

CHALLENGING THE STATE: THE TORT OF MISFEASANCE IN PUBLIC OFFICE AND THE CASE OF THREE RIVERS DISTRICT COUNCIL V. THE BANK OF ENGLAND.

Abstract

The tort of misfeasance in public office is designed to target “the deliberate and dishonest abuse of power”. Public officers are not liable merely because a bona fide administrative act is later found to be unlawful. However, there is a misfeasance in public office if a person suffers loss or damage as a result of administrative action known to be unlawful by those persons taking it, and those persons knew that the plaintiff would suffer loss or were recklessly indifferent as to whether the plaintiff would suffer loss. A deliberate and vindictive act by a public official, targeted at the plaintiff, is not necessary.

This article is based on the House of Lords decision in *Three Rivers District Council v. Governor and Company of The Bank of England*, which is considered a definitive statement of the law on misfeasance as it stands in England. This case serves to illustrate the principle that not only do corporate legal strategies have to comply with the specific requirements of state decision-making processes, so too do the responses to those strategies by the state and its agents. The tort is thus a useful – though limited – device for limiting governmental wrongs.

1. INTRODUCTION

The Anglo-French word *misfeasance*, from the Middle French *mesfaire*, to do wrong, from *mes*, wrongly, and *faire* to make or do, from the Latin *facere*, refers to the performance of a lawful action in an illegal or improper manner. The tort of misfeasance in public office has been described by Lord Diplock as “well established” in English common law.¹ Similarly, it has been said by the New Zealand Court of Appeal to be a “long established though infrequently prosecuted tort”.² Though long neglected, it is now frequently applied in courts in England and the Commonwealth.³ Though its existence was not doubted, misfeasance in public office was, in the words of de Smith, a “developing tort ... the precise scope of which is not yet settled”.⁴ This article will review the current state of the law of misfeasance, taking as its starting point the House of Lords decision in *Three*

¹ *Dunlop v. Woollahra Municipal Council* [1982] AC 158, 172 (PC) [*Dunlop*].

² *Garrett v. Attorney-General of New Zealand* [1993] 3 NZLR 600 (New Zealand CA) [*Garrett* 1993].

³ See for example, the New Zealand Court of Appeal in *Garrett v. Attorney-General* [1997] 2 NZLR 332 [*Garrett* 1997] and see also *Rawlinson v. Rice* [1997] 2 NZLR 651 [*Rawlinson*]. The former case is important because it established the requirements of the action, the latter in that it applied the law as laid down by the former; See Andrew Beck, “Misfeasance in Public Office” (1997) New Zealand L. J. 125 [Beck].

⁴ S. A. de Smith, Lord Woolf and J. Jowell, *Judicial Review of Administrative Action* 5d ed., (Sweet and Maxwell, 1995) 784.

*Rivers District Council v. Governor and Company of The Bank of England (No.3)*⁵ (*Three Rivers* case), a decision which has settled the scope of misfeasance in public office, at least in the law of England. It will then consider the tort's status in the United States of America, and its broader constitutional role.

The tort of misfeasance in public office arises when a public officer acted in the knowledge of, or with reckless indifference to, the illegality of his or her act and in the knowledge of, or with reckless indifference to, the probability of causing⁶ injury to the plaintiff or person of a class of which the plaintiff was a member. The House of Lords so held in dismissing in part, an appeal by the plaintiffs, Three Rivers District Council and other creditors of the Bank of Credit and Commerce International SA (BCCI) together with the Bank of Credit and Commerce International SA (in liquidation) from a decision of the Court of Appeal,⁷ which had in turn dismissed an appeal from decisions of Clarke J⁸ determining preliminary issues of law in an action brought against the defendant, the Bank of England.

Lord Steyn, whose speech formed the backbone of the case, observed that there were two different forms of liability for misfeasance in public office. First the case of targeted malice by a public officer, that is, conduct specifically intended to injure a person or persons. The second form was where a public officer acted knowing that he had no power to do the act complained of and that the act would probably injure the plaintiff. It involved bad faith inasmuch as the public officer did not have an honest belief that his or her act was lawful. Subjective recklessness was a sufficient state of mind to ground the tort.

Reckless indifference to consequences was as blameworthy as deliberately seeking such consequences. In both forms of the tort, the intent required had to be directed at the harm complained of, or at least to harm of the type suffered by the plaintiffs. This requirement resulted in the rule that a plaintiff had to establish not only that the defendant acted in the knowledge that the act was beyond their powers but also in the knowledge that the act would probably injure the plaintiff or person of a class of which the plaintiff was a member. Recklessness about the consequences of the act, in the sense of not caring whether the consequences happened or not, was also sufficient in law. Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett delivered concurring judgments.

This article begins with a brief review of the history of misfeasance tort in public office and examines the role of a misfeasance action. The requirements of the tort are then outlined. The circumstances of the *Three Rivers* case are then explored with particular focus on the House of Lords findings as to the requirements of the

⁵ [2000] 2 WLR 1220 (HL) [*Three Rivers* HL].

⁶ *ibid.*

⁷ *Three Rivers District Council v. Bank of England (No 4)* [2000] 2 WLR 15 (CA) [*Three Rivers* CA], Hirst and Robert Walker LJ; Auld LJ dissenting.

⁸ [1996] 3 All ER 558 [*Three Rivers*].

tort. The scope of the tort's applicability is examined by comparing England's position with that of the United States as well as through an examination of the torts broader constitutional role.

The various strands of the *Three Rivers* case are then brought together and the discussion concludes with an evaluation of the role of the tort of misfeasance in public office and its potential as a legal strategy.

2. THE TORT OF MISFEASANCE

2.1. History of Misfeasance in Public Office in the Commonwealth

The tort of misfeasance in or of public office is exceptional in that it is necessary to prove the requisite subjective state of mind of the defendant in relation not only to his or her own conduct, but also to his or her knowledge of its effect on others. The requisite state of mind is one equivalent to dishonesty or bad faith and knowledge includes both direct knowledge and also what is sometimes called "blind eye" knowledge. Blind eye knowledge has since been discussed in different contexts by the House of Lords in *Manifest Shipping v. Uni-Polaris Shipping*⁹ and *White v. White*.¹⁰

The history of the development of the tort of misfeasance in public office is traceable to the seventeenth century.¹¹ However, the first solid basis for this new head of tort liability, based on an action on the case, is to be found in *Ashby v. White*,¹² which concerned the discretionary refusal of voting rights.¹³ This and later decisions laid the foundation of the modern tort. They also established the two different forms of liability, and revealed the unifying element of conduct amounting to an abuse of power accompanied by subjective bad faith.

Despite the recognition and development of the tort in a number of cases in the eighteenth and nineteenth centuries, the English Court of Appeal in 1907 denied the existence of the tort in *Davis v. Bromley Corporation*.¹⁴ However by 1981, the Judicial Committee of the Privy Council (Privy Council) in *Dunlop v. Woollahra*

⁹ [2001] 2 WLR 170.

¹⁰ [2001] UKHL 9.

¹¹ *Turner v. Sterling* (1671) 2 Vent 24; See also S. Arrowsmith, *Civil Liability and Public Authorities* (Earlsgate Press, 1992) 226-234.

¹² (1703), best reported in 1 Smith's Leading Cases (13th ed.) 253; See also *Ashby v. White* (1703) 2 Ld Raym 938; 92 ER 126 [*Ashby*].

