

# Keeping public officers honest:

## An overview of misfeasance in public office

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### INTRODUCTION

Generally, damages are not available as compensation for losses resulting from an invalid administrative action.<sup>1</sup> However, in certain limited circumstances, the tort of misfeasance in public office does allow an individual to recover damages for loss suffered where an administrative action is carried out improperly.

In *Northern Territory of Australia v Mengel*, Brennan J said:<sup>2</sup> 'Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her office whereby loss is caused to a plaintiff.'

The policy behind the tort lies in the desirability of promoting high standards of official conduct. In *Jones v Swansea City Council*, Nourse LJ said:<sup>3</sup>

'The assumptions of honour and disinterest on which the tort of misfeasance in a public office is founded are deeply rooted in the polity of a free society... It ought to be unthinkable that the holder of an office of government in this country would exercise a power thus vested in him with the object of injuring a member of that public by whose trust alone the office is enjoyed. It is unthinkable that our law should not require the highest standards of a public servant in the execution of his office.'

This must be balanced against the undesirability of the law having a 'chilling effect on the performance of their functions by public officers',<sup>4</sup> as emphasised in *Sanders v Snell*.<sup>5</sup>

'Inappropriate imposition of liability on public officials may deter officials from exercising powers conferred on them when their exercise would be for the public good. But too narrow a definition of the ambit of liability may leave persons affected by an abuse of public power uncompensated.'

The intention with which the public officer acts plays a key role in striking this balance.

## ELEMENTS

The tort will generally be made out where the act was committed by a holder of a public office who acted maliciously or knew it was beyond power and was likely to harm the plaintiff.<sup>6</sup> Thus, the tort of misfeasance in public office relates to intentional behaviour, as opposed to negligence which relates to unintentional but careless behaviour.

The core elements of misfeasance in public office were set out by Deane J in *Mengel*:

- an invalid or unauthorised act;
- done maliciously;
- by a public officer;
- in the purported discharge of his or her public duties;
- which causes loss or harm to the plaintiff.<sup>7</sup>

### Invalid or unauthorised act

It must be established that the conduct complained of was an abuse of power – '[i]t is the absence of an honest attempt to perform the functions of the office that constitutes the abuse of office'.<sup>8</sup>

It may be difficult to establish deliberate abuse of office where such 'conduct' consists of a failure to act in cases where the public official has a high degree of discretion. However, an omission (or failure to act) can found an action for misfeasance in public office'.<sup>9</sup>

In *Three Rivers District Council v Bank of England (No 3)*,<sup>10</sup> Lord

"It may be difficult to establish deliberate abuse of office for a failure to act where the public official has a high degree of discretion."



Hobhouse considered that an unlawful act 'may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of powers granted for an improper purpose' and that the appropriate test 'is the same as or similar to that used in judicial review.'<sup>11</sup>

### Malice – the requisite state of mind

Misfeasance in public office is a 'deliberate tort'.<sup>12</sup> In *Three Rivers*, Lord Steyn referred to the 'unifying element of conduct amounting to an abuse of power accompanied by subjective bad faith'.<sup>13</sup> The focus is, therefore, on the state of mind of the defendant at the time of the relevant act or omission.

The mental element is satisfied by evidence of either malice or knowledge of the absence of power (including reckless indifference as to the extent of power, but not constructive knowledge of the absence of power).<sup>14</sup>

In *Three Rivers*, it was noted that there are 'two different forms of liability for misfeasance in public office'<sup>15</sup> – targeted malice (conduct specifically intended to injure a person or persons) and untargeted malice (where a public officer acts knowing that he or she has no power to do the act complained of and that the act will probably injure the plaintiff).

In the first case, the subjective bad faith is the improper or ulterior motive, while in the second, it is the lack of an honest belief that the action is lawful. Malice and knowledge are, therefore, alternative and not cumulative elements.

It has been suggested that to establish malice the plaintiff must establish both that the defendant was motivated by a purpose foreign to that for which the public power or duty had been bestowed, and that the impugned conduct was undertaken with the intention of harming the plaintiff.<sup>16</sup>

Liability may arise where there is actual, but not constructive knowledge that the impugned act is in excess of the officer's power.<sup>17</sup> However, a public officer will be held to have the state of mind necessary to establish misfeasance if it is established that they acted with reckless indifference both as to the extent of their power and the damage arising in the event that their actions are unauthorised.<sup>18</sup> Establishing this mental element of intention – either targeted or untargeted malice – has proven difficult for plaintiffs.<sup>19</sup>

### Public officer

In *Mengel*, Brennan J considered that a public officer could be identified as a person 'who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the Crown or otherwise'.<sup>20</sup> Mere employment by the Crown does not necessarily make a person a public officer,<sup>21</sup> a distinction being drawn between public office and public employment.<sup>22</sup> It has therefore been suggested that the notion of public officer encompasses both the public nature of the position and the public nature of its powers and functions.<sup>23</sup> The concept of a public office 'embodies in varying degrees the ideas of tenure, duration, emolument, powers and duties'.<sup>24</sup>



"Public officers include police officers, government inspectors, ministers, town clerks, premiers, members of parliament and collective entities."

