DAMAGES FOR IMPROPER EXERCISE OF STATUTORY POWERS

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1. Public law concepts and private law remedies

Recent statements in the House of Lords in two cases, in which public authorities were sued successfully for damages, have provided encouragement for those who hope to see "public law" concepts adapted to "private law" remedies for the purpose of damages claims against public authorities. Both Lord Diplock in *Dorset Yacht Co. Ltd.* v. *Home Office*[1] and Lord Wilberforce in *Anns* v. *Merton London Borough*[2] were of the opinion that, while as a general rule injury inflicted in the exercise of administrative discretion was free from civil consequences, there had to be some limit on that discretion beyond which a public authority or officer might properly be exposed to civil liability. This limit Lord Diplock suggested, depended "not on the civil law concept of negligence but on the public law concept of ultra vires".[3] To be *ultra vires,* the decision or action in question must be so unrelated to the legislative purpose imposed on the authority that no reasonable person could have reached a *bona fide* conclusion that it was conducive to that purpose.[4] Lord Wilberforce in *Anns* regarded this analysis with obvious approval and referred to the plaintiff's having to prove "that action taken was not within the limits of a discretion bona fide exercised".[5]

The above references to their Lordships' judgments are consciously selective, for both of the cases concerned actions in negligence and it is not the concern of this article to examine the application of that particular basis of tort liability to public authorities. The contribution which these cases have made to the law of negligence has received considerable attention elsewhere.[6] The "improper exercise"

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1 [1970] A.C. 1004.

2 [1978] A.C. 728.

3 [1970] A.C. 1004 at 1065.

4 *Id.* 1069.

5 [1978] A.C. 728 at 755.

6 Hamson, "Escaping Borstal Boys and the Immunity of the Home Office" (1969) 27 *Camb. L.J.* 273; Ganz, "Compensation for Negligent Administrative Action" [1973] *Public L.* 84; Harlow, "Fault Liability in Public Law" (1976) 39 *Mod. L.R.* 516; Phegan, "Public Authority Liability in Negligence" (1976) 22 *McGill L.J.* 606; Buxton, "Built Upon Sand" (1978) 41 *Mod. L.R.* 85; Craig, "Negligence in the Exercise of a Statutory Power" (1978) 94 *L.Q.R.* 428; Seddon, "The Negligence Liability of Statutory Bodies, Dutton Reinterpreted" (1978) 9 *Fed. L.R.* 326; Phegan "Tort Liability of Local Authorities" in *Recent Developments* in *Equity and the Law of Torts and Contract* Faculty of Law, University of Sydney (1979) 172-189.

of statutory powers which is the subject of this article involves "improprieties" other than lack of reasonable care.

The possibility of using the concept of *ultra vires* as a basis for recovery of damages was recognized some time ago in the Canadian case of *Roncarelli* v. *Duplessis*.[7] The defendant was the Prime Minister and Attorney General of Quebec. The plaintiff was a restauranteur in Montreal and a member of the religious sect known as Jehovah's Witnesses. For some time the sect had engaged in a public campaign against organized religion, especially the Roman Catholic Church. Riots and disturbances had been caused. There had been a number of arrests. An unsuccessful sedition trial had followed the publication of one particular document. At the forefront of the efforts to control the sect's activities was the defendant in his capacity as Attorney-General. Although the plaintiff had played no part in any civil disruption he had regularly furnished bail for members of the sect arrested for minor offences. When informed of the plaintiff's activities the defendant instructed the manager of the Liquor Commission to cancel the plaintiff's liquor licence some five months before it was due to expire and come up for renewal. The licence was cancelled and officers of the Liquor Commission entered the plaintiff's restaurant and confiscated all alcoholic liquors. The plaintiff claimed damages against the defendant alleging that the licence had been arbitrarily and unlawfully cancelled.

The defendant, in interfering with the autonomy of the Liquor Commission, had acted outside his functions and MacKinnon, J. accordingly awarded damages for the value of the liquor and loss of profit between the date of cancellation and normal expiry date of the licence. The plaintiff was also entitled to compensation for damage to goodwill and reputation caused by the public seizure of the liquor and statements made to the press by the defendant, but had failed to prove any actual pecuniary loss under this head. The decision at first instance was reversed in the Court of Queen's Bench (Appeal side) for the Province of Quebec[8] and finally restored by the Supreme Court of Canada.[9]

The case has received little attention outside Canada,[10] probably because of an assumption that the principles applied were derived from civil law and are therefore of little relevance to English common law. The judgments both at first instance and in the Canadian Supreme Court do not support such an assumption. It is true that two judges

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[7] [1952] 1 D.L.R. 680.
[8] [1956] Que. Q.B. 447.
[9] (1959) 16 D.L.R. (2d) 689.
[10] There are exceptions: Wade, *Administrative Law* (4th ed. 1977), at 637 (also case note in (1951) XXIX *Can. B.R.* 665); Gould, "Damages as a Remedy in Administrative Law" (1972) 5 *N.Z.U.L.R.* 105.

relied on an article of the Quebec Civil Code[11] and attention was given to a requirement under the Quebec Code of Civil Procedure of one month's notice of the issue of the writ.[12] But while local authorities were relied upon,[13] so also were a number of English cases.[14]

In an even earlier decision the Canadian Supreme Court had upheld an award of damages against a port licensing authority on grounds of jurisdictional error. The case was *McGillivray* v. *Kimber*[15] in which the licensing authority for the Port of Sydney, Nova Scotia, purported to revoke the plaintiff's pilot's licence by a simple resolution. While there was power to suspend a pilot's licence in cases of misconduct or incapacity, this could only be done after a proper investigation and appropriate finding. A summary dismissal based on no more than the personal opinions of members of the authority was therefore held to have been effected without jurisdiction and without any regard for the principles of natural justice. While no mention was made of *ultra vires,* so pervasive has that concept become that one author now confidently refers to the decision as "a plain case"[16] of *ultra vires.*

2. The Role of *Ultra Vires* in Tort Actions

Before pursuing more fully other implications to be drawn from the cases just mentioned, it is necessary to pause and consider the possible roles for the *ultra vires* concept in actions for damages. At least three possibilities are arguable:

(a) *ultra vires* as a ground for immunity from liability of a public corporation.

(b) *ultra vires* as a means of exposing a public authority to liability based upon some independent tort action.

(c) *ultra vires* as the basis of liability independent of any other tort action.

(a) *Ultra vires as a ground for immunity*

In a debate in 1926 between Professors Warren[17] and Goodhart,[18]

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[11] Rand and Abbott, JJ. refer to Art. 1053. But so general is this provision that case law was still resorted to.

[12] Art. 88. Failure to comply with this requirement was the principal reason for the dissenting judgments of Taschereau and Fauteux, JJ.

[13] e.g. *Jaillard* v. *Montreal* (1934) 72 Que. S.C. 112; *Leroux* v. *Lachine* [1942] Que. S.C. 352.

[14] *Mostyn* v. *Fabrigas* (1774) 1 Cowp. 161; 98 E.R. 1021; *Reg.* v. *Vestry of St Pancras* (1890) 24 Q.B.D. 371; *Sharp* v. *Wakefield* [1891] A.C. 173. In his dissenting judgment Cartwright, J. (16 D.L.R. (2d), at 717) relied on a passage from the judgment of Wilmot, C.J. in *Bassett* v. *Godschall* (1770) 3 Wils. K.B. 121. On this point see also Molot, "Tort Remedies Against Administrative Tribunals for Economic Loss" in Law Society of Upper Canada, *New Developments in the Law of Torts* (1973), at 431 and *Gershman* v. *Manitoba Vegetable Producers' Marketing Board* (1976) 69 D.L.R. (3d) 114 at 124.

[15] (1916) 26 D.L.R. 164.

[16] Wade, *op. cit. supra* n. 10.

[17] "Torts by Corporations in Ultra Vires Undertakings" (1926) 2 *Camb. L.J.* 180.

[18] "Corporate Liability in Tort and the Doctrine of Ultra Vires" (1926) 2 *Camb. L.J.* 350.

the view propounded by Professor Goodhart was that an act *ultra vires* a corporation's powers was not an act of the corporation at all. Just as a corporation could not be bound by an *ultra vires* contract, it could not be liable for an *ultra vires* tort.

While this argument is conceptually appealing, it assumes a parallel between contract and tort which does not always exist. A corporation is not bound by an *ultra vires* contract because any person dealing with the corporation has notice, at least constructive, of the limits of its powers. Such a person cannot later seek to enforce the contract if he knew that the corporation had no power to make it in the first place. The same rationalization cannot be meaningfully applied to liability in tort, especially where the tort arises from circumstances which lack any contractual character.

