

# MISFEASANCE IN PUBLIC OFFICE

by Mark Aronson<sup>1</sup>

## INTRODUCTION

The fact that administrative or executive action is invalid according to public law principles is an insufficient basis for claiming common law damages. The remedies in public law for invalid government action are orders that quash the underlying decision, or prohibit its further enforcement, or declare it to be null and void. Unlawful failure or refusal to perform a public duty is addressed by a mandatory order to perform the duty according to law. In other words, harm caused by invalid government action or inaction is not compensable<sup>2</sup> at common law just because it was invalid. The tort of misfeasance in public office represents a “safety net” adjustment to that position, by allowing damages where the public defendant’s unlawfulness is grossly culpable at a moral level.

Briefly, misfeasance in public office is a tort remedy for harm caused by acts or omissions that amounted to:

1. an abuse of public power or authority;
2. by a public officer;
3. who either
  - a. knew that he or she was abusing their public power or authority, or
  - b. was recklessly indifferent as to the limits to or restraints upon their public power or authority;
4. and who acted or omitted to act
  - a. with either the intention of harming the claimant (so-called “targeted malice”), or
  - b. with the knowledge of the probability of harming the claimant, or
  - c. with a conscious and reckless indifference to the probability of harming the claimant.

In short, misfeasance is an intentional tort, where the relevant intention is bad faith. Pleading bad faith is difficult, because the pleading rules<sup>3</sup> require details, and professional conduct rules forbid practitioners supporting obviously baseless allegations. Proving bad faith is even more difficult. Where they have a choice, the courts are strongly disposed to believing that bureaucratic error was caused by genuine mistake, even incompetence, rather than by bad faith. The result is that of

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<sup>2</sup> Able to be compensated.

<sup>3</sup> The importance of sufficiently particularised pleadings for intentional torts was emphasised in *Three Rivers DC and others v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 at [185 – 186].

the hundreds of misfeasance claims that are actually filed, very few make it to trial.<sup>4</sup> Most are filtered out for inadequate pleading of bad faith, or because an allegation of bad faith has no real prospect of success.

The courts often acknowledge that the tort of misfeasance in public office is not fully defined.<sup>5</sup> According to Stratas JA in Canada's Federal Court of Appeal, misfeasance is "a notoriously complex tort whose precise elements have only been settled recently ...".<sup>6</sup> That turns out to be an understatement. Bad faith has attracted most of the attention so far, leaving the tort's other elements under-developed.

## **UNFINISHED BUSINESS: AN OVERVIEW**

There are several reasons for concluding that misfeasance in public office is an oddity in the tort law canon.<sup>7</sup> Aside from its restriction to abuses of public power, and aside from the centrality of its requirement for bad faith, the tort's contours are only roughly formed, with many of its finer details yet to be resolved. That might be because its history is relatively short, although it has pretensions to a venerable past.

The action for misfeasance in public office lies only against public officers or those exercising public functions, and is in that sense the common law's only truly public law tort. Indeed, it might be safer to call it a public law "damages remedy", because its very existence troubles private law taxonomists,<sup>8</sup> although this paper will not go there.

There is occasional uncertainty as to how one might define a public officer,<sup>9</sup> and greater uncertainty as to how one might define a public function.<sup>10</sup>

Further, the cases have almost uniformly treated the misfeasance tort as a common law claim made by a subject against a government party. However, just as judicial review litigation can occur between different public sector bodies, the possibility has now been raised that government itself can be a claimant for misfeasance damages against individual officers. That would, for example, expose public officials to a damages action if they corruptly sell off public assets at an undervalue.

Unlawful conduct is one of the tort's central components, but there is uncertainty as to what might count as "unlawful", beyond that which would be unlawful for the purposes of judicial review.

The defendant's conduct must have caused the claimant harm or loss, which happens in most cases to be purely economic loss, but none of the special

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<sup>4</sup> See R Moules, *Actions against public officials: legitimate expectations, misstatement and misconduct* (2009) at [5-004] ("Moules").

<sup>5</sup> Lord Steyn, in *Three Rivers DC and others v Governor and Company of the Bank of England (No 1)* [2000] UKHL 33 [2000] 3 All ER 1, made it clear that the tort had only received limited analysis between the 18th and 20th centuries, stating "The present case is the first occasion on which the House has been called on to review the requirements of the tort in a comprehensive manner". See also Moules at [5-083].

<sup>6</sup> *St John's Port Authority v Adventure Tours Inc* (2011) 335 DLR (4th) 312 at [6].

<sup>7</sup> The collection of actions that can be described as 'torts'.

<sup>8</sup> Those who seek to classify and categorise private civil law actions.

<sup>9</sup> There is no exhaustive definition in English law. For discussion see *Lloyds v Henderson* [2007] EWCA Civ 930, [2008] 1 WLR 2255 at [26-41].

<sup>10</sup> See pp 10 and 14 below.

constraints upon compensation for purely economic losses so familiar to negligence lawyers has yet crystallised as a requirement in the misfeasance tort.<sup>11</sup>

The tort can be (and usually is) committed without any infraction upon a claimant's antecedent<sup>12</sup> right or breach of duty on the defendant's part. It therefore cannot conform to the classic corrective justice model of correlative rights and duties,<sup>13</sup> and yet it is occasionally suggested that claimants need to demonstrate standing to sue.

The bad faith requirement applies to the twin elements of harm and unlawfulness. The defendant must therefore have wanted to harm the claimant (a case of so-called targeted malice), or known the claimant would be harmed, or at the very least, have been consciously and recklessly indifferent about probable harm to the claimant. Strictly speaking, the defendant must have entertained at least one of the same three mental states with regard to acting unlawfully, but many judgments assert<sup>14</sup> (wrongly, in the author's opinion) that if there is intentional harm, then the claimant need not in addition prove bad faith as to the tort's "unlawfulness" component.

Finally, the very rationale of the tort is uncertain. A serious breach of public trust and confidence is central to the criminal offence of misconduct in public office, but that finds no counterpart in the tort. Punishment has occasionally been suggested as a rationale. The tort's history might indeed suggest that it is an adjunct to the criminal law, and its insistence on subjective bad faith suggests that it serves as a civil penalty for deliberate wrong-doing. However, punitive damages<sup>15</sup> will not lie in the absence of proof of material loss, the state can be vicariously liable<sup>16</sup> for the individual officer guilty of misfeasance (and is frequently the only defendant) and there has been no suggestion that the action is foreclosed<sup>17</sup> if the individual wrong-doer has been punished through the criminal justice system.

Lord Steyn said in *Three Rivers District Council v Bank of England (No 3)*<sup>18</sup> that the tort's rationale

is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes. ... The tort bears some resemblance to the crime of misconduct in public office.

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<sup>11</sup> The outer limits of the special relationships that must exist for a claimant to be able to claim pure economic loss under the law of England and Wales are now largely set by *Caparo Industries Plc v Dickman* [1990] 1 AC 605. See M Jones, *Clerk and Lindsell on Torts* (2014) [21st ed] para 1-43 ("Clerk and Lindsell").

<sup>12</sup> Pre-existing.

<sup>13</sup> Corrective justice "requires those who have without justification harmed others by their conduct to put the matter right... the harm-doer and the harm-sufferer are to be treated as equals", Honore, "The morality of tort law" in Owen, *Philosophical foundations of tort law* (1995). Also see Clerks and Lindsell at [1-15].

