

PRIVATE RIGHTS and PUBLIC WRONGS: the tort of misfeasance in public office

By Prue Vines

A plaintiff will succeed in a misfeasance in public office case where he or she can prove that a public officer has, with malice or recklessness, invalidly carried out some public duty and caused harm to them.



A SINGULAR TORT

Misfeasance in public office is an unusual tort in that it is the only tort that can *only* be brought against a public official. The familiar tort of negligence against a public authority obviously has parallels in some ways, but misfeasance in public office can be committed only by a public official of some kind and to do so they must misuse or abuse their office in some way.

The tort seems anomalous in many ways. First, it crosses the public/private law distinction by allowing for a private action for damages for committing a public wrong. This is peculiar, since damages are usually regarded as available only for private actions. It seems to apply to all forms of harm from personal injury to pure economic loss, and therefore it can play a role in commerce. The public wrong itself is complicated by the fact that its public wrongness in itself is not enough, but malice must also be proved. It applies only to public officers who are acting in their public capacity, but it applies to them personally. Whether vicarious liability applies is still controversial.

There has been a resurgence in academic and practitioner interest in this tort in the last two decades, after it had earlier been declared dead.¹ In Australia, the resurgence of the tort can be attributed to the effect of the civil liability act regimes, which have led practitioners to look in unfamiliar places for new actions to bring which might otherwise be obstructed by the new regime. But this cannot be the reason for the new interest in the United Kingdom, Canada and New Zealand. In those countries, it is perhaps a reflection of a new interest in public rights raised by their various Charters and Bills of Rights.

SCOPE OF THE TORT

Misfeasance in public office is an intentional tort which is an action on the case and, therefore, damage must be proved.² It concerns the exercise of public power for definition of what constitutes ‘public office’, see below), and so therefore may cause damage in a very wide range of spheres. The scope of misfeasance in public office is therefore also very wide. For example, *De Reus v Gray*³ was a case where a woman was arrested for non-payment of fines. She was taken to a police station where a sergeant told the officer who arrested her that he wanted her strip-searched. She was told to take all her clothes off for the purpose of the strip-search. All this took place in a corridor next to what she thought (incorrectly) was a two-way mirror. She was detained for approximately three hours and then released. She sued successfully for damages for assault, negligence and misfeasance in public office. In that case,

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the tort was operating in respect of injury to the person.⁴ In *Roncarelli v Duplessis*,⁵ the Premier of Quebec interfered in the licensing of premises because the proprietor was a prominent Jehovah’s Witness. We have seen it in operation in commercial matters such as banking,⁶ refusing licensing,⁷ forcing closure of a hotel,⁸ refusal to acknowledge validity of a tax minimisation scheme,⁹ denying consent for change of use of land¹⁰ and interfering with business generally.¹¹ It has also been used for economic and reputational harm.¹²

In its modern manifestation, the courts in four countries – Australia, New Zealand, Canada and the United Kingdom – are in considerable agreement about the elements of the tort.

Since *Northern Territory v Mengel*¹³ in 1995, followed by *Garrett v Attorney General (NZ)*,¹⁴ *Three Rivers District Council v Bank of England (No. 3)*¹⁵ and *Odhavji v Woodhouse*¹⁶ in Canada, it has been clear that liability will arise for public officials who knowingly or recklessly act or fail to act in a way which is an abuse or improper use of their office. However, in many if not most of the cases where misfeasance in public office has been pleaded, the court

has dismissed the action, often because of lack of evidence of the relevant intention. In Australia, between 2002 and 2010 there were approximately 80 actions in misfeasance in public office brought in Australia.¹⁷ Of these, only five succeeded. Indeed, the action failed in *Mengel*, *Three Rivers* and *Garret*. In 2007,¹⁸ the Law Commission for England and Wales noted that since *Three Rivers*, only nine successful cases of misfeasance in public office had been brought in the United Kingdom.

Although the jurisdictions all agree in broad terms, the Australian version of misfeasance in public office has some slight differences in how malice is determined, at least at this stage. The remainder of this article will concentrate on the Australian position.

THE ELEMENTS

Northern Territory v Mengel is the leading case in Australia on misfeasance. Officers of the Department of Primary Industry had wrongfully (but without knowing it was beyond their power) quarantined the plaintiff’s cattle for fear of brucellosis, and thereby prevented the owners from moving them to land which they had bought for the purpose of fattening them and selling them at the expected profit. The plaintiffs lost a significant profit and sued, *inter alia*, for misfeasance in public office.

