

The Tort of Misfeasance in a Public Office

by

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This paper is a comment on an article by McBride, "Damages as a Remedy for Unlawful Administrative Action".¹ It is confined however to a discussion of the tort of misfeasance in a public office. The separate, though important, question of causation is not considered.

The tort of misfeasance in a public office² is a public law remedy of damages for loss resulting from the abuse of a public office. Damages in the public law field are of course also available under the traditional torts. Negligence in particular may be considered as expanding in this area of the law.³ The tort of misfeasance, however, is solely a public law remedy.

The question may be asked, why, in the light of the remedies available, previously at common law, and now under the Judicature Amendment Acts,⁴ there is any need for a remedy of damages? In answer to this question McBride justifiably observes that a remedy solely in the nature of a prerogative writ, injunction or declaration, may often be a hollow victory.⁵ Such a remedy could not, for example, help Takaro Properties Ltd.,⁶ who, notwithstanding a declaration in their favour,⁷ were forced into receivership as a result of an executive error.⁸

¹ (1979) 38 Camb. L.J. 323.

² Hereafter referred to as "the tort of misfeasance".

³ Cf. *Anns v. London Borough of Merton* [1978] A.C. 728.

⁴ The Judicature Amendment Acts 1972 and 1977.

⁵ J. McBride, *loc. cit.*, 323.

⁶ Cf. *Takaro Properties Ltd. v. Rowling* [1975] 2 N.Z.L.R. 62; [1976] 2 N.Z.L.R. 657; [1978] N.Z.L.R. 314.

⁷ *Takaro Properties Ltd. v. Rowling* [1975] 2 N.Z.L.R. 62.

⁸ In his capacity as Minister of Finance, Mr. Rowling had refused his consent to the issue of shares in Takaro Properties Ltd., to the Japanese company Mitsubishi

Broadly McBride's hypothesis is that there exists a tort of misfeasance and that it is composed of two alternative limbs. While it is acknowledged that the tort exists it will be argued that it is not of the nature suggested by McBride. It is noted, however, that this divergence of opinion may ultimately be of little consequence.

I. IS THERE A TORT?

It is nonsense to discuss the content of the tort if in fact no tort exists. Accordingly, this problem is considered first. Two preliminary matters are however raised.

At the outset, a distinction must be drawn between the breach of a discretionary duty,⁹ and the breach of a ministerial duty. Only the former concerns the tort of misfeasance, the basis of which, it will be argued, is malice. The latter, for which an official is strictly liable,¹⁰ is the forerunner of the modern tort of breach of a statutory duty.¹¹

Thus in *Barry v. Arnaud*¹² a customs officer was held liable for damage caused by refusing to accept a correctly tendered customs duty. It was held that the officer's task was purely ministerial and that he was consequently liable without proof of malice.

By contrast, in the case of *Linford v. Fitzroy*,¹³ a magistrate was held not liable in damages for wrongfully refusing to admit the plaintiff to bail. Giving judgement for the defendant, Lord Denman C.J. stated:¹⁴

The broad line of distinction is this: that, unless the duty of the magistrate is simply and purely ministerial, he cannot be made liable to an action for a mistake in doing or omitting to do anything in the execution of that duty, unless he can be fixed with malice, which in this case had been negated by the jury.

Accordingly, cases concerning the breach of a ministerial duty are properly omitted from a consideration of the tort of misfeasance.

A second matter concerns the question of judicial immunity.

It is clear that judges of a Superior Court of Record have absolute immunity as long as they act as a judge. This will be so, despite the

— Rayon Corporation. The Takaro Lodge was owned and operated by Takaro Properties Ltd., and in refusing his consent the Minister had been influenced by the irrelevant desire to retain New Zealand ownership of the Lodge. A declaration that the refusal was invalid was obtained, but in the intervening period Mitsubishi Rayon Corporation had lost interest. Deprived of the necessary additional capital, Takaro Properties Ltd., went into receivership and sued Mr. Rowling for \$1.75 million as damages.

⁹ A judicial duty is an example of such a duty.