¹³ See also: *Drewe v. Coulton* (1787) 1 East 563n; 102 ER 217; *Tozer v. Child* (1857) 7 El & Bl 377; 119 ER 1286; *Cullen v. Morris* (1819) 2 Stark 577; 171 ER 741. In a second group of cases the defendants were judges of inferior courts, and the cases concerned liability of the judges for malicious acts within their jurisdiction: See *Ackerley v. Parkinson* (1815) 3 M & S 411; 105 ER 665; *Harman v. Tappenden* (1801) 1 East 555; 102 ER 214; *Taylor v. Nesfield* (1854) 3 El & Bl 724; 118 ER 1312.

¹⁴ [1908] 1 KB 170 (CA) [*Bromley*].

Municipal Council described the tort as “well established”.¹⁵ An examination of the ingredients of the tort was still required. The first steps towards that goal were the judgments in the English Court of Appeal in *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*.¹⁶ That case was authority for the view that misfeasance in public office can be committed without having to show that the official acted with the specific purpose of inflicting harm on the plaintiff. The *Three Rivers* case was the first occasion where House of Lords was called upon to review the requirements of the tort in a comprehensive manner. In so doing, while they were not called upon to write an essay on misfeasance in public office,¹⁷ they did undertake a review of the authorities from the principal common law jurisdictions of the Commonwealth.

2.2. The Role of the Action

The tort of misfeasance in public office has its origins in the premise that public powers are to be exercised for the public good. Parliament intends statutory powers to be exercised in good faith and for the purpose for which they were conferred.¹⁸

The scope of the tort is deliberately narrow. It is designed - inasmuch as a tort can be described as having a design - to target “the deliberate and dishonest abuse of power”.¹⁹ Public officers are not liable merely because a bona fide administrative act is later found to be unlawful.²⁰ A deliberate and dishonest abuse is required. The tort is complemented by, and complementary to, malicious prosecution, fraud, conspiracy, intimidation, and other similar actions.

Typically, a tort involves the invasion by the defendant, of some legally protected right of the plaintiff, for example, trespass to property or trespass to the person. Such conduct on the part of the defendant is actionable as such and the belief of the defendant as to the legality of what he or she did is irrelevant. It is no defence for the defendant to say that he or she believed that they had statutory or other legal authority if they did not. The legal justification must actually exist otherwise he or she is liable in tort.²¹ In *Dunlop v. Woollahra Municipal Council*,²² the Privy

¹⁵ *Dunlop* (n1) 172F.

¹⁶ [1986] QB 716 (CA) [*Bourgoin*].

¹⁷ *Three Rivers* HL (n 5) per Lord Stern.

¹⁸ See *Garrett* 1993 (n 3); See also *Galloway v. London Corporation* (1864) 2 De GJ & Sm 213, 229 [on appeal (1866) LR 1 (HL) 34, 43] [*Galloway*]; See also *Westminster Corporation v. London & North-Western Railway Co* [1905] AC 426 (HL); See also *G Scammell & Nephews Ltd v. Hurley* [1929] 2 KB 419 (CA) [*Scammell*].

¹⁹ See *Three Rivers* CA (n 7); See also J. McBride, “Damages as a Remedy for Unlawful Administrative Action” (1979) 38 Cambridge L. J. 323 [McBride].

²⁰ See *Lonrho Ltd v. Shell Petroleum Co Ltd (No 2)* [1982] AC 173, 189 [*Lonrho*]; See also *Dunlop* (n 1) 172; *Northern Territory v. Mengel* (1995) 69 AJLR 527, 546 [*Mengel*].

²¹ *Mengel* *ibid* 547.

²² *Dunlop* (n 1) 172.

Council restricted the effect of the case, *Beautesert Shire Council v. Smith*.²³ That case had allowed action “independently of trespass, negligence or nuisance” for “an action for damages upon the case, [where] 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”.²⁴ Lord Diplock found difficulty with “ascertaining what limits are imposed upon the scope of this innominate tort”. Lord Diplock drew a distinction between unlawful and invalid acts.

The High Court of Australia itself overruled *Beautesert* in *Northern Territory v. Mengel*.²⁵ The majority considered that misfeasance of public office, now ‘well established’, is the appropriate remedy for intentional wrongs by public officers. They considered that both policy and principle required liability to be more closely confined than misfeasance being established merely by an act by a public officer which the officer knows is beyond power and which results in damage (as argued by the Mengels). The Court said that the remedy should arguably be restricted to intentional infliction of harm or an act that the public officer knows is beyond his or her power and is calculated in the ordinary course to cause harm. However, it was sufficient for the court to decide in *Mengel* that liability for misfeasance in public office requires an act which the public officer knows is beyond his or her power (or, possibly, where the officer recklessly disregards the means of determining the extent of their power) and which involves a foreseeable risk of harm. The principle should not be extended to include the act of a public officer who only ought to have known that the act was beyond his or her power.

Brennan J considered this cause of action at some length. In summary, he made the following points:

- for the purposes of this tort, a public officer is ‘every one who is appointed to perform a public duty and who receives a compensation’;
- the tort is not limited to an abuse of office in the exercise of a statutory power;
- a purported exercise of administrative power is wrongful if: the exercise of power is invalid either because there is no power to be exercised or the purported exercise of power has miscarried, and the public officer has the relevant state of mind in that there is an intention to injure or knowledge that there is

²³ (1966) 120 CLR 145; ALR 1175 (HCA) [*Beautesert*].

²⁴ *ibid* 156.

²⁵ *Mengel* (n 21).

no power to engage in the conduct or reckless indifference as to whether there is that power.

- Constructive knowledge of the lack of power to engage in the particular conduct is not sufficient.
- Foreseeability of damage, which is necessary to establish negligence, is not necessary here although causation of damage is relevant.

Deane J was in general agreement with Brennan J in relation to this issue.

The result of these cases is that clients who had been concerned about the potential liability of their agency for an act of one of their officers where the act was done with due care and in good faith but in fact was done without statutory or other authority could be reassured. The vicarious liability of the government for acts of its employees is to be determined in accordance with ordinary principles of negligence or misfeasance in public office, breach of statutory duty or otherwise in accordance with well established principles of tort - that is, the principles of law which apply to civil wrongs. There is no general liability as posited in *Beaudesert*.

The tort of misfeasance in public office is an exception to “the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will not make him liable.”²⁶ The rationale of the tort is that, in a legal system based on the rule of law, executive or administrative power “may be exercised only for the public good” and not for ulterior and improper purposes.²⁷ The tort bears some resemblance to the crime of misconduct in public office²⁸ but it enables those adversely affected by decisions of government officials, in limited circumstances, to obtain compensation.

2.3. The Requirements of the Tort

There is a misfeasance in public office if a person suffers loss or damage as a result of administrative action known to be unlawful by those persons taking it, and those persons knew or were recklessly indifferent that the plaintiff would suffer loss.²⁹

²⁶ *Bradford Corporation v. Pickles* [1895] AC 587; *Allen v. Flood* [1898] AC 1.

²⁷ *Jones v. Swansea City Council* [1990] 1 WLR 54, 85F, per Nourse LJ, a decision reversed on the facts but not on the law by the House of Lords in *Jones v. Swansea City Council* [1990] 1 WLR 1453 (HL) 1458 [*Jones*].

²⁸ *R v. Bowden* [1996] 1 WLR 98 (CA) [*Bowden*].