Persons held to be public officers include police officers,<sup>25</sup> government inspectors,<sup>26</sup> ministers,<sup>27</sup> town clerks,<sup>28</sup> premiers and members of parliament,<sup>29</sup> and collective entities.<sup>30</sup>

Liability for misfeasance will ordinarily be personal,<sup>31</sup> that is, borne by the public officer in their own right. However, the employer, usually the Crown, may be vicariously liable if there is *de facto* authority<sup>32</sup> or implied authority.<sup>33</sup> In England, the House of Lords has held that it is clear 'that the principles of vicarious liability apply as much to misfeasance in public office as to other torts involving malice, knowledge or intention'.<sup>34</sup>

Recently, in *Perrett v Williams*,<sup>35</sup> it was submitted that there was no vicarious liability for misfeasance. Although it was not necessary to decide the issue, Wood CJ noted that the relationship between the defendants and the boards or state was one that 'potentially attracted vicarious liability'.<sup>36</sup>

## Damage

As the tort is derived from the action on the case, the plaintiff must establish that they have suffered loss or damage as a result of the misfeasance.<sup>37</sup> The most common form of loss associated with misfeasance involves pecuniary loss resulting from the defendant's action, although non-pecuniary damage, such as damage to reputation following failure to renew professional registration or striking off,<sup>38</sup> and personal injury and death,<sup>39</sup> have been recognised.

## AREAS OF UNCERTAINTY

Although some aspects of the tort can now be clearly stated, there remains uncertainty in Australia as to the limits of the tort. In *Mengel*, the majority concluded that misfeasance in public office is not made out simply by establishing that there has been a wrongful exercise of administrative power by a public officer which is deliberate and results in damage. Both policy and principle suggest that liability should be 'more closely confined'.<sup>40</sup>

## Does misfeasance involve a duty of care?

In *Mengel*, the majority noted that '[o]ne aspect of misfeasance in public office that lacks precise definition is whether...there is some additional requirement' such as 'that the plaintiff must be the member of the public, or one of the members of the public, to whom the holder of the office owed a duty not to commit the particular abuse complained of'.<sup>41</sup> Although the majority considered that both policy and principle require that there be restrictions on liability for misfeasance, they did not consider whether it was necessary to show that there was a duty to the plaintiff, noting that it was 'sufficient for present purposes to require that there be a foreseeable risk of harm'.<sup>42</sup>

Brennan J, however, was clear in his rejection of this as a requirement, considering that to introduce foreseeability would be to introduce a negligence concept into misfeasance.<sup>43</sup> In *Three Rivers*, the majority of the House of Lords similarly rejected the 'introduction of proximity as a controlling mechanism',<sup>44</sup> noting that the 'state of mind required to establish the tort', as well as 'the special rule of remoteness' keeps the tort within reasonable bounds.<sup>45</sup>

## Causation

The misfeasance must have caused the damage.<sup>46</sup> This raises some problems where the plaintiff, in complying with a decision of a public officer, acts in a way that contributes to the damage. However, faced with a decision by a public officer, an individual cannot usually risk disobedience, and ordinarily does not have the opportunity to test the legality of the exercise of office before responding to it. In such cases, the causal relationship between the defendant's abuse of office and the ensuing damage is not broken by the plaintiff's own conduct in complying with the order. However, where the alleged damage is the result of a voluntary action by the plaintiff, the causal chain may be broken.<sup>47</sup>

## Assessment of damages

The primary object of a damages award in tort is to compensate the plaintiff by placing them in the position, so far as it is possible to do so by a monetary award, in which they would have been if the tort had not been committed. This general principle applies equally to misfeasance actions.

However, damages for misfeasance are not confined solely to compensation. As in other torts, the court may, in appropriate circumstances, also award exemplary damages to punish the defendant for their conduct.<sup>48</sup> Exemplary damages will, therefore, generally be available where 'in the commission of the wrong complained of, the conduct of the defendant had been high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights'.<sup>49</sup>

Proof of express malice might, in some circumstances, equate with contumelious disregard of the plaintiff's rights. However, the absence of express malice will not necessarily preclude an award of exemplary damages, as reckless disregard may be sufficiently opprobrious conduct.<sup>50</sup> There is some doubt, however, as to whether it is appropriate that exemplary damages be made available in cases where liability in misfeasance attaches vicariously.<sup>51</sup>