¹⁰ *Barry v. Arnaud* (1939) 10 Ad. & El. 646, 113 E.R. 245; *Ferguson v. Kinnoull* (1842) 9 A. & F. 251; 8 E.R. 412.

¹¹ C.S. Phegan, "Public Authorities, Nonfeasance and Breach of Statutory Duty" (1977), 11 U.B.C.L.R. 187, 195; H.W.R. Wade, *Administrative Law* (4th ed., 1977), 632.

¹² *Supra*.

¹³ (1849) 13 Q.B. 240, 116 E.R. 1255.

¹⁴ *Ibid.*, 247, 1258.

impurest of motives, and whether or not the judge is acting within his jurisdiction.¹⁵

Judges of Inferior Courts however, have only limited immunity. They will be liable in the ordinary course for acts outside their jurisdiction.¹⁶ They may also be liable for malicious acts within their jurisdiction.¹⁷ However, there is strong support for the contrary proposition that, within their jurisdiction, judges of both Superior and Inferior Courts have absolute immunity.¹⁸

In this context, what is meant by the term jurisdiction? A judge acquires jurisdiction by satisfying the conditions precedent to the exercise of his power. Thus if a judge has authority to hear disputes concerning members of the King's household, he lacks the jurisdiction to hear a dispute where neither of the parties are members of the King's household.¹⁹ Once a judge has acquired this original jurisdiction however, it cannot be lost as a result of his subsequent actions. Thus in *R. v. Nat Bell Liquors Ltd.*,²⁰ the question was raised whether a magistrate could make a conviction on no evidence whatsoever and yet remain within his jurisdiction. Lord Sumner, giving judgment for the Privy Council, stated:²¹

A justice who convicts without evidence is doing something that he ought not do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, *however grave*, is a wrong exercise of a jurisdiction which he has, and is not a usurpation of a jurisdiction which he has not. [emphasis added]

Thus, for the purposes of judicial immunity, original jurisdiction is sufficient.

In *Sirros v. Moore*,²² the English Court of Appeal purported to abolish the distinction between Superior and Inferior Courts for the purposes of judicial immunity. If this decision is followed, judges of both Courts will be granted the full immunity previously granted only to judges of Superior Courts. However, the distinction between Superior and Inferior Courts remains fundamental to the pre-1974 caselaw with which this paper is largely concerned.

¹⁵ *Fray v. Blackburn* (18630 3 B. & S. 576, 122 E.R. 217; *Sirros v. Moore* [1975] Q.B. 118.

¹⁶ *Sirros v. Moore*, supra. It appears however, that to be liable in an action for trespass, a judge must have the means of knowing that he has exceeded his jurisdiction; *The Case of the Marshalea* (1612) 10 Co. Rep. 68b, 77 E.R. 1027; *Calder v. Hackett* (1839) 3 Moo.P.C. Cas. 28, 13 E.R. 12; *Houlden v. Smith* (1850) 14 Q.B. 841, 117 E.R. 323.

¹⁷ *Cave v. Mountain* (1840) 1 M. & G. 257, 133 E.R. 330; *Ferguson v. Kinnoull*, supra; *Linford v. Fitzroy* (1849) 13 Q.B. 240, 116 E.R. 1255; *Taylor v. Nesfield* (1854) 3 E. & B. 724, 118 E.R. 1312; *Fitzgerald v. Boyle*, supra; *O'Connor v. Isaacs* [1956] 2 Q.B. 288.

¹⁸ *Sirros v. Moore*, supra; *Everett v. Griffiths* [1921] A.C. 631, 665, per Viscount Finlay.

¹⁹ *The Case of the Marshalea*, supra.

²⁰ [1922] A.C. 128.

²¹ *Ibid.*, 151-152.

²² *Supra*.

With these preliminary matters in mind, the substantial question may be dealt with. Does the tort of misfeasance exist?