²⁹ See *David v. Abdul Cader* [1963] 3 All ER 579; [1963] WLR 834 (PC) [*David*]; See also *Takaro Properties Ltd v. Rowling* [1978] 2 NZLR 314 (New Zealand CA) 338 [*Takaro*]; See also *MacKenzie v. MacLachlan* [1979] 1 NZLR 670 [*MacKenzie*]; See also *Garrett* 1993 (n 3); See also *Jones* (n 28); See also *Smith v. East Elloe RDC* [1956] AC 736; [1956] 1 All ER 855 [*Smith*]; See also *Racz v. Home Office* [1994] 2 AC 45; [1994] 1 All ER 97 (HL) [*Rasz*]; See also *Ashby* (n 12); See also *Henley v.*

These general principles are distilled from a number of cases from the later years of the twentieth century, as approved in the judgment of the House of Lords in the *Three Rivers* case.³⁰

Bad faith on the part of a public officer or authority will result in civil liability where the act would constitute a tort but for the presence of statutory authority.³¹ The essence of misfeasance by a public officer or authority lies in the dishonest abuse of public office.³²

Proceedings may be taken either against a public body or against an individual official. In the former case it should be shown that a majority acted either with malice or with knowledge that the action was unlawful.³³ The Crown, or a public body, may also be vicariously liable for the actions of an official.³⁴

It is sufficient to show that the public officer or authority dishonestly disregarded his or her plain duty or failed to attempt to perform it honestly, there being reasonable foreseeability of injury.³⁵

A usurpation of a power which the officer or authority knows he or it does not possess, must have the foreseeable consequence of injuring the injured party.³⁶

It is now clearly established that knowledge that the relevant act was taken in either excess of power or malice towards the plaintiff will suffice. *Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*³⁷ identified a second limb to the tort. In the absence of malice, plaintiffs can recover damages if they can prove, first, that the public official knew at the time, that he or she had no legal power to do

Mayor and Burgesses of Lynne (1828) 5 Bing 91, 107; 130 ER 995 [*Henley*]; See also *Roncarelli v. Duplessis* [1952] 1 DLR 680 (on appeal (1959) 16 DLR (2d) 689 (SCC) [*Roncarelli*]; See also *Farrington v. Thomson* [1959] VR 286 [*Farrington*]; *Three Rivers CA* (n 7), explaining *Bourgoin* (n 16), and requiring that deliberate or dishonest abuse of power by a public official who knew that the plaintiff would suffer loss or was recklessly indifferent to this had to be proved. See also *Bromley* (n 14); *Elgouzouli-Daf v. Metropolitan Police Cmr* [1995] QB 335; [1995] 1 All ER 833, CA; *Bennett v. Metropolitan Police Cmr* [1995] 2 All ER 1; [1995] 1 WLR 488.

³⁰ *Three Rivers* HL (n 5).

³¹ *Calveley v. Chief Constable of Merseyside Police* [1989] AC 1228, 1338; [1989] 1 All ER 1025, 1030, (HL) per Lord Bridge of Harwich [*Calveley*].

³² *Dunlop* (n 1); *Calveley* *ibid* per Lord Bridge of Harwich *quaere* whether the tort exists where there is no bad faith but the officer acts without reasonable cause; See also *David* (n 30) for Roman-Dutch law of Sri Lanka, distinguishing *Bromley* (n 14); *Ashby* (n 12): apparently fraud and malice on the part of an official gave rise to the action.

³³ *Jones* (n 28).

³⁴ *Racz* (n 30); *Bowden* (n 29).

³⁵ *Three Rivers District Council v. Bank of England (No 4)* [2000] 2 WLR 15, CA.

³⁶ *Bourgoin* (n 16); *Roncarelli* (n 30): Premier of Quebec liable for usurpation of power in ordering licensing authority to revoke restaurant licence]; See also *Beaudesert* (n 24) where municipal authority liable for withdrawal of gravel from river bed without authority.

³⁷ *Bourgoin* (n 16).

that which was done, and, second, that he or she knew at the time, that the act done, would cause damage to the plaintiff.

“There is no sensible distinction between the case where an officer performs an act which he has no power to perform with the object of injuring A ... and the case where an officer performs an act which he knows he has no power to perform with the object of conferring a benefit on B but which has the foreseeable and actual consequence of injuring A.”³⁸

In practice, the plaintiff is likely to face considerable difficulties of proof. The mere fact that the public officer acted *ultra vires* is not however a ground for civil liability in tort.³⁹ However, if the following are proven, then the plaintiff will recover damages:

Firstly, the plaintiff must prove that the defendant is a “public officer”. This means a person appointed to discharge a public duty and who receives compensation, in whatever shape, from the Crown or otherwise.⁴⁰

Secondly, the plaintiff must also prove that the defendant acted in the exercise or purported exercise of his or her office.⁴¹ This requires a positive act, or an act of omission.⁴² Whether unauthorised acts are so unconnected with the officer’s authorised duties, as to be independent of and outside them, is a question of fact and degree.⁴³ The power must have a statutory or public origin.⁴⁴ However, this has been loosely interpreted thus a public body exercising a private law power will not escape the application of the tort.⁴⁵

Thirdly, the plaintiff must further prove that the defendant acted with malice towards the plaintiff⁴⁶ or with knowledge that he or she was acting invalidly.⁴⁷ In

³⁸ *ibid* 740 per Mann J.

³⁹ *Dunlop* (n 1); *Takaro* (n 30); *Bourgoin* (n 16).

⁴⁰ *Henley* (n 30). This will include returning officers (*Ashby* (n 12); councillors (*Dunlop* (n 1); *Smith* (n 30); *Jones* (n 28); a Minister of the Crown (*Takaro* (n 30); *Bourgoin* (n 16); *Roncarelli* (n 30)); policemen (*Garrett* 1993 (n 3); *Calveley* (n 32); *Farrington* (n 30)); prison officers (*R v. Deputy Governor of Parkhurst Prison* [1992] 1 AC 58, 164; *Racz* (N 30)). Brennan J has expressed the view that if a person takes reward from any source for discharge of public duty, they become a public officer; *Mengel* (n 21).

⁴¹ *Garrett* 1993 (n 3) 603; *Calveley* (n 32); *MacKenzie* (n 30); *Tampion v. Anderson* [1973] VR 715.

⁴² *Garrett* 1993 (n 3) where police failed to investigate the plaintiff’s complaint that she had been raped by a policeman; *Henley* (n 30).

⁴³ *Racz* (n 30).

⁴⁴ *Jones* (n 28).

⁴⁵ *ibid*: a contract.

⁴⁶ *Bourgoin* (n 16). This includes malice or some wrongful or improper motive; *Garrett* 1993 (n 3); *Roncarelli* (n 30).