The elements of the tort were set out by Deane J:¹⁹

- (i) an invalid or unauthorised act;
- (ii) done maliciously (or recklessly);
- (iii) by a public officer;

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The fact that the defendants did not know they had acted beyond power (they simply misunderstood the legislation) meant that the plaintiffs could not prove the malice requirement of the tort, so the action failed.

(iv) in the purported discharge of public duties; and
 (v) causing loss or harm to the plaintiff.
 The fact that the defendants did not know they had acted beyond power (they simply misunderstood the legislation) meant that the plaintiffs could not prove the malice requirement of the tort, so the action failed.

It is clear that it is not enough for the public official to have carried out an invalid or unauthorised act – there must be knowledge of its invalidity or recklessness as to its validity.²⁰ It is also clear that there must also be knowledge about the possibility of harm to the plaintiff.²¹ In this respect, what is required in Australia differs from requirements in New Zealand and England, where subjective recklessness (where the defendant referred in his or her mind to the possibility) may clearly be an element of malice in relation to the possibility of harm. It was held in the Full Court of the South Australian Supreme Court in *South Australia v Lampard-Trevorrow* that foreseeability rather than actual foresight of harm was sufficient.²² That is, an objective rather than a subjective test was required, and therefore the defendant need not have adverted to the possibility of harm. In *Trevorrow's* case, the plaintiff as a 13-month-old child had been fostered out by the Aborigines Protection Board without the consent of his parents and in the knowledge that the Board had no right to remove children without evidence of child abuse or neglect, which were not present in this case. The trial judge held that misfeasance in public office was made out, and that it was foreseeable that this would cause harm to the child. The full court upheld his decision. In using the objective test of reasonable foresight of harm, rather than the subjective test used in *Three Rivers* and *Garrett*, the Full Court was following Australian authority. The Court said:

'[263] But in *Sanders v Snell*, the High Court said that if the official knew that the act was beyond power it was sufficient that there be a foreseeable risk of harm: at [38]. In the passage from *Sanders v Snell* set out above, their Honours referred to a passage from the reasons of Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ

in *Northern Territory v Mengel*.²³ Immediately after that passage their Honours in *Mengel* said:

It may be that analogy with the torts which impose liability on private individuals for the intentional infliction of harm would dictate the conclusion that, provided there is damage, liability for misfeasance in public office should rest on intentional infliction of harm, in the sense that that is the actuating motive, or on an act which the public officer knows is beyond power and which is calculated in the ordinary course to cause harm. However, it is sufficient for present purposes to proceed on the basis accepted as sufficient in *Bourgoin*, namely, that liability requires an act which the public officer knows is beyond power and which involves a foreseeable risk of harm.'

So, in Australia, the malice requirement differs in its application to the question of whether the act was beyond power compared with its application to the harm requirement. In the latter, the objective test (which is easier for the plaintiff to meet) is sufficient.

GOOD FAITH IN THE EXERCISE OF PUBLIC POWER

The central focus of the tort is in the improper use of official power, which must be exercised in good faith. The High Court emphasised this in *Commissioner of Taxation v Futuris Corporation Ltd*:²⁴

'[B]ona fide? That phrase is used in several senses in public law. With cognate expressions, it also appears in formulations of the tort of misfeasance in public office. This Court has accepted that in that context it is sufficient that the public officer concerned acted knowingly in excess of his or her power. The House of Lords has since indicated that in English law recklessness may be a sufficient state of mind to found the tort. The affinity between tort law and public law has been remarked upon in this Court; that affinity reflects the precept that in a legal system such as that maintained by the Constitution executive or administrative power is not to be exercised for ulterior or improper purposes.'

And Brennan J in *Mengel* emphasised that the central issue was 'the absence of an honest attempt to perform the functions of the office'.²⁵ One of the central requirements of the tort is that the defendant be a public officer. How is this to be defined? In a world where public power is frequently exercised by private functionaries, this is a significant question. Persons who have been regarded as public officers include police officers, politicians, council members, and many others. It is probable that not all public employees are public officers – for example, railway drivers of State Rail authorities are employees but not public officers.

