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July 18, 2019

“Misfeasance in a Public Office, by Erika Chamberlain” (book review)

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Available at: https://works.bepress.com/neil_foster/133/
Most established tort actions are clearly based on certain fundamental “rights” that the common law has recognized for many years.\(^1\) Rights of bodily integrity, freedom of movement, enjoyment and possession of personal property and land, and reputation, are generally protected by the law. But there are important tort actions that seem not to fit this pattern. In particular, in an age where public officials are increasingly playing important roles that have an impact on a range of such rights in the private lives of citizens, the tort of misfeasance in a public office has seen a resurgence in interest in the last few decades.\(^2\) This comprehensive and clear review of the tort by the current Dean of Law at Western University will be an invaluable resource to anyone interested in the civil remedies available when officials misuse their public power. While the monograph is explicitly designed to provide a comprehensive review of the tort under Canadian law, the history of the common law courts around the world developing the law “with a view to each other’s decisions and a generous effort at consistent doctrine”\(^3\) means that the monograph will be of immense value to those interested in the topic around the common law world.

The introduction, chapter 1, situates the tort action in the context of the rise of the “administrative state”. In the midst of other possible infringements on liberties by public officers, the tort of misfeasance in a public office occupies an important space marked by malice in decision-making and action which is, in some sense, deliberately unlawful,\(^4\) accompanied also (as an “action on the case”) by some form of compensable material damage.\(^5\) In fact, the introductory chapter provides an excellent overview of the background to the tort, its theoretical justification and connections with other private law remedies, the main outlines of its elements, remedies, and advantages over other possible actions, and prospects for the future.

The succeeding chapters spell these themes out in more detail. In chapter 2 the historical development of the tort is traced from its probable origins in a decision on

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2. A minor point of terminology should be put to one side immediately. In Australia, at least, the tort is usually called “misfeasance in public office”, with no indefinite article before “public”- see, for example, the most recent substantive consideration of the tort by the High Court of Australia in *Sanders v Snell* (1998) 196 CLR 329 at [2], and the detailed discussion of the tort by the Full Court of the Federal Court of Australia in *Nyoni v Shire of Kellerberrin* [2017] FCAFC 59 at [62]. This seems to also represent the terminology preferred by the House of Lords in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1, e.g., per Lord Steyn at 188. However, the articular version does appear in some Australian decisions- see e.g., *Cornwall v Rowan* [2004] SASC 384, and in at least one significant academic comment: cf. J Murphy, “Misfeasance in a Public Office: A Tort Law Misfit?” (2012) 32 OJLS 51. It is the preferred usage in Canada: see *Odhavji Estate v Woodhouse*, [2003] 3 SCR 263, at para 1. In line with the usage in the monograph under review, this version will be used in this review, despite the author’s personal preference for the non-articular version. Perhaps Australia, the United Kingdom, and Canada could be said to be common law jurisdictions separated only by their conventions on indefinite articles.

3. Chamberlain at 8.
exclusion from voting, Ashby v. White. A series of decisions based on exercise of discretion in licensing cases also followed. As the author notes, however, for some reason the tort was not much relied on during most of the 20th century. Even though administrative decision-making expanded in the course of that century, the response of the courts initially was to seek to expand the boundaries of the tort of negligence to cover these cases. However, with decisions such as those in Murphy v Brentwood District Council restricting the broad application of negligence to public decision-making, the fairly dormant misfeasance in a public office action was revived in significant decisions in all major common law jurisdictions in the decades around the turn of the current century, and has continued to be relied on in litigation in more recent years.