The starting point is the case of *Ashby v. White*.²³ At an election, the defendant had, in error, prevented the plaintiff from casting his vote. The plaintiff sued for damages. At King's Bench he failed. A strong dissenting judgment was nevertheless delivered by Holt C.J. and this judgment was subsequently adopted by the House of Lords on appeal. That judgment however, suffers from inadequate reporting and the exact grounds of liability are uncertain. Some eighty-three years later, Wilson J., in *Drewe v. Colton*,²⁴ noted that Holt C.J. did not appear to have required malice, but that the House of Lords in adopting his judgment had nevertheless based their resolution on the requirement of malice.²⁵

Whatever was in fact meant by Holt C.J., the case of *Ashby v. White* has subsequently been treated as at least establishing an action on the case against an official for *maliciously* depriving a person of his right to vote. Those subsequent cases are certainly not open to challenge on the grounds that *Ashby v. White* has been wrongly interpreted. They establish a line of authority in their own right.

Ashby v. White was followed by *Drewe v. Colton*, *Williams v. Lewis*,²⁶ *Cullen v. Morris*²⁷ and *Tozer v. Child*.²⁸ In each case the defendant had, in error, disenfranchised the plaintiff who then sued for damages in an action on the case. But in each case the plaintiff failed as he was unable to prove malice.

An action on the case for damages has also been brought along similar lines against officers of a Company of Free Fishermen and Dredgermen for expelling a Freeman from their Company,²⁹ against a minister for refusing to perform a marriage ceremony,³⁰ against a magistrate for refusing to grant bail³¹ and against a Medical Council for removing a dentist's name from the Dentists' Register.³² In each case however, the plaintiffs failed as they were unable to prove malice on the part of the defendant.

In *Whitelegg v. Richards*,³³ the defendant was the clerk of the Court for the Relief of Insolvent Debtors. He had erroneously issued an

²³ (1704) 14 St.Tr. 695, 92 E.R. 126.

²⁴ (1787) 1 East. 563, 102 E.R. 217, n.(a).

²⁵ *Ibid.*, 102 E.R. 218.

²⁶ (1797) Peak. Add. Cas. 157, 170 E.R. 229.

²⁷ (1819) 2 Stark. 577, 171 E.R. 741.

²⁸ (1857) 7 E. & B. 377, 119 E.R. 1286.

²⁹ *Harman v. Tappenden* (1801) 1 East. 555, 102 E.R. 214, where Lawrence J. cites both *Ashby v. White* and *Drewe v. Colton*, both election cases, suggesting the existence of unified action for damages.

³⁰ *Davis v. Black* (1841) Q.B. 900, 113 E.R. 1376.

³¹ *Linford v. Fitzroy*, supra.

³² *Partridge v. General Medical Council* (1890) 25 Q.B.D. 90.

³³ (1823) 2 B. & C. 45, 102 E.R. 300.

order, on the face of it from the Court, releasing a debtor from goal. The plaintiff, the creditor, sued the clerk for depriving him of the means of enforcing his debt.

The case was ultimately decided on a procedural point. Both counsel had however argued that malice was an essential ingredient of the action. Abbott, C.J., while finding it unnecessary to decide the point stated:³⁴

On the argument before us, some authorities were quoted to show, that an action upon the case may be maintained against an officer of the Court for falsity or misconduct in his office . . . it is not necessary to repeat the authorities quoted. *The general principle was not controverted.* [emphasis added]

The "authorities" referred to include *Ashby v. White* and *Drewe v. Colton*, election cases, as well as *Harman v. Tappenden*, a case of wrongful expulsion. The use of these varied authorities in the unique facts of the case suggest the existence of a unified action for damages. Moreover malice appears to be a necessary element of that action.

The existence of an action on the case for the malicious abuse of a public office also arises by implication from the cases of *Cave v. Mountain*³⁵ and *Ferguson v. Kinnoull*.³⁶

In *Cave v. Mountain*, there was an action in trespass against a magistrate for falsely imprisoning the plaintiff. Tindall C.J. dismissed the action, holding that the magistrate had acted within his jurisdiction and was therefore protected. He added however:³⁷

It would be a very different case if the defendant had acted from any malicious or improper motive, or with any want of bona fides, in which case he would be liable in a different form of action.³⁸

At this point the reporter has added a reference to *Whitelegg v. Richards* in which, it has been suggested, a unified action for malicious misconduct in a public office is recognised.³⁹

In a similar vein, Lord Cottenham, giving judgment for the House of Lords in *Ferguson v. Kinnoull* writes:⁴⁰

Where a Judge of an Inferior Court acting within his jurisdiction, from corrupt motives gives a wrong decision, malice is the foundation of any action against him.

