Liability for Misfeasance in a Public Office

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Public officers[1] are usually not liable in damages for injuries they inflict whilst acting within their powers. If, however, they act without power, their actions attract the same legal consequences as those attaching to acts done by those who are not public officers.[2]

Albert Venn Dicey, writing in 1885, observed that:

> ... not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.
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> In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor (*Mostyn v Fabrigas* (1774) 1 Cowp 161; *Musgrove v Pulido* (1879) 5 App Cas 102; *Governor Wall's Case* (1802) 28 St Tr 51), a Secretary of State (*Entick v Carrington* (1765) 91 St Tr 1030; K & L 1974), a military officer *Phillips v Eyre* (1867) LR 4 QB 225; K & L 492), and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person. Officials, such for example as soldiers or clergyman of the Established Church, are, it is true, in England as elsewhere, subject to laws which do not affect the rest of the nation, and are in some instances amenable to tribunals which have no jurisdiction over their fellow countrymen; officials, that is to say, are to a certain extent governed under what may be termed official law. But this fact is in no way inconsistent with the principle that all men are in England subject to the law of the realm; for although a soldier or a clergyman incurs from his position legal liabilities from which other men are exempt, he does not (speaking generally) escape thereby from the duties of an ordinary citizen.[3]

Dicey made these observations at a time when it was usual for those aggrieved by the acts of public officers to bring actions for damages or restitution. The plaintiff alleged conduct which was prima facie tortious. The defendant has to plead and prove his lawful authority.

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1 A phrase which hereinafter includes public authorities.

2 See generally Gould, B C, "Damages as a Remedy in Administrative Law" (1972) 5 *NZULR* 105 and cases discussed therein.

3 This is Professor Dicey's second Rule of Law: Dicey, A V, *Introduction to the Study of the Law of the Constitution* (1886; 10th edn by E C S Wade, 1959) at 193-194.

As a response to these collateral challenges to the acts of public officers, the English courts developed a theory of jurisdiction. Acts performed outside jurisdiction attracted the same legal consequences as the acts of private citizens.[4]

The range of errors recognised as jurisdictional widened as actions seeking compensation for harm resulting from jurisdictional defects became scarce. Nowadays most cases involving public officers concern whether they have acted within or abused their jurisdiction and are brought before the courts as applications for prerogative writs, orders in the nature of prerogative writs, injunctions or declarations.

The consequences of a jurisdictional error will sometimes be determined by whether the injured party ought to receive compensation. Lord Wilberforce has said that:

> when a court says that an act of administration is voidable or void but not ab initio this is simply a reflection of a conclusion, already reached on unexpressed grounds, that the court is not willing in casu to give compensation and other redress to the person who establishes the nullity ... [It] is an unwillingness to accept that a subject shall be indemnified for loss sustained by invalid administrative action.[5]

If a public officer acts beyond his or her jurisdictional limits or improperly within those limits his or her decision is a nullity.[6] This does not necessarily mean that the decision gives rise to a crime or compensatable civil wrong. Subject to particular statutory authorisation, generally however, if what is done would be actionable if done by an individual in his private capacity,[7] those whose private rights are affected have a claim in damages.

Circumstances may exist in which an individual can show that he or she has suffered harm as a result of a decision by a public officer but cannot obtain recompense for his or her loss because the circumstances do not fit within any given head of liability — he or she cannot show either a statutory right to compensation or an infringement of some private right attracting a common law liability to pay damages or make restitution. If, however, the public officer intentionally abused his or her power this may attract liability for misfeasance in a public office, for malicious prosecution, intimidation or for the innominate tort described by the High Court in *Beaudesert Shire Council v Smith*.[8] All those torts just mentioned, other than misfeasance in a public office, have their roots in private law - they are private law torts which can apply to public officials.

Misfeasance in a public office is the only exception to the principle that, generally speaking, a public officer is not liable in tort unless the act complained of would, if done by a private individual, be actionable. It is the only tort having its roots and application within public law alone. It cannot

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4 Subject to some exceptions, for example, judges of Superior Courts; see Sadler, R J, "Judicial and Quasi-Judicial Immunities: A Remedy Denied" (1982) 12 *MULR* 508.

5 *Hoffman-La Roche & Co v Secretary of State for Trade and Industry* [1975] AC 295 at 358-359.

6 For example, *Smith v East Elloe RDC* [1956] AC 736 especially at 769; *Hoffman-La Roche & Co v Secretary of State of Trade and Industry* [1975] AC 295.

7 For example, negligence or nuisance.

8 (1966) 120 CLR 145 discussed by Sadler, R J, "Whither Beaudesert Shire Council v Smith?" (1984) 58 *ALJ* 38.

apply in private law; the defendant must be a public officer and the misfeasance complained of must occur whilst the public officer is purporting to exercise the powers of his or her office.

The significance of the exceptional nature of the tort of misfeasance in a public office[9] should not be understated. Malicious or wilful abuse of official power is socially intolerable. This social intolerability is compounded if the person injured as a result of the abuse is denied compensation. Indeed, if the abuse also gives rise to a tort known to the private law the tortfeasor will sometimes be "punished" by exemplary damages.[10] The spirit of the law concerning exemplary damages viewed alongside the need to remedy unauthorised inflictions of loss by public officers indicates that the parameters of the tort may be further widened and strengthened to accord with social demands to compensate and retribute.

The need for a social law of government torts has been mooted by many commentators and law reformers.[11] If the act causing the injury was done by a public officer acting within jurisdiction the aggrieved party cannot recover compensation. If, however, the act complained of was done by an individual without the cloak of public office, compensation may be awarded. From the public's viewpoint this is incongruous. The lawyer's response is based upon the historical dichotomy of public and private law. This is an explanation for the injustice, not a reason for its continuation — but to force government liability into the mould of private law leads inevitably to harsh and capricious results. Private law is, by its very nature, designed to deal with fundamentally different problems.[12]

An award of damages to redress injuries resulting from unlawful administrative action is necessary to achieve an equitable system of loss distribution. Public administration is designed to benefit the community. If those empowered to undertake that administration overstep their bounds then the community, in whose name the action is undertaken, should pay.[13] The Public and Administrative Law Reform Committee of New Zealand has concluded that this goal cannot be achieved without legislative intervention.[14]

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9 Hereinafter "misfeasance" unless the context otherwise indicates.

10 See for example, *Rookes v Barnard* [1964] AC 1129 especially at 1226; *Uren v John Fairfax & Sons Pty Ltd* [1966] 117 CLR 118; *Broome v Cassell & Co Ltd* [1972] AC 1027 especially at 1128.

11 For example, Public and Administrative Law Reform Committee (NZ), *Damages in Administrative Law* (1980); Law Commission for England and Wales, *Working Paper on Remedies in Administrative Law* (WP 40, 1971) especially paras 148-151; Justice Report (Eng), *Administration Under Law* (1971).

12 Whitmore, H, *Principles of Australian Administrative Law* (5th edn, 1980) at 262; see also Garner, J F, "Public Law and Private Law" [1978] *Public Law* 230 at 237; Harlow, C, "'Public' and 'Private' Law : Definition Without Distinction" (1980) 43 *MLR* 241 especially at 245-246; Street, H, *Governmental Liability* (1953) at 79-80, 185-186; Rubinestein, A, *Jurisdiction and Illegality* (1965) at 145-149; Law Commission for England and Wales, *Working Paper on Remedies in Administrative Law* (WP 40; 1971) especially paras 148-151; Public and Administrative Law Reform Committee (NZ), *Damages in Administrative Law* (1980).

13 This conclusion has not gone undisputed. Professor Davis, for example, has argued that liability should not follow invalidity because it does not necessarily impute fault and because of the enormity of potential claims: Davis, K C, *Administrative Law Treatise*, Vol 3 (1958) at 487-488; see also Craig, P P, "Compensation in Public Law" (1980) 96 *LQR* 412 especially at 437-441.

14 *Damages in Administrative Law* (1980) at para 19ff.

The tort of misfeasance in a public office may go some way toward alleviating the injustice. Indeed, some writers[15] have suggested that the development and extension of the action for misfeasance can overcome the absence of a cause of action designed to provide compensation for persons suffering loss as a result of unlawful administrative action.

The Tort

The elements of the tort of misfeasance in a public office have been the subject of academic analysis.[16] Yet, it is not widely known to practitioners. Whilst the tort's existence can no longer be disputed[17] some of its elements and their content are unclear.

In *Farrington v Thomson and Bridgland*[18] Smith J observed that:

> [If] a public officer does an act which to his knowledge amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suite of that person.

Smith J had said that:

> Some of the authorities seem to assume that in order to establish a cause of action for misfeasance in a public office it is, or may be, necessary to show that the officer acted maliciously, in the sense of having an intention to injure: compare *Acland v Buller* (1848) 1 Exch 837; 1 Rolle's Abr 93; *Drewe v Coulton* (1787) 1 East 563 (n). It appears to me, however, that this is not so and that it is sufficient to show that he acted with knowledge that what he did was an abuse of his office: see the other authorities previously cited [namely Comyns' Digest, tit "Action on the Case for Deceit" (N); *Whitelegg v Richards* (1823) 5 Bing 91 at 107-108; *Fitzgerald v Boyle* (1861) 1 QSCR 19, 26 *Halsbury* (2nd ed) sect 579; Chaster, *Public Officers* at 631], and see, too *Smith v East Elloe RDC*, [1956] AC 736 at 752 ... Indeed, in some cases at least, even this is unnecessary, and it is sufficient that the act was a breach of his official duty, even though it is not shown either that he realised this or that he acted maliciously: compare *Brasyer v Maclean* (1875), LR 6 PC 398, at 406. Proof of damage is, of course, necessary in addition.