VICARIOUS LIABILITY OF THE CROWN

There are still questions to be answered. Can there be vicarious liability for misfeasance in public office, since traditionally it was regarded as a personal liability? There is no time here to go into the history of crown liability, but the issues concerning vicarious liability of public

officers for misfeasance may not be as problematic as the individual formulation of the liability as 'personal' suggests. In *Mengel*, the High Court seemed to assume that vicarious liability could not be imposed except in exceptional circumstances such as where there is *de facto* authority. The English seem to have assumed that vicarious liability would be allowed.²⁶ Mark Aronson suggests that, in Australia, vicarious liability has in fact existed since governments have paid costs in most misfeasance cases.²⁷ If vicarious liability were to be imposed, there could be problems created by the fact that many of the vicarious liability statutes (which impose vicarious liability on the Crown) exempt matters of bad faith or wilful misconduct. The bad faith provisions (many of which concern police) are especially problematic, since that is an element of the tort that would appear to make vicarious liability not possible. On the other hand, if the malice is regarded as something different from bad faith in general, such as wilful misconduct then the question would be whether vicarious liability could arise on the basis that this was an unauthorised mode of doing an authorised activity,²⁸ or was closely connected to the employment. In *Lepore*,²⁹ the High Court accepted that intentional torts could give rise to vicarious liability if they were sufficiently closely connected to the employment.

A PUBLIC TORT

The public nature of misfeasance in public office should be taken seriously. It may have a role as a way of regulating and deterring the abuse of power; but more important is its role in vindicating the rights of individuals as citizens who have the right to expect their public officials to carry out their duties without abusing the power with which they have been entrusted. This is central to the rule of law, and to have a private law protection of it as well as a public law protection of it in the form of administrative law is right and proper. ■

Notes: **1** *Davis v Bromley Corporation* [1908] 1 KB 170 (CA). **2** *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395; *NT v Mengel* (1995) 185 CLR 307. **3** (2003) 9 VR 432. **4** *Fernando v Minister for Immigration and Citizenship (No. 9)* [2009] FCA 833 and *Fernando v Commonwealth* [2010] FCA 753; (2010) 188 FCR 188; *Gallo v Schubert* [2004] VCC 36 (personal injury) *Trevorrow v South Australia (No. 5)* [2007] SASC 285. **5** (1959) 16 DLR 2d 689. **6** *Three Rivers* [2003] 2 AC 1. **7** *Bourgoin SA v Ministry of Agriculture, Fisheries and Food* [1986] QB 716; [1985] 3 All ER 585 (CA); *Namusa Enterprises Ltd v Etobicoke (City)* (1990) 3 MPLR (2d) 227 (Ont Gen Div); *Edwards v Olsen* [2000] SASC 438. **8** *Farrington v Thomson* [1959] VR 286. **9** *Longley v Minister for National Revenue* (1999) 176 DLR (4th) 445 [Canada]. **10** *Jones v Swansea City Council* [1990] 3 All ER 737 (HL). **11** *White Hatter Limousine Service Ltd v Calgary (City)* (1993) [1994] 1 WWR 620. **12** *Rowan v Cornwall (No 7)* [2003] SASC 49 and *Cornwall v Rowan* [2004] SASC 384; *Twining v Curtis* [2009] ACTSC 106 (economic harm). **13** (1995) 185 CLR 307 (*Mengel*). **14** [1997] 2 NZLR 332 (*Garrett*). **15** *Three Rivers*, see note 6 above. **16** [2003] 2 SCR 263 ('*Odhavji*'). **17** P Vines, 'Misfeasance in Public Office: Old Tort New Tricks?' in *Geleging, Edelman and Goudkamp* (eds) *Torts in Commercial Law*, 2011. **18** England Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No. 187 (2007) at 74 [4.90]. **19** [1995] HCA 65; (1995) 185 CLR 307 at 370. **20** *Mengel* per Mason CJ, Toohey, Gaudron and McHugh JJ at 352; *Sanders v Snell* (1998) 196 CLR 329. **21** *Sanders v Snell* (1998) 196 CLR 329. **22** *State of South Australia v Lampard-Trevorrow* [2010] SASC 56 at [264-264] per Doyle CJ, Duggan and White JJ. **23** (1994-1995) 185 CLR 307 at 347. **24** (2008) 237 CLR 146 at [11]. **25** At 357. **26** *Three Rivers*; *Racz v Home Office* [1994] 2 AC 45. **27** M Aronson, 'Misfeasance in public office: a very peculiar tort' (2011) 35 *MULR* 1 at 46 He notes that governments appear to have accepted vicarious liability for police officers even where a bad faith clause might exempt them. **28** *Deatons PL v Flew* (1949) 79 CLR 370. **29** *New South Wales v Lepore* (2003) 212 CLR 511.

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