 9-10.