

Justice, fairness and the common law: The tort of misfeasance in public office

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Introduction

The tort of misfeasance in public office has been described by Lord Diplock as “well established” in English common law.¹ Similarly, it has been said by the New Zealand Court of Appeal to be a “long established though infrequently prosecuted tort”.² Though long neglected, it is now frequently applied in courts in England and the Commonwealth.³ Though its existence was not doubted, misfeasance in public office was, in the words of de Smith, a “developing tort ... the precise scope of which is not yet settled”.⁴ This article will consider the tort in its broader constitutional role, and the way in which the tort may have been influenced, as was the development of the tort of negligence, by moral or religious concepts.

The tort of misfeasance in public office arises when a public officer acted in the knowledge of, or with reckless indifference to, the illegality of his or her act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the plaintiff or person of a class of which the plaintiff was a member. The House of Lords so held in dismissing in part, an appeal by the plaintiffs, Three Rivers District Council and other creditors of the Bank of Credit and Commerce International SA (BCCI) together with the Bank of Credit and Commerce International SA (in liquidation) from a decision of the Court of Appeal,⁵ which had in turn dismissed an appeal from decisions of Clarke J⁶ determining preliminary issues of law in an action brought against the defendant, the Bank of England.

Misfeasance is not alone in exhibiting signs of a Christian influence. Lord Atkins judgment in *Donoghue v. Stevenson* is a classic case in point. But the influence is wider even than the law. Schmidt wrote regarding liberty and justice as seen by today’s culture:

The liberty and justice that are enjoyed by humans in Western societies and in some non-Western countries are increasingly seen as the products of a benevolent, secular government that is the provider of all things. There seems to be no awareness that the liberties and rights that are currently operative in free societies of the West are to a great degree the result of Christianity’s influence.⁷

History of Misfeasance in Public Office in the Commonwealth

¹ *Dunlop v. Woollabra Municipal Council* [1982] AC 158, 172 (PC) [*Dunlop*].

² *Garrett v. Attorney-General of New Zealand* [1993] 3 NZLR 600 (New Zealand CA) [*Garrett* 1993].

³ See for example, the New Zealand Court of Appeal in *Garrett v. Attorney-General* [1997] 2 NZLR 332 [*Garrett* 1997] and see also *Rawlinson v. Rice* [1997] 2 NZLR 651 [*Rawlinson*]. The former case is important because it established the requirements of the action, the latter in that it applied the law as laid down by the former; See Andrew Beck, “Misfeasance in Public Office” (1997) New Zealand L. J. 125 [Beck].

⁴ S. A. de Smith, Lord Woolf and J. Jowell, *Judicial Review of Administrative Action* 5d ed., (Sweet and Maxwell, 1995) 784.

⁵ *Three Rivers District Council v. Bank of England (No 4)* [2000] 2 WLR 15 (CA) [*Three Rivers* CA], Hirst and Robert Walker LJ; Auld LJ dissenting.

⁶ [1996] 3 All ER 558 [*Three Rivers*].

⁷ Alvin J. Schmidt, *How Christianity Changed the World* (Zondervan, 2004) 248.

The tort of misfeasance in or of public office is exceptional in that it is necessary to prove the requisite subjective state of mind of the defendant in relation not only to his or her own conduct, but also to his or her knowledge of its effect on others. The requisite state of mind is one equivalent to dishonesty or bad faith and knowledge includes both direct knowledge and also what is sometimes called “blind eye” knowledge. Blind eye knowledge has since been discussed in different contexts by the House of Lords in *Manifest Shipping v. Uni-Polaris Shipping*⁸ and *White v. White*.⁹

The history of the development of the tort of misfeasance in public office is traceable to the seventeenth century.¹⁰ However, the first solid basis for this new head of tort liability, based on an action on the case, is to be found in *Ashby v. White*,¹¹ which concerned the discretionary refusal of voting rights.¹² This and later decisions laid the foundation of the modern tort. They also established the two different forms of liability, and revealed the unifying element of conduct amounting to an abuse of power accompanied by subjective bad faith.