<sup>14</sup> See p 14 below and for further discussion, see M Aronson, "Misfeasance in public office: a very peculiar tort" (2011) 35 *Melbourne University Law Review* 1 p 18 and following; and Moules at [5-049].

<sup>15</sup> Court ordered damages, the express purpose of which is to express displeasure with the party ordered to pay them.

<sup>16</sup> Responsible not only for torts it commits itself, but also for those it has authorised or subsequently ratified.

<sup>17</sup> Prevented.

<sup>18</sup> [2003] 2 AC 1 at [190-191].

With respect, that reasoning is opaque. In context, it seems clear that when his Lordship spoke of ulterior and improper purposes, he meant subjective and morally culpable bad faith, in which case his Lordship saw an award of misfeasance damages as vindicating the rule of law<sup>19</sup> by punishing individual public officers for dishonest abuse of public power.

Alternatively, Lord Steyn may have been doing nothing more than making a normative claim wrapped up in rule of law language. On that view, he meant only that the usual public law remedies for invalid government action do not sufficiently uphold rule of law values where the invalidity and consequent harm were deliberate. In those cases, the rule of law provides an avenue for compensation, as an exception to the general rule that damages are unavailable for administrative law illegality.

## HISTORY<sup>20</sup>

The tort of misfeasance in public office claims a history that dates back to *Ashby v White*,<sup>21</sup> in which Holt CJ had awarded a very large sum in damages against a public official who had maliciously prevented the plaintiff<sup>22</sup> from casting his vote at a general election. The plaintiff had in fact sustained no material loss, his preferred candidate was elected and the damages award was explained in much the same terms that might apply to a criminal penalty. Indeed, Holt CJ said that in order to avoid a multiplicity of actions, a criminal prosecution would have been the only remedy if the official had maliciously denied the vote to a large number of electors.<sup>23</sup>

More than 250 years were to pass before the common law tort of misfeasance in public office was actually recognised.<sup>24</sup> Dicta<sup>25</sup> from some of the cases decided in that long interval are still cited occasionally,<sup>26</sup> but they cannot be taken at face value, and were never developed into a workable and free-standing public law tort for invalid government action. In addition, the application to Crown servants (albeit not the Crown itself) of the more general torts against property, person and reputation reduced the demand for a special damages action against government itself.

Early cases suggested the possibility of an action for breach of any *public duty*,<sup>27</sup> but as the state's size and duties increased exponentially in the nineteenth century, such

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<sup>19</sup> The principle that all persons are equally subject to the law.

<sup>20</sup> See also M Aronson, "Misfeasance in Public Office: a Very Peculiar Tort" (2011) 35 *Melbourne University Law Review* 1 at 4-9.

<sup>21</sup> (1703) 2 Ld Raym 938; 1 Smith LC (13th ed) 253.

<sup>22</sup> In England and Wales, under the Civil Procedure Rule [updated 28 July 2015] a plaintiff is now referred to as a claimant.

<sup>23</sup> (1703) 2 Ld Raym 938 at 955; 1 Smith LC (13th ed) 253 at 275.

<sup>24</sup> The Court of Appeal had denied its existence in *Davis v Bromley Corporation* [1908] 1 KB 170 at 173. Without citing a single authority, the Privy Council pronounced the tort "well-established" in *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172. Canada and Australia took the first tentative steps prior to *Dunlop*; see *Roncarelli v Duplessis* [1952] 1 DLR 680 and *Roncarelli v Duplessis* [1959] SCR 121; and *Farrington v Thomson* [1959] VR 286.

<sup>25</sup> Opinions of a judge that do not embody the resolution or determination of the specific case before the court going beyond the facts before the court and therefore not binding in subsequent cases as legal precedent.

<sup>26</sup> For example, *Henly v Lyme Corporation* (1828) 5 Bing 91, 130 ER 995.

<sup>27</sup> *Sutton v Johnstone* (1786) 1 TR 493 at 509; *Mayor of Lyme Regis v Henley* (1834) 8 Bli NS 690 at 714; and *Ferguson v Kinnoull* (1842) 9 Cl & Finn 251 at 279.

a cause of action would have been far too wide. A proposal for a damages action for breach of any *statutory duty* was likewise too broad, although it might initially have made some sense as a mechanism for enforcing Acts obtained by promoters of privately funded infrastructure programs.<sup>28</sup>

A more generalised right of action for breach of statutory duty was eventually recognised in the context of employees' claims against their employers for breach of industrial safety legislation,<sup>29</sup> but beyond that specific context, it now struggles for survival. It is certainly highly improbable as against public bodies whose responsibilities are owed to the community at large or, at least, to large sections of the community.<sup>30</sup>

With the rejection of a right of action against anyone for breach of a common law or statutory duty, the best remaining common law option might have been to allow actions for any harm caused intentionally, at least if there was malice. However, the intentional infliction of purely economic loss is of the very essence of commercial competition, and even outside that context, the common law decided against a *prima facie* tort of abuse of rights.<sup>31</sup> As against private sector defendants, malice nowadays converts conduct that would otherwise have been lawful into a tort only if it was done in combination with others so as to constitute a conspiracy.<sup>32</sup>

The common law, therefore, set its face against developing a doctrine of abuse of *rights*. Similarly, the common law was hesitant to remedy abuse of *power*, which in the private sector is largely regulated by legislation. Of course, abuse of *public* power has long been the over-arching theme of judicial review, but compensation is not in the suite of judicial review remedies. The plaintiff in *Davis v Bromley Corporation*<sup>33</sup> was a builder seeking to carry out major improvements on his property. He could not proceed without the necessary approvals, which the council withheld. He alleged that the council had not considered his plans according to law, and even that he was entitled to the approvals. The Council's motive, he said, was revenge for him having earlier sued the council in relation to other aspects of his building proposal. The Court of Appeal said the power to grant the necessary approvals lay with the council, not the court itself, and that it was a discretionary

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<sup>28</sup> See: *Byrne v Australian National Airlines Ltd* (1995) 185 CLR 410 at 459-460; and *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 376, where Gummow J said that the action for breach of statutory duty sprang originally "from the relationship between the legislature and the promoters of private Acts". The courts held statutory undertakers strictly to the terms of "their" statutes, which were treated much like contracts between the promoters and the relevantly affected public.

<sup>29</sup> *Groves v Wimbourne* [1898] 2 QB 402.

<sup>30</sup> See: *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731-2; *O'Rourke v Camden London Borough Council* [1998] AC 188 at 193-4; and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 and 652.

<sup>31</sup> *Bradford Corporation v Pickles* [1895] AC 587.

<sup>32</sup> See: *Bradford Corporation v Pickles* [1895] AC 587 at 594, 598-9 and 601; *Allen v Flood* [1898] AC 1 at 92 and 152-3; *Crofter Hand Woven Harris Tweed Co Ltd v Veitch* [1942] AC 435 at 442; *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 190; and *OBG Ltd v Allan* [2008] 1 AC 1 at 22.

<sup>33</sup> [1908] 1 KB 170.

power. Even if the council had indeed been malicious, the court said that the builder's only remedy was mandamus.<sup>34</sup>

One might speculate whether the outcome in *Davis* might have been different if the council had had no discretion in the matter. Assessment of damages for loss of a chance is a much more recent development,<sup>35</sup> and even *Three Rivers* had statements to the effect that abuse of a discretionary power is beyond the reach of the misfeasance tort unless the circumstances were such that, legally speaking, the discretion could in the particular case be exercised in only one way.<sup>36</sup> In England, in any event, the very possibility of a tort for misfeasance in public office lay dormant for roughly 80 years after *Davis*.