Despite the doubts expressed by Professor Goodhart,[19] the decision in *Campbell* v. *Paddington Corporation*[20] does support the view that a corporation can be liable for an *ultra vires* tort. The plaintiff had planned to hire seats at windows of the house in which she was a tenant to enable people to watch the funeral procession of Edward VII. The defendant corporation erected a stand for the accommodation of "council and their friends" in such a position that the view of the street from the first floor of the premises occupied by Mrs. Campbell was obstructed. She was therefore unable to use floor for the purpose originally intended. She was held entitled to recover the loss sustained as a result of being deprived of the prospect of letting rooms. It is true, as Professor Goodhart points out, that the report fails to make clear whether the erection of stands was *ultra vires*. The corporation's actions are merely described as illegal and therefore a public nuisance. However, the observations of both Avory and Lush, JJ. leave little doubt that they viewed corporate liability in tort as applying to *ultra vires* acts. Lush, J.[21] distinguished between the wrongful act of a servant done without the express authority of the corporation and the unlawful act of the corporation done in the only way in which the corporation could act (i.e., by resolution of its council). In the former case the corporation was not liable for acts outside its statutory powers,[22] in the latter case it was.

On the subject of acts done by servants without authority, Lord Diplock in the *Dorset Yacht Case*[23] stated:

> . . . although the system of control, including the subdelegation of discretion to subordinate Officers, may itself be *intra vires*, an act or omission of a subordinate officer employed in the adminis-

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[19] *Id.* 364.
[20] [1911] 1 K.B. 869.
[21] *Id.* 875 and 878 respectively.
[22] *Poulton* v. *London and South Western Ry. Co.* (1867) L.R. 2 Q.B. 534.
[23] *Supra*, n. 1.

> tration of the system may nevertheless be *ultra vires* if it falls outside the limits of the discretion delegated to him — i.e., if it is done contrary to instructions . . . .[24]

Presumably in such a case the officer would be answerable for his *ultra vires* act but the public corporation (or other authority) would not because the officer had acted outside the course of employment.

But where the corporation itself authorizes the *ultra vires* act, there is gathering support for the view that it can be liable in tort.[25] Where public corporations are concerned, there is little relevance in Professor Gower's argument that to allow a corporation to be sued for an *ultra vires* tort would defeat the interest of shareholders and creditors.[26] In addition, in the sphere of public law there would be a contradiction in using the doctrine of *ultra vires* as the basis for granting a plaintiff a remedy prohibiting a threatened act (i.e., by injunction) while using it as a reason for denying a right to damages for the consequences of such an act if it has already been done.

An act outside a corporation's powers can be treated in the same way as an act committed in purported exercise of powers conferred by invalid legislation. In both cases there is a lack of legal authority to act. The views of Dixon, J. in *James* v. *The Commonwealth*[27] are thus of particular relevance. The defendant Commonwealth had argued that under a void statute and regulations those who had seized the plaintiff's dried fruits had no valid authority to act on behalf of the Commonwealth. Dixon, J.[28] refused to accept this argument. In his opinion the actions had been taken under the general direction of the relevant Commonwealth department. This *de facto* authority was sufficient to establish the Commonwealth's responsibility. The doctrine of *ultra vires* could not be used as a source of immunity in such cases. It can similarly be argued that a public corporation which acts outside the powers conferred upon it is liable for acts done within its *de facto* authority in so far as they are tortious. While its servants are acting within the course of employment or its agents within the scope of their authority, the doctrine of *ultra vires* is in itself no defence.

When used for the purpose of protecting a public corporation from liability, *ultra vires* should therefore be confined to those cases where the corporation has been sued for the *unauthorized ultra vires* act of a servant. Beyond this, *ultra vires* is a reason *for* liability rather

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[24] *Id.* 1068.

[25] *Cf.* Welsh, "The Criminal Liability of Corporations" (1946) 62 *L.Q.R.* 345; Ashton-Cross, "Suggestions, Regarding the Liability of Corporations for the Torts of Their Servants" (1950) 10 *Camb. L.J.* 419; *Winfield & Jolowicz on Tort* (15th ed. 1975) at 572-3; Street, *The Law of Torts* (6th ed. 1976) at 465; *Salmond on Torts* (17th ed. 1977) at 429-30; *Clerk & Lindsell on Torts* (14th ed.) at 193.

[26] Gower, *The Principles of Modern Company Law* (3rd ed. 1969) at 97.

[27] (1939) 62 C.L.R. 339.

[28] *Id.* 359-60.

rather than the opposite. But this still leaves the choice between *ultra vires* as a means of exposing to liability (by another means) and *ultra vires* as a means of imposing liability *per se*.

(b) *Ultra vires as a means of exposing a public authority to liability*

If the effect of an *ultra vires* act is to deprive the defendant of the statutory protection which is available as long as the defendant acts within the powers conferred by statute, the result may be to expose the defendant to the full range of tort liability but not to any separate and distinct cause of action. This aproach is sufficient to explain at least part of the result in *Farrington* v. *Thomson & Bridgland*[29] a decision of Smith, J. in the Victorian Supreme Court.

The plaintiff was licensee of a hotel in the town of Bendigo in Victoria. Bridgland was a police sergeant stationed in the town and Thomson was a superintendent of police and the licensing inspector for the Bendigo licensing area. Under Thomson's orders Bridgland went to the plaintiff's hotel and ordered the plaintiff to close the hotel and cease supplying liquor . The plaintiff complied with the order but later sued both police officers alleging trespass and negligence. Smith, J. observed that a trespass had been committed if

> Bridgland's conduct in giving the order to close the hotel for the sale of liquor was so far wrongful that the fact he entered to give it placed him outside the scope of any tacit invitation which might otherwise have extended to cover the entry.[30]

His Honour held that while the defendants had believed (mistakenly) that the plaintiff had been convicted of offences sufficient to require forfeiture of the licence, they knew that, in any case, they did not have the power to order the closing of the hotel. His Honour concluded that *inter alia* the tort of trespass had been committed and gave judgment for the plaintiff against both defendants. To this extent *ultra vires* had been used in the sense just explained but there is more to the case than this and it will be considered at greater length later.

That the role of *ultra vires* should be no more than a means of exposing the defendant to independently based tort liability is suggested by the High Court decision in *James* v. *The Commonwealth*.[31] In that case, officers of a Commonwealth department had seized the plaintiff's dried fruit under what later proved to be invalid legislation. The plaintiff was successful in an action in conversion with regard to the seizure of four out of five specific parcels of fruit. While the action in conversion was successful, the Court failed to find ". . . a cause of action of a more general description entitling him (the plaintiff) to

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[29] [1959] V.R. 286.
[30] *Id.* 292.
[31] *Supra* n. 27.

damages for interference in the conduct of his business owing to the manner in which the regulations were maintained and enforced".[32]

The proposition that the effect of invalidity (through unconstitutionality) was to save a common law action by removing the statutory defence, was echoed in a number of later decisions of the Australian High Court.[33]

(c) *Ultra vires as a basis of liability*

Support for a more positive role for *ultra vires* is to be found in *Roncarelli* v. *Duplessis*.[34] At least some members of the Canadian Supreme Court appear to have proceeded on the basis that liability was founded on the *ultra vires* act itself, not on some independent cause of action to which the defendant was exposed having acted *ultra vires*.[35] There is no doubt that, in this regard, a conclusion in the plaintiff's favour was made easier by the law prevailing under the Quebec Civil Code.[36]

While no use is made of the term *"ultra vires"* in *Farrington* v. *Thomson*,[37] Smith, J. nonetheless referred to the purported exercise of a power which the defendants were aware they did not possess.[38] *Ultra vires* in substance if not in name. But his Honour went on to conclude that not only was the unauthorized purpose behind Bridgland's entry relevant to whether or not a trespass had been committed but the purported exercise of a power known not to be possessed, resulting in loss to the plaintiff, was itself an actionable wrong, in the form of "misfeasance in a public office".[39]

3. Misfeasance in a Public Office as a Separate Tort

To support his assertion that a tort of misfeasance in a public office existed Smith, J. in *Farrington* v. *Thomson* relied primarily on three cases: *Whitelegg* v. *Richards*;[40] *Henly* v. *Mayor of Lyme*[41] and *Smith* v. *East Elloe R.D.C.*[42]

In *Whitelegg* v. *Richards* the defendant was a clerk of the Court for the Relief of Insolvent Debtors who had issued an order for the

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[32] *Id., per* Dixon, J. at 360.