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15 For example, Gould, B C, "Damages as a Remedy in Administrative Law" (1972) 5 *NZULR* 105 especially at 120; Haughey, *The Liability of Administrative Authorities*, Occasional Paper No 9, Legal Research Foundation, Auckland, (1975).

16 For example, Aronson, M, and Whitmore, H, *Public Torts and Contracts* (1982) at 120-131; McBride, J, "Damages as a Remedy for Unlawful Administrative Action" (1979) 38 *Camb LJ* 323; Dench, S, "The Tort of Misfeasance in a Public Office" (1981) 4 *Auck ULR* 182; Gould, B C, "Damages as a Remedy in Administrative Law" (1972) 5 *NZULR* 105; Evans, R C, "Damages for Unlawful Administrative Act : The Remedy for Misfeasance in Public Office" (1982) 31 *ICLQ* 640; Phegan, C S, "Damages for Improper Exercise of Statutory Powers" (1980) 9 *Syd LR* 93; Craig, P P, "Compensation in Public Law" (1980) 96 *LQR* 412.

17 See for example, Dench, above n16 at 183-190; *Lucas v O'Reilly* (1979) 79 ATC 4081 at 4087; *Dunlop v Woollahra Municipal Council (No 2)* (1981) 33 ALR 621 (PC); *Bourgoin SA v Ministry of Agriculture* [1985] 3 All ER 585; cf Aronson and Whitmore, above n16 at 120 and 121; *Davis v Bromley Corporation* [1908] 1 KB 170; contra *Poka v Eastburn* [1964] Tas SR 98 at 101; *Bassett v Godschall* (1770) 3 Wils KB 21; 95 ER 967. See also Little v *Law Institute of Victoria* [1990] VR 257.

18 [1959] VR 286 at 293.

This observation of Smith J was adopted by the Full Court of the Victorian Supreme Court in *Tampion v Anderson*.[19] The Court added that:

> The precise limits of the tort have yet to be defined, but certain things are clear. Employment with the Crown is not necessarily a public office for this purpose. The office must be one the holder of which owes duties to members of the public as to how the office shall be exercised ... [T]o be able to sustain an action ... a plaintiff plainly must not only show damage from the abuse; he must also show that he was a 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.

From these dicta the elements of the tort can be identified as follows:

a. The defendant must hold a public office;
b. The defendant must engage in "misfeasance";
c. The defendant must owe a duty to the plaintiff;
d. The misfeasance complained of must occur whilst the defendant is acting outside or in abuse of his or her jurisdiction;
e. The plaintiff must suffer damage; and
f. The damage to the plaintiff must be caused by the misfeasance.

If all of these elements exist the defendant may nevertheless be entitled to claim an immunity due to the public nature of his or her office.

The history of the action in misfeasance helps in answering some of the difficulties in defining its breadth. This history will not be explored in detail. It has been canvassed elsewhere.[20]

(a) Public office

The defendant must hold a "public office". The accepted view appears to be that a public officer is a decision-maker empowered to perform a statutory power or duty in which the public have an interest.[21]

Two questions must be answered to determine whether the defendant is a "public officer". First, does the defendant hold an "office" and, if so, secondly, is that office "public".

(a) (i) "Public"

In *R v Whitaker*[22] Lawrence J said that a public officer is "... an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public". The Court's words "any duty in the discharge of which the public are interested" amplify what had previously been understood by the phrase "public duty".[23] The need for an emolument would nowadays probably be unnecessary — an officer may well hold an office, without recompense, and act so as to injure persons

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19 [1973] VR 715 per Smith, Pape and Crockett JJ on appeal from [1973] VR 321.
20 For example, Evans, above n16.
21 See id at 644 ff; Dench, above n16 at 201; Gould, above n16 at 177; Aronson and Whitmore, above n16 at 129. See also *Jones v Swansea City Council* [1989] 3 All ER 162 (CA); [1990] 3 All ER 737 (HL).
22 [1914] 3 KB 1283 at 1296.
23 *Henly v Lyme Corporation* (1828) 5 Bing 91 at 107; 130 ER 995. The officer must be answerable to the public: *Tampion v Anderson* [1973] VR 321 at 337.

who rely upon his or her determination[24] and in making his or her determination exercise a duty in which the public are interested.

To succeed in a misfeasance action the plaintiff must show that he or she is owed a "duty" by the defendant. In addition, if it is necessary that the defendant is a "public officer" in the sense of owing a "public duty", then the plaintiff must also show that the defendant owed a duty both to him or her[25] and to the public. Indeed, as recently as 1981, in *Dunlop v Woollahra Municipal Council (No 2)*,[26] the Privy Council spoke of the tort of "misfeasance by a public officer in the discharge of his [or her] public duties".[27] The word "duty" in this context is not intended to mean an obligation other than that of exercising a power according to proper principles of law.

Recently the English Court of Appeal in *Jones v Swansea City Council*[28] considered these types of difficulties. A local Council refused to grant its consent to a request for a change of use of premises it let to the wife of one of its former members. These premises were let pursuant to a written lease with the Council. The tenant commenced misfeasance proceedings. The Council, inter alia, alleged that it was not a public law matter, that it (the Council) was not exercising public duties as the facts related to a private contract. Slade LJ said that the essence of the tort was:

> ... that someone holding public office has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or for a section of the public either with the intent to injure another or in the knowledge that he was acting ultra vires.[29]

The Court determined that all powers possessed by the Council, howsoever conferred, are possessed solely in order that it may use them for the public good. The Court emphasised the public nature of the office of Council rather than the private derivation of the power (that is the lease). Nourse LJ interestingly regarded the nature of the power as seemingly unimportant. He said:

> [i]t is not the nature or origin of the power which matters. Whatever its nature or origin, the power may be exercised only for the public good. It is the office on which everything depends.[30]

The Council appealed to the House of Lords.[31] The House of Lords did not question the statements of principle quoted above from members of the Court of Appeal but nevertheless reversed the decision of the Court of Appeal. The House of Lords found that the plaintiff would have succeeded if the plaintiff had alleged that a majority of the councillors were actuated by malice. However, the plaintiff had alleged that all the councillors were actuated. The House found this was not supported by the evidence.

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24 See McBride, above n16 at 326; Gould, above n16; *Henly v Lyme Corporation* (1828) 5 Bing 91 at 107; 130 ER 995 at 1001.
25 *David v Abdul Cader* [1963] 1 WLR 834.
26 (1981) 33 ALR 621 at 630.
27 Brackets mine.
28 [1989] 3 All ER 162; [1990] 1 WLR 54.
29 Id at 175; and 71.
30 Id at 176; and 85.
31 [1990] 3 All ER 737 and [1990] 1 WLR 1453.

(a) (ii) "Office"

Not every public employment or employment by the Crown is a public office.[32] The ambit of a public office has been much discussed by American jurists. They have determined, in another context but the principles of which are germane for present purposes, that one must distinguish between public offices and public employments, the latter lacking the indicia of an office,[33] that the word "office" is beyond precise definition but necessarily embodies in varying degrees the ideas of tenure, duration, emolument, powers and duties and that public employment may be a public office for some purposes but not for others.

The defendant must have statutory powers.[34] The misfeasance must occur during the purported exercise of those powers or in exercising ancillary common law powers.[35]

One commentator has concluded that a "public officer" exercises a duty involving "public trust and confidence".[36] This observation is not supported by authority. A public officer will usually owe duties to the particular authority under which he or she holds his office and will be directly responsible to the authority for his or her conduct in that office. But, the argument can be put, quite apart from the "employment" relationship between the officer and the authority under which he or she holds office, the officer, in addition, subjects himself or herself to duties and/or liabilities attended by public "trust and confidence". This, it is submitted, is no more than an assertion that the defendant must exercise "public duties".[37]

Although the courts have not shied from equating a public officer's position with that of private law trustees and fiduciaries[38] and have often spoken of a public officer as being in a position of "trust" or in a "fiduciary" relationship with the public, the need for the public to repose trust and confidence in a servant for him or her to be determined to hold a public office has arisen only within the confines of a crime much steeped in history known as breach of trust and confidence and, indeed, even then only when the officer derives his or her authority from letters patent.[39] The confusion may well

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32 See *Ex Parte Kearney* (1917) 17 SR (NSW) 578; *Tampion v Anderson* [1973] VR 715 at 720; [1973] VR 321 at 337.

33 For example, *Varden v Ridings* (1937) 20 F Supp 495; *People v Knox* (1931) 247 NYS 731; *Tillquist v Department of Labour & Industry* (1943) 12 NW 2d 512.

34 *Tampion v Anderson* [1973] VR 715; *R v Whitaker* [1914] 3 KB 1283.