The Role of the Action

The tort of misfeasance in public office has its origins in the premise that public powers are to be exercised for the public good. Parliament intends statutory powers to be exercised in good faith and for the purpose for which they were conferred.¹³

The scope of the tort is narrow. It is designed – inasmuch as a tort can be described as having a design – to target “the deliberate and dishonest abuse of power”.¹⁴ Public officers are not liable merely because a bona fide administrative act is later found to be unlawful.¹⁵ A deliberate and dishonest abuse is required. The tort is complemented by, and complementary to, malicious prosecution, fraud, conspiracy, intimidation, and other similar actions.

Typically, a tort involves the invasion by the defendant, of some legally protected right of the plaintiff, for example, trespass to property or trespass to the person. Such conduct on the part of the defendant is actionable as such and the belief of the defendant as to the legality of what he or she did is irrelevant. It is no defence for the defendant to say that he or she believed that they had statutory or other legal authority if they did not. The legal justification must actually exist otherwise he or she is liable in tort.¹⁶ In *Dunlop v. Woollahra Municipal Council*,¹⁷ the Privy

⁸ [2001] 2 WLR 170.

⁹ [2001] UKHL 9.

¹⁰ *Turner v. Sterling* (1671) 2 Vent 24; See also S. Arrowsmith, *Civil Liability and Public Authorities* (Earlsgate Press, 1992) 226-234.

¹¹ (1703), best reported in 1 Smith’s Leading Cases (13th ed.) 253; See also *Ashby v. White* (1703) 2 Ld Raym 938; 92 ER 126 [*Ashby*].

¹² See also: *Drew v. Coulton* (1787) 1 East 563n; 102 ER 217; *Tozer v. Child* (1857) 7 El & Bl 377; 119 ER 1286; *Cullen v. Morris* (1819) 2 Stark 577; 171 ER 741.

¹³ See *Garrett* 1993 (n 3); See also *Galloway v. London Corporation* (1864) 2 De GJ & Sm 213, 229 [on appeal (1866) LR 1 (HL) 34, 43] [*Galloway*]; See also *Westminster Corporation v. London & North-Western Railway Co* [1905] AC 426 (HL); See also *G Scammell & Nephews Ltd v. Hurley* [1929] 2 KB 419 (CA) [*Scammell*].

¹⁴ See *Three Rivers CA* (n 7); See also J. McBride, “Damages as a Remedy for Unlawful Administrative Action” (1979) 38 Cambridge L. J. 323 [*McBride*].

¹⁵ See *Lonrho Ltd v. Shell Petroleum Co Ltd* (No 2) [1982] AC 173, 189 [*Lonrho*]; See also *Dunlop* (n 1) 172; *Northern Territory v. Mengel* (1995) 69 AJLR 527, 546 [*Mengel*].

¹⁶ *Mengel* ibid 547.

Council restricted the effect of the case, *Beaudesert Shire Council v. Smith*.¹⁸ That case had allowed action “independently of trespass, negligence or nuisance” for “an action for damages upon the case, [where] a person who suffers harm or loss as the inevitable consequence of the unlawful intentional and positive acts of another is entitled to recover damages from that other”.¹⁹ Lord Diplock found difficulty with “ascertaining what limits are imposed upon the scope of this innominate tort”. Lord Diplock drew a distinction between unlawful and invalid acts.

The tort of misfeasance in public office is an exception to “the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will not make him liable.”²⁰ The rationale of the tort 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.²¹ The tort bears some resemblance to the crime of misconduct in public office²² but it enables those adversely affected by decisions of government officials, in limited circumstances, to obtain compensation. Crucially, it also bears some similarity to Christian principles of justice. This point will be explored soon.

Scope of the tort: Constitutional aspects

To summarize, the tort of misfeasance in public office arises when a public officer acted in the knowledge of, or with reckless indifference to, the illegality of his or her act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the plaintiff or person of a class of which the plaintiff was a member.²³

There is a unifying element of conduct amounting to an abuse of power accompanied by subjective bad faith. Lord Steyn, whose speech formed the backbone of the *Three Rivers* case, observed that there were two different forms of liability for misfeasance in public office. First the case of targeted malice by a public officer, that is, conduct specifically intended to injure a person or persons. The second form was where a public officer acted knowing that he or she had no power to do the act complained of and that the act would probably injure the plaintiff. It involved bad faith inasmuch as the public officer did not have an honest belief that his or her act was lawful. Subjective recklessness was a sufficient state of mind to ground the tort.