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## RECENT LEGISLATIVE CHANGES IN NEW SOUTH WALES

### Police Legislation Amendment (Civil Liability) Act 2003 (NSW)

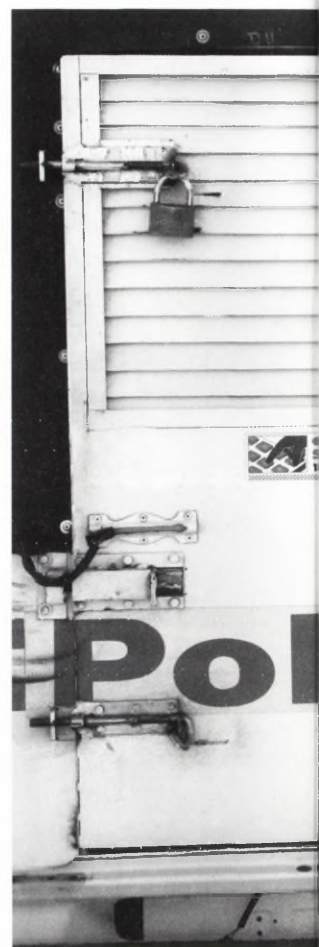
In *Bennett v Commissioner of Police of the Metropolis*, Sir Richard Scott VC said:

'Actions against the police for assault, in using excessive force in effecting an arrest or interrogating a suspect, can be brought. Why should an action for misfeasance in public office not be brought? I can see no reason why not. The police and the CPS, like everyone else, are subject in the discharge of their duties to the rule of law. There is no public interest that requires them to be afforded immunity against actions based on knowing abuse of their powers.'<sup>52</sup>

Legislation relating to the civil liability of police officers has recently been enacted in New South Wales,<sup>53</sup> receiving Royal Assent on 20 November 2003. The Act declares police officers to be Crown employees<sup>54</sup> and prevents police officers from being sued personally for damages for a tort allegedly committed in the performance or purported performance of their functions (including an independent function).<sup>55</sup> Generally such claims must now be brought against the Crown<sup>56</sup> and a police officer can only be joined where vicarious liability is denied.<sup>57</sup>

Further, even where able to be sued personally, police officers are not liable for any injury or damage caused by any act or omission in the good faith exercise of a function conferred or imposed by law.<sup>58</sup>

In *State of Victoria v Horvath*,<sup>59</sup> similar legislation in Victoria was said to have been enacted in 'recognition by the legislature of the need to provide a proper level of protection to police members on the one hand, and the need to ensure that no encouragement was thereby being given to the development of an attitude of irresponsibility by police members on the other'.<sup>60</sup> The legislative protection is 'not to be (considered) absolute and available regardless of the circumstances'.<sup>61</sup> Good faith, which has been equated with honesty of purpose, is a criterion on which the existence of protection is based. As misfeasance necessarily involves subjective bad faith, or dishonesty, it seems that despite the 'legal difficulties' associated with allegations of personal liability against police officers, where misfeasance is established, personal liability may still attach.<sup>62</sup>



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tion 3B(i), where the act complained of is an intentional act done with intent to cause injury or death.

The most significant amendment for the purposes of misfeasance appears in the new section 43A, which states that '[a] special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power'.

The legislative test for statutory immunity from an action in tort, including an action for misfeasance, therefore imports the administrative law principle of *Wednesbury* unreasonableness.

The question, therefore, is to what extent 'unreasonable' conduct in this context is co-extensive with the tests that are currently used in misfeasance. Since these focus on the state of mind of

the defendant, and are concerned with knowledge of a lack of power and consequential damage, will courts construe actions which are knowingly or recklessly beyond power to be 'unreasonable' in an administrative law sense?

In this context, it should be noted that Lord Hobhouse specifically aligned the test for the requisite state of mind in misfeasance with the test for improper purpose in judicial review.<sup>63</sup> Ultimately, it is probable that an act recklessly beyond power (as the 'softest' of the requisite states of mind necessary to establish misfeasance) would be unreasonable. Could it really be said that a reasonable authority would make a decision, whether intentionally, maliciously or recklessly, that was beyond its powers? If that is the case, the limitations placed on the bringing of an action in tort contained in the amended Civil Liability Act will not generally prevent the bringing of an action for misfeasance. **PL**

**Endnotes:** **1** *Garrett v Attorney General* [1997] 2 NZLR 332 at 351. **2** *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 at 357. **3** [1990] 1 WLR 54 at 85. **4** *Mengel* at 358. **5** *Sanders v Snell* (1998) 196 CLR 329 at 344 (on a remittal the Full Federal Court held that misfeasance was not made out, although the decision to terminate Snell's employment was invalid for want of procedural fairness, the Minister was held not to possess the requisite state of mind: [2003] FCAFC 150 – unless otherwise stated, reference to *Sanders v Snell* herein are to the High Court decision). **6** R Balkin and J Davis (1996) *Law of Torts* 2nd ed, Butterworths, Sydney, 727. **7** *Mengel* at 370. See also *Three Rivers District Council v Governor and Company of the Bank of England* [2000] 3 All ER 1 at 8. **8** *Mengel* at 357. See also *Three Rivers* at [6], [16]. **9** at 345; *Garrett v Attorney-General*