[33] e.g. *Bank of N.S.W.* v. *The Commonwealth* (1948) 76 C.L.R. 1, *per* Latham, C.J. at 231; *Williams* v. *Metropolitan and Export Abattoirs Board* (1953) 89 C.L.R. 66, *per* Kitto, J. at 77; *Deacon* v. *Grimshaw* (1955) 93 C.L.R. 83, *per* Fullagar, J. at 108. These cases are considered in greater depth by Pannam. "Tortious Liability for Acts performed under an Unconstitutional Statute" (1966) 5 *Melb. U.L.R.* 113, *cf. Vine* v. *National Dock Labour Bd.* [1957] A.C. 488. The United States Government is protected by statute from liability for unconstitutional acts: Federal Tort Claims Acts 421(a). See Street, (1959) 47 *Mich. L.R.* 341 at 352.

[34] *Supra* n. 9.

[35] E.g. 16 D.L.R. (2d) *per* Rand, J. at 706; *per* Abbott, J. at 730.

[36] *Cf.* n. 11, *supra.*

[37] *Supra* n. 29.

[38] *Id.* 291.

[39] *Id.* 293.

[40] (1823) 2 B. & C. 45; 107 E.R. 300.

[41] (1828) 5 Bing. 91; 130 E.R. 995.

[42] [1956] A.C. 736.

discharge of a debtor in custody at the suit of the plaintiff. The order was given without the authority of the Court and, according to the plaintiff's allegation, "wrongfully and maliciously" with the intention of depriving the plaintiff of the means of recovering his debt. Argument was directed primarily to the question of whether it was necessary to plead that the order had been set aside. There was no challenge to the general nature of the cause of action relied upon by the plaintiff, described by Abbott, C.J. as ". . . an action upon the case . . . maintained against an officer of a Court for a falsity or misconduct in his office, whereby a party sustains special damage".[43]

The relevance of *Henly* v. *Mayor of Lyme* is doubtful. Best, C.J. refers to an action against a public officer who "abuses his office, either by an act of omission or commission".[44] But the facts were concerned with a failure to repair decayed sea-walls under a Crown grant to the defendant corporation.

It has been argued at greater length elsewhere[45] that while the famous case of *Ashby* v. *White*[46] can be regarded as an example of an action based on malicious exercise of discretion it is also the first of a line of cases[47] based upon no more than a failure to perform a positive duty imposed by statute. Such cases are adequately explained as examples of the action for breach of statutory duty and therefore not dependent on proof of abuse of office as a separate basis of liability. *Henly* v. *Mayor of Lyme* would seem to be such a case.

In *Smith* v. *East Elloe R.D.C.* a compulsory purchase order of land belonging to the plaintiff had been obtained by the defendant council and confirmed by the Ministry of Housing. The plaintiff sought damages, an injunction and a declaration against the council and its clerk who had procured the order, and against the government department, alleging bad faith. Since by statute such an order once confirmed could not be questioned in any legal proceedings,[48] the validity of the order could not be challenged as against either council or government department. However, as to the claim against the clerk, Viscount Simonds stated:

> . . . the appellant by her writ claims against the personal defendant a declaration that he knowingly acted wrongfully and in bad faith in procuring the order and its confirmation, and damages,

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[43] 2 B. & C. 45 at 52.
[44] 5 Bing. 91 at 107.
[45] Phegan, "Public Authorities, Nonfeasance and Breach of Statutory Duty" (1977) 11 *U.B.C.L.R.* 187.
[46] (1703) 2 Ld. Raym. 938; 92 E.R. 126.
[47] The second was *Barry* v. *Arnaud* (1839) 10 Ad. & E. 646; 113 E.R. 245.
[48] As to the exclusion of judicial review by statute, grave doubts have now been expressed by the House of Lords concerning *Smith* v. *East Elloe* in the *Anisminic Case* [1969] 2 A.C. 147, discussed in De Smith, *Judicial Review of Administrative Action* (3rd ed. 1973) at 328-9.

and that is a claim which the court clearly has jurisdiction to entertain.[49]

But this offers no real indication of the nature of any claim which might have been brought.

Furthermore there are cases denying the existence of the misfeasance tort not cited by Smith, J. In *Bassett* v. *Godschall*[50] the defendants were sued for "wrongfully and maliciously, and with an intent to oppress and injure", refusing to grant the plaintiff a licence to keep an ale house. Wilmot, C.J. expressed the view that where justices were entrusted with a discretionary power to grant licences they were answerable criminally for abuse of power or misbehaviour in the execution of their authority. However, they were not answerable in damages to any aggrieved individual.[51]

Other cases sometimes relied upon in support of existence of the right to sue in such circumstances are at best inconclusive. For example, *Grainger* v. *Hill*,[52] cited by Professor Hogg in this context,[53] is more properly classified as an example of abuse of process of law[54] than as abuse of public office.

The words of Wilmot, C.J. in *Basset* v. *Godschall*,[55] were to be echoed soon after the turn of this century by Vaughan Williams, L.J. in *Davis* v. *Bromley Corporation*.[56] The plaintiff had lodged building and drainage plans for approval by the defendant corporation after considerable litigation between the parties. When the plans were rejected for alleged non-compliance with certain by-laws the plaintiff sued the corporation claiming that the plans complied with the by-laws in all respects and that their rejection was motivated by ill-will from the previous litigation. Holding that the corporation exercised a discretion vested in them by statute, Vaughan Williams, L.J. stated that no action would lie in respect of the decision ". . . even if there is some evidence to show that the individual members of the authority were actuated by bitterness or some other indirect motive".[57]

A different view however was expressed by the Privy Council in *David* v. *Abdul Cader*.[58] The defendant was Chairman of the Urban Council of Puttalan in Ceylon and as such was responsible for the issue of licences under the Public Performances Ordinance. The

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[49] *Supra* n. 42 at 752.
[50] [1770] 3 Wils. K.B. 121; 95 E.R. 967.
[51] 3 Wils. K.B. 121 at 123.
[52] (1838) 4 Bing. (N.C.) 1212; 132 E.R. 769.
[53] *Liability of the Crown* (1971) at 82 (footnote 22).
[54] *Cf.* Street, *op. cit. supra* n. 25 at 400-1; *Clerk & Lindsell, supra* n. 25, § 1920; Fleming, *Law of Torts* (5th ed. 1977) at 611; Higgins, *Elements of Tort in Australia* (1970) at 370.
[55] *Supra* n. 50.
[56] [1908] 1 K.B. 170.
[57] *Id.* 172.
[58] [1963] 1 W.L.R. 835.

plaintiff alleged that he had applied for a licence for a cinema of which he was proprietor, but that the defendant had wrongfully and maliciously refused to issue the licence. The defendant denied that the plaintiff's claim disclosed a good cause of action. In the appeal from the Supreme Court of Ceylon to the Privy Council, Viscount Radcliffe acknowledged that the question of liability was "dependent directly upon the Roman Dutch law of delict and only indirectly and by way of analogy and illustration upon the English law of torts".[59]

However, in the process of analogy and illustration his Lordship considered the aplication by the Ceylon Supreme Court of *Davis* v. *Bromley Corporation*[60] and expressed doubts about it as an authority for any general rule negativing liability.

> *Davis's case* was decided in the year 1907 . . . the decision in that case would now have to be seen in the context of a very great number of later decisions that have dealt with the question at more length and with more elaboration . . . certainly it would not be correct to treat it as sufficient to found the proposition, as asserted here, that an applicant for a statutory licence can in no circumstances have a right to damages if there has been a malicious misuse of the statutory power to grant the licence.[61]

Such observations must reduce the weight of *Davis' Case* and with it *Bassett* v. *Godschall*.[62] Viscount Radcliffe was clearly directing his remarks to English law in criticizing *Davis's Case,* although the principles of English law were only secondary to the Roman Dutch law of delict to which the parties in *David* v. *Abdul Cader* were subjected but which his Lordship concluded was not fundamentally different on the crucial issue.[63] Some writers have attached weight to this decision,[64] while others have preferred to interpret it as being of relatively narrow ambit.[65]

Cases since *David* v. *Abdul Cader* present the same variety of opinions as those which preceded it. In *Poke* v. *Eastburn*[66] Gibson, A.C.J. in the Tasmanian Supreme Court rejected a claim against two stock inspectors and the Attorney-General. It was alleged that the defendants had wrongfully and without cause issued an isolation order preventing cattle being moved on or off the plaintiff's property for a period of 180 days. The facts were complicated by a separate allega-