In chapter 3 the author provides a thorough and carefully nuanced analysis of the theoretical basis for the misfeasance action in light of recent general suggestions about the theoretical underpinnings of tort actions in general. Her conclusions are that, broadly, the tort is not a good fit for most of the “rights-based” theories of tort law, given that the action does not seem to be based on a generally acknowledged primary civil right (such as the right to bodily integrity or the right to possession of land). However, she correctly points out that the tort is, in this respect, not dissimilar to the tort of negligence, which is an action addressing a number of different rights, connected by the feature that the right has been interfered with carelessly (in breach of a duty to behave carefully). It is possible to analogously frame misfeasance in a public office as an action that protects other rights (such as liberty, reputation, enjoyment of possessions or land) from an interference resulting from malicious abuse of public power. The rights-based analysis may thus be expressed in this way:

The defendant has a duty not to harm foreseeable plaintiffs through his or her unlawful conduct, and the plaintiff has a right not to suffer foreseeable harm as a result of the defendant’s unlawful conduct.

Perhaps the major criticism of this view is that it suffers from the defects of the analysis of the tort of negligence with which the comparison is drawn. In particular, a number of rights-based theorists criticize aspects of the tort of negligence itself which are not clearly grounded in primary rights. The most common example given is the application of negligence to “pure economic loss,” where all agree that there is no unifying “right to an income stream” which supports negligence actions in this area. The rights-based view of misfeasance in a public office suffers from the same defect, especially given that a number of such actions are based on economic loss suffered as a result of government action.

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6 (1703) 92 ER 710 (UKHL).
7 Chamberlain at 37.
11 Chamberlain at 55.
12 Ibid at 57.
13 See, for example, Stevens, supra note 1 at 21: “The common law’s starting position is that the infliction of economic loss does not per se infringe any right of the claimant”, and other sources noted there.
14 In chapter 4, at 146-147, the author offers a number of examples of successful “economic loss” claims made using the misfeasance tort.
However, the author acknowledges that while something can be said in favour of a potential rights-based analysis, more persuasive justifications for the existence of the misfeasance tort are found in more “instrumental” theories focussed on the need for compensation for loss, vindication, and deterrence, all of which provide further good grounds for the tort and its elements. In the conclusion of the chapter, the author also puts forward a stimulating and helpful analysis of parallels between this common law tort and equitable principles relating to decision-making by fiduciaries. Drawing in part on previous work by the noted equity scholar and former Australian Federal Court Justice Paul Finn, she notes that the view has long been taken that, in broad terms, public officials are to discharge their duties and exercise their powers in the interests of the public, and not in their own interests. In other words, it can be said that “public obligations are essentially trust-like in character”. As the author notes, the parallels may assist in resolving questions that are still unsettled in the tort, such as how precisely to define who is a “public officer”, and the scope of “unlawful conduct” covered by the tort.

In chapter 4, then, there is a detailed review of the elements of the tort of misfeasance in a public office. There is a preliminary discussion of the important decision of the House of Lords in *Three Rivers*, noting that at least one possible element of the tort suggested at an early point in that case was not in the end found to be essential: the need for a specific “duty” owed by the defendant to the particular plaintiff. In passing it may be noted that the overall set of elements laid down in the *Three Rivers* decision by the House of Lords seems to reflect fairly closely the elements accepted by the High Court of Australia in *Northern Territory of Australia v Mengel*, where Deane J adopted a definition from the Privy Council in *Dunlop v Woollahra Municipal Council*:

As Lord Diplock observed, in delivering the judgment of the Privy Council in *Dunlop v Woollahra Municipal Council*, the tort of misfeasance in public office is ‘well-established’. Its elements are: (i) an invalid or unauthorised act; (ii) done maliciously; (iii) by a public officer; (iv) in the purported discharge of his or her public duties; (v) which causes loss or harm to the plaintiff.

The author discusses the elements of the tort under the headings of public office, deliberately unlawful act, state of mind of the defendant, and relevant material damage. The discussion considers not only the law of Canada, but also offers perspectives on these points from around the common law world.