The first modern stirrings occurred in Canada, in a long-running (and moderately successful) claim by a restaurant owner against an autocratic Provincial Premier for cancelling his liquor licence, or for ordering its cancellation.<sup>37</sup> The Premier had no formal power over the licensing body, and no licensing power of his own, and even if he had, his actions were taken for wholly improper (indeed, outrageous) reasons.

An Australian case followed, namely, *Farrington v Thomson*.<sup>38</sup> The defendants in that case had borne no malice towards the plaintiff. They had not set out deliberately to harm him, but they had known that they were exceeding their power when they had ordered him to cease selling liquor. The trial judge drew on a number of disparate and largely old cases to construct what was, in essence a new tort, upon which he conferred its modern label. More importantly, he extended the old cases, which had all involved defendants deliberately setting out to harm the plaintiff. Deliberate harm was said to be but one branch of this newly branded tort, which henceforth was to have a second branch, namely, deliberate excess of power.

After some academic urging in English commentaries,<sup>39</sup> Lord Diplock (speaking for the Judicial Committee of the Privy Council) declared the tort of misfeasance in public office "well-established", and accepted that the tort's constituent mental elements were either malice or deliberate excess of power.<sup>40</sup> Shortly afterwards, the English Court of Appeal accepted the tort's existence in *Bourgoin SA v Ministry of Agriculture, Fisheries and Food*,<sup>41</sup> and that it had two alternative mental elements, and for the first time, it applied the label "targeted malice" to the first of those alternatives (namely, deliberate harm).

Four leading cases followed *Bourgoin*; in chronological order, they came from Australia, New Zealand, England and Canada. They all accepted the misfeasance

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<sup>34</sup> A judicial remedy in the form of an order from a superior court, to any subordinate court or public body to do, or not do, some specific act which that body is obliged under law to do, or refrain from doing.

<sup>35</sup> See Clerk and Lindsell at [1-45].

<sup>36</sup> *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 230, 237 and 293. Two Australian cases appear to have said that the misfeasance tort is available whether the defendant has abused a public duty or a public power: *Cannon v Tahche* (2002) 5 VR 317; and *Leerdam v Noori* (2009) 255 ALR 553 at [4] and [105].

<sup>37</sup> *Roncarelli v Duplessis* [1959] SCR 121.

<sup>38</sup> *Farrington v Thomson* [1959] VR 286.

<sup>39</sup> SA de Smith, *Judicial Review of Administrative Action* (2nd ed, 1968) pp 19 and 319; HWR Wade, *Administrative Law* (4th ed, 1977) pp 636-640; and J McBride, "Damages as a Remedy for Unlawful Administrative Action" (1979) 38 CLJ 323.

<sup>40</sup> *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172.

<sup>41</sup> [1986] 1 QB 716.

tort, and while some issues were unique to each case, the tort's mental elements were their principal focus.

The great bulk of misfeasance cases decided since these four leading cases have concerned defence applications either to strike out the claimant's pleadings for failure to pinpoint the alleged bad faith, or even for summary judgment because of the sheer improbability of ever proving bad faith.<sup>42</sup> In practical terms, strike-outs and summary judgments<sup>43</sup> are serving as judicially administered filters, weeding out a very large number of claimants who will never be able to prove bad faith with hard evidence, even where their suspicions are reasonable. Misfeasance has lots of unexplored or unresolved issues, but this filtering process has clarified most of the problems relating to the tort's mental elements. It might be convenient, therefore, to discuss those elements next.

### ALTERNATIVE WAYS OF ESTABLISHING BAD FAITH

*Northern Territory v Mengel*<sup>44</sup> was the first of the leading cases on the new tort's mental elements. *Mengel* settled two principal issues. First, it overturned an earlier case<sup>45</sup> declaring a right to claim compensation for any and all losses flowing inevitably from positive action deliberately undertaken by any defendant, provided only that the action was "unlawful". Overturning the older case disposed of any argument for an even broader common law right to damages for government action simply because it was invalid. At the same time, however, *Mengel* accepted the existence of a misfeasance tort, but insisted that its critical feature was to be bad faith, not in any watered down sense, but subjective bad faith: "the absence of an honest attempt to perform the functions of the office",<sup>46</sup> according to Brennan J, or "conscious maladministration"<sup>47</sup> as Gummow J put it only three years after *Mengel*. The court in *Mengel* itself thought that "reckless disregard" might well equate to the bad faith required by misfeasance, but only, it seems, if that would involve an inquiry into the defendant's actual mental state, rather than an inference to be imputed from what a reasonable defendant ought to have known. Tests involving "ought to have known" should be left to negligence law.<sup>48</sup>

A police sergeant in *Garrett v Attorney General (NZ)*<sup>49</sup> was accused of covering up a rape committed by one of his constables. If that were true, then he would have known that he was acting unlawfully, but he escaped misfeasance liability because the jury accepted that he had neither intended, known, believed, nor even suspected that a cover-up would probably turn out to hurt the victim. The court endorsed "reckless indifference" as an alternative to intentional harm, but said that it could exist only if the sergeant had turned his mind to the consequences, and he had not.

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<sup>42</sup> For discussion see Moules at [5-079]

<sup>43</sup> Mechanisms by which the courts can remove claims which have no realistic prospect of success from the court system at an early opportunity.

<sup>44</sup> (1995) 185 CLR 307.

<sup>45</sup> *Beaudesert Shire Council v Smith* (1966) 120 CLR 145.

<sup>46</sup> (1995) 185 CLR 307 at 357.

<sup>47</sup> *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 376.

<sup>48</sup> (1995) 185 CLR 307 at 347-348.

<sup>49</sup> [1997] 2 NZLR 332.

The House of Lords decision in *Three Rivers District Council v Bank of England (No 3)*<sup>50</sup> was the next of the leading cases, and it remains the leading English case on the tort of misfeasance in public office. The claimants were depositors in a failed bank. They alleged that the bank was so evidently dodgy that it should never have been licensed, or at the very least, that its licence should have been cancelled years before it ultimately failed. A claim in negligence offered no hope. That was partly because the weight of precedent and policy considerations went strongly against the existence of a common law duty of care on the part of a financial services regulator to protect investors against the risks of bad or even fraudulent funds management. It was also because the regulator in *Three Rivers* had statutory protection from liability for any conduct undertaken in “good faith”. Therein lay the explanation for the claimants pursuing misfeasance in public office, an intentional tort rooted in bad faith. The claim eventually went to trial, where it failed for want of proof of bad faith, but not before the House of Lords had considered the material elements of the tort on applications first to strike out the pleadings, and then (after the pleadings were amended) for summary judgment on the ground that the claim lacked any real prospects of success.

