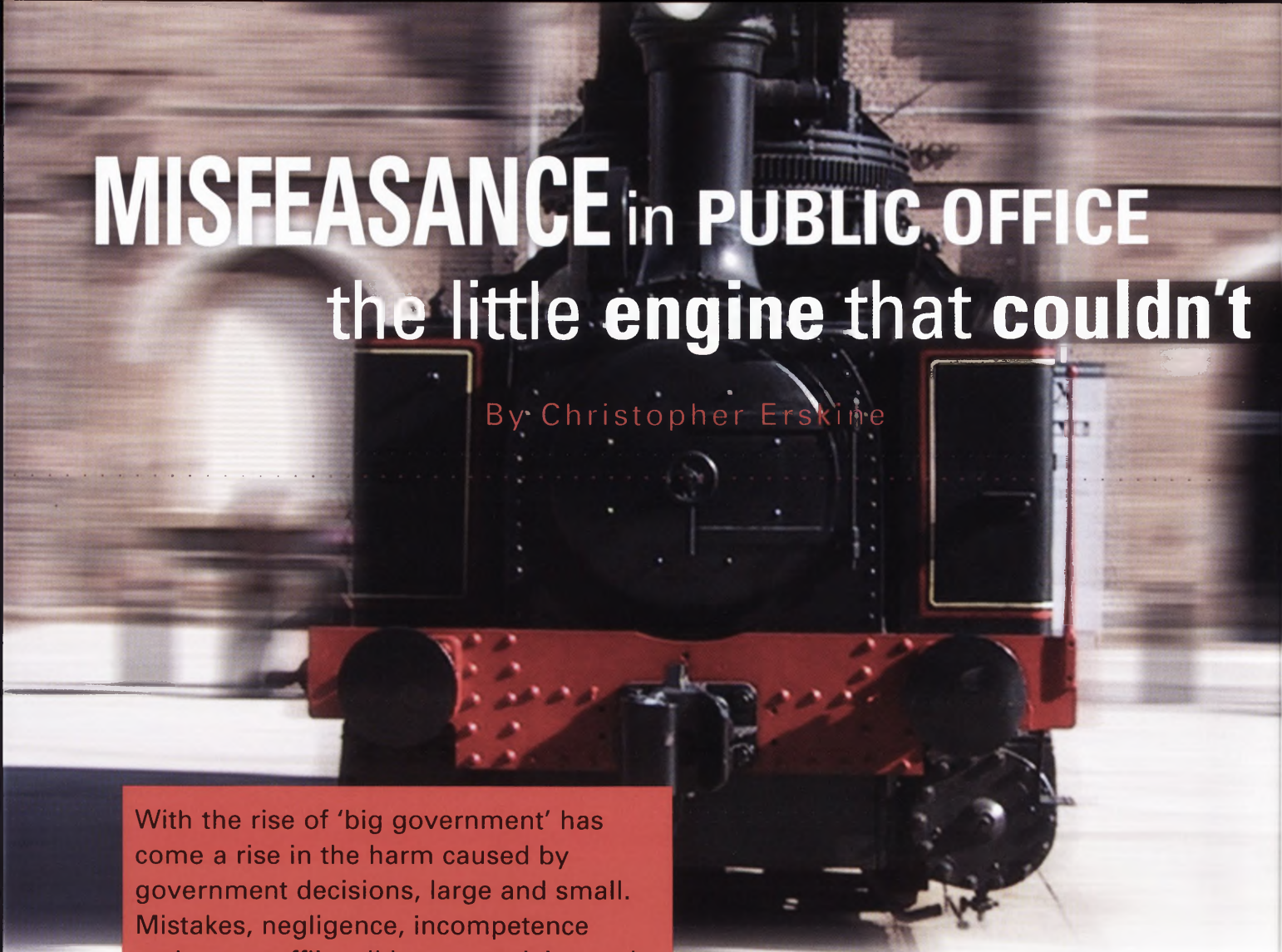

MISFEASANCE in PUBLIC OFFICE the little engine that couldn't

By Christopher Erskine

With the rise of 'big government' has come a rise in the harm caused by government decisions, large and small. Mistakes, negligence, incompetence and worse afflict all human activity, and governments are no exception. The more decisions that governments make, the greater the likelihood that individuals will be hurt by government wrongdoing.

The common law responded to this trend in the 1960s and 1970s with a vast judge-driven raft of administrative law, which effectively dusted off ancient prerogative writs to do duty in the new big government environment.

But administrative law is unusual in that it is driven to a large extent by existing remedies, not existing rights. This is not an area of the law where the court exposes a wrong and creates a remedy to deal with it. Rather, the court exposes a wrong but then has to struggle to apply a handful of pre-existing and arcane remedies to try to deal with it, often quite unsatisfactorily.

None of the prerogative writs allow compensation for the effect of a wrong decision. Although decisions can be set aside, or further reliance on them prohibited, this is cold comfort to a person whose livelihood has been injured by a failure to grant a licence, for example.