35 *Jones v Swansea City Council* [1989] 3 All ER 162 (CA); *Tampion v Anderson* [1973] VR 715 at 720; eg, (CA; [1990] 3 All ER 737 (HL) a Commissioner undertaking a statutorily authorised investigation might call witnesses as a result of a common law power to do so — the calling of witnesses being a necessary ancillary incident to the statutory power to conduct the investigation — see, also, Sadler, R J, "The University Visitor: Visitatorial Precedent and Procedure in Australia" (1981) 7 *U Tas LR* 2 at 25-27.

36 Evans, above n16 at 646.

37 In the context of the phrase as used by the Privy Council in *Dunlop v Woollahra Municipal Council (No 2)* (1981) 33 ALR 621 at 630. Interestingly, in *Dunlop* the municipal authority was itself regarded as an "office" — a wider meaning of "officer" and "official" than had hitherto been accepted. Cf *Jones v Swansea City Council* [1989] 3 All ER 162 (CA); [1990] 3 All ER 737 (HL).

38 See *R v Boston* (1923) 33 CLR 386 at 412; *Horne v Barber* (1920) 27 CLR 494 at 501-502 (both cases concern Members of Parliament).

39 See *R v Bembridge and Powell* (1783) 22 St Tr 1 at 77, 151; *R v Wyat* (1703) 1 Salk 380 n (a) 91 ER 331.

have arisen from the parallel development of the tort of misfeasance in a public office and the crimes of official misconduct and breach of trust and confidence.

In each case the courts will need to consider such issues as the role of the officer, his or her tenure, powers, and duties, and the significance of his or her decision making authority.

(b) Misfeasance

What type of conduct by a public officer generates liability? This aspect of the tort has been subject to much judicial[40] and academic[41] comment.

Misfeasance requires proof of malice, a term which has been subject to a "regrettable exuberance of definition"[42] and which has caused "more confusion in English law than any judge can hope to dispel".[43] Malice, when translated into an element of the tort of misfeasance, has taken on two broad meanings. First, conduct which is motivated by ill-will or spite towards the plaintiff (sometimes called express or targeted malice) or, second, a knowledge by the public officer that his or her act amounts to an abuse of office or, what sometimes is the same thing, where "an officer performs an act which he knows he had no power to perform with the object of conferring a benefit on A but which has the foreseeable and actual consequence of injury to B".[44]

The invalidity of an administrator's act is not itself a ground of liability in tort. Invalidity simply means that if the act is otherwise tortious the administrator cannot raise the fact of his public office as a defence.[45] Some commentators have taken a different view.[46] Mr B C Gould, for instance, relies upon an observation of Rand J in the infamous case of *Roncarelli v Duplessis*,[47] that "malice in the proper sense is simply acting for a reason and

40 For example, *Farrington v Thomson and Bridgland* [1959] VR 286; *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689; *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314; *Bourgoin SA v Ministry of Agriculture* [1985] 3 All ER 585; *Little v Law Institute of Victoria* [1990] VR 257; *R v Secretary of State, ex parte Ruddock* [1987] 2 All ER 518.

41 For example, Evans, above n16; Gould, above n16; Dench, above n16; Phegan, above n16.

42 *British Railway Traffic and Electric Co Ltd v CRC Co Ltd* [1922] 2 KB 260 at 268 per McCardie J.

43 *Shapiro v La Morta* (1923) 40 TLR 201 at 203 per Scrutton LJ. See also Fridman, G H L, "Malice in the Law of Torts" (1958) 21 *MLR* 484.

44 *Bourgoin SA v Ministry of Agriculture* [1985] 3 All ER 585 at 624 per Oliver LJ. See also *Little v Law Institute of Victoria* [1990] VR 257 at 270. Some commentators (for example, Gould, above n16 at 114-115; Evans, above n16 at 647-648) rely upon two cases to show that ultra vires conduct is actionable per se. First, they rely upon *Brayser v MacLean* (1857) LR 6 PC 398. *Brayser* was an action for the false return of a Writ of Attachment — an historically well recognised cause of action where malice is not an element. This was argued by the Appellant and apparently accepted by the Privy Council (see at 406 and cases cited at 401). "Misfeasance" as used in *Brayser* has a different meaning historically than the use of the phrase in the context of a tortious action for misfeasance. Secondly, they rely upon *Wood v Blair et al; The Times*, 3, 4, and 5 July, 1957, but this case properly concerned the economic tort of conspiracy, not misfeasance.

45 For example, *James v Commonwealth* (1939) 62 CLR 339; *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314; *Dunlop v Woollahra Municipal Council (No 2)* (1981) 33 ALR 621; [1981] 2 WLR 693 (PC).

46 Gould, above n16 at 113-114; Evans, above n16 at 647-649.

47 (1959) 16 DLR (2d) 689 at 705 — Rand J gave the leading judgment for the majority in the Supreme Court of Canada.

a purpose knowingly foreign to the administration". Gould then argues that "malice" is "equated with any diversion of statutory authority from its proper purpose. Another way of describing such a diversion would be to label it as ultra vires".[48] He notes that any ultra vires act, being an improper use of legal powers, would thus be regarded as malicious. Gould, however, fails to stress the word "knowingly" in Rand J's observation. It is submitted that that knowledge is to be viewed subjectively, not objectively. The officer must, with knowledge of the potential for abuse, proceed and abuse his or her jurisdiction. This interpretation is supported by Smith J in *Farrington v Thompson and Bridgland*.[49] He observed that it would suffice to show that the officer "acted with knowledge that what he did was an abuse of his office". Gould also relies upon these words of Smith J in support of his argument. It is suggested that Smith J requires the defendant to at least have exercised powers which he or she knew were not possessed. A host of authorities support the proposition that the officer will be responsible for misfeasance if he or she acted unlawfully, with knowledge of the unlawfulness.[50]

The decision of the Privy Council in *Dunlop v Woollahra Municipal Council (No 2)*[51] provides an interesting gloss. The members of the Board regarded the tort of misfeasance by a public officer as "well established" and that:

> in the absence of *malice*, passing without knowledge of its invalidity a resolution which is devoid of any legal effect is not conduct that of itself is capable of amounting to such "misfeasance" as is a necessary element in the tort.[52]

At first glance they are simply observing that invalidity per se is not actionable. A closer scrutiny suggests that they did not regard knowledge of invalidity as amounting to malice — they do not note whether such conduct is a separate form of misfeasance, distinct from malice, which would suffice to found the tort. Nevertheless it is suggested that they cannot be taken to mean that passing an invalid resolution with knowledge of its invalidity is not actionable should the other elements of the tort exist. This would be contrary to many authorities which were not questioned in the judgment and which were obliquely acknowledged by reference to the tort as "well established".

The meaning of the concept embodied in the phrase "acted with knowledge that what he did was an abuse of his office" has not been subject to close judicial consideration. It is suggested that, at least, it requires an absence of bona fides in the sense that the officer knowingly acts outside his or her jurisdiction or acts with knowledge that the legislative basis for his or her action is unsound.[53] This does not necessarily involve "malice" in the

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48 Gould, above n16.

49 [1959] VR 286.

50 For example, *Farrington v Thomson and Bridgland* [1959] VR 286; *Hlokloff v City of Vancouver* (1968) 67 DLR (2d) 119; *Takaro Properties Ltd v Rowling* [1976] 2 NZLR 657 at 662; *David v Cader* [1963] 1 WLR 834 at 838; *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 at 706; *Bourgoin SA v Ministry for Agriculture* [1985] 3 All ER 585; *Little v Law Institute of Victoria* [1990] VR 257.

51 (1981) 33 ALR 621.

52 (1981) 33 ALR 621 at 630. Emphasis mine.

53 See *Little v Law Institute of Victoria* [1990] VR 257 at 270.

sense of spite or ill-will towards the plaintiff or an intention to injure.[54] The officer may knowingly abuse or act outside jurisdiction for reasons other than an intent to injure the plaintiff. He may, for example, simply regard his jurisdiction as inadequate. A bona fide misconception on the official's part as to the ambit of jurisdiction is not misfeasance, nor is an error of jurisdictional fact made in good faith, nor, for example, taking into account irrelevant considerations or acting for an improper purpose.[55]

(c) Duty to the plaintiff

The plaintiff must show that "the holder of the office owed him [the plaintiff] a duty not to commit the particular abuse complained of".[56]

This was acknowledged by the Privy Council in *David v Abdul Cader*.[57] The plaintiff was the proprietor of a cinema. He alleged that his application for a cinema licence had been wrongfully and maliciously refused. The trial judge held that the statement of claim did not disclose a cause of action. Their Lordships determined that it was:

> ... impossible to say that the Respondent [Defendant — public officer] did not owe some duty to the Appellant [Plaintiff] with regard to the execution of his statutory power; and if, as pleaded, he had been malicious in refusing or neglecting to grant a licence, it is equally impossible to say without investigation of the facts that there cannot have been a breach of duty giving rise to a claim for damages.[58]

These observations were considered by the Court of Appeal of the Supreme Court of New South Wales in *Campbell v Ramsay*.[59] The Court regarded *David*'s case as suggesting that if an applicant for a licence was entitled to have his or her application considered fairly and if there was malice towards him or her in the consideration of the application, then he or she may, if damage ensued, proceed by way of an action sounding in damages. The Court cited without disapproval the passage quoted above from *David*'s case in which the Privy Council regarded a breach of duty to the plaintiff as necessary to found the action. Although the Supreme Court of New South Wales eventually distinguished *David*'s case, the point of distinction was the statutory provision in question, not the observations on points of law made by the Privy Council.