Again, the tort is designed to target “the deliberate and dishonest abuse of power”.²⁴ Targeted malice and untargeted malice, or bad faith and recklessness, are both based on the premise that public powers are to be exercised for the public good. Hence, statutory powers – or potentially administrative or even prerogative powers – are to be exercised in good faith and for

¹⁷ *Dunlop* (n 1) 172.

¹⁸ (1966) 120 CLR 145; ALR 1175 (HCA) [*Beaudesert*].

¹⁹ *ibid*156.

²⁰ *Bradford Corporation v. Pickles* [1895] AC 587; *Allen v. Flood* [1898] AC 1. A public officer is a person who exercises governmental power and the term does not apply to a commercial operation concerned with the internal commercial interests of its own members, even if it regulates its members’ activities: *Society of Lloyd’s v. Henderson* [2007] EWCA Civ 930; [2008] 1 WLR 2255; [2008] Lloyd’s Rep IR 317.

²¹ *Jones v. Swansea City Council* [1990] 1 WLR 54, 85F, per Nourse LJ, a decision reversed on the facts but not on the law by the House of Lords in *Jones v. Swansea City Council* [1990] 1 WLR 1453 (HL) 1458 [*Jones*].

²² *R v. Bowden* [1996] 1 WLR 98 (CA) [*Bowden*].

²³ *Three Rivers* HL (n 7).

²⁴ *Three Rivers* CA (n 9); See also McBride (n 14) 323.

the purpose for which they were conferred.²⁵ The mere invasion of a constitutional right does not constitute actionable damage.²⁶

We have the *Three Rivers* case to illustrate the general application of the tort to administrative actions based on statutory power. Since that case the principles enunciated by the House of Lords have been adopted in a number of cases, with only comparative slight elaboration.²⁷ *Three Rivers* not merely is the principle modern case on misfeasance in public office; it also substantially broadened the test, to be essentially a tort of subjective recklessness (from one of intentional wrongdoing).²⁸ As such it also was good for pure economic loss, where the courts are traditionally loath to tread.²⁹

But there is also the *Black* case,³⁰ concerned with the exercise of the royal prerogative. The appellant Conrad Black alleged that the Canadian Prime Minister Jean Chrétien intervened with Queen Elizabeth II, Queen of the United Kingdom and also Queen of Canada, to oppose his appointment to the House of Lords, and that, but for the Prime Minister's intervention, he would have received the peerage. Mr Black sued the Prime Minister for abuse of power, misfeasance in public office and negligence. He also sued the Government of Canada, represented by the Attorney General of Canada, for negligent misrepresentation. He sought declaratory relief and damages of \$25,000.³¹

On appeal to the Court of Appeal for Ontario, Black sought three declarations. First was a declaration that the Prime Minister and the Government of Canada had no right to advise the Queen not to confer an honour on a British citizen or a dual citizen. The second was a declaration that the Prime Minister committed an abuse of power by intervening with the Queen to prevent him from receiving a peerage. The third was a declaration that the Government of

²⁵ See: *Garrett* 1993 (n 3); *Galloway* (n 13); and *Scammell* (n 13).

²⁶ *Watkins v. Secretary of State for the Home Department* [2006] UKHL 17; [2006] 2 AC 395; [2006] 2 All ER 353.