In 1977, the Commonwealth introduced the *Administrative Decisions (Judicial Review) Act* (the ADJR Act). This attempted to set out in a less technical form the administrative law principles developed through the prerogative writs.

Section 16 of the ADJR Act sets out the remedies that a court may grant. Under s16(1)(d), the court may make an order 'directing any of the parties to do ... any act or thing the doing of ... which the court considers necessary to do justice between the parties'.

In *Park Oh Ho v Minister for Immigration and Ethnic Affairs,*[1] the High Court held (in passing) that this provision did not include a power to award damages. Since then it has been clear that traditional administrative law does not include damages among the remedies available to an aggrieved applicant.

And so attention turned to a little engine that might be able to achieve that result – misfeasance in public office.

This is an ancient tort. It has been little-used: the law reports in Australia reveal a mere handful of examples in the hundred years from 1890 to 1990. But following *Park* litigants were quick to see what misfeasance could do. It came before the High Court twice in the 1990s: *Northern Territory v Mengel,*[2] and *Sanders v Snell.*[3]

While the precise boundaries of the tort remain unclear, the Court recognised that it is an intentional tort.

An earlier statement by Smith J in *Farrington v Thomson*[4] sums up the elements of the tort reasonably well:

'if a public officer does an act which to his knowledge is an abuse of his office, and he thereby causes damage to

another person, then an action in tort for misfeasance of a public office will lie against him at the suit of that person'.

But this formula contains some important issues that need to be looked at more closely.

A PUBLIC OFFICE

Merely because a person is paid by a government does not make them a public officer:

> 'Employment with the Crown is not necessarily a public office for this purpose. The office must be one the holder of which owes duties to members of the public as to how the office shall be exercised.'[5]

Some doubt was cast on this statement by Brennan J:[6]

> 'In my opinion there is no additional element which requires the identification of the plaintiff as a member of a class to whom the public officer owes a particular duty, though the position of the plaintiff may be relevant to the validity of the public officer's conduct.'

A good example of the difficulties of the *Tampion* requirement is seen in the judgment of Neasey J in the full court of the Tasmanian Supreme Court in *Pemberton v Attorney-General*.[7] In that case, the director-general of education dismissed the plaintiff, who was a teacher. Neasey J held that one reason why the plaintiff could not claim in misfeasance was that the employment relationship with the Crown did not give rise to duties owed to the public. That is, the director-general as the person responsible for the plaintiff's employment was not exercising duties owed to the public in dismissing him, and neither was the plaintiff a member of the public by virtue of being a government employee.

This decision was followed, with some hesitation, by Crispin J in *Berry v Ryan*.[8]

The hesitation arose from the fact that in *Sanders v Snell*[9] the High Court dealt with a claim in misfeasance arising from the dismissal of a Norfolk Island public servant. Whether the public servant was a public officer does not seem to have been argued in the High Court. But, equally, nothing in the judgment suggests that a government employment relationship is incapable of giving rise to misfeasance. One might have expected that had the defendant raised this argument in *Sanders*, it would have been a knockout blow for the plaintiff.

Sanders returned to the Norfolk Island Supreme Court, where the trial judge once again found for the plaintiff.[10] On appeal, the full Federal Court looked extensively at the elements of the tort of misfeasance.[11] The case was argued by senior counsel for both parties. The government employment issue raised in *Pemberton* again seems not to have been argued, nor was the decision in *Berry* referred to, even though other post-*Mengel* decisions at first instance are discussed.

The Court did refer to another decision of the Federal Court, *Martin v Tasmania Development and Resources*,[12] where an employee of the defendant had been dismissed. At paragraph 83, Heerey J accepted that the head of the defendant was the holder of a public office for the purposes of the tort of misfeasance. No argument seems to have been presented in this case on the *Pemberton* point. However, his Honour does refer to *Sanders* in the High Court to support his conclusion that the relevant person was a public officer.

We are left in a rather unsatisfactory situation about what is meant by a public office. On the one hand, the decision in *Pemberton* is consistent with earlier authority and has been followed, with hesitation, in at least one recent decision. On the other hand, the apparently obvious and devastating point that *Pemberton* raises has not been mentioned in the full Federal Court (on two occasions), or the High Court in the *Sanders* saga, nor in at least one recent single-judge decision in the Federal Court. It may also have been doubted by at least one High Court judge in *Mengel*.

And if an employment relationship with the Crown does give rise to misfeasance, it casts a lot of doubt on the strength of earlier statements of principle about the meaning of a public office. The *Pemberton* decision is logical, if narrowly based. If it is wrong, then the whole concept of a public office in relation to misfeasance may need rethinking.

MALICE AND INTENTION

It is now clear that the tort of misfeasance is intentional. Various verbal formulae were canvassed in *Sanders* when it returned to the full Federal Court, but the test was pithily set out by Heerey J in *Martin* at paragraph 82: 'This tort is committed where a holder of a public office acts in that capacity either with intention to cause harm or knowingly in excess of his or her power.' >>

To 'knowingly', we can probably add 'recklessly'.[13]

'With intention to cause harm' is a rather misleading way to put it, however. Many public officers have a duty to cause harm. The classic example is a parking inspector. It is the duty of a parking inspector to put a ticket on a car that is parked illegally. In doing so, the inspector causes harm to the motorist, because a fine will have to be paid.