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54 See *Bourgoin SA v Ministry of Agriculture* [1985] 3 All ER 585.

55 "Malice", even when used in the strictest sense, is not free from ambiguity. It may mean an indirect, dishonest or improper motive: cf *Serville v Constance* [1954] 1 WLR 487; *Mentone Racing Club v Victorian Railways Commissioner* (1902) 28 VLR 77, or an intent to injure without just cause or excuse: cf *Joyce v Motor Surveys Ltd* [1948] Ch 252; *Ratcliffe v Evans* [1892] 2 QB 524. Mere recklessness, contrasted with reckless indifference, may not constitute malice: cf *Manitoba Fress Press v Nagy* (1907) 39 SCR 340; *Shapiro v La Morta* (1923) 40 TLR 201; *Balden v Shorter* [1933] Ch 427. Reckless indifference as to the existence of jurisdiction would not appear to be malice for the purpose of a misfeasance action as it is not an act undertaken with knowledge that it is an abuse of office.

56 *Tampion v Anderson* [1973] VR 715 at 720.

57 [1963] 1 WLR 834; see also Burt, F T P, "The Tort Liability of Local Government Bodies" (1971) 2 *UWAL Rev* 99

58 [1963] 1 WLR 834 at 839.

59 [1968] 1 NSWR 425 at 428-429.

What circumstances must exist for the law to impose, alongside public law powers and duties, a public law duty towards individuals as distinct from the public such that an individual may sue for damages? *Tampion v Anderson*[60] makes it clear that a duty may be both a public and a private duty, arising from public law, owed to a particular member of the public but not necessarily all members of the public.

What criteria does one use in determining whether there is a common law duty of care arising from the performance of statutory functions? This is the same question that, in another context, was initially answered by the House of Lords in *Anns v Merton London Borough Council*.[61] This answer provided by the House was, however, rejected by the High Court of Australia in *Sutherland Shire Council v Heyman*.[62] The High Court's reasoning and rejection of *Anns* was subsequently adopted by the House of Lords in *Murphy v Brentwood District Council*.[63]

The House of Lords decision in *Murphy* concerned a local authority's liability in negligence to a building owner for approving the design of a concrete raft forming part of the foundations of the house, in circumstances where the defective raft caused damage to the house and diminished its value. The House determined that the local authority owed no tortious duty to the owner.

The question now in issue is whether the same decision would result if the local authority was malicious in granting its approval with knowledge that the raft was defective and with the intent of causing the owner some harm. In these circumstances is there a tortious duty, not a duty of care for the purposes of founding a negligence action, but a broader tortious duty not to act maliciously toward the owner?

It is suggested that the appropriate solution lies in the reasoning of the House of Lords in *Anns*, now overruled insofar as negligence actions are concerned, but useful in determining the existence of a duty in misfeasance actions. In *Anns* Lord Wilberforce pointed out that there are two relevant questions. First as between the decision-maker and the person who has suffered damage, is there a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, misfeasance on his or her part is likely to cause damage to the latter. Secondly, are there any considerations, either of policy or of the facts before the court,[64] which ought to negative or limit the scope of the duty or the class of persons to whom it is owed, for instance, whether the wrongdoer was exercising a duty or a discretion, the breadth of possible damage resulting from the decision, the social significance of the decision-maker's position and the powers reposed in him or her. From a policy point of view these criteria provide useful parameters: at end the law is imposing a similar liability upon the miscreant conduct of public officials for either their grossly careless or malicious conduct. To impose a requirement of proximity, although not necessarily decisive, is justifiable in order to limit the consequences of the

60 [1973] VR 715 especially at 720.
61 [1978] AC 728.
62 (1985) 60 ALR 1.
63 [1991] 1 AC 398.
64 See *Jaensch v Coffey* (1984) 155 CLR 549 at 553.

wrongful decision and prevent limitless actions. This is particularly significant when one considers, say, the malicious refusal to grant a licence.

The granting of a licence may have multiplier effects extending to person entering transactions with the potential licence holder. The official should not be regarded as owing the appropriate duty to these persons, although of course he or she may owe them the more general public law duties.

(d) The defendant must act without jurisdiction

The officer must abuse his or her office whether that be by express malice or acting with knowledge of a lack of jurisdiction. If he or she acts with malice this will ipso facto be regarded as an abuse of jurisdiction.[65] If he or she acts with knowledge of the lack of jurisdiction he or she must necessarily have acted without jurisdiction. In each case, therefore, where misfeasance is shown the officer will have committed a jurisdictional error. The requirement that the defendant must act without jurisdiction is thus otiose, since the Courts have recognised that an error in the exercise of jurisdiction is as much a jurisdictional error as acting without the existence of the requisite jurisdictional facts to empower the officer to commence the exercise of his or her power.[66]

(e) The plaintiff must suffer damage

As misfeasance is a development of an action on the case[67] damage is the gist of liability. What forms of injury are actionable, the relevance of mitigation and the adequacy and legitimacy of damages as a form of relief are therefore always relevant issues.

(f) Causation

An action cannot be maintained if the damage is not caused by the misfeasance. But a difficult question arises as to the requisite legal connection between the defendant's conduct and the plaintiff's injury.

The issues surrounding this complex area had not been the subject of substantial and relevant assessment until *Bourgoin SA v Ministry of Agriculture*[68] came before the English Court of Appeal. The Minister for Agriculture had revoked an import licence held by the Plaintiffs with the object of protecting domestic producers from foreign competition. It was (by consent) assumed that the Minister knew that such protection was a illegitimate use of his statutory powers. Misfeasance proceedings were

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65 *Amisminic v Foreign Compensation Commission* [1969] 2 AC 147 especially at 171 per Lord Reid.

66 McBride, J, "Damages as a Remedy for Unlawful Administrative Action" (1979) 38 *Camb LJ* 323 at 328-331 makes much of the requisite state of mind in determining when the error goes to jurisdiction, but this point is amply demonstrated to be false by Dench, above n16.

67 See *Comyns' Digest*, tit "Action on the Case for Misfeasance (A1)"; Bradley, A W, "Liability for Malicious Refusal of a Licence" (1964) 22 *CLJ* 4; *Ashby v White* (1704) 15 St Tr 695; *Tozer v Child* (1857) 7 E & B 377, 119 ER 1286; *Whitelegg v Richards* (1823) 2 B & C 45; 107 ER 300; Gould, B C, "Damages as a Remedy in Administrative Law" (1972) 5 *NZULR* 105 at 112.

68 [1986] QB 716.

commenced but malice in its strict sense was not pleaded. The Minister alleged that malice was an essential ingredient of a misfeasance action and put his case on the basis that it was not misfeasance at the behest of the importers for him to exercise his powers, not with the object of injuring the plaintiffs, but of benefiting the domestic producers. The Court held that "targeted malice" was not an essential ingredient of misfeasance but was a alternative to that element of the tort expressed as "acting with knowledge of the invalidity". Oliver LJ[69] went on to say:

> If it be shown that the Minister's motive was to further the interests of the English ... producers by keeping out the product of the French ... producers, an act which must necessarily injure them, it seems to me entirely immaterial that the one purpose was dominant and the second merely a subsidiary purpose for giving effect to the dominant purpose. If an act is done deliberately and with knowledge of its consequences, I do not think that the actor can sensibly say that he did not "intend" the consequences or that the act was not "aimed" at the person who, it is known, will suffer them.

(g) Statutory protection from liability

Even if all the elements of the tort of misfeasance in a public office exist it is sometimes said that the public officer may nevertheless be able to rely upon a statute giving him or her an immunity from suit.[70] These protective provisions fall into the following main categories:

i. Privative clauses which cover collateral as well as direct challenges.

ii. Provisions modelled on the *Justices' Protection Act* (UK) 1848[71] and provisions giving officers the same protection as judges of some designated superior court.[72] These provisions form the basis of a discussion on judicial and quasi-judicial immunities.[73]

iii. Provisions which limit liability to cases where there has been negligence or bad faith and provisions excluding liability of public utilities for acts and omissions relating to the supply or rendering of services.[74]

Typical of the statutory protection provisions is that found in s29 of the *Transport Act* 1983 (Vic) which provides that:

> Any member or officer [of the statutory authority] shall not be subject to any action, liability, claim or demand for any matter or thing done or contract entered into by the [statutory authority] if the matter or thing is done or contract is entered into in good faith for the purpose of carrying out the powers or duties of the [statutory authority] under this Act.

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69 Id at 777.

70 For example, *Farrington v Thomson & Bridgland* [1959] VR 286; Dench, above n16 at 184 ff.

71 For example, *Magistrates Court Act* 1971 (Vic) ss22 and 23.

72 A subject canvassed by many of the commentators in discussing misfeasance action. The writer's views on these immunities have been expressed elsewhere ("Judicial and Quasi-Judicial Immunities: A Remedy Denied" (1982) 12 *MULR* 508) and will not be regurgitated here.

73 For example, *Ombudsman Act* 1973 (Vic) s29(1); *Housing Act* 1958 (Vic) s126; *Motor Car Traders Act* 1973 (Vic) s10B; *Transport Act* 1983 (Vic) s29; *Health Act* 1958 (Vic) s433.