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[59] *Id.* 840.
[60] *Supra* n. 56.
[61] *Supra* n. 58 at 839-40.
[62] *Supra* n. 55.
[63] *Supra* n. 58 at 840. The case is susceptible to the same reservations as those expressed about *Roncarelli* v. *Duplessis* as an authoritative expression of English, as distinct from Civil, law. See *supra* nn. 11-14.
[64] Wade, *op. cit. supra* n. 10 at 638; Benjafield and Whitmore, *Principles of Australian Administrative Law* (4th ed. 1971) at 296.
[65] E.g. the description of the cause of action as "malicious refusal of a licence" De Smith, *op. cit. supra* n. 48 at 281.
[66] [1964] Tas. S.R. 98.

tion that prior to the issue of the isolation order one of the defendant stock inspectors drove a number of diseased cattle on to the plaintiff's property, thus infecting the plaintiff's herd. Nonetheless Gibson, A.C.J. addressed himself to the claim based on fraudulent issue of the order and stated that he was not aware of any authority to support an action based on the failure to exercise statutory powers in good faith.[67] While no reference was made to *David* v. *Abdul Cader,* his Honour explained *Smith* v. *East Elloe R.D.C.* as a case of trespass and therefore of no authority for an action of the kind relied upon by the plaintiff in the instant case.[68]

David v. *Abdul Cader* was referred to in the New South Wales Court of Appeal in *Campbell* v. *Ramsay.*[69] The plaintiff in that case alleged that he was a fit and proper person and his premises were in all respects suitable for the keeping of rabbits and that he had fulfilled all necessary and reasonable conditions entitling him to a permit to keep rabbits under the Pastures Protection Act, 1934-1957. The defendant Minister had refused to grant such a permit. The Act gave the Minister a discretion and it was held that no conditions were prescribed by the Act which entitled the plaintiff to have this discretion exercised in his favour.[70] For reasons which are discussed more fully later,[71] the Privy Council decision was distinguished. However, Wallace, P. and Holmes, J.A. made the point that Viscount Radcliffe intended much of what he said to apply equally to the English law of tort as to the Roman-Dutch law of delict[72] and that

> the Privy Council were not prepared to accept the view that the view that the decision of the Court of Appeal in *Davis* v. *Bromley Corporation* [1908] 1 K.B. 170 was conclusive of the law relevant to the rights of plaintiff.[73]

To deny any remedy in damages against a defendant guilty of improper conduct in a public office would now weigh against the balance of authority. But it is one thing to assert the existence of the misfeasance tort, it is another to provide a positive exposition of the basis on which an aggrieved plaintiff is entitled to recover. It is therefore necessary to examine more closely the ingredients of the tort of "misfeasance in a public office", if such a tort does exist.

4. The Elements of the Misfeasance Tort

(a) *Malice*

In those cases in which the possibility of a misfeasance tort is accepted, reference is often found to malice or lack of good faith.[74]

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[67] *Id.* 103.
[68] *Id.* 102.
[69] (1967) 87 W.N. (pt. 2) (N.S.W.) 153.
[70] *Id.* 156.
[71] *Infra* n. 89.
[72] *Cf.* nn. 59-63, *supra.*
[73] *Supra* n. 69 at 157.
[74] E.g. *David* v. *Abdul Cader, supra* n. 61.

The decision in *Roncarelli* v. *Duplessis*[75] was influenced by the assumption that the "real reason" for the cancellation of the plaintiff's licence was his regular furnishing of bail for fellow Jehovah's Witnesses arrested for various by-law offences: ". . . the Commission acted arbitrarily when it cancelled the licence on the ground it did . . . it disregarded the rules of reason and justice".[76]

The majority judgments in the Supreme Court emphasized the improper motives of the defendant:

> . . . there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power, exercisable for any purpose, however, capricious or irrelevant, regardless of the nature or purpose of the Statute. . . . Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty. . . .[77]

The view that malice is a necessary ingredient of a tort such as this finds support by way of analogy in cases concerned with exclusion from membership of professional or commercial organizations. In *Harman* v. *Tappenden*[78] the plaintiff sued the defendants for disenfranchising him from the Company of Free Fisherman and Dredgermen of the Manor and Hundred of Faversham in the County of Kent. Laurence, J. observed that, while no action could be maintained where only an error of judgment was alleged,

> . . . the action might have been maintained, if it had been proved that the defendants contriving and intending to injure and prejudice the plaintiff, and to deprive him of the benefits of his profits from the fishery, which as a member of this body he was entitled to according to the custom, had wilfully and maliciously procured him to be disenfranchised, in consequence of which he was deprived of such profits.[79]

Similarly in *Partridge* v. *The General Council of Medical Education*,[80] in which the plaintiff had been removed from the register kept under the Dentists Act, 1878, Lord Esher stated that the defendant Council was protected from liability "in the absence of malice".[81]

If further analogy would help, an even closer one can be found in the traditional common law rule imposing liability on judges of

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[75] *Supra* n. 9, and see Molot, *supra* n. 14 at 430-2 and 435.
[76] *Per* Mackinnon, J. at first instance, *supra* n. 7 at 695.
[77] *Supra* n. 9 *per* Rand, J. at 705.
[78] (1801) 1 East. 555; 102 E.R. 214.
[79] 1 East. 555 at 562-3.
[80] (1890) 25 Q.B.D. 90.
[81] *Id.* 96.

courts not of record for acts within jurisdiction which were malicious or lacked reasonable cause.[82] It is difficult, in spite of this rule, to find an example of a case in which a judge of a court not of record has actually been held liable for malicious exercise of jurisdiction.

There are many cases in which the pleadings alleged that the defendant justice acted maliciously and without reasonable cause and in which no objection was raised to such allegation. In some the plaintiff was unable to substantiate the allegation;[83] in others the action failed on some more technical ground such as failure to give notice of action as required by the Justices Protection Act.[84] In *Cave* v. *Mountain*[85] the defendant, on the complaint of one witness relying on the statement of a boy, had committed the plaintiff to custody where he remained eight days in solitary confinement on a ration of bread and water. When he was then brought before a bench of magistrates for examination, the boy, on whose alleged statement the complaint was based, was called. The boy denied that he had said what had been attributed to him in the earlier proceedings. The plaintiff was discharged and he sued the defendant for assault and false imprisonment. In a motion to set aside the verdict for the defendant, the plaintiff objected that the defendant had acted without jurisdiction and alternatively had proceeded improperly in calling no further witnesses or other evidence. As to the second objection, Tindal, C.J. took the view that the defendant had been guilty of no more than an error of judgment and for that he could not be liable. However, his Lordship continued: "[I]t would be a very different case if the defendant had acted from any malicious or improper notice or with any want of bona fides; in which case he would be liable. . . ."[86]

A similarly clear statement is to be found in the judgment of Erle, J. in *Taylor* v. *Nesfield*:[87]

> If the act of a magistrate is done without jurisdiction, it is a trespass; if within the jurisdiction, the action rests upon the corruptness of motive; and, to establish this, the act must be shown to be malicious.[88]

Since it was concluded that the plaintiff's notice under the Justices Protection Act failed to amount to more than an allegation of lack of jurisdiction, the remarks are, once again, strictly *obiter*. In a case in which the plaintiff failed to allege malice, Lord Campbell, C.J. held that the defendant had acted within jurisdiction and could therefore

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[82] Diplock, J. in *O'Connor* v. *Isaacs* [1956] 2 Q.B. 288 at 312. See generally: Thompson, "Judicial Immunity and The Protection of Justices" (1958) 21 *Mod. L.R.* 517.
[83] E.g. *Linford* v. *Fitzroy* (1849) 13 Q.B. 239; 116 E.R. 1255.
[84] *Kirby* v. *Simpson* (1854) 10 Ex. 358; 156 E.R. 482.
[85] (1840) 1 M. & G. 257; 113 E.R. 330.
[86] 1 M. & G. 257 at 263.
[87] (1854) 3 E. & B. 724; 118 E.R. 1312.
[88] 3 E. & B. 724 at 730.

not be liable.[89] His Lordship added that "acting from a corrupt motive, he might be liable to an action on the case for maliciouly granting it" (a warrant for arrest).[90]

Much more recently it was Diplock, J. in *O'Connor* v. *Isaacs*[91] who, relying in particular on *Kirby* v. *Simpson*,[92] expressed the view that an action did lie against a magistrate for malicious acts committed within jurisdiction.