Under the heading of “public office” the author considers a wide range of important topics; she notes there is a certain irony in the fact that, in a tort action focussed on the abuse of power by public servants, there continues to be some debate about how precisely to define the class of persons who are subject to the tort. Some issues are fairly clear and resolved in Australia in manner similar to the Canadian treatment. For example, in suing a corporate public entity, it is not possible to “aggregate” knowledge or intention across a number of

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15 Chamberlain at 72.
16 Ibid at 80-81.
17 In Australia also, the need to find a separate “duty” owed to the plaintiff was rejected by Brennan J in *Northern Territory v Mengel* (1995) 185 CLR 307 at 357, and this view was applied by Penfold J in *Twining v Curtis* [2009] ACTSC 106, at para 57, holding that it was “not necessary for the plaintiff to establish that he or she is a member of a class to whom the public officer owes a particular common law or statutory duty.”
20 See the adoption of this passage in *Cornwall v Rowan* [2004] SASC 384 at para 209 by the Full Court of the Supreme Court of South Australia.
21 Chamberlain at 86.
But other issues are treated slightly differently. As the author notes, it seems well established in Australia at the moment that solicitors engaged as prosecutors are not “public officers” for the purposes of the misfeasance tort.23 However, in at least one Saskatchewan case, full-time prosecutors were regarded as susceptible to the action.24 Future cases in both countries may need to give careful consideration to the reasons offered in the other when these issues arise again.

The nature of “deliberately unlawful conduct” that will be actionable is considered next, with a helpful overview of cases based on the common types of unlawfulness – ultra vires action, improper purposes, breach of statutory duty, violations of administrative fairness principles, and omissions.

One point worth noting in this section is the general statement that “a defendant will not be liable for actions that comply with legislation”.25 In Australia, at least, this comment needs to be nuanced in light of the decision in Sunraysia Natural Beverage Co Pty Ltd v NSW.26 There a Departmental officer had authorised a warning to be issued about the plaintiff’s products. The issue of such a warning was authorized by legislation, but the New South Wales Court of Appeal held that it was still possible for a claim of misfeasance to be made out if it could be shown that the power had been exercised for an improper purpose. Handley JA commented that this would be an example of “targeted malice” that would be actionable.27 So a decision that, on the surface, complied with legislation might be actionable if it could be shown to have been made for a purpose not justified by the law. Indeed, the author is clearly aware of this line of cases in the section headed “Improper Purposes”.28 It would perhaps have been wise to have qualified the earlier statement29 by reference to the later section.

The author highlights an important issue as to the nature of the behaviour of a public officer that will create liability in the misfeasance tort.30 She notes that in Australia there are some decisions holding that the relevant behaviour must be the “exercise of a public power”.31 However, the main Canadian authority, Odhavji Estate, held that it was not necessary to find that the officer had a specific power; rather, it was sufficient to show there was “unlawful conduct in the exercise of public functions” generally, which might involve a failure to act in accordance with a duty, rather than requiring identification of a specific power.32 This difference of opinion is reflected in the recent Queensland Supreme Court

22 See Leinenga v Logan City Council [2006] QSC 294 at paras 65-73.
24 Milgaard v Kujawa (1994), 123 Sask R 164 (Sask CA). At 110 the author also notes other Canadian and U.K. decisions where it was assumed prosecutors could be sued in this tort. See also, in New Zealand, Currie v Clayton [2014] NZCA 511, where the New Zealand Court of Appeal allowed an action against a public prosecutor, in relation to failure to disclose certain matters before trial, to continue, distinguishing Cannon and Leerdam by noting that the officer was a full-time prosecutor
25 Chamberlain at 117.
27 Ibid at para 5.
28 Chamberlain at 120-122.
29 Ibid at 117.
30 Ibid at 122-126.
31 For example, Cannon, supra note 23.
32 Odhavji, supra note 2 the quote here comes from the judgment of Iacobucci J, cited in Chamberlain at 123, n 188.
decision in Pro Teeth Whitening (Aust) Pty Ltd v Commonwealth of Australia,\(^{33}\) where Lyons J held that it was arguable that the requirement for abuse of a specific power was not necessary, and allowed a claim to proceed on the wider basis.\(^{34}\)