Perhaps because of the tort’s obscurity, Lord Steyn’s extended exposition in *Three Rivers*<sup>51</sup> has become the usual starting point of all subsequent analysis in English cases, but it is nevertheless worth bearing in mind that *Three Rivers* itself resolved only one major issue, namely, that misfeasance is an intentional tort. Negligence, even gross incompetence, are not sufficient. As in *Mengel*<sup>52</sup> and *Garrett*,<sup>53</sup> “reckless indifference” is the last remaining alternative to “intention” and “knowledge”, and it requires some conscious level of advertence to the relevant unlawfulness or harm. Lord Steyn said that as bad faith was the tort’s *raison d’être*, “reckless indifference” had to be real, not imputed; misfeasance had to be limited to the person who knowingly took the relevant risk, rather than the person who gave it no thought.<sup>54</sup>

*Odhavji v Woodhouse*<sup>55</sup> is the fourth of the leading cases, and it, too, refused to dilute the requisite mental elements any further than conscious reckless indifference.

Many judgments now speak as if the tort has only two possible mental elements – intention (targeted malice) and reckless indifference. In *Three Rivers* itself, for example, Lord Steyn said:<sup>56</sup>

The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer, ie conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.

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50 [2003] 2 AC 1.

51 [2003] 2 AC 1 at 190-196.

52 (1995) 185 CLR 307.

53 [1997] 2 NZLR 332 at 349-351.

54 [2003] 2 AC 1 at 192-193.

55 [2003] 3 SCR 263.

56 [2003] 2 AC 1 at 191. The “twin elements” viewpoint is advanced by J Steele in her chapter 14, “Public Service Liability”, in R Buckley et al (eds) *Clerk & Lindsell* p 1076.



On the other hand, Lord Hobhouse spoke of three limbs – purpose, knowledge, and consciously reckless indifference.<sup>57</sup>

The difference between seeking illegality or harm, and knowing that there would be illegality or harm, is clear but small, and the central issue in *Bourgoin*<sup>58</sup> was whether it should matter for the purposes of misfeasance. The Minister in *Bourgoin* had deliberately abused the importation rules to help British farmers compete against French imports. What he *wanted* was to protect local farmers; but he *knew* the consequences for their competitors. *Bourgoin* itself used ambiguous language, which subsequently gave rise to debate as to the relevance of any distinctions between intention and knowledge, or between dominant and secondary intention. *Menge*<sup>59</sup> had left the issue open, but *Garrett*<sup>60</sup> and *Three Rivers*<sup>61</sup> said that to sustain the moral equivalence of intention and knowledge, the latter had to be conscious, not imputed.

It will be noted that in the passage from Lord Steyn's judgment quoted above, his Lordship spoke of "two different *forms* of liability" (emphasis added). That was a careful choice of words. His Lordship addressed the possibility that different forms might imply different torts, and concluded that they did not.<sup>62</sup> *Odhavji* agreed.<sup>63</sup> The requisite bad faith is the constant; there is only one tort, even though it can manifest in any one of three ways.

#### **COHERENCE: IS THAT A GAP OR AN EXCLUSION?**

The four leading cases (and many others besides) all talked a lot about coherence, but that is a tricky concept, particularly when one is in the process of creating a new tort. Brennan J said in *Mengel* that "[t]he law does not speak with a forked tongue ...",<sup>64</sup> his point being that misfeasance must require something morally worse than carelessness if it is not to chip away at the limits of negligence liability.

All four cases saw their task as accommodating this newly rediscovered tort into a reasonably settled tort law landscape. They all emphasised the difference between subjective and reckless indifference on the one hand, and want of due care on the other. This was not just to highlight the meaning of "reckless indifference", nor merely to emphasise that misfeasance is an intentional tort, although those points were made very clearly. It was also to avoid rocking the tort boat too much. The new tort must be designed so as to avoid creating alternative avenues (or causes of action) for redressing the same wrongs, and so as to avoid creating avenues for redress that other torts have thought about and refused to remedy. At the same time, however, the leading cases failed to indicate just how, if at all, the government's liability might be limited in instances of bad faith abuses of power inflicting entirely predictable and huge pecuniary losses on large sections of the population.

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<sup>57</sup> [2003] 2 AC 1 at 230-231 and 286.

<sup>58</sup> [1986] 1 QB 716.

<sup>59</sup> (1995) 185 CLR 307.

<sup>60</sup> [1997] 2 NZLR 332 at 349-351.

<sup>61</sup> [2003] 2 AC 1 at 223-228, Lord Hutton.

<sup>62</sup> [2003] 2 AC 1 at 192.

<sup>63</sup> [2003] 3 SCR 263 at 281.

<sup>64</sup> (1995) 185 CLR 307 at 359.

Doctrine alone cannot answer the call for coherence when a new tort is being created; normative and pragmatic considerations come before that, and give shape to the new doctrine. Normatively, bad faith is seen as especially wrong in a public officer, but even that is not enough, because the torts of public officers are usually to be judged by the same criteria as the torts of anyone else. As pointed out by the Canadian Supreme Court, bad faith is only one element of the misfeasance tort: “The law does not recognise a stand-alone action for bad faith.”<sup>65</sup> A public officer’s bad faith makes the conduct tortious only where there is an abuse of public power, but why should that be so? Lord Sumption thought that it was because the public officer is in such cases acting for his or her own personal reasons,<sup>66</sup> but that is not always credible; the tort catches the over-zealous officer who seeks no personal gain whatsoever.

Pragmatically, the cases talk in terms of setting a “balance” between two considerations. On the one hand, public officers must be deterred from deliberately abusing their power, and on the other hand, they should not “be assailed by unmeritorious actions”.<sup>67</sup> One might doubt the tort’s deterrence effect in a system that allows for vicarious liability, and the high success rate of challenges to the pleadings and of applications for summary judgment can certainly be explained in part by the need to protect government officials from having to endure trials doomed to failure. Perhaps also, however, that same success rate bears testimony to an implicit belief in the benignity of government.

#### THE OBJECT OF INDIFFERENCE: RISK

The next problem is to identify the object of indifference. It must be indifference to a *risk*, of course, be it a risk of illegality or harm, but *Mengel*,<sup>68</sup> *Garrett*,<sup>69</sup> and *Three Rivers*<sup>70</sup> all addressed further arguments as to whether the risk (of harm, in each of those cases) had to be “foreseen”, “probable”, “foreseeable”, or none of the above. In other words, how great must the risk be?

*Mengel* said that the bar could go no lower than “foreseeable”,<sup>71</sup> and an intermediate appeal court in Australia has since ruled that it need go no higher.<sup>72</sup> *Garrett* avoided an explicit ruling on the issue, but seemed to require that the risk be likely.<sup>73</sup> *Three Rivers* said that to conform to the tort’s moral foundations, the balance had to be set higher than “foreseeable”, and to avoid stripping the tort of any efficacy, it had to be set lower than “foreseen”. *Three Rivers* therefore opted for reckless indifference to a

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<sup>65</sup> *Alberta v Elder Advocates of Alberta Society* [2011] 2 SCR 261 at 296, McLachlin CJ, writing for the court.

<sup>66</sup> *Crawford Adjusters (Cayman) Ltd v Sagicor Insurance (Cayman) Ltd* [2014] AC 366 at 416.

<sup>67</sup> *Three Rivers* [2003] 2 AC 1 at 195, Lord Steyn.

<sup>68</sup> [1995] 185 CLR 307.

<sup>69</sup> [1997] 2 NZLR 332 at 349-351.

<sup>70</sup> [2003] 2 AC 1 at 192-193

<sup>71</sup> (1995) 185 CLR 307 at 347.

<sup>72</sup> *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 at 387-388.

<sup>73</sup> [1997] 2 NZLR 332 at 349-351.