The introduction in 1848 of the Justices Protection Act[93] appears to have done very little to clarify the matter, despite its obvious intention to do so.[94] In s. 1 it is stated that an action against a justice in respect of any matter within jurisdiction shall be in the form of an action on the case and that the plaintiff must allege that the justice acted maliciously and without reasonable and probable cause. Whether or not this was meant as a restatement of the common law, the reference to liability for acts within jurisdiction means that justices (or if it is possible to make the transition, courts not of record) can now be liable for the malicious exercise of such jurisdiction. While all Australian States have enacted similar provisions in whole,[95] or in part,[96] the New Zealand legislature has denied an action against a justice unless he exceeded jurisdiction or acted without jurisdiction.[97] Such a denial confirms that some action would otherwise have been available at common law.

Against this are authoritative judicial pronouncements extending judicial immunity to all who exercise the judicial function.[98] Most recently, Lord Denning, M.R. was quite explicit:

> . . . as a matter of principle the judges of superior courts have no greater claim to immunity than the judges of the lower courts. Every judge of the courts of this land — from the highest to the lowest — should be protected to the same degree, and liable to the same degree. . . . This principle should cover justices of the peace also. . . . They should have the same protection as the other judges.[99]

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[89] *Kendall* v. *Wilkinson* (1855) 4 E. & B. 680; 119 E.R. 251.
[90] 4 E. & B. 680 at 689.
[91] [1956] 2 Q.B. 288 at 312.
[92] *Supra* n. 84.
[93] 11 & 12 Vic., c. 4.
[94] See generally, Sheridan, "Protection of Justices" (1951) 14 *Mod. L.R.* 267.
[95] N.S.W.: Justices Acts 1902-1971, ss. 135-6; Victoria: Justices Act 1958, ss. 170-1; Tasmania: Justices Act, ss. 126-7; South Australia: Justices Act 1926-1972, ss. 190-191; Western Australia: Justices Act 1902-1967, s. 230.
[96] Queensland: Justices Act 1886-1964. There is no equivalent to s. 1 of the English Act.
[97] Summary Proceedings Act, 1957, s. 193.
[98] *Per* Viscount Finlay in *Everett* v. *Griffiths* [1921] 1 A.C. 631 at 665-6.
[99] *Sirros* v. *Moore* [1975] 1 Q.B. 118 at 136. *Cf.* similar views expressed in *Salmond on Torts, supra* n. 25 at 409-10; *Clerk & Lindsell, supra* n. 25, § 1975. However *Winfield & Jolowicz On Tort, supra* n. 25 leaves the matter open by confining immunity to jurisdiction *bona fide* exercised (at 598).

If judicial immunity is to apply as widely as Lord Denning, M.R. suggests, even greater care has to be taken in determining when the defendant is a "judge". In the context of administrative law a "judicial function" is applied to a much wider class of activity than Lord Denning was envisaging in his suggested extension of judicial immunity. Judicial function is frequently applied to any activity to which discretion is attached, which leads in turn to the need to distinguish between ministerial and judicial acts. More recent studies on administrative law have graphically demonstrated the inadequacy of this dichotomy as a means of classifying the functions of administrative agencies.[100] The resort to such terms as "quasi-judicial" has done little to clarify the problem. In any case it is a term which is seldom used in cases where damages are sought as a remedy.

Even if it were possible to classify adequately and reliably the full range of governmental functions,[101] there are further complications to unravel. A function may change according to the remedy in mind[102] or a particular authority may be vested with a combination of functions.[103]

Such complications cannot be ignored in the overall consideration of the award of damages any more than they can be in the use of the prerogative writs or other remedies. But despite the fact that the term "judicial" is a particular victim of the tendency to attach different meanings in different contexts, it is possible to make a distinction between those bodies which are courts of law *stricto sensu* and those which are not.[104] It is only to the former that the rules of judicial immunity apply.

In contrast to his views on judicial immunity Viscount Finlay in *Everett* v. *Griffiths*[105] was prepared to concede the possibility of liability for malicious exercise of functions, other than those exercised by courts of law *stricto sensu*. His Lordship referred to the professional organization cases[106] as examples of a class of case in which persons discharging public duties are not liable to be sued, so long as they act honestly.[107]

"Malice" when used in this context means more than mere ill-will.[108]

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[100] See, for example, De Smith, *op. cit. supra* n. 48, Ch. 2; Benjafield and Whitmore, *op. cit. supra* n. 64, Ch.v.

[101] This would include the "legislative" function which is not considered here.

[102] De Smith, *op. cit. supra* n. 48 at 62.

[103] See, for example, the remarks of Lord Campbell in *Ferguson* v. *Kinnoul* (1842) 9 Cl. & F. 251 at 321-3.

[104] It may be necessary to include justices capable of various functions but actually performing the functions of courts of law.

[105] *Supra* n. 98.

[106] *Supra* nn. 78-81.

[107] *Supra* n. 98.

[108] *David* v. *Abdul Cader, supra* n. 58 *per* Viscount Radcliffe at 840.

In *Roncarelli* v. *Duplessis,* Rand, J. defined malice as ". . . acting for a reason and purpose knowingly foreign to the administration".[109] In the same case, Martland, J. stated:

> . . . the discretionary power to cancel a permit . . . must be related to the administration and enforcement of that statute. It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act.[110]

In *Farrington* v. *Thomson,* Smith, J. was reluctant to commit himself on whether it was necessary for the plaintiff to prove malice. Leaving the definition of malice open beyond one wide enough to embrace the facts before him, his Honour referred to the public officer who "does an act which to his knowledge, amounts to an abuse of his office".[111]

The difficulty of defining malice is further complicated by the suggestion that discretions may vary in extent.[112] In *Campbell* v. *Ramsay*[113] considerable emphasis was placed on the "complete discretion" vested in the defendants by the relevant statutory provisions.[114] It was suggested that *David* v. *Abdul Cader*[115] could be distinguished because, it seems to have been assumed, the defendants in that case had something less than a complete discretion. Mr. Justice Burt of the Supreme Court of Western Australia[116] takes this suggestion even further when he argues that it was incorrect to regard *David's Case* as authority for a right to have an application considered fairly which would entitle the applicant to an action for damages if malice was displayed in the consideration of that application.

> The plea in *David's* case was that the plaintiff having "fulfilled all necessary and/or reasonable conditions entitling him to the issue of a licence, the respondent had nevertheless wrongfully and maliciously refused and neglected to issue the required licence". And the plaintiff claimed damages not because of the respondent's malice towards him in the consideration of his application but because of its malicious refusal to exercise the power.[117]

If, as this interpretation suggests, the right to a cinema licence in *David's Case* depended only upon compliance with certain conditions and the plaintiff had complied with them, the plaintiff did not need

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[109] *Supra* n. 9 at 706.
[110] *Id.* 742.
[111] *Supra* n. 29 at 293.
[112] Bradley, [1964] *Camb. L.J.* 4 at 6.
[113] *Supra* n. 69.
[114] *Id. per* Wallace, P. and Holmes, J.A. at 156-7; *per* Walsh, J.A. at 160.
[115] *Supra* n. 58.
[116] Burt, "The Tort Liability of Local Government Bodies" (1971) 10 *U.W.A.L. Rev.* 99.
[117] *Id.* 104.

to prove malice at all. Refusal to grant the licence would amount to wilful refusal to act and would be actionable as such.[118]

The present writer cannot agree with Bradley[119] who welcomes the fact that the Privy Council decision was not based on the right/privilege distinction. It is the preservation of this distinction which enables consistent explanation of the tort actions available. Bradley's use of the word "interest"[120] does little to clarify the problem and when Mr. Justice Burt refers to a power and a "correlative right"[121] he is taking considerable liberty with Hohfeldian analysis. It is true that there may be a separate "right", even in those cases where holding a licence is itself a privilege. The right is to have the application considered upon necessary conditions having been complied with. But a refusal to consider the application, actionable without proof of malice, is not the same as a refusal to grant the licence. If the latter is subject to a discretion, the power to grant and the correlative liability cannot in themselves supply a basis for any action in damages. It is only by manufacturing a duty to consider without malice that a correlative right to have considered without malice is supplied so that denial of this right will give rise to an action in damages.

Two further suggested difficulties are mentioned here, only to discount them. In *Roncarelli* v. *Duplessis,* Rand, J. observed that "it may be difficult if not impossible" to demonstrate the illegal purpose necessary to constitute malice. The instant case was an exception because the illegal purpose had been openly admitted.[122] However, difficulty of proof is not a reason for abandoning the search for a remedy.[123] Similarly, the view that excesses of the kind in *Roncarelli* v. *Duplessis* are rare (whether that be true or false), provides no better reason for not having an appropriate remedy to curb such excesses when they do occur. If the misfeasance tort, with malice as one of its elements, does exist, neither of these objections succeed in establishing that it should not.