Technically, both these cases may be dismissed as simply recognising an exception to the rule of judicial immunity.⁴¹ On their face, however, they go further and may be considered to lend additional support to the proposition that there exists a general action for the abuse of a public office, the foundation of which is malice and the origins of which are an action on the case.

It is clear that by the mid-nineteenth century there existed a signifi-

³⁴ *Ibid.*, 52, 302.

³⁵ *Supra.*

³⁶ *Supra.*

³⁷ (1840) 1 M. & G. 257, 263, 113 E.R. 330, 333.

³⁸ Namely, an action on the case.

³⁹ *Ante.*

⁴⁰ (1842) 9 A. & F. 251, 321, 8 E.R. 412, 438.

⁴¹ *Ante.*

cant body of caselaw readily classified as examples of the tort of misfeasance.⁴² Those cases span a varied set of facts and are not easily dismissed as a collection of ad hoc torts.⁴³

It is probable therefore, that by the middle of last century the tort was well established. Thereafter, however, it appears to have fallen into disuse. So much so that by 1907 the English Court of Appeal in *Davis v. Bromley Corporation*⁴⁴ were able to reject outright a claim for damages against a local authority for maliciously refusing to approve a set of building and drainage plans. Vaughan Williams L.J. observed:⁴⁵

In my opinion, . . . no action will lie against a local authority in respect of its decisions, even if there is some evidence to show that the individual members of the authority were actuated by bitterness or some other indirect motive.

On its face, this represents a considerable reversal of opinion from fifty years before.⁴⁶ Not until the latter half of this century was the tort revived in earnest. This began with the judgment of Viscount Simonds in *Smith v. East Elloe R.D.C.*⁴⁷

In that case the defendant council had made and confirmed a compulsory purchase order over the plaintiff's land. The plaintiff challenged the order on the grounds that it had been made in bad faith. She failed in her attempt to invalidate the order, the House of Lords holding that it was protected by a privative provision. Viscount Simonds noted however, that the clerk, whose bad faith was alleged, might be personally liable in damages on the grounds that he had "knowingly acted wrongfully and in bad faith".⁴⁸ There is nothing however, to indicate that Viscount Simonds relied on, or was even aware of, the previously discussed authorities on the tort of misfeasance. Nevertheless, his remarks were made at a time of renewed interest in the tort and added impetus to its revival.

Two years later Smith J., in the Supreme Court of Victoria,

⁴² The cases of *Henley v. Mayor of Lyme* (1828) 5 Bing. 91, 130 E.R. 995, *Brayser v. Maclean* (1875) L.R. 6 P.C. 398, *Goslin v. Wilcock* (1766) 2 Wils. 302, 95 E.R. 824 and *Grainger v. Hill* (1838) 4 Bing. (N.C.) 212, 132 E.R. 769, have been deliberately omitted. Both the initial cases appear to concern ministerial duties, rather than discretionary duties. This factor explains the imposition of strict liability. The latter cases may be classified as abuses of legal process. In neither case was the defendant a public officer, but in each case the person who had deliberately set the legal process in action. Cf. C.S. Phegan, "Damages for Improper Exercise of Statutory Powers" (1980), 9 Syd. L.R. 92, 100.

⁴³ See however, *Poke v. Eastburn* [1964] Tas. S.R. 98, 101, per Gibson A.C.J.

⁴⁴ [1908] 1 K.B. 170.

⁴⁵ *Ibid.*, 172.

⁴⁶ However, less than a decade later, the Supreme Court of Canada recognised the existence of an action for the malicious abuse of a public office, noting the line of cases from *Ashby v. White*; *McGillivray v. Kimber* (1916) 26 D.L.R. 164, 172, per Idington J.