74 For example, *Postal Services Act* 1975 (Cth) s104; *Telecommunications Act* 1975 (Cth) s101.

This clause, in terms, will not give protection if the act complained of is not done in "good faith" or is in pursuit of the execution of a power or duty not done "under the Act".

Do those provisions which limit liability to cases where there is bad faith make immune a public officer from an action based upon misfeasance in his or her public office? It will be argued that they offer no protection.

In *Little v Commonwealth*[75] Dixon J observed that in reading protective clauses one must attempt to find the middle ground between construing the provision so broadly that it would be manifestly dangerous, and construing it so narrowly that it would be useless.[76] In his words the line must be drawn somewhere "between a mere foolish imagination and a perfect observance of the statute".[77] He said that:

> Protective provisions requiring notice of action, limiting the time within which actions may be brought or otherwise restricting or qualifying rights of action have long been common in statutes affecting persons or bodies discharging public duties or exercising authorities or powers of a public nature. In provisions of this kind it is common to find such expressions as "act done in pursuance of this section" or "statute", "anything done in execution of this statute" or "of the powers or authorities" given by a statute, or "under an by virtue of" a statutory provision. Such enactments have always been construed as giving protection, not where the provisions of the statute have been followed, for then protection would be unnecessary, but where an illegality has been committed by a person honestly acting in the supposed course of the duties or authorities arising from the enactment[78]

He held that the section before the Court protected a person who was "honestly engaged in a course of action that falls within the general purpose of the provisions". He regarded the section as protecting all those who, although acting outside the empowering Act, had honestly thought that they were acting lawfully and whose general purpose conformed with the general purpose of the Act. He observed that it was wrong to require reasonableness in addition to honesty, although, of course, it would be harder to prove honesty if the act was grossly unreasonable.[79] Significantly, he said that the protection continued whether the officer's mistake was one of fact or law, or was "a default in care of judgment".

One should distinguish between acts which can be done legitimately only if authorised by legislation, and acts which can be done legitimately by a person irrespective of whether he is acting in an official or private capacity. For instance, in *Marks v Forest Commission*[80] the plaintiff recovered damages for injuries she received when hit by a truck driven by an employee of the defendant (notwithstanding the familiar protection clause): the negligent act was unauthorised, it was not something done "in the performance" of the employee's duties.[81]

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75 (1974) 75 CLR 94.

76 See further Aronson, M, and Whitmore, H, *Public Torts and Contracts* (1982) at 164-165.

77 (1974) 75 CLR 94 at 109. Cf *Richardson v London County Council* [1957] 2 All ER 330 especially at 339; *Carter v Commissioner of Police* [1975] 2 All ER 33 at 38; *Poutney v Griffiths* [1975] 2 All ER 881; *McLaughlin v Fosbery* (1904) 1 CLR 546; *Marshall v Watson* (1972) 124 CLR 640.

78 (1947) 75 CLR 94 at 108.

79 (1974) 75 CLR 94 at 111 and 113.

80 [1936] VLR 344.

It will be recalled that in proving misfeasance the plaintiff must adduce evidence of malice. Malice removes the protection afforded by the protective clauses. In *Farrington v Thomson and Bridgland*[82] Smith J noted that an act done with knowledge that that act is an abuse of office is sufficient to displace "bona fides" and make a protective clause otiose. The High Court in *Trobridge v Hardy*[83] held that a protective clause was of no avail to a defendant who had acted maliciously and from vindictive motives. Fullagar J noted[84] that:

> It has never been doubted that an act is not done, "in pursuance of an Act" or "in carrying an Act into effect" unless it is done in a bona fide belief that it is authorised by the Act and in a bona fide attempt to give effect to the Act. But opinions have differed as to whether it is necessary that the belief should be based on reasonable grounds ... [I]t seems now to be settled that, whilst there must be some factual basis for the belief and while the actual facts known to the defendant may often be relevant to the question of the existence of a real belief, it is not necessary that the belief should be based on reasonable grounds ... [b]ut, although a belief that his act is authorised by law may, even if it is not based on reasonable grounds, bring a constable or other official within a protective statute ... it is essential not only that such a belief should be honestly entertained, but that the purpose of the act should be to vindicate and give effect to the law ... [I]n *Theobald v Crichmore* (1818) 1 B & Ald 227 at 229 Lord Ellenborough CJ said "the object (sc. of the protective statute) was clearly to protect persons acting illegally, but in supposed pursuance and with a bona fide intention of discharging their duty under the Act of Parliament". (This passage was quoted by Starke J in *Hamilton v Halesworth* (1937) 58 CLR at 374). A defendant is not "acting in pursuance" of a statute, or "carrying into affect" a statute, if there is any absence of such a bona fide intention - if he is "acting wantonly and in abuse of his power" (per Lush J in *Selmes v Judge* (1871) LR 6 QB 724 at 728).

It would seem, therefore, that if a public official acts with malice in the sense of spite or ill-will, an intent to injure the plaintiff or continues to act knowing he or she does not have power, then a protective clause will not shield him or her from an action of misfeasance in a public office.

Exemplary Damages

What direct purpose is served by an award of damages in an action for misfeasance in a public office? The recognised object of damages in tort is to

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81 [1936] VLR 344 especially at 354. See similar reasoning in *Metropolitan Water, Sewerage & Drainage Board v OK Elliott Ltd* (1934) 52 CLR 134 at 144; *Gifford v Minister for Water Supply, Sewerage & Drainage* (1953) 55 WALR 94 at 99-100; *Carkeet v Shire of Bass* [1940] VLR 143 at 152. See also *Hudson v Vanderheld* (1968) 118 CLR 171; contra *Board of Fire Commissioners v Rowland* (1960) 60 SR (NSW) 322, a case criticised by Kitto J in *Board of Fire Commissioners v Ardouin* (1961) 109 CLR 105 at 118: He regarded the protection clause as applying only to an act which, in the absence of negligence, would have been the very thing which the protection clause gave power in the circumstances to do, as distinguished from an act which was merely "incidental to ... the exercise of a power": (at 117). It is an act which the officer could equally have performed without authorisation, that is, could have been performed in his private capacity. *Ardouin* has since been applied in *Australian National Airlines Commission v Newman* (1987) 162 CLR 466.

82 [1959] VR 286 at 290-291.

83 (1955) 94 CLR 147.

84 (1955) 94 CLR 147 at 156-157.

compensate the plaintiff by placing him or her in the position, so far as money can do so, as he or she would have been in but for the commission of the tort.[85]

This principle has emerged over the centuries from cases dealing with private law torts. The legitimacy of its application as the sole determinant of quantum in actions for misfeasance in a public office, a public law tort, is questionable.

If a plaintiff succeeds in an action for misfeasance in a public office the court may award exemplary damages in addition to compensatory damages: if the circumstances justify an action for misfeasance then the criteria articulated by the courts in determining those cases in which exemplary damages are to be awarded will be met. Whilst in the misfeasance case of *McGillivray v Kimber*[86] Duffy J observed that "this is emphatically not a case for measuring damages with nicety", the only reported misfeasance case in which exemplary damages have been awarded is *Farrington v Thomson and Bridgland*[87] although even there proof of trespass was necessary before the Court felt that the award was justified.

Until the mid twentieth century it was thought that vindictive, retributory, exemplary, punitive and aggravated damages were synonymous. It was not until 1964 with the decision of the House of Lords in *Rookes v Barnard*[88] that judicial observation and subsequent academic interest highlighted the possibly tenuous[89] distinction between, on the one hand, exemplary damages and, on the other, aggravated damages. After *Rookes'* case it has been accepted that vindictive, retributory, exemplary and punitive damages (which are synonymous) are awarded not to compensate but to punish the tortfeasor and deter others.[90] Aggravated damages, however, are purely compensatory.

In what circumstances may exemplary damages be awarded?

The circumstances justifying an award of exemplary damages have been variously described. For instance:

a. Owen J with the concurrence of Dixon CJ observed that:

> in a proper case the damages recoverable are not limited to compensation for the loss sustained but may include exemplary or punitive damages as, for example, where the defendant has acted in a high handed fashion or with malice.[91]

This observation was made prior to *Rookes'* case. In *Uren v John Fairfax & Sons Pty Ltd*,[92] decided after *Rookes'* case, Owen J reiterated his views

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85 For example, see *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 especially at 39 per Lord Blackburn; *General Tire & Rubber Co v Firestone Tyre and Rubber Co* [1975] 1 WLR 819 at 824; *The Albazero* [1977] AC 774 at 841.

86 (1916) 26 DLR 164 at 181.

87 [1959] VR 286 especially at 291.

88 [1964] AC 1192.

89 *Johnstone v Stewart* [1968] SASR 142.

90 As early as *Ashby v White* (1704) 15 St Tr 695 Lord Holt CJ noted that "if public officers will infringe men's rights, they ought to pay greater damages than other men to deter and hinder others from the like offences". See also *Pollack v Valpato* [1973] 1 NSWLR 653 at 657.

91 *Fontin v Katapodis* (1962) 108 CLR 177 at 187.