(b) *Ultra vires and jurisdictional error*

(i) *improper purpose vs improper motive*

In the area of administrative law remedies (i.e., other than damages) the distinction between purpose and motive is well recognized.[124] The exercise of administrative discretion with a motive to do harm is undoubtedly *ultra vires.* But a *bona fide* exercise of administrative discretion for purposes not contemplated by enabling legislation

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[118] I.e. as a breach of statutory duty. *Cf.* discussion of this *supra* nn. 45-7.
[119] *Supra* n. 112 at 7.
[120] *Ibid.*
[121] *Supra* n. 116 at 103.
[122] *Supra* n. 9 at 706.
[123] Bradley (*supra* n. 112 at 6-7) suggests that problems of proof were the real reason for the decision in *Bassett* v. *Godschall, supra* n. 50.
[124] Whitmore and Aronson, *Review of Administrative Action* (1978) at 205.

but within the area of authorized operation may also be *ultra vires*. It is difficult to assess the importance of this distinction for purposes of the misfeasance tort given the uncertainty about malice as a necessary element. But it is important to recognize that malice and *ultra vires* are not co-extensive and thus it is possible that each has an essential but separate role in the misfeasance tort.[125]

(ii) *jurisdictional error and judicial immunity*

Taking the matter one step further, a separate, but now closely related,[126] ground for judicial review of administrative action is jurisdictional error, i.e., the exercise of powers not possessed as distinct from abuse of powers possessed, or want of jurisdiction as distinct from excess of jurisdiction.

Speaking for the majority in the Canadian Supreme Court in *McGillivray* v. *Kimber*,[127] Idington, J. distinguished between acting entirely without jurisdiction and having jurisdiction but erring in the mode of proceeding.[128] However, while his Honour relied on some early judicial immunity cases to support this distinction,[129] he failed to follow through the analogy. The consequences of an inferior court's acting without jurisdiction was to deprive that court of judicial immunity. The remedy most frequently used in such cases was an action in trespass for interference with person or property pursuant to the unauthorized decision.[130] Although slow to emerge,[131] the distinction between superior courts of record and inferior courts of record came to play a fundamental role in the determination of whether a court had acted within jurisdiction, because, by definition, a superior court was neither bound by restrictions of subject matter, persons or place, nor subject to the control of the prerogative writs for exceeding its jurisdiction. On the other hand, a judge of an inferior court was liable in damages where the authority of the court had been asserted prematurely,[132] over persons or subject matter outside the limits of its jurisdiction[133] or where a penalty had been imposed which the court lacked power to impose.[134]

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125 Discussed further under (c) *infra*.
126 Whitmore and Aronson, *op. cit. supra* n. 124 at 237-41.
127 *Supra* n. 15.
128 *Id.* 171-2.
129 E.g. *The Case of the Marshalsea* (1613) Co. Rep. 68b.
130 *Clerk & Lindsell on Torts, supra* n. 25, § 1793. *Cf. Taylor* v. *Nesfield* (1854) 3 E. & B. 724; 118 E.R. 1312. The possibility of actions other than trespass is left open in s. 2 of the Justices Protection Act, 1842 (or its equivalent see nn. 95-7, *supra*), where it refers to ". . . an Action against such Justice in the same form and in the same case as he might have done before the passing of this Act".
131 Holdsworth, "Immunity for Judicial Acts" (1924) *J.S.P.T.L.* 17.
132 *Pease* v. *Chaytor* (1861) 1 B. & S. 658; 121 E.R. 859; *Wood* v. *Fetherston* (1901) 27 V.L.R. 492.
133 *Houlden* v. *Smith* (1850) 14 Q.B. 841.
134 *Barton* v. *Bricknell* (1850) 13 Q.B. 393.

The significance of the distinction between superior and inferior courts for this purpose has now been challenged. In *Sirros* v. *Moore*[135] the majority of the English Court of Appeal held that the judges of inferior courts were entitled to the same immunity from liability as that traditionally available only to those of superior courts. A judge of either court could only be liable if "he was not acting judicially knowing that he had no jurisdiction to do it".[136]

As a general rule his Lordship preferred to leave the control of acts done without jurisdiction to the prerogative writs. Buckley, L.J. agreed that no distinction should be made in this context between superior and inferior courts, but with a different end in mind, namely, that judges in both courts should be exposed to liability for acts done outside their jurisdiction.[137]

The effect of the majority decision is to substantially eliminate the prospect of a judicial officer (judge or magistrate[138]) ever having to answer for an act done in pursuance of his judicial function whether with or without jurisdiction. Nevertheless the distinctions made in the older authorities may still serve a useful purpose in attempting to resolve the many unanswered questions concerning the elements of this elusive misfeasance tort.

(c) *Malice and ultra vires*

If the term *ultra vires* can be used as an umbrella for all of the possible defects in the administrative function so far envisaged, the role of malice in the misfeasance tort must be examined more closely. In one sense the malicious exercise of powers possessed by a public authority is just one example of *ultra vires* and it may therefore be argued that all that has been said on malice in the misfeasance tort can be explained within the context of *ultra vires*. However, there are a number of statements in the cases which suggest that malice has a more independent and general role, namely, as a necessary element of the misfeasance tort in addition to *ultra vires*. It follows from this latter view that if the act in question is *ultra vires* because of a malicious exercise of powers possessed, malice has a dual role: first in determining *ultra vires* and secondly in providing the ingredients of the "independent" element of malice. Needless to say it would be expected that for both purposes malice would have the same meaning and what in other types of *ultra vires* acts would be a double requirement would become a single requirement based on malice alone.

Even those cases which support the existence of the misfeasance tort present a perplexingly inconclusive picture on this issue. For

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[135] *Supra* n. 99, *per* Lord Denning, M.R. and Ormrod, L.J.
[136] *Id. per* Lord Denning, M.R. at 136.
[137] *Id.* 139-40.
[138] *Cf.* nn. 82-104, *supra.*

example, the facts of *Roncarelli* v. *Duplessis*[139] put the remarks quoted earlier, on the necessity of good faith in the exercise of discretion,[140] in a peculiarly ambiguous position. Since the defendant Prime Minister had no power to direct the decision of the Liquor Commission his act was *ultra vires* independently of malice. The observations on malicious exercise of discretion as a basis of liability were therefore more relevant to the liability of the manager of the Liquor Commission who was not a party to the proceedings. Either the discussion of malice was inadvertently applied to the defendant or it was intended to establish malice as an element of liability over and above *ultra vires*. It is not easy to tell from the judgments. In *Farrington* v. *Thomson*,[141] Smith, J. was reluctant to commit himself on whether it was necessary to prove malice. In fact his Honour's conclusions contain an odd combination.[142] The order to close the hotel was *ultra vires* but it was also malicious because it was made in the knowledge of lack of power. This was the misfeasance tort. But the defendants were also liable in trespass for entering the plaintiff's premises without authority. As stated earlier,[143] this was an example of *ultra vires* used only for the purpose of exposing the defendants to liability based on some independent tort action.

A more confident advocate of the necessity of malice is Beattie, J. in the recent New Zealand case of *Takaro Properties Ltd.* v. *Rowling*.[144] Having reviewed the authorities his Honour concluded:

> . . . there is no proper cause of action for the invalid exercise of discretionary power vested in a Minister of the Crown notwithstanding loss is suffered by an individual citizen. There may well be a valid action when the administrative authority acts maliciously to an individual's loss.[145]

If malice is not a separate element and is only relevant as one means of establishing *ultra vires* in the form of an abuse of power, can *ultra vires* stand alone as a self-sufficient basis of liability?

(d) *Misfeasance without malice*

The main reason why Smith, J. in *Farrington* v. *Thompson*[146] was reluctant to commit himself (not having to on the facts) on whether the plaintiff had to prove malice was the difficulty in reconciling those cases in which it was held to be necessary to show that the defendant acted with an intention to injure with others in which the plaintiff proved neither an intention to injure nor an awareness of

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[139] *Supra* n. 9.
[140] *Supra* n. 77.
[141] *Supra* n. 29.
[142] *Id.* 297.
[143] See discussion under 2(b), *supra*. *Cf.* Gould, *supra* n. 10.
[144] [1976] 2 N.Z.L.R. 657. The same view was taken by the N.Z. Court of Appeal, [1978] 2 N.Z.L.R. 314 at 338.
[145] *Id.* 672.
[146] *Supra* n. 29.

abuse of office. As to cases in the latter category, two examples were given.