⁴⁷ See: *Garrett* 1993 (n 3) 603; *Bourgoin* (n 16); *Farrington* (n 30).

the former case the official is exercising power that they actually possess but for an improper purpose;⁴⁸ in the latter, they are knowingly exceeding their authority.⁴⁹

Lastly, the plaintiff must prove that the plaintiff suffered damage as a result of the defendant's conduct.⁵⁰ This may include damage to reputation, loss of employment, or other economic loss.⁵¹ Emotional distress alone is not actionable, though this may be an aggravating consideration.⁵²

2.4. The Circumstances of the *Three Rivers* Case

The litigation in the *Three Rivers* case flows from the fall of the Bank of Credit and Commerce International SA ("BCCI"). BCCI was incorporated under the laws of Luxembourg on 21 September 1972. In November it established its first office in the United Kingdom and commenced its business in that country as a deposit-taker. Two years later the structure of BCCI was altered by the incorporation on 13 December 1974 of BCCI Holdings SA ("Holdings") in Luxembourg of which BCCI became a subsidiary. On 25 November 1975 another subsidiary of Holdings called BCCI Overseas ("Overseas") was incorporated in the Cayman Islands. Overseas opened its first branch in the United Kingdom in June 1976. At this stage a substantial part of the issued share capital of Holdings was owned by the Bank of America.⁵³

Although the group was trading through various branches in the United Kingdom, it was not subject to any regulatory system in that country. But Holdings was subject to regulation in Luxembourg by the Luxembourg Banking Commission ("LBC") which at that time was that country's regulatory authority. At the end of 1977, the Bank of America decided to withdraw from its relationship with BCCI. It sold its holding of shares in Holdings to International Credit and Investment Co Ltd. ("ICIC") which at that time was BCCI's largest shareholder.⁵⁴

Prior to the enactment of the *Banking Act 1979*, banking in the United Kingdom was not subject to any formalised system of regulation. Control was exercised in an informal way by the Bank of England and in an indirect manner by means of various statutory provisions which gave privileges to banks recognised by the Board of Trade and by the Bank of England (collectively referred to as "the Bank"). Following the publication of a White Paper in 1976 and the First Council

⁴⁸ i.e. *Roncarelli* (n 30).

⁴⁹ In which case there is no need to prove malice; *Bourgoin* (n 16).

⁵⁰ See: *David* (n 30); *Takaro* (n 30); *MacKenzie* (n 30); *Garrett 1993* (n 3); *Jones* (n 28) *Smith* (n 30); *Racz* (n 30); *Bourgoin* (n 16); *Ashby* (n 12); *Henley* (n 30); *Roncarelli* (n 30); and *Farrington* (n 30).

⁵¹ *Garrett 1993* (n 3) 608.

⁵² *ibid.* Exemplary damages may be awarded in New Zealand, though their availability in England has been restricted.

⁵³ *Three Rivers District Council v. Governor and Company of The Bank of England* [2001] UKHL 16 (HL) para 17 per Lord Hope of Craighead [*Three Rivers* per Craighead].

⁵⁴ *ibid* para 17.

Banking Co-ordination Directive (77/780/EEC), steps were taken to establish a new statutory system of banking supervision in the United Kingdom. This was contained in the *Banking Act 1979*, which came into force on 1 October 1979.⁵⁵

The *Banking Act 1979* (the “1979 Act”) provided for the recognition of banks under section 3(1) if they satisfied the criteria in Schedule 2, Part I, and for the licensing of deposit-taking institutions under section 3(2) if they satisfied the less stringent criteria in Schedule 2, Part II. Section 3(5) of the *1979 Act* provided that, in the case of an institution whose principal place of business was in a country or territory outside the United Kingdom, the Bank might regard itself as satisfied that the criteria in Schedule 2 - regarding those responsible for the management of the business and the prudence with which its business was being conducted - were fulfilled, if, the relevant supervisory authorities informed the Bank that they were satisfied with respect to them and the Bank was satisfied as to the nature and scope of the supervision exercised by those authorities.⁵⁶

On 1 October 1979, BCCI applied to the Bank for recognition as a bank under the *Act*. On 19 June 1980 the Bank refused recognition as a bank but granted to BCCI, a full licence under the *1979 Act* as a deposit-taker. By that date, its principal place of business was in the United Kingdom. Nevertheless, the Bank decided to rely on, under section 3(5) of the *1979 Act*, the supervision of its activities by LBC.⁵⁷

The plaintiffs’ case was that when the Bank granted the licence, it did so: knowingly and deliberately contrary to the statutory scheme; or it was recklessly indifferent to whether it was acting in accordance with the scheme; or it wilfully disregarded the risk that it was not acting in accordance with that scheme in bad faith; and, in the knowledge, that the likely consequences were losses to depositors and potential depositors or that it wilfully disregarded the risk of the consequences or that it was recklessly indifferent to those consequences.⁵⁸

During the period from June 1980 to December 1986 the activities of the BCCI group expanded dramatically not only in the United Kingdom but throughout the world. Officials of the Bank pointed out that it was unsatisfactory for it, as the supervising authority of BCCI in the United Kingdom, to rely, as it had been doing, under section 3(5) of the *1979 Act*, on the views of LBC as to the activities of the holding company in Luxembourg. They recognised that, as the activities of BCCI continued to expand, pressure was likely to grow for its recognition as a bank under the *1979 Act*. Various possible solutions were considered, including on the one hand, a proposal for the Bank to supervise the whole institution and, on the other hand, the incorporation of Holdings in the United Kingdom to improve the effectiveness of the Bank’s supervision of the group’s activities in that

⁵⁵ *ibid* para 18.

⁵⁶ *ibid* para 18.

⁵⁷ *ibid* para 19.

⁵⁸ *ibid* para 19.

country. In September 1984, the effectiveness of the existing statutory regime was called into question by the collapse of Johnson Matthey Bankers.⁵⁹

In the light of that debacle, a further White Paper was produced and the enactment of a new statute, which was to become the *Banking Act 1987*, was proposed. The system introduced by the *1979 Act* was to be both strengthened and simplified. In place of the dual system of recognition and licensing, a single system of authorisation was to be introduced with restrictions on the use of banking names. The Bank was to be required to establish a committee to be known as the Board of Banking Supervision which was to include six independent members as well as three members *ex officio*. Various other changes were to be made to the powers and duties of the Bank as regulatory authority. In the meantime, the Bank continued to rely on the views of the Luxembourg regulatory authority.⁶⁰

The plaintiffs' case regarding this period contained three specific allegations about decisions by the Bank not to withdraw the authorisation from BCCI. These are said to have been taken:

1. after the Bank had learned in May 1986 that BCCI, which had been dealing on a massive scale in the financial and commodity markets through its central treasury in London, had incurred losses amounting to some \$285 million;
2. after a paper prepared by the Bank for the Board of Banking Supervision in November 1989 had revealed serious defects in the group's structure and the existing supervisory regime and the extent to which BCCI's activities in the U.K. were dependent upon what happened elsewhere in the group which was largely unsupervised; and
3. after the officials of BCCI had pleaded guilty in Tampa, Florida in January 1990 to charges of money-laundering and conspiracy.⁶¹

In October 1990 the accountants, Price Waterhouse, reported to Holdings' audit committee that an urgent investigation was needed to quantify the group's liabilities and its need for financial support. On 5 October 1990, a letter was produced on behalf of the majority shareholders undertaking to provide support to the level indicated by Price Waterhouse. By December 1990, a revised support package had been put together which Price Waterhouse regarded as acceptable, but later that month Price Waterhouse became aware of the extent to which BCCI's financial problems were due to fraudulent activities on the part of management. On 4 March 1991 the Bank commissioned Price Waterhouse to investigate and report to it under section 41 of the *Banking Act 1987* on malpractice within BCCI. Price Waterhouse delivered their report to the Bank on

⁵⁹ *ibid* para 20.

⁶⁰ *ibid* para 20.

⁶¹ *ibid* para 24.

24 June 1991. It contained a comprehensive account of widespread frauds and deceptions which had been perpetrated by BCCI. Four days later, the Bank decided that the proposed reconstruction of the group could not be pursued, and that to protect depositors, BCCI had to be closed down. On 5 July 1991 the Bank presented a petition for the appointment of a provisional liquidator.⁶²

The plaintiffs' case regarding this period was based on general allegations that the Bank failed in bad faith to face up to its responsibilities as a supervisor to take decisions that would protect the interests of depositors and potential depositors, when it was aware that there was a serious and immediate threat that, unless it was rescued by the Abu Dhabi Government, BCCI would collapse.⁶³

The reason why the plaintiffs had to rely upon the tort of misfeasance in public office is that they could not allege that the defendants owed them a duty of care. If the plaintiffs were able to rely upon the tort of negligence, their claim would have been relatively easy to formulate.