*probable* risk, with the result that the claimants needed to amend their pleadings.<sup>74</sup> *Odhavji* endorsed this view of the requisite probability of risk.<sup>75</sup>

The logic of *Three Rivers* is to deny liability where the defendant's reckless indifference was to a highly improbable risk of catastrophic consequences. One might question that result. Two situations come to mind, in each of which the defendants (A and B) know that they are exceeding the lawful limits to their public power, and in each of which, their unlawful action causes harm to claimants C1 and C2 respectively. Defendant A contemplates, and then chooses to disregard, a very low chance of causing C1 an extremely serious personal injury. The risk to C2 that defendant B contemplates and chooses to disregard is a high chance of sustaining a small economic loss. In purely normative terms, it does seem odd that C1 should lose and C2 should win. In moral terms, A's conduct seems worse than the conduct of B.

Lord Steyn seemed to think that the "recklessness" ingredient of "reckless indifference" took sufficient care of any normative concerns,<sup>76</sup> but one might consider that recklessness is better judged by reference to *all* the objects of indifference, rather than to only some of them. It is a curious fact that after *Three Rivers* ruled that there must be reckless indifference to a *probable* harm, a majority of the House of Lords then waved through the claimants' amended pleading, which was framed in terms of a risk of harm, rather than a *probable* or *likely* risk of harm.<sup>77</sup>

Legal practitioners owe their clients a duty to take reasonable care that their advice is correct in law, but beyond that context, the common law of negligence has been extremely reluctant to impose a duty of care to act lawfully.<sup>78</sup> If failure properly to check the law is rarely negligent, it is even less likely to have been reckless. *Minister of Fisheries v Prantfield Holdings Ltd*<sup>79</sup> held that the Minister had not been reckless in failing to have sought legal advice as to the validity of his proposed course of action. The court was fearful that a ruling the other way would have the practical effect of requiring government to suspend action every time a legal doubt might occur to someone. *Donoghue v Commissioner of Taxation*<sup>80</sup> is a rare exception. A revenue officer knew that he was treading on thin ice in looking at legal advice received by the taxpayer, but chose not to seek advice as to whether client legal privilege applied, for fear that this might alert the taxpayer to the existence of his inquiries.

### **MUST THE DEFENDANT ALWAYS BE A PUBLIC OFFICER?**

In the days before the introduction of merit-based public service regimes for central and local governments, a public officer was usually regarded as a person appointed to perform public duties, and remunerated in the form of land or money from the Crown or fees from the public. The appointment was to an "office" invested with

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<sup>74</sup> [2003] 2 AC 1 at 196 (Lord Steyn), and 228 (Lord Hutton), (with Lord Hobhouse expressing general agreement at 231).

<sup>75</sup> [2003] 3 SCR 263 at 281.

<sup>76</sup> [2003] 2 AC 1 at 195-196.

<sup>77</sup> [2003] 2 AC 1 at 247 and 251.

<sup>78</sup> See: *Mengel* (1995) 185 CLR 307 at 353; and *Rowling v Takaro Properties Ltd* [1988] AC 473 at 501-503; and *Padden v Bevan Ashford Solicitors (No 2)* [2013] EWCA Civ 1616, [2012] 1 WLR 1759.

<sup>79</sup> [2008] 3 NZLR 649 at 674 [116].

<sup>80</sup> [2015] FCA 235.

powers, duties, rights and privileges, and the office itself was often something that could be bought and sold.<sup>81</sup>

Whilst it is clear that the misfeasance tort applies far more broadly than to “public officers” in that older sense, the cases have not supplied a modern definition. Buxton LJ suggested in *Society of Lloyd’s v Henderson*<sup>82</sup> that this might be because the answer is usually obvious. The question is nowadays approached from a modern perspective. In *Three Rivers* Lord Steyn said that “office” bears a “relatively wide” meaning,<sup>83</sup> and Lord Hobhouse said that it “is a broad concept” that applies to “those vested with governmental authority and the exercise of executive powers”.<sup>84</sup>

Public prosecutors in Britain and New Zealand are within the tort’s scope;<sup>85</sup> that might also apply in Canada;<sup>86</sup> and Lord Sumption has said that misfeasance “may be committed by any person performing a public function notwithstanding that he is not actually employed in the public service ...”.<sup>87</sup> That is particularly important in light of the wide-spread practice of outsourcing governmental functions. The tort extends to police,<sup>88</sup> banking regulators,<sup>89</sup> prison officers,<sup>90</sup> immigration officers,<sup>91</sup> revenue officers,<sup>92</sup> social workers<sup>93</sup> and the Royal College of Surgeons.<sup>94</sup>

Two Australian cases ruled out private sector lawyers acting for government on an *ad hoc* basis, but it is submitted that this was not because they were not on a full-time public payroll. It was partly because the only powers and responsibilities at issue in those cases were either contractual or ethical duties owed only to the court, and partly, it seems, because the lawyers concerned were doing nothing more than acting as legal practitioners.<sup>95</sup> The New Zealand Court of Appeal has read the Australian cases in this way, and adopted their reasoning as the bases for striking out a claim against a private practitioner contracted to the revenue authorities.<sup>96</sup> Just as judicial review extends to private sector actors exercising public power,<sup>97</sup> private

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<sup>81</sup> *Henly v Lyme* (1828) 5 Bing 91 at 107-108; and *Mengel* (1995) 185 CLR 307 at 355.

<sup>82</sup> [2008] 1 WLR 2255 at 2263.

<sup>83</sup> [2003] 2 AC 1 at 191.

<sup>84</sup> [2003] 2 AC 1 at 230.

<sup>85</sup> *Elguzouli-Daf v Commissioner of Police* [1995] QB 335 at 347 and 352; and *Currie v Clayton* [2015] 2 NZLR 195.

<sup>86</sup> The issue was not discussed in *Henry v British Columbia (Attorney General)* (2015) 383 DLR (4th) 383.

<sup>87</sup> *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366 at 416. His Lordship was in dissent, but this particular question was not in issue.

<sup>88</sup> Eg *Daniels v Chief Constable of Wales* [2015] EWHC 228 (QB).

<sup>89</sup> *Three Rivers* [2003] 2 AC 1.

<sup>90</sup> See: *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395; *Karagozlu v Commissioner of Police of the Metropolis* [2007] 1 WLR 1881 at [50]; *Iqbal v Prison Officers Association* [2010] QB 732 at 746; *Amin v Imran Khan & Partners* [2011] EWHC 2958 (QB); *Houchin v Lincolnshire Probation Trust* [2013] EWHC 794 (QB); and *McCreehan v Ministry of Justice* [2015] 1 WLR 354.

<sup>91</sup> *B v Home Office* [2012] EWHC 226 (QB).

<sup>92</sup> See: *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146 at 153-154 and 164; and *Donoghue v Commissioner of Taxation* [2015] FCA 235.

<sup>93</sup> *F v Wirral Borough Council* [1991] Fam 69 at 107.

<sup>94</sup> *Phipps v Royal College of Surgeons of Edinburgh* [2010] CSOH 58.

<sup>95</sup> See: *Cannon v Tahche* (2002) 5 VR 317; and *Leerdam v Noori* (2009) 255 ALR 533.

<sup>96</sup> *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] 2 NZLR 679 at 706-709.

<sup>97</sup> See: *R v Panel on Take-overs and Mergers; Ex parte Datafin Plc* [1987] 1 QB 815; and *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393.

persons abusing public power invested in them *pro tem*<sup>98</sup> should be treated as public officers for the purposes of the misfeasance tort.