There are a number of issues in defining the parameters of this tort which are still to be settled, and they are canvassed very well in this chapter in more detail than can be readily summarized here. Perhaps one of the most important areas where there is disagreement among some Commonwealth courts is the question as to whether the harm flowing from the misuse of power must have been subjectively *foreseen* by the defendant, or whether it is sufficient if it was objectively *foreseeable*. As the author notes, the subjective approach has been taken by the English and New Zealand authorities, but an objective approach seems to have been adopted in at least one of the major Australian High Court decisions, and subsequently adopted by lower Australian courts.\(^{35}\) There are good arguments in favour of the subjective approach, given the need to confine the misfeasance tort fairly closely within the area of an actual abuse of public power, and it may be that as the author suggests the High Court of Australia might reconsider previous comments if the occasion arises in the future.

Chapter 5 offers a helpful review of remedies available for breach, including a discussion of the different types of damages awards that have been made. The author notes that this is a classic area where exemplary damages are available, and suggests that the analogies she has identified with breaches of fiduciary duty may support these damages based on breach of public trust and the need to deter such behavior in the wider public interest. There is also a very good discussion of the issues around vicarious liability for the misfeasance tort. While there is a statement from the High Court of Australia in *Mengel* suggesting that vicarious liability may not be applicable to the tort,\(^{36}\) the fact is that in more recent years awards based on vicarious liability have regularly been made, even in Australian courts.\(^{37}\) As the author points out, given that vicarious liability has been accepted even for intentional torts involving sexual battery, it would seem to be odd not to allow this doctrine to operate in relation to the less egregious wrongful acts committed by public officers.\(^{38}\)

Chapter 6 provides an overview of the relationship of the misfeasance tort to other tort actions, clearly showing that it has features which distinguish it from apparently similar actions in negligence, breach of statutory duty, and the economic torts in ways which enable

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\(^{34}\) [2015] QSC 175.

\(^{35}\) See *Mengel*, supra note 17 at para 60.

\(^{36}\) See *SA v Lampard-Trevorrow* [2010] SASC 56, (2010) 106 SASR 331, referring to comments from *Mengel* holding that the Crown can be liable if an officer had *de facto* authority, which seems to mean that the officer was acting in accordance with instructions given by superiors which appeared to be valid at the time (at paras 267-276.) More recently, however, Charlesworth J in *Okwume v Commonwealth* [2016] FCA 1252 at paras 207-211 suggested that it may be difficult to make out a claim for vicarious liability of the Commonwealth in a misfeasance action.

\(^{37}\) The author cites *NSW v Lepore* (2003) 212 CLR 511 on the sexual battery point. More recently the High Court of Australia has redefined the circumstances in which vicarious liability may be imposed for intentional torts in its decision in *Prince Alfred College Inc v ADC* (2016) 258 CLR 134. The issues of “authority, power, trust and control” referred to at para 81 as potentially allowing a finding of vicarious liability for an intentional tort of battery would seem to be also relevant to issues relating to the tort of misfeasance in a public office.
to operate even where elements of those other torts may not be satisfied. Connections with, and distinctions from, general administrative law remedies and torts related to the criminal justice system are clearly spelled out. For those in jurisdictions with general “human rights” charters, there is a fascinating discussion of the relationship of the tort to remedies under such a charter.

Finally, chapter 7 summarizes the general role played by the tort and looks to what might be possible future developments. The tort has been playing, and looks to continue to play, a key role as a “private ombudsman” keeping abuse of public power in check, and providing compensation to victims of such abuse. In Western societies where bureaucracies seem to have increasing power over the everyday lives of citizens, the tort is an essential part of the protections provided by private law against misuse of power. This book should be an essential tool for anyone seeking to understand how the tort operates, and might operate in the future. It is highly recommended.

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