It was well established in English law that individuals in the position of the depositors cannot maintain an action for compensation for losses they suffered as a result of the Bank's breach of statutory duties.⁶⁴ Judicial review is regarded as an adequate remedy. Similarly, persons in the position of the depositors cannot sue the Bank for losses resulting from the negligent licensing, supervision or failure to withdraw a licence.⁶⁵ The availability of the tort of misfeasance in public office has been said to be one of the reasons justifying the non-actionability of a claim in negligence where there is an act of maladministration.⁶⁶ It is also established that an *ultra vires* act will not *per se* give rise to liability in tort.⁶⁷ Further, there is no overarching principle in English, Australian or New Zealand law, of liability in tort for "unlawful, intentional and positive acts".⁶⁸

The closure of BCCI on 5 July 1991 provoked widespread concern in the financial community on the ground that this action was long overdue, yet the action that was taken was criticised by depositors, employees and shareholders as precipitate. The plaintiffs are more than 6,000 persons who claim to have been depositors with United Kingdom branches of BCCI.⁶⁹

⁶² *ibid* para 26.

⁶³ *ibid* para 27.

⁶⁴ *Yuen Kun-Yeu v. Attorney-General of Hong Kong* [1988] AC 175 (PC); *Davis v. Radcliffe* [1990] 1 WLR 821 (PC).

⁶⁵ *ibid*.

⁶⁶ *Calveley* (n 32) 1238F.

⁶⁷ *X (Minors) v. Bedfordshire County Council* [1995] 2 AC 633.

⁶⁸ See *Lonrho* (n 21) 187G in which the House refused to follow *Beaudesert* (n 24), which was subsequently overruled by the Australian High Court in *Mengel* (n 21).

⁶⁹ *Three Rivers* HL (n 5) 1227 per Lord Steyn.

The plaintiffs' writ of summons was issued on 24 May 1993. On 19 July 1995 Clarke J made an order for the following questions to be tried as preliminary issues:

1. Is the defendant capable of being liable to the plaintiffs for the tort of misfeasance in public office?
2. Were the plaintiffs' alleged losses caused in law by the acts or omissions of the defendant?
3. Are the plaintiffs entitled to recover for the tort of misfeasance in public office as existing depositors or potential depositors?⁷⁰

After a further hearing in April 1997, when he considered the claim as then formulated, Clarke J delivered a judgment on 30 July 1997 in which he held that: on the basis of the evidence then available, the claim was bound to fail; that, as there was no reasonable possibility that the plaintiffs would obtain evidence in the future which might enable them to succeed, the claim was bound to fail in the future; that in these circumstances it would be an abuse of process or vexatious or oppressive to allow the action to proceed; that the application to amend the statement of claim should be refused; and the action should be struck out.⁷¹

In the Court of Appeal, the majority⁷² upheld the order pronounced by Clarke J. The majority asked themselves the question whether, the plaintiffs had an arguable case that the Bank actually foresaw BCCI's imminent collapse at each relevant stage. They said that they agreed with the judge's conclusion that, on the material then available, the plaintiffs did not have an arguable case that the Bank actually foresaw BCCI's imminent collapse at each relevant stage. They also agreed with him, that, in all the circumstances, it was now for all practical purposes inconceivable, that new material would emerge of such significance as to alter that conclusion.⁷³

On 21 January 1999, the Court of Appeal gave leave to the plaintiffs to appeal to the House of Lords on the plaintiffs' undertaking to apply to the House for a direction that the correct test for misfeasance in public office should be determined, before any consideration of whether the facts alleged, or capable of being alleged, were capable of meeting that test. On 12 May 1999 the House gave the plaintiffs leave to appeal against the refusal of leave to re-re-amend the statement of claim.⁷⁴

⁷⁰ *Three Rivers* per Craighead (n 54) para 108.

⁷¹ *Three Rivers* HL (n 5) 1228 per Lord Steyn.

⁷² Hirst and Robert Walker LJJ.

⁷³ *Three Rivers* CA (n 7) 101F-H.

⁷⁴ *Three Rivers* per Craighead (n 54) para 40.

2.5. The Findings in the House of Lords as to the Requirements of the Tort

The House of Lords was not asked to try the case. But they were required to review the nature and elements of misfeasance. As Lord Hobhouse of Woodborough observed:

“The tort, concerning as it does the acts of those vested with governmental authority and the exercise of executive powers, has developed over the centuries as circumstances have changed. Terminology still tends to be used which is of little assistance to anyone not familiar with the legal history. The use of the word malice also causes confusion both as to its meaning in relation to this tort and the role it has in the analysis of the tort. The particular elements emphasised as being of the essence of the tort have varied from time to time. There has been little consistency of language. It is therefore right to take the opportunity to attempt to draw together the threads and assist a more definitive view to be taken.”⁷⁵

To establish misfeasance in public office, it must first be established that the defendant is a public officer. It is the office in a relatively wide sense on which everything depends. Thus, a local authority exercising private-law functions as a landlord was potentially capable of being sued.⁷⁶ In the present case it was common ground that the Bank satisfied this requirement.

The second requirement is the exercise of power as a public officer.⁷⁷

The third requirement concerns the state of mind of the defendant. The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer that is, conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.

“The official concerned must be shown not to have had an honest belief that he was acting lawfully.”⁷⁸ This is sometimes referred to as not having acted in good faith. In *Northern Territory v. Mengel*,⁷⁹ the expression “honest attempt” was used.

⁷⁵ *Three Rivers* HL (n 5).

⁷⁶ *Jones* (n 28).

⁷⁷ *Racz* (n 30).

⁷⁸ *Three Rivers* HL (n 5) 1269 per Lord Hobhouse.

⁷⁹ *Mengel* (n 21) 546.

Another way of putting it is that he or she must be shown either to have known that he was acting unlawfully or to have wilfully disregarded the risk that his act was unlawful. This requirement is therefore one which applies to the state of mind of the official concerning the lawfulness of his act and covers both a conscious and a subjectively reckless state of mind, either of which could be described as bad faith or dishonest.

The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose. Here again the test is the same as or similar to that used in judicial review.

“It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.”...“The [nineteenth century] decisions laid the foundation of the modern tort; they established the two different forms of liability; and revealed the unifying element of conduct amounting to an abuse of power accompanied by subjective bad faith.”⁸⁰

[...]

My Lords, I consider that dishonesty is a necessary ingredient of the tort and it is clear from the authorities that in this context dishonesty means acting in bad faith.”⁸¹

The House of Lords outlined the general aspects of liability for misfeasance. First, there is what has been called “targeted malice”. Here the official does the act intentionally with the purpose of causing loss to the plaintiff, being a person who is at the time identified or identifiable. This limb does not call for explanation. The specific purpose of causing loss to a particular person is extremely likely to be consistent only with the official not having an honest belief that he was exercising the relevant power lawfully. If the loss is inflicted intentionally, there is no problem in allowing a remedy to the person so injured.

Secondly, there is what is sometimes called “untargeted malice”. Here the official does the act intentionally, being aware that it will in the ordinary course directly cause loss to the plaintiff or an identifiable class to which the plaintiff belongs. The element of knowledge is an actual awareness but is not the knowledge of an existing fact or an inevitable certainty. It relates to a result which has yet to occur. It is the awareness that a certain consequence will follow as a result of the act unless something out of the ordinary intervenes. The act is not done with the intention or purpose of causing such a loss but is an unlawful act which is intentionally done for a different purpose notwithstanding that the official is aware that such injury will, in the ordinary course, be one of the consequences.”⁸²

⁸⁰ *Three Rivers* HL (n 5) 1231 per Lord Steyn.