[1993] 3 NZLR 600. **10** [2000] 3 All ER 1 at [28]. **11** at [10]. **12** *Mengel* at 345. **13** at [16]. **14** *Mengel* at 346, 357, 359. **15** [15]:[16]. **16** R Balkin and J Davis (1996) *Law of Torts* 2nd ed, Butterworths, Sydney, 279. **17** *Mengel* at 348, 358; *Aus-Pol Engineering v AMSA* Unreported, Federal Court of Australia, New South Wales District Registry, Burchett J, NG 418 of 1996, 24 September 1998. **18** *Mengel*; in *Three Rivers* Lord Hobhouse refers to this as 'reckless untargeted malice' at [15]. **19** For an example of a successful case see *Rowan v Cornwall* (no 5) (2002) 82 SASR 152. **20** at 355. **21** *Pemberton v Attorney-General (Tas)* [1978] Tas SR 1 at 12. **22** P Finn, 'Public Officers: Some Personal Liabilities' (1977) 51 ALJ at 314. **23** R Balkin and J Davis (1996) *Law of Torts* 2nd ed, Butterworths, Sydney, 727-28; *Cannon v Tahche* [2002] VSCA 84. **24** *Supra* 22. **25** *Farrington v Thomson* [1959] VR 286 at 292; *Garrett v Attorney-General; Racz v Home Office* [1994] 2 AC 45. **26** *Mengel*. **27** *Sanders v Snell*. **28** *Smith v East Elloe Rural District Council* [1956] AC 736 at 752. **29** *Roncarelli v Duplessis* [1959] SCR 121. **30** For example, universities: *Bayley Jones v University of New South Wales* (1990) 22 NSWLR 424; town councils: *Dunlop v Woollahra Municipal Council* [1981] 1 NSWLR 76 at 84; central banks: *Three Rivers* [2000] 3 All ER 1; and statutory bodies: *Gimson v Victoria Workcover Authority* [1995] 1 VR 209 at 226. **31** *Mengel* at 347. **32** *ibid*; *James v Commonwealth* (1939) 62 CLR 339 at 359-60. **33** *Racz v Home Office* [1994] 2 WLR 23 at 25-28. **34** *Three Rivers* at [14]. **35** [2003] NSWSC 381. **36** [559]: [532]-[560]. **37** *Farrington v Thomson; Tampion v Anderson* at 720; *Pemberton v Attorney-General (Tas)* at 12, 26. *Three Rivers* at [10], [17]. **38** *Partridge v General Medical Council* (1890) 25 QBD 90; *Little v Law Institute of Victoria (No 3)* [1990] VR 257. **39** *Akunza v Secretary State for the Home Office* (Court of Appeal, England and Wales) Unreported 23 October 2002. **40** at 347. **41** at 346. **42** at 347. **43** at 357; cf *Murcia v City of Nedlands* (1999) 22 WAR 1 at 38; see also *Cannon v Touche* [2002] VSCA 84. **44** at 10. **45** *Garrett v Attorney-General* [1993] 3 NZLR 600 at 606. **46** *Farrington v Thomson; Mengel* at 358; *Three Rivers*. **47** *Emanuele v Hedley* [1998] FCA 709 (Wilcox, Miles and Nicholson JJ, unreported 19 June 1998, BC9802580). **48** *Sanders v Snell; Kuddus v Chief Constable of Leicestershire* [2001] 3 All ER 193. **49** *Uren v John Fairfax & Sons* (1966) 117 CLR 118 at 129. **50** *Lamb v Cotogno* (1987) 164 CLR 1 at 12. **51** Luntz p 71; *Kuddus v Chief Constable of Leicestershire* at 225. **52** (1997) 10 Admin LR 245 at 254. **53** Police Legislation Amendment (Civil Liability) Act 2003: <http://www.legislation.nsw.gov.au/> **54** s 3 which amends by schedule 1 The Employees Liability Act 1991. **55** s3 which amends by Schedule 2 Amendment of Law Reform (Vicarious Liability) Act 1983 adding 9B(1). **56** 9B(2). **57** 9B(3). **58** s3 which amends Schedule 3 Amendment of Police Act 1990 No 47 by adding s213. **59** [2002] VSCA 177 at [41]; [52]. **60** [46]. **61** [45]. **62** *Richards v State of Victoria* [2003] VSC 368 at [95]. **63** *Three Rivers* at [10] – see n12.



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