⁴⁷ [1956] A.C. 736, [1956] 1 All E.R. 855.

⁴⁸ *Ibid.*, 752, 859. Gould notes that in *Smith v. Pyewell*, *The Times*, 29 April 1959, the plaintiff sued the clerk but failed as she was unable to prove bad faith; B.C. Gould, "Damages as a Remedy in Administrative Law" (1972), 5 N.Z.U.L.R. 105, 112.

expressly allowed a claim for damages in the tort of misfeasance.⁴⁹ This was the case of *Farrington v. Thomson* where the defendant policemen, though they knew they lacked the power to do so, closed the plaintiff's hotel for breach of the Licensing Act 1928. Smith J. referred to the traditional authorities, including the dictum of Viscount Simonds, concluding that:⁵⁰

. . . [I]f 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 the tort of misfeasance in a public office will lie against him at the suit of that person.

The full Court of the Supreme Court of Victoria have since approved *Farrington v. Thomson* in *Tampion v. Anderson*.⁵¹ In New South Wales the Court of Appeal in *Campbell v. Ramsay*⁵² have also considered a claim in the tort⁵³ and recognised that in the appropriate circumstances such a claim may be maintained. The Supreme Court of Tasmania however, in *Poke v. Eastburn*,⁵⁴ have declined to recognise the tort at all.

In *David v. Abdul Cader*,⁵⁵ an appeal from the Supreme Court of Ceylon,⁵⁶ the Privy Council overruled *Davis v. Bromley Corporation*, acknowledging that an action in damages for the malicious abuse of a statutory power to grant a licence could be maintained.⁵⁷

In Canada, within a month of *Farrington v. Thomson*, the Supreme Court of Canada delivered judgment in *Roncarelli v. Duplessis*,⁵⁸ an action that had been progressing through the courts since 1951. The plaintiff owned a licensed restaurant in the City of Montreal. The defendant, who was Premier and Attorney-General for Quebec, caused the plaintiff's liquor licence to be revoked with a stipulation that it never be reissued. The plaintiff was a member of the Jehovah's Witnesses and the defendant was a Roman Catholic. His motive for revoking the licence was to penalise the plaintiff for providing bail for those members of his sect arrested for distributing pro-Jehovah's Witnesses leaflets in the predominantly Catholic Province of Quebec. Without the liquor licence the restaurant failed and the plaintiff sued the defendant for damages. The Supreme Court allowed a claim based on the defendant's malicious abuse of his office.⁵⁹

⁴⁹ [1959] V.R. 286.

⁵⁰ *Ibid.*, 293.

⁵¹ [1973] V.R. 715.

⁵² (1967) 87 W.N. (Pt.2) (N.S.W.) 153.

⁵³ *Ibid.*, 155 at lines 24-27.

⁵⁴ *Supra*.

⁵⁵ [1963] 1 W.L.R. 834.

⁵⁶ Ceylon has a civil law jurisdiction. The decision is clearly applicable to the common law however.

⁵⁷ *David v. Abdul Cader* was approved in *Campbell v. Ramsay*, *supra*.

⁵⁸ (1959) 16 D.L.R. (2d) 689.

⁵⁹ It has been suggested that, on the question of damages, *Roncarelli v. Duplessis* is improperly cited at common law. Art. 1053 of the Quebec Civil Code reads: —

The decision in *Roncarelli v. Duplessis* was probably never intended as an example of the tort of misfeasance. However, being given at the time it was, and in circumstances closely resembling those of the tort, it has been readily classified as such.

In the subsequent Canadian case of *Hlookoff v. City of Vancouver*⁶⁰ the British Columbia Supreme Court have also recognised that an action may be maintained against a public official for the malicious abuse of his office. In that case however, the defendant acted in good faith and was not liable. *Roncarelli v. Duplessis* was distinguished on this basis.⁶¹

Finally, the question has been considered in the recent New Zealand cases of *Takaro Properties Ltd. v. Rowling* and *MacKenzie v. MacLachlan*.⁶² The former were proceedings to determine whether Takaro Properties Ltd., had an arguable cause of action. In the Supreme Court, Beattie J. delivered a detailed judgment concluding that an action could be maintained against an official for the malicious abuse of his office. In the Court of Appeal the question was not directly before the Court, but both Woodhouse and Richardson JJ. recognised the existence of the tort of "misfeasance".