⁸¹ *ibid* 1266 per Lord Hutton.

⁸² *Garrett* 1997 (n 3) 349-350.

Thirdly there is “reckless untargeted malice”. The official does the act intentionally being aware that it risks directly causing loss to the plaintiff, or an identifiable class to which the plaintiff belongs, and the official wilfully disregards that risk. What the official here is aware of is that there is a risk of loss involved in the intended act. His recklessness arises because he chose wilfully to disregard that risk. “Intentionally” relates to the doing of the act and covers a similar point to that referred to earlier in relation to acts and omissions. It indicates that the mind must go with the act. It does not require any specific intent (except insofar as having a specific purpose under the first limb imports an intent).

According to Lord Hope of Craighead, the allegation was that this was a case of “untargeted malice”.⁸³ Where the tort takes this form the required mental element is satisfied where the act or omission was done or made intentionally by the public officer:

- (a) in the knowledge that it was beyond his powers and that it would probably cause the plaintiff to suffer injury (simple untargeted malice), or
- (b) recklessly because, although he was aware that there was a serious risk that the plaintiff would suffer loss due to an act or omission which he knew to be unlawful, he wilfully chose to disregard that risk (reckless untargeted malice).

In regard to this form of the tort, the fact that the act or omission is done or made without an honest belief that it is lawful is sufficient to satisfy the requirement of bad faith. In regard to alternative (a), bad faith is demonstrated by knowledge of probable loss on the part of the public officer. In regard to alternative (b), it is demonstrated by recklessness on his part in disregarding the risk. The plaintiffs relied on each of these two alternatives. His Lordship rejected these submissions:

“The effect of your Lordships’ decision following the first hearing is that it is sufficient for the purposes of this limb of the tort to demonstrate a state of mind which amounts to subjective recklessness. That state of mind is demonstrated where it is shown that the public officer was aware of a serious risk of loss due to an act or omission on his part which he knew to be unlawful but chose deliberately to disregard that risk. Various phrases may be used to describe this concept, such as “probable loss”, “a serious risk of loss” and “harm which is likely to ensue”. Although I have used the phrase “serious risk of loss”, I do not think that for present purposes it is necessary to choose between them. Further attempts to define their meaning would raise issues of fact and degree which are best considered at trial. The absence of an honest belief in the lawfulness of the conduct

⁸³ *Three Rivers* per Craighead (n 54) para 44.

that gives rise to that risk satisfies the element of bad faith or dishonesty.”⁸⁴

Counsel for the Bank pointed out that there was no precedent in England before *Three Rivers* which held recklessness to be a sufficient state of mind to ground the tort. Counsel argued that recklessness was insufficient. However, the Australian High Court and the Court of Appeal of New Zealand had ruled that recklessness is sufficient.⁸⁵ Clarke J explained the reason for the inclusion of recklessness:

“The reason why recklessness was regarded as sufficient by all members of the High Court in *Mengel* is perhaps most clearly seen in the judgment of Brennan J. It is that misfeasance consists in the purported exercise of a power otherwise than in an honest attempt to perform the relevant duty. It is that lack of honesty which makes the act an abuse of power.”⁸⁶

The Court of Appeal accepted the correctness of this statement of principle.⁸⁷ This is an organic development, which fits into the structure of the law governing intentional torts. The policy underlying it appears sound: reckless indifference to consequences is as blameworthy as deliberately seeking such consequences. It can therefore now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second form.⁸⁸ The House of Lords agreed with the Court of Appeal.

Initially, counsel for the plaintiffs argued that in this context “recklessness” is used in an objective sense. Counsel said that the distinction was between subjective or advertent recklessness in the sense used in *R v. Cunningham*⁸⁹ and objective recklessness as explained in *R v. Caldwell*⁹⁰ and *R v. Lawrence*.⁹¹ The latter ingredient i.e. objective recklessness, is present where in a case of an obvious risk the defendant failed to give any thought to the possibility of its existence.⁹²

⁸⁴ *Three Rivers per Craighead* (n 54) para 46.

⁸⁵ See: *Mengel* (n 21); *Garrett* 1997 (n 3) 2 NZLR 332; and *Rawlinson* (n 3).

⁸⁶ *Three Rivers* (n 8) 581.

⁸⁷ *Three Rivers* CA (n 7) 61G-62A.

⁸⁸ *Three Rivers* HL (n 5) 1232 per Lord Steyn.

⁸⁹ [1957] 2 QB 396.

⁹⁰ [1982] A.C. 341.

⁹¹ [1982] A.C. 510.

⁹² See J. Smith AND B. Hogan, *Criminal Law*, 9th ed. (Butterworths,1999) 60-69 who trenchantly observed: “The *Caldwell* test fails to make a distinction which should be made between the person who knowingly takes a risk and the person who gives no thought to whether there is a risk or not. And, on the other hand, it makes a distinction which has no moral basis. The person who, with gross negligence, fails to consider whether there is a risk is liable; but the person who considers whether there is a risk and, with gross negligence, decides there is none, is not liable. The right solution, it is

Counsel argued for the adoption of the objective recklessness or Caldwell test⁹³ in the context of the tort of misfeasance in public office. The difficulty with this argument was that it could not be squared with a meaningful requirement of bad faith in the exercise of public powers which is the *raison d'être* of the tort. However, understandably, the argument became more refined during the oral hearing and counsel for the plaintiffs accepted that only reckless indifference in a subjective sense will be sufficient. The plaintiff must prove that the public officer acted with a state of mind of reckless indifference to the illegality of his act.⁹⁴

“The official does the act intentionally being aware that it risks directly causing loss to the plaintiff or an identifiable class to which the plaintiff belongs and the official wilfully disregards that risk.... His recklessness arises because he chooses wilfully to disregard that risk. [...] Subjective recklessness comes into the formulation at the first and last stage because it is in law tantamount to knowledge and therefore gives rise to the same liability.”⁹⁵

The tort is historically an action on the case. It is not generally actionable by any member of the public. The plaintiff must have suffered special damage in the sense of loss or injury which is specific to him or her and which is not being suffered in common with the public in general. The alternative limbs (reckless indifference, and intention) reflect this. The plaintiff has to be complaining of some loss or damage to him or her which completes the special connection between him or her and the official's act.

The question is who can sue in respect of an abuse of power by a public officer. Counsel for the Bank argued that in order to be able to claim in respect of the second form of misfeasance, there must be established “an antecedent legal right or interest” and an element of “proximity”. Clarke J did not enunciate a requirement of proximity. He observed:

“If an officer deliberately does an act which he knows is unlawful and will cause economic loss to the plaintiff, I can see no reason in principle why the plaintiff should identify a legal right which is being infringed or a particular duty owed to him, beyond the right not to be damaged or injured by a deliberate abuse of power by a public officer”.⁹⁶

submitted, is to go back to the Cunningham test which appears to have been entirely trouble-free in practice.”

⁹³ See *ibid* and accompanying text.

⁹⁴ *Rawlinson* (n 3).

⁹⁵ *Three Rivers* HL (n 5) 1270 per Lord Hobhouse.

⁹⁶ *Three Rivers* (n 8) 584B.