The first of them was *Brayser* v. *McLean*.[147] The defendant, who was the sheriff of the colony of New South Wales, alleged (falsely) in a return that the plaintiff and others had released a person while in custody who had been arrested under warrant. The plaintiff was arrested on a writ of attachment and gaoled for contempt. Upon his release the plaintiff sued the defendant for the issue of the false return which the Court issuing the writ of attachment was entitled to assume to be conclusive as to the truth of the facts stated in the return. A verdict in favour of the plaintiff was set aside by the New South Wales Supreme Court on the grounds that the action could not be maintained without proof of malice or want of reasonable cause. This decision was reversed on appeal to the Privy Council.

> It appears . . . to their Lordships that the sheriff in this case was guilty of misfeasance in the exercise of the powers which were entrusted to him by law and in the discharge of his duty as a public ministerial officer, and that in respect of that misfeasance he is liable to an action for the damage which resulted from that act, notwithstanding it was not proved against him that he was actuated by malicious motives.[148]

The report offers no information as to the precise nature of the defendant's misconduct. His error may have been explained by lack of care in which case the plaintiff's claim would now be adequately met by an action in negligence.

The second case referred to was *Wood* v. *Blair and the Helmsley R.D.C.*[149] The defendants were the council and its medical officer who had issued notices forbidding the sale of the plaintiff's milk because his manageress was found to be suffering from typhoid fever. The plaintiff was finally able to establish that the notices were invalid, but not before he had poured six weeks supply of milk down the drain. He sued the defendants alleging that they had conspired together to destroy his business knowing that they had no power to serve the notices. The decision suffers not only from the absence of an adequate report,[150] but also from the lack of any definitive statement on the nature of the cause of action on which the plaintiff was able to succeed. The trial judge held that the defendants had acted from the best of motives but that the plaintiff could rely on the fact that the notices were invalid and the defendants were therefore guilty of "misfeasance". It appears that only the question of damages was argued before the

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147 (1875) L.R. 6 P.C. 398.
148 *Id.* 406.
149 (1957) Adm. L.R. 243.
150 The report in *The Times* of 3, 4 and 5 July 1957 is the longest available.

Court of Appeal. Counsel for the defendants conceded that the defendants were liable for misfeasance if the damages were proved.[151]

Other cases in which malice played no part but terms such as "abuse of office" or "misfeasance in a public office" were used are sufficiently explained as examples of breach of statutory duty.[152]

The decisions in *Brayser* v. *McLean* and *Wood* v. *Blair* were referred to somewhat inconclusively in the recent, and as yet unreported decision of Yeldham, J. in *Dunlop* v. *Woollahra Municipal Council*.[153] The plaintiff had claimed damages from the defendant Council for loss allegedly resulting from two invalid decisions of the Council. The first, imposing an upper limit on the number of storeys in a residential flat building proposed for the plaintiff's land, was invalid because the power to regulate the number of storeys had been taken away from the Council. The second, fixing a building line, was invalid because the Council, had failed to give notice of action as required under statute. Yeldham, J., in rejecting the plaintiff's claim based on the misfeasance tort, left open the question of whether malice (at least in the sense of knowledge of invalidity) was a necessary ingredient. On the facts, his Honour was satisfied that the defendant Council was not aware of the invalidity of its actions but he held that the passing of invalid resolutions did not amount to a misfeasance. This seems to ignore the fact that while the passing of resolutions has no element of positive infliction of harm (as in ordering the closure of a hotel or restaurant), it still has the inevitable effect of preventing the plaintiff from acting as he would otherwise have acted. Such a narrow definition of misfeasance would seem to be re-introducing malice (or something very much like it) by the back door.

So it remains extremely difficult to confidently state the role of malice in the misfeasance tort. But continuing to assume that there is a misfeasance tort, ill-defined as it is, there are at least two other obstacles to its application which must be considered.

(e) *Consenting to governmental action.*

Where the *ultra vires* act takes the form of a demand to surrender person or property, the person upon whom the demand is made is likely to submit to the demand in the belief that the authority issuing the demand must be obeyed. Will any subsequent claim based on the discovery that such demands were *ultra vires* be defeated by the defence of consent?

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151 One may agree with Mr. Gould that this case is "clear" authority (Gould, *supra* n. 10 at 115) for a right to damages for *ultra vires* action even in the absence of malice but in all the circumstances it could hardly be regarded as weighty authority.

152 *Supra* nn. 45-7.

153 Supreme Court of N.S.W. Common Law Division 4347/76. Unreported decision of Yeldham, J. 28/7/78.

The decision of the Australian High Court in *McLintock* v. *The Commonwealth*[154] may seem to give an affirmative answer to that question, although opinions were evenly balanced. The plaintiff in that case was a pineapple grower who delivered up part of his crop at the direction of an agent of the Commonwealth. He claimed that the direction was made under invalid legislation and sued the Commonwealth for conversion. Latham, C.J.[155] expressed the view that even if the legislation was invalid, the plaintiff had no claim because he had voluntarily delivered up the pineapples. In a dissenting judgment, Williams, J. pointed out that refusal to comply with the direction rendered the plaintiff liable to summary prosecution or indictment under the National Security Act: "[I]t is therefore difficult for the Commonwealth to assert that what it intended should be an act of compulsion was complied with voluntarily".[156]

To argue that once the order is shown to be invalid there is no longer any obligation to obey it, is to shut the gate after the horse has bolted. The use of the plaintiff's consent as a defence in such circumstances has the same air of unreailty about it as the suggestion that an *ultra vires* act cannot be tortious because it is not legally an act at all.[157] The individual faced with a direction from a public authority cannot risk disobedience, nor has he any opportunity of testing the legality of the direction before responding to it.[158]

There are signs that reality may prevail: in *Symes* v. *Mahon*[159] the plaintiff successfully sued a police constable in false imprisonment. It was held that the plaintiff had not voluntarily surrendered his liberty to the defendant whom he agreed to accompany to a police station to exonerate himself from suspicion of being the respondent in affiliation proceedings. The plaintiff was held to be under a reasonable belief that he had no alternative. In *Farrington* v. *Thomson*[160] the plaintiff complied with the defendant's order to close his hotel and cease supplying liquor. Smith, J. refused to accept that this was a reason for defeating the claim.[161]

(f) *Damage*

The second obstacle is one given some prominence by Neazor.[162] He argues that when the court comes to deciding whether the plaintiff has suffered damage as the result of malicious exercise of discretion

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154 (1947) 75 C.L.R. 1.
155 *Id.* 18-19. McTiernan, J. agreed.
156 *Id.* 40. Rich, J. concurred in this judgment. The fifth judge, Starke, J., did not commit himself on the issue.
157 See 2(a), *supra.*
158 Rubinstein, *Jurisdiction and Illegality* (1965) at 131-2.
159 [1922] S.A.S.R. 447.
160 *Supra* n. 29.
161 *Id.* 294-6.
162 Thesis (unpublished) on *Crown Liability in Tort in New Zealand*, Victoria University of Wellington (1967).

it must reach a conclusion on what decision should have been reached by the defendant had the decision been free from malice.

> It is . . . one thing for the Court to say that a discretionary decision was reached by improper procedures or on improper considerations . . . but quite another to say what the decision would or should be if proper procedures were followed or only proper considerations were taken into account.[163]

It follows that if the decision would still have gone against the plaintiff in the latter circumstances, he has suffered no loss. But to answer this question, the court must exercise the discretion vested in the defendant.

It should be pointed out at this stage that the court will have to usurp the administrative function only if malice or improper purpose is the basis of the claim. If the act is without power (i.e., it should not have been done at all), the damage would not have occurred if the defendant had not acted. That is presumably why the courts had little difficulty with the question of damages in *McGillivray* v. *Kimber,*[164] *Roncarelli* v. *Duplessis*[165] and *Farrington* v. *Thomson.*[166] In none of these cases was it necessary for the court to put itself in the position of the defendant authority and direct its mind to those matters appropriate to the discretionary function.

In cases of abuse of power (malice or improper purpose), it is no longer a question whether the damage would have occurred if the defendant had not acted (having no power to act at all) but whether the damage would have occurred if the defendant had not acted *as he did* (having the power to act but having abused that power). This means the court must make a decision on how he should have acted. Is this a proper function for the court to perform? The view is that in judicial review of administrative action the courts supervise but do not rehear.[167] On this view a rehearing would be tantamount to treating an authority exercising administrative discretion as a lower court whose decision making process is subject to correction on appeal. But the nature of discretion is to free the administrator from such scrutiny subject only to those controls which the court exercises in its supervisory role, for example, by declaring the decision a nullity or directing the administrator to reconsider.