Some Australian cases have doubted whether a composite body invested with separate legal personality can be directly (as opposed to vicariously) liable in misfeasance, partly because it would lack a mind of its own capable of entertaining the necessary mental elements, and partly because of the difficulty in conceiving of any such body holding an office.<sup>99</sup> The better view is that where a collective body can act only through its officers and agents, the body itself has the mental state of those officers and agents.<sup>100</sup> The New Zealand Court of Appeal has left open the possibility of holding the Crown directly liable as a result of aggregating the acts and mental states of its employees. However, it appears that this possibility stands a greater chance in the context of negligence actions than in claims for misfeasance in public office.<sup>101</sup>

English decisions have raised no objection to the idea of a collective entity being directly liable in misfeasance.<sup>102</sup> That may be explained by the fact that the law in England and Wales has no special barrier against vicarious liability for misfeasance in public office.<sup>103</sup> Indeed, it has been said that it is preferable to proceed only against the officers' employing body, to save on costs and to avoid distracting individual officers as far as possible.<sup>104</sup> In Australia, on the other hand, *Mengel* had assumed that there would ordinarily be no vicarious liability.<sup>105</sup> The validity of that assumption turns on the resolution of the more general issue of the extent of vicarious liability for wilful wrong-doing, which in Australia has not yet been resolved.<sup>106</sup>

Regardless of whether vicarious liability is available, it is clear that misfeasance depends upon proof that at least one individual had personally committed misfeasance in public office, so that the requisite bad faith must be that of an individual.<sup>107</sup> The good faith mistakes and incompetence of a range of individuals within an organisation cannot be amalgamated to create the basis for inferring or imputing a "composite" bad faith to a fictional and "composite" officer. "Reckless indifference", for example, cannot be established by proof of a litany of errors by

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<sup>98</sup> Temporarily.

<sup>99</sup> *Emanuele v Hedley* (1998) 179 FCR 290 at 300; and *Bailey v Director General, Department of Natural Resources* [2014] NSWSC 1012 at [531].

<sup>100</sup> See *Chapel Road Pty Ltd v Australian Securities and Exchange Commission (No 10)* (2014) 307 ALR 428 at [77].

<sup>101</sup> *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] 2 NZLR 679 at 713-717.

<sup>102</sup> *Dunlop v Woollahra Municipal Council* [1982] AC 158 at 172; and *Jones v Swansea City Council* [1990] 1 WLR 54.

<sup>103</sup> See: *Racz v Home Office* [1994] 2 AC 45; *Lister v Hesley Hall Ltd* [2002] 1 AC 215; and *Various Claimants v Catholic Child Welfare Society* [2013] 2 AC 1.

<sup>104</sup> *Adams v Law Society of England and Wales* [2012] EWHC 980 (QB) at [160]-[162]. The Law Commission for England and Wales had the same view. Its preference was that government alone should answer civil claims for misfeasance, and that if necessary, the individual officers could be prosecuted for the criminal offence of misconduct in public office: Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010) 35-37.

<sup>105</sup> (1995) 185 CLR 307 at 347.

<sup>106</sup> See: *Rogers v Legal Services Commission (SA)* (1995) 64 SASR 572 at 587; *New South Wales v Lepore* (2003) 212 CLR 511; *Moder v Commonwealth* (2012) 261 FLR 396 at 415; and *Skinner v Commonwealth* [2012] FCA 1194.

<sup>107</sup> *Merchant Law Group v Canada Revenue Agency* (2010) 321 DLR (4th) 301 at [35]-[39].

different officers, none of whom was himself or herself guilty of reckless indifference. The result is that where different actions are taken by different actors within an organisation, the plaintiff may have to prove common intention.<sup>108</sup>

### **DISTINGUISHING THE ADVISER FROM THE DECISION-MAKER**

The process of making complex decisions within the public sector is typically staged in sequences. Sometimes the overall decision will in fact have been broken down into different components for final determination by different officers.

Sometimes, however, the final and operative decision will have been made by a Minister or agency, signing off on a series of reports and recommendations by subordinate officers. Other permutations are also possible, and the problem in these cases should be to identify who in fact was the moving force behind the operative act or omission which harmed the claimant. Distinguishing between an advisor acting in bad faith and the agency acting on that advice in good faith should be relevant only where vicarious liability is disputed.

*Calveley v Chief Constable of the Merseyside Police*<sup>109</sup> said that a chief constable acting in good faith upon a report made in bad faith by one of his officers could not be liable in misfeasance. The officer's report was not in itself "an exercise or purported exercise by the public officer of some power or authority with which he is clothed by virtue of the office he holds ...".<sup>110</sup> In *Cornelius v Hackney London Borough Council*,<sup>111</sup> the Court of Appeal treated *Calveley* as if the problem was whether misfeasance was to be extended beyond abuse of public "power" strictly so called, to abuse of public position. It chose the latter option, but side-stepped that aspect of *Calveley* which had turned on distinguishing the officer who made the report from the officer who made the final and operative decision. It is certainly true that the great bulk of misfeasance claims could easily have been dismissed *in limine*<sup>112</sup> had that latter aspect of *Calveley* been applied. Whilst *Calveley* remains more honoured in the breach than the observance, its concern remains to be formally resolved by courts at the highest levels.<sup>113</sup>

### **ABUSE OF POWER OR POSITION?**

Judicial review focuses on powers or functions that are in some sense "public", and whose exercise establishes, extinguishes or alters legal rights and obligations. The misfeasance tort covers those situations, but extends further; it is not confined to abuses of power that would be amenable to judicial review.<sup>114</sup> Indeed, this must be

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<sup>108</sup> *Moder v Commonwealth* (2012) 261 FLR 396 at 416; *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] 2 NZLR 679 at 713-715; and *Chapel Road Pty Ltd v Australian Securities Investments Commission* (No 10) (2014) 307 ALR 428 at [76]-[79].

<sup>109</sup> [1989] AC 1228.

<sup>110</sup> [1989] AC 1228 at 1240, Lord Bridge.

<sup>111</sup> [2002] EWCA Civ 1073.

<sup>112</sup> At a preliminary stage.

<sup>113</sup> See: *Tampion v Anderson* [1973] VR 715 at 720; *Emanuele v Hedley* (1998) 179 FCR 290; *MM Constructions (Aust) Pty Ltd v Port Stephens Council (No 6)* (2011) 185 LGERA 276 at [266]-[273] (and (2012) 191 LGERA 202 at [102] on appeal, where the question was not pursued); and *Pro Teeth Whitening (Aust) Pty Ltd v Commonwealth* [2015] QSC 175.

<sup>114</sup> Cf *Mengel* (1995) 185 CLR 307 at 355-356, Brennan J.

true if misfeasance lies not just against the person who makes the final and operative decision, but also to their subordinates whose advice was accepted.

There would have been a short answer to many cases if misfeasance were confined to the abuse of powers that are amenable to judicial review. Two of the leading cases, for example, concerned police covering-up or not reporting evidence of their wrong-doing. Their actions, if proved, would clearly have been illegal, but neither “valid” nor “invalid”.<sup>115</sup> In one of those cases (*Odhavji*), the Supreme Court of Canada rejected an attempt to confine the tort to excess of statutory or prerogative power:<sup>116</sup>

[T]he class of conduct at which the tort is targeted is not as narrow as the unlawful exercise of a particular statutory or prerogative power, but more broadly based on unlawful conduct in the exercise of public functions generally.