Thus a deliberate and vindictive act by a public official, targeted at the plaintiff, is no longer necessary. A knowing breach of duty with the knowledge that harm to the plaintiff is likely, is sufficient, and “knowing” includes acting recklessly in the sense of suspecting the true position and going ahead anyway.⁹⁷

The majority in the Court of Appeal held that “the notion of proximity should have a significant part to play in the tort of misfeasance, as it undoubtedly has in the tort of negligence”.⁹⁸ Counsel for the Bank argued that both requirements are essential in order to prevent the tort from becoming an uncontrollable one. Lord Steyn observed that:

“It would be unwise to make general statements on a subject which may involve many diverse situations. What can be said is that, of course, any plaintiff must have a sufficient interest to found a legal standing to sue. Subject to this qualification, the principle does not require the introduction of proximity as a controlling mechanism in this corner of the law. The state of mind required to establish the tort, as already explained, as well as the special rule of remoteness hereafter discussed, keeps the tort within reasonable bounds. There is no reason why such an action cannot be brought by a particular class of persons, such as depositors at a bank, even if their precise identities were not known to the bank. The observations of Clarke J are correct.”⁹⁹

On the question of foreseeability of loss, Lord Steyn gave a brief account of the decisions in which this issue was considered.¹⁰⁰ It was first touched on in *Bourgoin SA v. Ministry of Agriculture*.¹⁰¹ At first instance Mann J had spoken of foreseeable losses. Oliver LJ quoted and endorsed the relevant passage. In *Northern Territory v. Mengel*,¹⁰² the majority in the Australian High Court adopted a test of “a foreseeable risk of harm” for which it relied on *Bourgoin*. In the present case, Clarke J concluded that in using the word “foreseeable” in *Bourgoin*, Mann J must have meant “foreseen” and that the same applies to the adoption of the relevant passage by Oliver LJ. Before the judgments in the Court of Appeal in the *Three Rivers* case, the Court of Appeal of New Zealand adopted the conclusions of Clarke J as well as his explanation of *Bourgoin*.¹⁰³ In England, the Court of Appeal and Divisional Court have also, on a number of occasions, approved the reasoning

⁹⁷ Beck (n 3).

⁹⁸ *Three Rivers CA* (n 7) 66A.

⁹⁹ *ibid* 1233 per Lord Steyn.

¹⁰⁰ *ibid* 1234-1236.

¹⁰¹ *Bourgoin* (n 16).

¹⁰² *Mengel* (n 21) 540.

¹⁰³ *Garrett* 1997 (n 3); *Rawlinson* (n 3).

of Clarke J.¹⁰⁴ While it is unnecessary to discuss these decisions it is relevant to point out that in the *North Wales Police* case,¹⁰⁵ the Lord Chief Justice expressed agreement with the view that the tort is only established if the officer had knowledge that he had no power to do the act complained of and that the act would probably injure the plaintiff. He paid tribute to the “extended consideration and most helpful summary” by Clarke J.¹⁰⁶ His Lordship continued:

“A test of knowledge or foresight that a decision *would* cause damage does not readily fit into the standard of proof generally required in the law of tort, and specifically in the case of intentional torts. Moreover, this test unnecessarily emasculates the effectiveness of the tort. The real choice is therefore between the test of knowledge that the decision would probably damage the plaintiff (as enunciated by Clarke J) and the test of reasonable foreseeability (as contended for by counsel for the plaintiffs).”¹⁰⁷

In both forms of the tort, the intent required must be directed at the harm complained of, or at least to harm of the type suffered by the plaintiffs. This results in the rule that a plaintiff must establish not only that the defendant acted in the knowledge that the act was beyond his powers but also in the knowledge that his act would probably injure the plaintiff or person of a class of which the plaintiff was a member. In presenting a sustained argument for a rule allowing recovery of all foreseeable losses, counsel for the plaintiffs argued that such a more liberal rule is necessary in a democracy as a constraint upon abuse of executive and administrative power. The force of this argument is, however, substantially reduced by the recognition that subjective recklessness on the part of a public officer in acting in excess of his powers is sufficient. Recklessness about the consequences of his act, in the sense of not caring whether the consequences happen or not, is therefore sufficient in law. This justifies the conclusion that the test adopted by Clarke J represents a satisfactory balance between the two competing policy considerations, namely enlisting tort law to combat executive and administrative abuse of power and not allowing public officers, who must always act for the public good, to be assailed by unmeritorious actions.

Lord Hutton also relied on the Australian and New Zealand cases, *Northern Territory of Australia v. Mengel*,¹⁰⁸ and *Garrett v. Attorney-General*.¹⁰⁹

¹⁰⁴ These decisions include the following: *Lam v. Brennan* [1997] 3 PLR 22 (CA); *R v. Chief Constable of the North Wales Police, Ex parte AB* [1999] QB 396 (DC) [Wales]; *Barnard v. Restormel Borough Council* [1998] 3 PLR 27 (CA); *W v. Essex County Council* [1999] Fam 90 (CA).

¹⁰⁵ *Wales* *ibid.*

¹⁰⁶ [1999] QB 396, 413B.

¹⁰⁷ *Three Rivers* HL (n 5) 1235 per Lord Steyn.

¹⁰⁸ *Mengel* (n 21).

¹⁰⁹ *Garrett* 1997 (n 3).

At the end of the day, reliance on a claim of misfeasance in public office did not enable the BCCI investors to receive compensation for their losses.¹¹⁰ However, the revival and restatement of this action has given potential plaintiffs another possible cause of action, and one which is specifically aimed at public officials. In an atmosphere of distrust of governments and public authorities, misfeasance in public office might be a useful addition to the arsenal of the law, and can serve to minimise instances of the exercise of public powers in bad faith. From a strategic perspective, it is clear that the tort is also well suited as a legal strategy which can be implemented when a challenge to regulator or state action is sought.

3. SCOPE OF THE TORT: FURTHER CONSIDERATIONS

3.1 Comparison to the Law of Misfeasance in the United States

We have been concerned thus far with the position of misfeasance of public office in English common law, and in those laws which most closely follow developments in English law, particularly those in Canada, Australia and New Zealand. However, in the United States of America (U.S.), the law of misfeasance of public office has taken a different direction.

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,¹¹¹ is the starting point for any analysis of the law. As another court has observed, “*Bivens* is the case establishing, as a general proposition in United States law, that victims of a constitutional violation perpetrated by a federal actor may sue the offender for damages in federal court despite the absence of explicit statutory authorization for such suits.”¹¹²

At first glance this seems to equate with misfeasance in the Commonwealth jurisdictions. But there are important distinctions which serve to reduce the effectiveness of the action as an alternative means of recovery in cases such as *Three Rivers*. It is well settled that a *Bivens* action will not lie against an agency of the federal government.¹¹³ The same holds true as to federal officials sued in their official capacities.¹¹⁴ A *Bivens* action only may be brought against federal officials

¹¹⁰ The case was eventually dropped in November 2005 after two years in court and 12 years of litigation. See : Staff, “Judge calls BCCI case a farce” *The Guardian* (12 April 2006), online: [Guardian < http://www.guardian.co.uk/business/2006/apr/12/bcci.money>](http://www.guardian.co.uk/business/2006/apr/12/bcci.money); See also J. Kollwe, “BCCI Liquidator Abandons £850m Claim Against Bank” *The Independent* (3 Nov 2005), online: [The Independent < http://www.independent.co.uk/news/business/news/bcci-liquidator-abandons-163850m-claim-against-bank-513718.html>](http://www.independent.co.uk/news/business/news/bcci-liquidator-abandons-163850m-claim-against-bank-513718.html).