92 (1966) 117 CLR 118 at 161.

quoted above but added "abuse of power" to "malice" and "high handed" action.

b. Knox CJ noted that exemplary damages were awarded where the defendant had acted with "conscious wrong-doing in contumelious disregard" of the plaintiff's rights.[93]

c. Taylor J, in what is a most significant and respected judgment, observed that prior to the decision of the House of Lords in *Rookes*, exemplary damages were to be awarded only if the defendant's conduct had been "high handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of a plaintiff's rights".[94] He held that *Rookes* did not alter the attitude to be adopted towards exemplary damages in Australia.

d. Exemplary damages have been regarded as a manner in which the Court can register its condemnation of the defendant's conduct.[95]

Recent developments

In 1964 the House of Lords in *Rookes v Barnard*[96] were concerned, insofar as relevant for the purpose of this paper, with the meaning and role of exemplary damages. The House set aside prior judicial directions and laid down new principles in assessing awards of aggravated and exemplary damages.[97]

It was held that, except in a few exceptional cases, it was no longer permissible to award exemplary damages against a defendant, however outrageous his or her conduct. Lord Devlin, who spoke for the House on exemplary damages, considered that almost all of the so-called exemplary damages cases could and should be explained as cases of aggravated damages, that is as additional compensation to the plaintiff for injuries to his or her feeling and dignity.[98] He went on to observe that only three circumstances would justify an award of exemplary damages; viz:

a. Where exemplary damages are expressly authorised by statute.[99]

b. Where there had been "oppressive, arbitrary or unconstitutional action by the servants of the government".[100]

c. Where "the Defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the Plaintiff".[101]

The second of Lord Devlin's categories assumes special significance for present purposes.

He refused to extend the second category to oppressive action by private corporations and individuals because:

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93 *Whitfield v De Lauret & Co Ltd.* (1920) 29 CLR 71 at 77. This description was adopted by Menzies J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 143.

94 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 129.

95 Id per Taylor and Windeyer JJ.

96 [1964] AC 1129.

97 Lord Denning has made interesting extra-judicial comment upon the approach of the House of Lords in *Rookes*: see *The Discipline of Law* (1979) at 309-313.

98 Cf *Ley v Hamilton* (1935) 153 LT 384 at 386.

99 [1964] AC 1129 at 1226.

100 Ibid.

101 Ibid.

> where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater than the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service. It is true that there is something repugnant about a big man and, very likely, the bullying will be a source of humiliation that makes the case one for aggravated damages but it is not, in my opinion, punishable by exemplary damages.[102]

The significant point is that "bullying" by the government is intolerable and punishable by an award of exemplary damages. This is precisely those circumstances which justify the bringing of a misfeasance action.

But for subsequent judicial comment in Australia it would be necessary to ascertain exactly what the House meant by the words "oppressive, arbitrary or unconstitutional action by the servants of the government". Australian courts, however, have not followed *Rookes*.

The significance of the House's observation is that it bestowed contemporary recognition on the notion that exemplary damages could be awarded where public officers act in an oppressive or arbitrary fashion. This is analogous to the circumstances which give rise to an action for misfeasance in a public office. Shortly after *Rookes v Barnard* was decided, the High Court of Australia in *Uren v John Fairfax & Son Pty Ltd*[103] rejected the House's delimitation of those cases in which exemplary damages may be awarded.[104]

Much could and has been said about the various judgments in the *Uren* case.[105] For present purposes, however, it will suffice to give particular attention to the judgment of Taylor J. He determined that exemplary damages should be given to punish and deter the wrong-doer. He made much of that category noted by Lord Devlin in *Rookes* concerning the oppressive, arbitrary or unconstitutional action by the servants of the government.

Taylor J questioned the justification given by Lord Devlin for the existence of that category, the meaning of the phrase "servants of the government" and the meaning of the use of the word "unconstitutional" especially in Australia which has a written constitution. He vacillated on whether punishment was a matter only for the criminal law observing that:

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102 Ibid.

103 (1966) 117 CLR 118. See *Taylor v Beere* (1982) 1 NZLR 81 for the situation in New Zealand. See also Fridman, G H L, "Punitive Damages in Tort" (1970) 48 *Can B Rev* 373; cf Stoll, H, "Penal Purposes in the Law of Tort" (1970) 18 *Am J Comp L* 3; Ehrenzweig, A A, *Psychoanalytical Jurisprudence* (1971) at para 207; Kelly, J M, "The Inner Nature of the Tort Action" (1967) 2 *Ir Jur* 279; Stone, J, "Double Count and Double Talk: The End of Exemplary Damages?" (1972) 46 *ALJ* 311.

104 This finding was upheld on appeal to the Privy Council: *Australian Consolidated Press v Uren* [1969] 1 AC 590. See also *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448; *Lamb* v *Cotogno* (1987) 74 ALR 188; *Mosca v Astle* (1988) 80 ALR 251.

105 For example, Stone, J, "Double Count and Double Talk: The End of Exemplary Damages?" (1972) 46 *ALJ* 311; Fridman, G H L, "Punitive Damages in Tort" (1970) 48 *Can B Rev* 373.

> no doubt the criminal law prescribed penalties for wrongs which are also crimes, but it prescribes no penalties for wrongs which are not at one and the same time crimes, and in both types of cases the Courts of this country, and I venture to suggest the Courts of England, had admitted the principle of exemplary damages as, in effect, a penalty for a wrong committed in such circumstances or in such manner as to warrant the Court's signal disapproval of the defendant's conduct. This principle did not admit of the award of exemplary damages against a defendant "simply because he is more powerful"; it permits such an award, not because of the character of the Defendant, but because of the character of his conduct.[106]

He went on to adopt the observations of Lord Pratt CJ in *Wilks v Woods*[107] that "damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty to deter from any such proceeding for the future, and as proof of the detestation of the jury to the action itself."

Significantly Windeyer J[108] noted that a case could occur in which the defendant's conduct was motivated by malice, indicating his contumelious disregard of the (plaintiff's) rights which, if *Rookes* applied, would preclude an award of exemplary damages. Yet the defendant's motives may not increase harm or insult to the plaintiff in respect of which aggravated damages may be awarded. In such a case, if exemplary damages were excluded there would be no way for the Court to register its condemnation of the defendant's conduct.

Relevance to misfeasance

It has been noted that in order to establish misfeasance, malice must be proven. Malice used in the sense of spite or ill-will (express malice) is that very concept, so often expressed in discussing exemplary damages, contained in the phrase "contumelious disregard of the plaintiff's rights". In other words, in each case of misfeasance in a public office where express malice is shown, not only is it possible to fit within the second category mentioned by Lord Devlin in *Rookes v Barnard* but in addition within the subsequent delimitation of exemplary damages as articulated by the High Court in *Uren*'s case.

However, it is not necessary in all cases to show express malice in order to succeed in an action in misfeasance. It is enough to show that the defendant continued to act knowing that he or she was abusing his or her office or acting without jurisdiction. Will this justify an award of exemplary damages? On one view it could be said that a conscious abuse of power is not necessarily an act in contumelious disregard of the plaintiff's rights, nor is it necessarily oppressive, arbitrary or unconstitutional action. Contumely conduct requires a positive spiteful act. It is not enough merely to act in disregard of the plaintiff's rights. However, the plaintiff has a right to have the decision bearing upon his or her affairs determined by a decision-maker who is acting with power. Knowingly acting without jurisdiction, for whatever motive, is therefore oppressive by subverting or smothering the plaintiff's rights. On any

106 (1966) 117 CLR 118 at 131-132.

107 (1763) Lofft 1; 98 ER 489.

108 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 153-155 — a point which was adopted by the Privy Council in *Australia Consolidated Press v Uren* [1969] 1 AC 590 at 642-643.

view the official has acted in "abuse of power" within the meaning of the observation of Owen J in *Uren. Rookes v Barnard*, and in particular Lord Devlin's second category, makes it clear that exemplary damages may appropriately be awarded in misfeasance cases. The Australian dicta, although not directed necessarily towards circumstances falling within Lord Devlin's second category, appear to provide adequate support to justify an award. To echo Lord Devlin, "... the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service".[109]

Exemplary damage and the criminal law

Lord Devlin has said that

> ...there remains a sound sentiment that a person who has without good excuse caused loss ought to be held liable for it and an equally sound sentiment that there are injuries which ought to be redressed as well, maybe, as punished.[110]

This dual object of a tortious action can be achieved by an award of exemplary damages.

It is sometimes said that it is the criminal law's role to punish and the civil law's role to compensate. The application of that assertion to misfeasance in a public office requires special consideration. Misfeasance is a public law tort. The compensatory principle of damage was not designed to deal with a public law tort. A misfeasance action will succeed in precisely those circumstances which warrant public condemnation of the defendant's conduct through the courts. Positive, spiteful and purposive abuses of power should be condemned and punished.

But what if there is a crime which exists to punish the wrong? At first glance this places the defendant in double jeopardy? In the Manitoban case of *Radoveskis v Tomm*[111] the Court went out of its way to note that because the defendant had been sentenced to a long term of imprisonment for his crime, exemplary damages were not apposite — their imposition would mean that the defendant was being punished twice for the same act. One of Lord Devlin's principal considerations in *Rookes*' case in jettisoning exemplary damages in all but a few circumstances was that the criminal law could be invoked to punish rather than permit the plaintiff to "inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law".[112] He seemed to suggest that exemplary damages confuse the objects, nature and effects of civil and criminal law. His reasoning has not gone unchallenged.[113] For instance, Lord Wilberforce in *Broome v Cassell*[114] observed that English law was not committed to the view that the purpose of tort law is or ought to be compensation or that tort

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109 *Rookes v Barnard* [1964] AC 1129 at 1226.