Notwithstanding this traditional view there is evidence of an increasing tendency to replace improperly exercised discretion with the decision of a court.[168] If this same tendency is displayed when damages

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[163] *Id.* 150. See also Molot, *supra.* n. 14 at 422.
[164] *Supra* n. 7.
[165] *Supra* n. 9.
[166] *Supra* n. 29.
[167] *General Electric Co. Ltd.* v. *Price Commission* [1975] I.C.R. 1, *per* Lord Denning, M.R. at 12.
[168] Whitmore and Aronson, *op. cit. supra* n. 124 at 200-201.

are sought, this second obstacle has been removed. But if the courts are reluctant to take over the administrator's role, the use of the misfeasance tort will thereby be limited to cases of lack of power or error of jurisdiction.

5. The Action on The Case and Public Authoriites

While the misfeasance tort retains its enigmatic character, plaintiffs have special reason to explore other possible avenues. One such avenue was opened by the High Court of Australia in *Beaudesert Shire Council* v. *Smith*.[169] In that case a general principle was stated of potentially wider ambit than the misfeasance tort even without malice.

> . . . independently of trespass, negligence or nuisance but by an action for damages upon the case, 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.[170]

The defendant Council had acted in breach of regulations under the Queensland Water Acts, 1926 to 1964, by excavating gravel from the bed of a river without obtaining the necessary authority. The result was that the river changed course and ceased to flow into a water-hole from which the plaintiff pumped water. Although the Council was in breach of the regulations, the High Court discounted the possibility of an action for breach of statutory duty in one sentence,[171] but held that the proposition quoted above covered the case and the plaintiff was therefore entitled to damages for the loss occasioned by having to move the pump to another less advantageous site.

More recently a plaintiff sought to rely on the *Beaudesert* decision in an action against the Commonwealth of Australia. In *Kitano* v. *The Commonwealth*[172] the part owner of a Japanese yacht had been left stranded in Darwin when his co-owners had set sail for Japan without him, thus terminating an intended round-the-world voyage. He based his action on the issue by the local customs authorities of a certificate of clearance in the absence of an export licence as required by statute which had enabled the yacht to leave the port. Referring to the *Beaudesert* principle, Mason, J.[173] concluded that it had no application because in the instant case the deprivation of possession of the yacht was not an inevitable consequence of the issue of the certificate of clearance. In distinguishing the two cases his Honour said:

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169 (1966) 120 C.L.R. 145.
170 *Id.* 156.
171 *Id.* 151-2.
172 (1973) 129 C.L.R. 151.
173 In a judgment subsequently upheld on appeal.

> In the *Beaudesert* case it was the defendant's intentional act of removing gravel which destroyed the plaintiff's water-hole thereby preventing the exercise of his rights under his licence. Here it cannot be said that the defendant intended that which brought about the plaintiff's loss, namely, his exclusion by his companions from possession of the yacht.[174]

The language of causation in the first sentence is transformed to that of intention in the second, thus blurring the distinction which his Honour sought to make. Just as it was true to say that the customs officers in *Kitano* did not intend to exclude the plaintiff from his yacht, it is equally true to say that the defendant Council in *Beaudesert* did not intend to render the plaintiff's pump useless. In other words, the cases are indistinguishable on the question of intention.

One of the most telling criticisms of the *Beaudesert* principle is directed at its failure to account for the absence of any connection between the defendant's intention and the injurious result to the plaintiff, a connection which existed in nearly all of the cases relied upon by the High Court in that case.[175] In *Kitano,* Mason, J. went on to say:

> . . . for the plaintiff to succeed in his special action on the case he must show something more than a mere breach of the statute and consequential damage; he must show something over and above what would ground liability for breach of statutory duty if the action were available . . . he has not succeeded in showing that the act was tortious (and not merely a contravention of statute), that its inevitable consequence was to cause damage to the plaintiff, or that there was an intention to cause harm to the plaintiff.[176]

This can only mean that Mason, J., notwithstanding the facts of the *Beaudesert Case* itself, regarded intention to harm as a prerequisite of liability. Certainly this was the view of Nagle, J. in *Hull* v. *Canterbury Municipal Council.*[177] In that case development consent granted to the plaintiffs by the defendant Council was a nullity because the necessary approval had not been obtained from the State Planning Authority. The plaintiffs sued for loss sustained in proceeding with the purchase of the land in question in reliance on the development consent. Nagle, J. held that the *Beaudesert* principle had no application because the defendant Councils' servants had not intended to harm the plaintiffs and also because the plaintiffs' loss was not an "inevitable consequence" of the defendant's failure to obtain State Planning Authority approval.

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[174] *Supra* n. 172 at 174.
[175] Dworkin and Harari, "The Beaudesert Decision — Raising the Ghost of the Action upon the Case" (1967) 40 *A.L.J.* 296 at 304-5.
[176] *Supra* n. 172 at 174-5.
[177] [1974] 1 N.S.W.L.R. 300.

It is not only the meaning of the word "intention" in the *Beaudesert* principle that has been read down in later cases. The word "unlawful" has also been narrowly construed. Following the Victorian case of *Grand Central Car Park Pty. Ltd.* v. *Tivoli Freeholders,*[178] Yeldham, J. in *Dunlop* v. *Woollahra Council*[179] refused to accept the plaintiff's claim based on *Beaudesert* on the principal ground that "unlawful", as used by the High Court, was intended to mean "forbidden by law". The defendant Council's resolutions in *Dunlop* were invalid and therefore devoid of legal effect, but they were not unlawful in the required sense.

Suspect from its inception,[180] the *Beaudesert* principle has not been well received. If it has any continuing significance in the area of public authority liability, it is of a much lesser variety than the original formulation suggested. What is left could probably be adequately covered by one of the more specific applications of the action on the case such as intimidation or inducement of breach of contract. The recent Canadian case of *Gershman* v. *Manitoba Vegetable Producers' Marketing Board*[181] provides an illustration of successful reliance on both inducement of breach of contract and intimidation. The plaintiff was principal shareholder of a company which was one of a small number engaged in fruit and vegetable marketing in Winnipeg, Manitoba. The defendant Board, which had exclusive control over the marketing activities in which the plaintiff was engaged, harassed the plaintiff's company with multiple prosecutions and threatened bankruptcy proceedings. When the plaintiff's company suffered loss from a fire, the plaintiff went to work for Stella Produce Co. Ltd., another company in the same trade, on an understanding that he would become part owner of Stella Produce upon purchase of a major shareholding. Not content with pursuing the plaintiff's own company, the defendant Board immediately suspended normal credit arrangements with Stella Produce and threatened to continue the suspension as long as the plaintiff remained an employee. Stella Produce dismissed the plaintiff. In his action against the Board, it was held that the plaintiff was entitled to damages for inducement of breach of contract not only with regard to his dismissal but also for the prevention of the anticipated purchase of shares in Stella Produce. It was further held that the Board was liable in the tort of intimidation since the actions threatened by the Board were clearly in abuse of its powers and therefore illegal.[182]

But two other Canadian cases are reminders that public authorities acting *bona fide* within their powers are as unlikely to be

[178] [1969] V.R. 62.
[179] *Supra* n. 153.
[180] See Dworkin and Harari, *supra* n. 175. *Cf. Takaro Properties Ltd.* v. *Rowling, supra* n. 144, esp. [1978] 2 N.Z.L.R. 314, *per* Richardson, J. at 338-340.
[181] *Supra* n. 14.
[182] It was in this regard that reliance was placed on the decision in *Roncarelli* v. *Duplessis, supra* n. 9.

exposed to liability under these heads as to be guilty of misfeasance in a public office.[183] In fact cases such as *Gershman* do appear to to serve many of the purposes of the misfeasance tort.

The use of more established and therefore familiar examples of tort liability has its obvious advantages as long as they prove flexible enough to respond to the special demands of public authority liability. There is now evidence that, in negligence actions, the courts are becoming more responsive to these demands.[184] Perhaps, as long as the parameters of the misfeasance tort and the *Beaudesert* principle are so unclear, a more imaginative use of torts such as intimidation and inducement of breach of contract may be profitable for plaintiffs who have suffered loss from improper official conduct.

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[183] *Roman Corp. Ltd.* v. *Hudson's Bay Oil & Gas Co. Ltd.* (1973) 36 D.L.R. (3d) 411; *Central Canada Potash* v. *Government of Saskatchewan* [1977] 1 W.W.R. 487.

[184] *Supra* nn. 1-6.