¹¹¹ 403 U.S. 388 (1971).

¹¹² See *Wright v. Park*, (1993) 5 F.3d 586, 589 n.4 (1st Cir.).

¹¹³ See *FDIC v. Meyer*, (1994) 510 U.S. 471, 486.

¹¹⁴ See *Affiliated Prof'l Home Health Care Agency v. Shalala*, (1999) 164 F.3d 282, 286 (5th Cir.); *Buford v. Runyon*, (1998) 160 F.3d 1199, 1203 (8th Cir.) [*Buford*]; *Sanchez-Mariani v. Ellingwood*, (1982) 691 F.2d 592, 596 (1st Cir.).

in their individual capacities. Even then, the plaintiff must state a claim for direct rather than vicarious liability.¹¹⁵

Supervisors may sometimes be held liable however for failures in carrying out their supervisory responsibilities,¹¹⁶ much as it was alleged that the Bank of England was careless in its supervision of BCCI. But supervisory liability exists only where “(1) there is subordinate liability, and (2) the supervisor’s action or inaction was “affirmatively linked” to the constitutional violation caused by the subordinate.”¹¹⁷ It is by no means clear that such conditions could arise in cases such as that of the BCCI, there the alleged failings are essentially those of a government regulator.

3.2 Constitutional Aspects of the Tort

To summarize, the tort of misfeasance in public office arises when a public officer acted in the knowledge of, or with reckless indifference to, the illegality of his or her act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the plaintiff or person of a class of which the plaintiff was a member.¹¹⁸

There is a unifying element of conduct amounting to an abuse of power accompanied by subjective bad faith. Lord Steyn, whose speech formed the backbone of the *Three Rivers* case, observed that there were two different forms of liability for misfeasance in public office. First the case of targeted malice by a public officer, that is, conduct specifically intended to injure a person or persons. The second form was where a public officer acted knowing that he or she had no power to do the act complained of and that the act would probably injure the plaintiff. It involved bad faith inasmuch as the public officer did not have an honest belief that his or her act was lawful. Subjective recklessness was a sufficient state of mind to ground the tort.

Again, the tort is designed to target “the deliberate and dishonest abuse of power”.¹¹⁹ Targeted malice and untargeted malice, or bad faith and recklessness, are both based on the premise that public powers are to be exercised for the public good. Hence, statutory powers - or potentially administrative or even prerogative

¹¹⁵ See *Bibeau v. Pacific Northwest Research Found.*, (1998) 188 F.3d 1105, 1114 (9th Cir.); See also *Buford* (n 123); See also *Cronn v. Buffington*, (1998) 150 F.3d 538, 544 (5th Cir.); *Simpkins v. District of Columbia Gov’t*, (1997) 108 F.3d 366, 369 (D.C. Cir.); See also *Aponte Matos v. Toledo-Dávila*, (1998) 135 F.3d 182, 192 (1st Cir.): reaching identical conclusion in suit brought against state actors under 42 U.S.C. § 1983 [*Aponte*]. On this point see also *Gutierrez-Rodriguez v. Cartagena*, (1989) 882 F.2d 553, 562 (1st Cir.).

¹¹⁶ See for example, *Camilo-Robles v. Zapata*, 175 F.3d 41, 43-44 (1st Cir. 1999).

¹¹⁷ *Aponte* (n 124).

¹¹⁸ *Three Rivers* HL (n 5).

¹¹⁹ *Three Rivers* CA (n 7); See also *McBride* (n 20) 323.

powers - are to be exercised in good faith and for the purpose for which they were conferred.¹²⁰

We have the *Three Rivers* case to illustrate the general application of the tort to administrative actions based on statutory power. But there is also the *Black* case,¹²¹ concerned with the exercise of the royal prerogative. The appellant Conrad Black alleged that the Canadian Prime Minister Jean Chrétien intervened with Queen Elizabeth II, Queen of the United Kingdom and also Queen of Canada, to oppose his appointment to the House of Lords, and that, but for the Prime Minister's intervention, he would have received the peerage. Mr Black sued the Prime Minister for abuse of power, misfeasance in public office and negligence. He also sued the Government of Canada, represented by the Attorney General of Canada, for negligent misrepresentation. He sought declaratory relief and damages of \$25,000.¹²²

On appeal to the Court of Appeal for Ontario, Black sought three declarations. First was a declaration that the Prime Minister and the Government of Canada had no right to advise the Queen not to confer an honour on a British citizen or a dual citizen. The second was a declaration that the Prime Minister committed an abuse of power by intervening with the Queen to prevent him from receiving a peerage. The third was a declaration that the Government of Canada negligently misrepresented to Mr. Black that he would be entitled to receive a peerage if he became a dual citizen and refrained from using his title in Canada. The respondents acknowledged that the negligent misrepresentation claim against the Government of Canada could proceed to trial. However, they moved to dismiss all other claims against the Government of Canada and all claims against the Prime Minister.¹²³

Ultimately as in *Three Rivers*, Black was to fail, but the principle was established that the tort of misfeasance might, potentially, be applicable with respect to the royal prerogative, even though traditionally regarded as unjusticiable.

Whether or not a specific power is justiciable, the tort is based on the premise that public powers are to be exercised for the public good, and the deliberate and dishonest abuse of power is prohibited. Thus it is intimately associated with the principle of the rule of law.

¹²⁰ See: *Garrett* 1993 (n 3); *Galloway* (n 19); and *Scammell* (n 19).

¹²¹ *Black v. Chretien* (2001) 199 DLR (4th) 228 [*Black*]; See also N. Cox, "Black v. Chrétien: Suing a Minister of the Crown for Abuse of Power, Misfeasance in Public Office and Negligence" (2002), 9(3) E-Law, Murdoch University Electronic Journal of Law, online: E LAW <http://www.murdoch.edu.au/elaw/indices/title/cox93_abstract.html>; See also N. Cox. "Black v. Chrétien and the Control of the Royal Prerogative" (2003), 12(3) Constitutional Forum 94-101.

¹²² *Black* (n 130) para 1 per Laskin JA.

¹²³ *ibid* para 16.

4. CONCLUSION

This article began with a brief review of the history of misfeasance in public office. It then examined the role of the action. The requirements of the tort were then outlined. The circumstances of the litigation, and the findings in the House of Lords as to the requirements of the tort followed. In essence, the House of Lord had to determine whether recklessness is sufficient to establish liability for misfeasance of public office, and whether it is necessary to establish foresight of the actual consequences of a particular failure in supervision.

Referring the appeal and cross-appeal to the House of Lords for further argument, their Lordships concluded that the tort involved bad faith, including reckless indifference. To conclude otherwise would be to impose an artificial burden on plaintiffs. But they also found that foresight of probable harm, or reckless indifference, was required, otherwise there would be a risk of a “stultifying effect on governance without commensurate benefit to the public”. Thus the tort exists to restrain certain classes of governmental action, but only those of the most exceptional type. Accordingly, while the tort has potential to be utilized as a legal strategy against government action, the likelihood of success is slim as demonstrated by the *Three Rivers* and *Black* cases and its effectiveness may be further reduced depending on the jurisdiction, as with the United States.

That being said, the tort of misfeasance in the public office, nonetheless provides a remedy which, although comparatively rare, is based upon an important constitutional principle, namely that the legislature intends statutory powers to be exercised in good faith and for the purpose for which they were conferred. Failure to do this can, and should, result in successful litigation where a loss ensues. This is thus a practical example of the principle of the rule of law.