One would like to think that every parking inspector was sufficiently conscious of what they were doing to intend to cause this particular harm each time they put a ticket on a car. If they handed out parking tickets accidentally or carelessly, they might be far more likely to attract criticism.

And even if we extend the example it does not help. Suppose the parking inspector comes across the car of a person they absolutely despise which is parked illegally. With relish – indeed, with the popular sense of 'malice' – they would put the ticket on the car. But even in these circumstances, they are no more guilty of misfeasance.

Brennan J referred to this point in *Mengel*:[14]

> 'In this context the "injury" intended must be something which the plaintiff would not or might not have suffered if the power available to the public officer had been validly exercised.'[15]

Thus, the intention to harm must always be coupled with some invalid exercise of power. If the harm suffered by the plaintiff would still have occurred had the power been exercised properly, there is no misfeasance.

The second alternative – acting knowingly or recklessly in excess of their power – needs to be examined, too.

Many might think that this covers only situations where an officer knew that their statutory authority did not extend to a particular action but went ahead anyway. Such situations are rare, one would hope.

But *Sanders* provides a good illustration of the potential breadth of misfeasance. In that case, the minister dismissed a public employee despite being told that he should give the employee natural justice before he did so. That was enough, in principle, to found a proper claim of misfeasance, although on the facts of the case neither the High Court nor the full Federal Court, when the case returned, found the minister to be liable.

This example shows that the grounds of review in s5 of the ADJR Act can often provide a basis for the excess of power required under the alternative formula of malice for misfeasance. To this extent, judicial review and misfeasance are closely linked, and one can well understand how there was some belief after *Park* that misfeasance might develop to provide a broad remedy of damages for administrative decision-making that goes wrong.

However, the High Court in *Mengel* and *Sanders* firmly rejected any suggestion of watering down the requirement of actual knowledge or recklessness as to abuse of power. Part of its concern was that this would blur the distinction between misfeasance and negligence by public authorities. Given the difficulties of coming up with a satisfactory way of describing negligence by public authorities in recent High Court cases, however, it seems we are not much further advanced in finding a broad-ranging basis for awarding damages for bad administrative decision-making.

VICARIOUS LIABILITY

In the vast majority of claims in negligence there is no issue of vicarious liability. But it is a serious issue in many cases of misfeasance.

It arises in two contexts. First, many decisions are made by ministers, who are not employees of the Crown and who also exercise substantial statutory discretion. Second, the very acts of public officers in committing misfeasance (that is, abuse of power) may in any event take them well outside their de facto authority.

These issues were discussed at some length by Weinberg J in *McKellar v Container Management Services Ltd.*[16] His Honour concluded that while it seems unlikely that the Commonwealth could be vicariously liable for the tort of conspiracy committed by a minister, there may be vicarious liability in the case of misfeasance.

This conclusion, however, arose in the context of a strike-out application. His Honour was unable to strike out the application on the basis that it was hopeless, even though it may well have failed when it was ultimately heard.

His Honour's discussion picks up some of the authorities in this area, including Dixon J in *James v Commonwealth*,[17] and *Racz v Home Office*,[18] which suggest that ordinarily there will not be vicarious liability for misfeasance (though it cannot be ruled out). This is the reverse of the normal situation faced by plaintiffs seeking damages in negligence. It is a warning that misfeasance might not give a plaintiff access to a defendant with resources quite as easily as occurs in other causes of action.

This discussion raises only some of the obvious difficulties in bringing a claim in misfeasance. Far from opening the proverbial floodgates to damages in administrative law, the approach of the courts over the past 15 years has been strongly against the extension of the tort of misfeasance. In particular, the High Court has firmly restated the requirement for the public officer to have deliberately or recklessly abused their power, which excludes the vast majority of instances where decision-makers have erred in making decisions.

So misfeasance is simply not going to be a cause of action that is available to most plaintiffs adversely affected by government decisions. The little engine that puffed on to the tracks after *Park* in 1989 has turned out to be the little engine that couldn't. ■

Notes: **1** (1989) 167 CLR 637. **2** (1995) 185 CLR 307. **3** (1998) 196 CLR 329. **4** [1959] VR 286 at 293. **5** Smith J, speaking for the full Court, in *Tampion v Anderson* [1973] VR 715 at 720. **6** *Mengel* at 357, with reference to the passage quoted above. **7** [1978] TasSR 1. **8** [2001] ACTSC 11. **9** (1998) 196 CLR 329. **10** [2000] NFSC 5. **11** [2003] FCAFC 150. **12** [1999] FCA 593. **13** See *Mengel* at 347; see also *Three Rivers District Council v Bank of England* [2000] 3 All ER 1. **14** At 356. **15** See also the full Federal Court in *Sanders* at 108. **16** (1999) FCA 1101 at 206 – 57. **17** (1939) 62 CLR 339 at 359-60. **18** [1994] 2 AC 45.

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