110 Devlin, P, *The Enforcement of Morals* (1965) at 40.

111 (1957) 65 Man LR 61.

112 [1964] AC 1129 at 1230.

113 The issue had been considered prior to *Rookes*: Morris, C, "Punitive Damages in Tort Cases" (1931) 44 *Harv LR* 1173 at 1205 said that "there can be an admonitory function in the law of torts ... there should be such a function if it will work well ...".

114 [1972] AC 1027 at 1112-1114.

law may not be a better means of redressing a wrong to the social fabric than the criminal law.[115]

American writers[116] have identified three criticisms of awards of exemplary damages in circumstances which could justify criminal prosecution:

a. sufficiently serious conduct should be dealt with by the criminal law;

b. to treat a tort as a crime is to use the civil process where the criminal process is more appropriate (the reason noted by Lord Devlin in *Rookes*); and

c. a person should not be punished twice for the same offence.

The compensatory object of tort law has been pushed to the fore in modern times paralleling the development of the action in negligence. It is suggested, however, that in certain circumstances the objects and function of tort law transcend compensation, in particular in the context of a public tort such as misfeasance. In this light it is legitimate to regard tort law as prescribing social and moral standards to order a civilised society and reduce the general level of socially intolerable conduct. These functions of tort law bring it much closer to the criminal law. They make awards of exemplary damages a legitimate means of fulfilling the objects of tort law. Exemplary damages can thus be regarded as indicators by those applying the law that the designated proper standard of control and conduct are not being met, and may assist the law in the imposition of those standards.

It is argued that sufficiently grave and serious conduct should be treated by the criminal law, not the civil law. Indeed, there is a crime which will often have been committed should the public officer have acted in a manner so as to justify the bringing of a misfeasance action.[117] It is submitted that an award of exemplary damages supplements rather than usurps the role of the criminal law. Often the criminal law will not be invoked, as has often happened over many years for the crime existing in circumstances of misfeasance, because of the lack of awareness of the crime, difficulties in prosecuting or because the sentences passed do not adequately meet the social need for retribution. Moreover, in a civil action it is accepted that reference may be made to the plaintiff's conduct in assessing exemplary damages.[118] In other words, not only must the intrinsic wrongfulness of the defendant's conduct be taken into account and the gravity of his or her wrongdoing by reference to his or her motive but also the actions of the plaintiff. That is not to say that all wrongful conduct should be the subject of the criminal law, but that tort law should distinguish between conduct of this type and conduct which whilst tortious is not odious.

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115 See generally Kelly, J M, "The Inner Nature of the Tort Action" (1967) 2 *Ir Jur* 279.

116 For example, Brandwen, M, "Punitive-Exemplary Damages in Labour Relations Litigation")1962) 29 *U Ch L Rev* 460 especially at 464. See also Comment, (1960) 46 *Va L Rev* 1036 especially at 1039.

117 See text below at n125 and following. Taylor J in *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, at 131-2 spoke of exemplary damages and crime but did not address the situation when a criminal prosecution could be laid for conduct which is also tortious.

118 For example, *Fontin v Katapodis* (1962) 108 CLR 177; *Lane v Holloway* [1968] 1 QB 379; *Slater v Watts* (1911) 16 BCR 36 at 43.

It is said that to impose punishment should be the role of the criminal law, not the civil law, because of its procedures, its presumption of innocence, its heavier burden of proof, different evidentiary standards and more common use of trial by jury.[119] However, in a misfeasance action the defendant is not on trial for his or her criminal conduct, he or she will escape the social stigma of criminal guilt, an argument often used in the converse for the development and/or retention of harsher criminal standards and procedures. Exemplary damages merely recognise that the defendant's tortious conduct is sufficiently serious to warrant some penalty in addition to awarding compensation to the plaintiff. Conversely the criminal law has a breadth of weaponry not available to tort law, for instance, incarceration, bonds or probation. If the object is to punish and deter, a financial penalty may not be the best manner of achieving that object.

Four states of the United States of America have abolished exemplary damages largely because it leaves open the possibility of the defendant being punished twice for the same conduct: once by the civil law and again by the criminal law.[120] This abolition, it is submitted, is unjustified. The courts consider the means and circumstances of the defendant in determining whether or not to award exemplary damages.[121] Past punishment imposed by the criminal law or the likelihood of a future prosecution will surely be a relevant consideration for the court to take into account when considering the circumstances in determining whether to award exemplary damages.[122]

An award of exemplary damages therefore is justifiable in an appropriate misfeasance case. It fulfils a number of legitimate roles of tort law in the context of this exceptional tort. It operates to punish the defendant, and to deter other public officers by stressing the importance — the powerful social role — and the gravity of their conduct upon society. The quantum of exemplary damages may, of course, vary according to the heinousness of the defendant's conduct which in turn may depend upon whether the defendant has acted with express malice or merely usurps his power by knowingly acting in abuse of his or her jurisdiction.

Criminal Liability

Conduct which generates tortious liability for misfeasance may also give rise to criminal liability.

The classic outline of the relevant crime was given by Lord Mansfield in *R v Bembridge*:[123]

> if a man accepts an office of trust and confidence, concerning the public...he is answerable to the king for his execution of that office; and he can only answer to the king in a criminal prosecution...where there is a breach of trust, a fraud, or an imposition in a subject concerning the public, which, as

119 See Fridman, above n105.

120 See Note, (1957) 70 *Harv LR* 517 at 529 n59, the courts of Louisiana, Massachusetts, Nebraska and Washington have effectively abolished exemplary damages. Statutes in Connecticut, Michigan and New Hampshire effectively limit the scope of exemplary damages.

121 For example, *Pollack v Valpato* [1973] 1 NSWLR 653 especially at 657-658.

122 See *Archer v Brown* [1984] 2 All ER 267 at 281-283.

123 (1783) 22 St Tr 1 at 155.

> between subject and subject, would only be actionable by a civil action, yet as that concerns the king and the public (I use them as synonymous terms) it is indictable.

There is little literature on this common law crime[124] one part of which, and that which is relevant for present purposes, is known as malfeasance in office.

The embryo of the crime was known as early as 1704: "any public officer is indictable for misbehaviour in his office".[125] Earlier prosecutions were of judicial rather than other public officers.[126]

Those circumstances which justify a tortious action for misfeasance equally justify a criminal prosecution for malfeasance. The elements of the crime are more crudely defined than those of the tort. If all the elements of the tort exist, then the crime has occurred. However, for the purposes of the crime, the breadth of the element — public officer — is probably wider than that of the tort. An officer may be reposed with trust and confidence but not meet all the requisites of a "public office" for the purposes of the tort. For the purposes of the crime the accepted definition of a public officer is an officer who discharges any duty in the discharge of which the public are interested.[127] It seems that the public officer need not hold an office of trust and confidence unless his authority is derived directly or derivatively from letters patent.[128] It will suffice here to note that the definitional difficulties have been amply discussed by the commentators.[129]

The crime is recognised in Australia,[130] the United States[131] and in other common law jurisdictions.[132] For instance, in June 1984 it was suggested, by Counsel assisting the inquiry, to the Commissioner of Inquiry[133] inquiring into the conduct of the former NSW Corrective Services Minister, that the former Minister had committed malfeasance of office, a crime which falls within the general rubric of criminal official misconduct, by allowing the early release of three prisoners from Broken Hill jail in April 1984.[134]

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124 In England certain conduct within the ambit of the crime was embodied in legislation: for example, *Sheriffs Act*, 1887, s29; 14 Edw 3, c10; *Gaolers Act*, repealed in 1863. For an analysis of the American position see *Perkins on Criminal Law* (2nd edn, 1969) at 482ff.

125 *Case 136, Anon* (1704) 6 Mod 96; 87 ER 853.

126 See Roome, H D, and Ross, R E, *Archbold's Criminal Pleading Evidence and Practice* (25th edn, 1918) at 30-31, 1098-1099; Turner, J W C, *Russell on Crime*, Vol 1, (1964) at 361ff.

127 See *R v Whitaker* [1914] 3 KB 1283 at 1296.

128 *R v Bembridge and Powell* (1783) 22 St Tr 1 at 77, 151; *R v Wyat* (1703) 1 Salk 380 n (a); 91 ER 331.

129 For example, Finn, P D, "Public Officers: Some Personal Liabilities" (1977) 51 *ALJ* 313 at 314-315; Finn, P D, "Official Misconduct" (1978) 2 *Crim LJ* 307; Turner, J W C, *Russell on Crime*, Vol 1, (1964) at 361ff.

130 *R v Jones* [1946] VLR 300; *Ex parte Kearney* (1917) 17 SR (NSW) 578; *Report of the Board of Enquiry into Certain Land Purchases by the Housing Commission of Victoria* (1978) at para 7, 28, 23.13 (Vic); see also s92 of *The Criminal Code of Queensland* which provides that: "Any person who, being employed by the Public Service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour, and is liable to imprisonment for two years ...", cf *Criminal Code of Western Australia*, s87.