The misfeasance in yet another case comprised a police constable forging the plaintiff’s signature to a document requesting that a theft complaint be dropped.<sup>117</sup> In another case, the misfeasance was committed by prison warders reading correspondence between the prisoner and his legal adviser.<sup>118</sup> More recently, the claim in one case alleged misfeasance against police for allegedly fabricating evidence against the claimants,<sup>119</sup> and in another, it alleged appalling deception by undercover police in entering into intimate and long-term relationships with the claimants.<sup>120</sup> “Invalidity” in any public law sense was similarly irrelevant in misfeasance claims regarding government complicity in rendition and torture,<sup>121</sup> and in a misfeasance claim of police collusion in obtaining the release of an extremely dangerous criminal.<sup>122</sup>

### **ABUSE OF PUBLIC POWER**

Just as judicial review remedies lie only in respect of the exercise of public power, the misfeasance tort is confined to acts or omissions that constitute an abuse of *public* power. Judicial review does not extend to public bodies exercising “private power”, the paradigm example being contractual power. Similarly, Australian cases dealing with misfeasance have authoritatively restricted the tort’s ambit to the

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<sup>115</sup> *Garrett* [1997] 2 NZLR 332; and *Odhavji* [2003] 3 SCR 263.

<sup>116</sup> [2003] 3 SCR 263 at 278 [17], Iacobucci J, writing for the court.

<sup>117</sup> *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122.

<sup>118</sup> *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395.

<sup>119</sup> *Daniels v Chief Constable of South Wales* [2015] EWHC 228 (QB).

<sup>120</sup> *AKJ v Commissioner of Police of the Metropolis* [2014] 1 WLR 285 (permission to appeal refused [2015] 1 WLR 494). The tort claims were not addressed at this stage. *R v Quach* (2010) 201 A Crim R 522 upheld a conviction for the criminal offence of misconduct in public office. The offender had had consensual sex with an extremely fragile person. She had previously attempted suicide, and in the course of his duties, he had been sent to conduct a “welfare check” on her earlier in the day; he returned that evening to have sex. At that stage, he was off duty, and not in uniform.

<sup>121</sup> See: *Habib v Commonwealth (No 2)* (2009) 175 FCR 350; *Habib v Commonwealth* (2010) 183 FCR 62; and *Al-Rawi v Security Service* [2012] 1 AC 531.

<sup>122</sup> *Akenzua v Secretary of State for the Home Department* [2003] 1 WLR 741.

exercise of “public” power.<sup>123</sup> In practice, the same position applies in England, despite a case that seemed to rule to the contrary. In a recent appeal to the Privy Council, Lord Sumption said in *Crawford Adjusters (Cayman) Ltd v Sagikor General Insurance (Cayman) Ltd*:<sup>124</sup>

[T]he essence of the tort is the abuse of a public function for some collateral private purposes of the person performing it. .... The tort may be committed by any person performing a public function notwithstanding that he is not actually employed in the public service ...

An older decision, however, appears to stand against the proposition that the power abused must, in English law, be public. The issue arose in *Jones v Swansea City Council*,<sup>125</sup> in which the council was alleged to have imposed a restriction upon one of its commercial tenants in retribution for her political opposition. The court said that the council’s property powers could be exercised only in the public interest;<sup>126</sup> in that respect, therefore, the council’s powers were narrower than those of a private landlord. That should have been sufficient, and in effect, Lord Millett chose in *Three Rivers* to read *Jones* as stopping at that point.<sup>127</sup> In *Jones* itself, however, Slade LJ also said that if a power were exercised by a public body, then it would not matter whether the power was public or private.<sup>128</sup>

With respect, that aspect of *Jones* cannot be right.<sup>129</sup> For example, police officers might commit wrongs which on no stretch should fall within the ambit of the misfeasance tort, even though the officers were in uniform and on duty at the time of the relevant conduct. A uniformed officer who punches his domestic partner during an argument about whether they should shop at Ikea commits both a crime and the private law tort of assault, but not the tort of misfeasance in public office. Whether he was on duty or uniformed is irrelevant.<sup>130</sup>

### UNLAWFULNESS AND HARM BOTH REQUIRED

The defendant’s conduct must have been unlawful and it must have caused harm. Each of those elements (in combination with their requisite mental elements) is necessary but not sufficient.<sup>131</sup> In *Garrett*,<sup>132</sup> for example, the police sergeant knew that he was acting unlawfully in covering up the rape complaint, but he escaped liability because the jury found that he had not turned his mind to how that might harm the complainant. Lord Millett said in *Three Rivers* that dishonesty was the theme underlying both targeted and untargeted harm. He said that even a deliberate

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<sup>123</sup> See: *Cannon v Tahche* (2002) 5 VR 317; *Leerdam v Noori* (2009) 255 ALR 533; and *Chapel Road Pty Ltd v Australian Securities and Exchange Commission (No 10)* (2014) 307 ALR 428 at [56].

<sup>124</sup> [2014] AC 366 at 416. His Lordship was in dissent, but this particular point was not in dispute.

<sup>125</sup> [1990] 1 WLR 54.

<sup>126</sup> See [1990] 1 WLR 54 at 71 and 85.

<sup>127</sup> [2003] 2 AC 1 at 235.

<sup>128</sup> [1990] 1 WLR 54 at 70-71.

<sup>129</sup> *Three Rivers* [2003] 2 AC 1 at 191, where Lord Steyn said: “It is the office in a relatively wide sense on which everything depends. Thus a local authority exercising private-law functions as a landlord is potentially capable of being sued: *Jones v Swansea City Council* ...”.

<sup>130</sup> See the discussion in *Cornelius v Hackney London Borough Council* [2002] EWCA Civ 1073.

<sup>131</sup> *Odhavji* [2003] 3 SCR 263 at 281.

<sup>132</sup> [1997] 2 NZLR 332.



excess of power would not amount to an “abuse” of power for misfeasance purposes if it was done specifically for the claimant’s benefit.<sup>133</sup>

Similarly, spite or an intention to harm are not sufficient if the action is in fact lawful. A parking officer who gives a ticket with glee to his worst enemy is not guilty of misfeasance if the car was in fact parked illegally.<sup>134</sup> An immigration officer in *B v Home Office*<sup>135</sup> took what he acknowledged to be a “sneaky” point to justify breach of an undertaking given to the Upper Tribunal to recognise the claimant’s right of residence. He undoubtedly knew that this would harm the claimant, but he had thought that he was acting lawfully, which meant that he was not liable for misfeasance.<sup>136</sup>

Damage is the gist of the action, with the result that material loss must be alleged and proved.<sup>137</sup> Exemplary damages are available, but are rarely granted.<sup>138</sup>

### WHO CAN CLAIM DAMAGES?

*Three Rivers*<sup>139</sup> was a class action brought on behalf of some 6,000 depositors in a failed bank. One of the allegations in the pleadings was that the regulator should never have permitted the bank to commence trading, and it therefore appears likely that some of the class members had been depositors from the bank’s inception. It is clear that some of the class members had opened their accounts at various times after the bank had started trading. The House of Lords did not go into the manifest difficulties that might arise if distinctions had to be drawn between different categories of depositors. Nor did it consider the possibility that there might be other potential claimants waiting in the wings – the depositors were surely not the bank’s only creditors.