²⁷ Thus, see *Akenzua v. Secretary of State for the Home Department* [2002] EWCA Civ 1470; [2003] 1 All ER 35; [2003] 1 WLR 741 (it is immaterial whether the defendant knows at the relevant time of the risk to the claimant or to a particular class of which the claimant is or becomes a member; what matters is his knowledge of the risk to someone); *Weir v. Secretary of State for Transport* [2005] EWHC 2192 (Ch); [2005] All ER (D) 160 (Oct) ("targeted malice" not proved); *Watkins v. Secretary of State for the Home Department* [2006] UKHL 17; [2006] 2 AC 395; [2006] 2 All ER 353 (the tort of misfeasance in public office is not actionable per se, some loss is required). *Karagozlu v. Metropolitan Police Comr* [2006] EWCA Civ 1691; [2007] 2 All ER 1055; [2007] 1 WLR 1881 (harm may include loss of liberty, including the residual liberty of a person who is lawfully imprisoned); *Hussain v. Chief Constable of West Mercia Constabulary* [2008] EWCA Civ 1205; (2008) Times, 17th November; [2008] All ER (D) 06 (Nov) (mental injury falling short of a psychiatric condition will not suffice); *Society of Lloyd's v. Henderson* [2007] EWCA Civ 930; [2008] 1 WLR 2255; [2008] Lloyd's Rep IR 317 (a public officer is a person who exercises governmental power and the term does not apply to a commercial operation concerned with the internal commercial interests of its own members, even if it regulates its members' activities); *Dennett v. Southwark London Borough Council* [2007] EWCA Civ 1091; [2008] LGR 94; [2008] HLR 23 (an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form).

²⁸ Fairgrieve, Duncan, *State Liability in Tort: A comparative Law Study* (Oxford University Press, Oxford, 2003) 87-94, 93.

²⁹ *ibid*, 94.

³⁰ *Black v. Chrétien* (2001) 199 DLR (4th) 228 [Black]; See also N. Cox, "Black v. Chrétien: Suing a Minister of the Crown for Abuse of Power, Misfeasance in Public Office and Negligence" (2002), 9(3) E-Law, Murdoch University Electronic Journal of Law, online: E LAW <http://www.murdoch.edu.au/elaw/indices/title/cox93_abstract.html>; See also N. Cox. "Black v. Chrétien and the Control of the Royal Prerogative" (2003), 12(3) Constitutional Forum 94-101.

³¹ *Black* (n 30) para 1 per Laskin JA.

Canada negligently misrepresented to Mr. Black that he would be entitled to receive a peerage if he became a dual citizen and refrained from using his title in Canada. The respondents acknowledged that the negligent misrepresentation claim against the Government of Canada could proceed to trial. However, they moved to dismiss all other claims against the Government of Canada and all claims against the Prime Minister.³²

Ultimately as in *Three Rivers*, Black was to fail, but the principle was established that the tort of misfeasance might, potentially, be applicable with respect to the royal prerogative, even though traditionally regarded as unjusticiable.

Whether or not a specific power is justiciable, the tort is based on the premise that public powers are to be exercised for the public good, and the deliberate and dishonest abuse of power is prohibited. Thus it is intimately associated with the principle of the rule of law.

Conclusion

This article began with a brief review of the history of misfeasance in public office. It then examined the role of the action. The requirements of the tort were then outlined. The circumstances of the litigation, and the findings in the House of Lords as to the requirements of the tort followed. In essence, the House of Lord had to determine whether recklessness is sufficient to establish liability for misfeasance of public office, and whether it is necessary to establish foresight of the actual consequences of a particular failure in supervision.

Referring the appeal and cross-appeal to the House of Lords for further argument, their Lordships concluded that the tort involved bad faith, including reckless indifference. To conclude otherwise would be to impose an artificial burden on plaintiffs. But they also found that foresight of probable harm, or reckless indifference, was required, otherwise there would be a risk of a “stultifying effect on governance without commensurate benefit to the public”. Thus the tort exists to restrain certain classes of governmental action, but only those of the most exceptional type. Accordingly, while the tort has potential to be utilized as a legal strategy against government action, the likelihood of success is slim as demonstrated by the *Three Rivers* and *Black* cases and its effectiveness may be further reduced depending on the jurisdiction, as with the United States. But despite the Law Commission of England and Wales proposing that the tort be abolished altogether, it remains of some utility.

That being said, the tort of misfeasance in the public office, nonetheless provides a remedy which, although comparatively rare, is based upon an important constitutional principle, namely that the legislature intends statutory powers to be exercised in good faith and for the purpose for which they were conferred. Failure to do this can, and should, result in successful litigation where a loss ensues. This is thus a practical example of the principle of the rule of law.

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³² *ibid* para 16.