131 For example, *Donnelley v US* (1927) 27 US 505-516; *Commonwealth v Steinberg* (1976) 362 A 2d 379.

132 For example, *Canadian Criminal Code*, RSC, 1970, C-34, s111.

133 Slattery J.

134 Carbines, L, "Judge Asked to Consider Malfeasance Issue", *The Age*, 23 June 1984, at 1,

Although the precise breadth of the crime is unclear[135] its principal applications historically have included:[136]

a. Frauds and deceits by public officers.[137]

b. Wilful neglect of duty.[138]

c. Misfeasance or malicious exercises of official power.[139]

d. Wilful excesses of official authority.[140]

e. Intentional infliction of injury to the person.[141]

The third and fourth categories are criminal parallels to the tort of misfeasance in a public office. These crimes will almost invariably have been committed should the tort be proven, although it does not necessarily follow that if the crime is committed, a tortious act must also have taken place.[142]

Whilst the Courts have stressed[143] that it is not the role of the criminal law to punish an honest public official who makes a mistake in the exercise of his or her office, if the conduct is coloured by a culpable intent then the criminal law may be invoked.

Misfeasance or malicious exercises of official power

If a public officer wilfully abuses a discretion entrusted in him or her, then he or she may be prosecuted for official misconduct.[144] The liability of the official turns on his or her state of mind, not upon the merits of the decision. The requisite state of mind has been variously described as "malicious",[145] "dishonest",[146] "revengeful or oppressive"[147] and "bad".[148] Personal spite, as in misfeasance, satisfies the mental element of the crime.[149]

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3. That part of the Commissioner's Report relating to the recommendation of prosecutions and the details of the crimes involved were not made public when the Report was released, but it was suggested that the Commissioner recommended that charges be laid: Carbines, L , "Jackson, 3 Others to Face Charges", *The Age*, 1 August 1984, at 1, 5.

135 Cf *R v Llewellyn-Jones* [1967] 3 All ER 225 at 229.

136 See Finn, P D, "Official Misconduct" (1978) 2 *Crim LJ* 307.

137 For example, *R v Hodgkinson*, The Times, 26 June 1900.

138 For example, *R v Dytham* [1979] 1 QB 722; *R v Wyat* (1703) 1 Salk 380; 91 ER 331.

139 Sometimes called malfeasance in office — for example, *R v Holland and Forster* (1787) 1 TR 692; 99 ER 1324; *R v Young and Pitts* (1758) 1 Burr 557; 97 ER 447.

140 For example, *R v Brooke* (1788) 2 TR 190; 100 ER 103.

141 For example, *R v Mather* (1733) 2 Barn KB 249; 94 ER 480.

142 Subject always to the different burdens of proof having been satisfied. See *Farrington v Thomson and Bridgland* [1959] VR 286 at 292-293; *R v Llewellyn-Jones* [1967] 3 WLR 1298; *contra* Finn, P D, "Official Misconduct" (1978) 2 *Crim LJ* 307 at 309.

143 For example, *R v Friar* (1819) 1 Chit Rep (KB) 702; *R v Hoseason* (1811) 14 East 605; 104 ER 734; *R v Cox* (1759) 2 Burr 785; 97 ER 562. Cf *Commonwealth v Wood* (1903) 76 SW 842 (USA); *Commonwealth v Steinberg* (1976) 362 A 2d 379 (USA).

144 For example, *R v Jones* [1946] VLR 300; *R v Valentine-Jones* (1809) 31 St Tr 251; *R v Buck and Hire* (1704) 6 Mod 306; 87 ER 1046; *R v Hann* (1765) 3 Burr 1716; 97 ER 1062; *R v Holland and Forster* (1787) 1 TR 692; 99 ER 1324; *R v Hoseason* (1811) 14 East 605; 104 ER 734.

145 *R v Palmer and Baine* (1761) 2 Burr 1162; 97 ER 767.

146 *R v Jones* [1946] VLR 300 at 302.

147 *R v Palmer and Baine* (1761) 2 Burr 1162; 97 ER 767.

148 *R v Hoseason* (1811) 14 East 605; 104 ER 734.

149 *R v Hann* (1765) 3 Burr 1716; 97 ER 1062.

Wilful excesses of official authority

Misfeasance arising from an act without jurisdiction with knowledge of that absence of jurisdiction also gives rise to the crime of official misconduct. Two strands of this crime have developed using a differentiation technique identical to that used by administrative lawyers. First, where there is a conscious error of jurisdictional fact in that the assumed power was one which did not and could not belong to the officer under any circumstances. Secondly, where there is a conscious jurisdictional error in that the power was reposed in the officer in certain circumstances but on the facts before him or her those circumstances did not exist.

If the officer, whilst exercising the powers of his or her office, assumes a power which he or she cannot have under any circumstances, then he or she may be prosecuted for official misconduct.[150] If, in these circumstances, the act is a crime of itself (for instance a trespass) then the officer can be prosecuted[151] irrespective of whether he or she was "actuated solely by a desire to serve the interest of the [public]".[152] Whenever the act of itself is a crime, provided the defendant was not bona fide as to his excess of jurisdiction, the official can be indicted for official misconduct. For example, in America a police officer has been convicted of official misconduct for promising immunity from prosecution to a suspected arsonist — an act totally beyond his powers — the promise having been made as a favour to the suspect's father, the Local Mayor.[153] It has also been suggested that it would be official misconduct and indictable for a senior official of the State Securities Commission to use his official position in making a concerted effort to prevent the de-listing of a public company with some of whose shareholders he had had close business connections.[154]

If there was a conscious jurisdictional error in that whilst the power was reposed in the official in certain circumstances, on the facts before him or her those circumstances did not exist then, if the official has wilfully abused his or her powers, he or she may still be prosecuted for official misconduct.[155] The central issue here is the state of mind of the defendant. He or she will be liable if he or she has wilfully abused his or her powers, having acted corruptly, oppressively or maliciously. It has been said that if the officer honestly believed that the known facts justified the action taken, a conviction may still result depending upon firstly:

> whether the circumstances were in fact such that what was done was really done in excess of the duty of the officer, that is, more than he ought to have done as a reasonable man of ordinary firmness, and secondly whether a person placed in a position of that officer, having the information that he had, believing what he did believe, and knowing what he did know, if exercising ordinary firmness, judgment and moderation, would have perceived it was an excess.[156]

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150 *R v Stukely* (1701) 12 Mod 493; 88 ER 1469; *R v Herber* (1731) 2 Barn KB 102; 94 ER 382; *Anon* (1731) 2 Barn KB 229; 94 ER 335; *R v Harwood* (1738) 2 Stra 1088; 93 ER 1050; *R v Scott* (1842) 2 QB 247n; 114 ER 97; *R v Campbell* (1967) 3 Can CC 250 (Can).

151 *R v Picton* (1804) 30 St Tr 225; *R v Sainsbury* (1971) 4 TR 451; 100 ER 1113. Cf *Connor v Sankey* [1976] 1 NSWR 570.

152 *Caine v Doyle* (1946) 72 CLR 425 per Dixon J.

153 *State v Secula* (1977) 380 A 2d 713 (USA).

154 *R v Campbell* (1967) 3 Can CC 250.

155 *R v Jackson* (1787) 1 TR 653; 99 ER 1302; *R v Friar* (1819) 1 Chit Rep (KB) 702.

The existence of a crime analogous to the tort has significance beyond merely the assessment of exemplary damages — an issue of quantum. It affects the substance of the tort itself. The tort took its basic parameters from the crude elements of the crime. The law recognised that if the crime had occurred a member of the public will have suffered. The criminal law did not then cater for restitution or recompense. The tort filled that gap. With cases such as *Farrington v Thomson*[157] and *Roncarelli v Duplessis*[158] the tort has widened beyond the crime largely by a more expansive consideration of the mental element necessary and the expansion of powers reposed in public bodies which, if exercised improperly, can damage a member of the public whose interest are not recognised as lesser than the public interest in mass administration. The parallel existence of the crime and the subsequent development of the tort evidences the need for a law which does more than punish the offending public officer.

Conclusion

The breadth of potential application of the tort of misfeasance in a public office grows with the expansion of administrative and quasi-judicial decision making bodies. The number of these bodies has expanded exponentially in recent years causing the growth and development of the general principles of administrative law.

The need for precise delimitation of the tort has thus grown considerably in recent times. Contemporary cases such as *Little v Law Institute of Victoria*,[159] *Bourgoin SA v Ministry of Agriculture*,[160] *Jones v Swansea City Council*[161] and *Secretary of State; ex parte Ruddock*[162] demonstrate the growing awareness of the application of the tort.

Recent administrative law developments such as Ombudsman and Freedom of Information legislation and, in certain cases, a statutory right to reasoned decisions, nowadays make access to those facts behind the subject decisions relatively less difficult. Public administrators are now, more than ever, accountable to the public. "Malicious" conduct is more likely to be exposed.

The precise delimitation of the elements of the tort, and its relationship to the crime of malfeasance, is now a matter of practical significance.

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156 Finn, P D, above n131 at 324 quoting from Finlason, *A Review of the Authorities as to the Repression of Riot and Rebellion* (1868) at 210.
157 [1959] VR 286.
158 (1959) 16 DLR (2d) 689.
159 [1990] VR 257.
160 [1986] QB 716.
161 [1989] 3 All ER 162; [1990] 3 All ER 737.
162 [1987] 2 All ER 518.