The regulator in *Three Rivers* had sought to persuade their Lordships to place categorical limits upon those who could sue for misfeasance, and upon the extent of the losses that might be compensable.<sup>140</sup> One suggestion was that a misfeasance defendant would need to have been in breach of a duty owed specifically to the claimant or to a class in which the claimant belongs. The House was very clear in rejecting the need for an antecedent duty owed by the defendant to the claimant.<sup>141</sup> If a common law duty were required, the misfeasance tort would have been entirely superfluous because such duties come with their own remedies.<sup>142</sup> If a public law or statutory duty towards the claimants had been required, it would have been difficult to justify extending the tort to abuse of public “position” (as opposed to “power” in the

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<sup>133</sup> [2003] 2 AC 1 at 235.

<sup>134</sup> *Grimwade v Victoria* (1997) 90 A Crim R 526.

<sup>135</sup> [2012] EWHC 226 (QB).

<sup>136</sup> Cf *Weir v Secretary of State for Transport* [2005] EWHC 2192 (Ch), where the court may have overlooked the need to prove unlawfulness. The claimants alleged that the Minister withheld extra funding for Railtrack, so that the company might ultimately fail and be re-nationalised at a loss to its shareholders. There does not appear to have been any allegation that the Minister was obliged to rescue the company.

<sup>137</sup> *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395.

<sup>138</sup> *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122.

<sup>139</sup> [2003] 2 AC 1.

<sup>140</sup> Remedied through compensation.

<sup>141</sup> Cf *Odhavji* [2003] 3 SCR 263 at 285.

<sup>142</sup> [2003] 2 AC 1 at 229, Lord Hobhouse.

public law sense).<sup>143</sup> Their Lordships were also clear in rejecting the suggestion that either the claimants or their harm be “proximate”.<sup>144</sup>

*Three Rivers* looked to the tort’s extremely demanding mental elements to ward off claims by an inappropriately large number of people for inappropriately large sums, but it was aware that the mental elements might not always be enough. The judgments hinted at the imposition of additional restrictions, such as that there be standing to sue,<sup>145</sup> or special damage not incurred by members of the general public,<sup>146</sup> or membership of a class that the officer had been obliged to protect,<sup>147</sup> or a “direct” link between the officer’s wrong-doing and the claimant’s loss.<sup>148</sup> However, there are serious problems with each of those suggestions.

A requirement for standing solves nothing unless one knows its content. The idea that the claimant’s losses be “special” in comparison to the public’s losses would suffer the same defects experienced with the old standing rule for declaratory relief.<sup>149</sup> A requirement that the defendant must have been obliged to protect the claimant is either an oblique way of requiring the existence of an antecedent duty, or nothing more than a reminder that the defendant should have given the claimant’s needs more thought.

Furthermore, the floodgates will not always be opened wide even if there is no requirement that the defendant have the claimant specifically in mind. The police in *Akenzua v Secretary of State for the Home Department*<sup>150</sup> had colluded in a series of deceptions of other authorities in order to facilitate the release of an extremely dangerous criminal. He subsequently murdered only one person, so that strictly speaking, the Court of Appeal had no need to consider the “floodgates” issue. Nevertheless, the court said that it would have allowed the misfeasance claim to go forward even if the offender had murdered a few more people, and even if he had committed a terrorist act of mass destruction resulting in many deaths.<sup>151</sup>

The misfeasance tort is usually justified on the basis that in the exceptional circumstances to which it applies, it provides subjects with an additional measure of protection from the abuse of public power. That assumes that the claims will always be brought by a subject against the government, but *Marin v Attorney General of Belize*<sup>152</sup> held by majority that the Attorney General of a new government could claim damages for his country from allegedly corrupt Ministers of the former government. It was alleged that the Ministers had deliberately sold state property at an undervalue to a company that one of them owned. The judgments all acknowledged the novelty

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<sup>143</sup> Two relatively recent Australian cases contain different views as to whether the misfeasance tortfeasor needs to have owed a “duty” to the claimant, but it is submitted that they exhibited some ambiguity as to the meaning of “duty”. See: *Cannon v Tahche* (2002) 5 VR 317; and *Leerdam v Noori* (2009) 255 ALR 533.

<sup>144</sup> [2003] 2 AC 1 at 194-196 (Lord Steyn), 228 (Lord Hutton), 229 (Lord Hobhouse), and 235 and 237 (Lord Millett).

<sup>145</sup> [2003] 2 AC 1 at 193 (Lord Steyn) and 246 (Lord Hope).

<sup>146</sup> [2003] 2 AC 1 at 231 (Lord Hobhouse).

<sup>147</sup> [2003] 2 AC 1 at 193 and 196 (Lord Steyn), 221 (Lord Hutton) and 230-231 (Lord Hobhouse).

<sup>148</sup> [2003] 2 AC 1 at 230-231 (Lord Hobhouse).

<sup>149</sup> A legal determination of a court that resolves legal uncertainty for the litigants. *Boyce v Paddington Borough Council* [1903] 1 Ch 109.

<sup>150</sup> [2003] 1 WLR 741.

<sup>151</sup> [2003] 1 WLR 741 at 747, 750 and 751.

<sup>152</sup> [2011] 5 *Law Reports of the Commonwealth* 209, [2011] CCJ 9 (AJ); Caribbean Court of Justice (Appellate Jurisdiction), on appeal from the Court of Appeal of Belize.

of the issue, and the majority saw no overwhelming reason of principle against the claim. The dissenters raised a number of objections, some taxonomical,<sup>153</sup> some pragmatic. Taxonomically, they saw misfeasance as a relational tort designed to protect private interests against a more powerful state. Pragmatically, they thought that the government had no need for the tort, because it could institute criminal proceedings to punish the offenders, and proceedings in equity to reclaim the misappropriated property. They were also concerned with the potential for new governments to abuse the tort itself in the pursuit of their political foes.

## CONCLUSION

Misfeasance in public office is an oddity in several respects. Not allowed to trespass on better established torts, it occupies a tiny niche reserved, in essence, for redressing harms caused by public officers who knew or suspected that they were abusing their public power or position to the detriment of the individual.

Despite its pretensions to a long history, the tort is in fact reasonably modern, but not modern enough, apparently, to have yet decided who might be a public officer, and what might be a public power. Specifically, we have yet to learn how far it extends into the outsourced state, and how far it might apply to abuse of dominant position as opposed to power.

Originally punitive in rationale, the function of the misfeasance tort is now compensatory, with government standing behind individual officers who may be sued. Its rationale has always centred on protecting the subject from the state's overweening power, which explains why it applies only *against* public actors, but there is now the possibility that government itself can be a claimant against corrupt public officials.

The cases have plumbed the depths of its requirement to prove bad faith, extending it to an equivalent of criminal law's blind eye ignorance.<sup>154</sup> That sets claimants an extremely high bar, but it may not be enough to protect government from potentially large numbers of claimants claiming huge economic losses. Various additional protective measures have been proposed, but whether government needs or deserves them remains to be debated, and they may in any event prove to be illusory.

Finally, beyond noting that damage is the gist of the action, there has been no occasion to discuss any special problems that may arise in proving causation and loss, particularly where the power abused was discretionary. Quite simply, no cases have yet got that far.

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<sup>153</sup> To do with the classification and characterisation of legal claims.

<sup>154</sup> Subjective recklessness.