In *MacKenzie v. MacLachlan*, the Supreme Court successfully avoided the question. However, reference is made to *Farrington v. Thomson*, and use is made of *Tampion v. Anderson*, without query-

Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect or want of skill.

It is pursuant to this article that damages were awarded to Mr. Roncarelli. Under the article however, the basis of liability is fault. This fault is based on the public law of Quebec which in turn has its origins in the common law; E.C.S. Wade, "*Roncarelli v. Duplessis*" (1951), Can.Bar Rev. 665; C.A. Sheppard, "*Roncarelli v. Duplessis*: Art. 1053 c.c. Revolutionised" (1960), 6 McGill L.J. 75. This explains the enigmatic statement by Rand J. in the Supreme Court that:

The injury done . . . was a fault engaging liability within the principles of the underlying public law of Quebec: *Mostyn v. Fabrigas* (1774), 1 Cowp. 161, 98 E.R. 1021, and under Art. 1063 of the *Civil Code*.

Mostyn v. Fabrigas, is an action in damages against the Governor of Minorca at common law.

This common law element also explains the comment by Cartwright J., also in the Supreme Court that, had the defendant exceeded his authority, it would have been necessary to consider the judgments in *McGillivray v. Kimber, Bassett v. Godschall* (1770) 3 Wils. K.B. 121, 95 E.R. 967, and the cases cited in Halsbury, *Laws of England* (2nd ed.). *McGillivray v. Kimber, Bassett v. Godschall* and Halsbury are all common law authorities.

Subsequently *Roncarelli v. Duplessis* has been treated as having common law application in *Hlookoff v. City of Vancouver* (1968) 67 D.L.R. (2d) 119, and *Roman Corporation Ltd. v. Hudson Bay Oil & Gas Co. Ltd.* (1973) 36 D.L.R. (3d) 413, where it was distinguished on its facts. It has also been treated as having common law application by, both Courts in *Takaro Properties Ltd. v. Rowling* [1975] 2 N.Z.L.R. 62; [1978] 2 N.Z.L.R. 314, B.C. Gould, *loc. cit.*, and C.S. Phegan, "Damages for Improper Exercise of Statutory Powers", *loc. cit.*

⁶⁰ *Supra*.

⁶¹ It is noteworthy that *Roncarelli v. Duplessis* was not distinguished on the grounds that it is inapplicable at common law.

⁶² [1979] 1 N.Z.L.R. 670.

ing their authority.

In conclusion, there appears little cause to doubt that the tort of misfeasance exists and is in good health. It had probably evolved by the mid-nineteenth century but appears to have fallen into disuse until its revival nearly a century later. While it is apparent that the initial cases in this revival of *Smith v. East Elloe R.D.C.* and *Roncarelli v. Duplessis* were decided without reference to the tort of misfeasance as such, it is now legitimate to include those cases as early instances in the evolution of a modern tort, now identified as that of the tort of misfeasance in a public office.⁶³

Accordingly, the cases discussed are cited as examples of the tort of misfeasance. The conclusion follows that the tort exists, and to this extent, the writer agrees with McBride.

II. THE CONTENT OF THE TORT OF MISFEASANCE

The tort of misfeasance is available for damage resulting from the misuse of a discretionary power. It is implicit moreover, that the discretion has been invalidly exercised,⁶⁴ and has caused damage. Thus the tort may be available if an official in exercising his discretion is, for example, motivated by irrelevant considerations,⁶⁵ but it will never be available if the exercise of the discretion is unimpeachable. This will be so notwithstanding the most abhorrent motives on the part of the official.⁶⁶

It appears, however, that a distinction must be drawn between the exercise of a discretion that is technically invalid, but is protected by, for example, a privative provision,⁶⁷ and the exercise of a discretion that is technically valid because it cannot be impeached.⁶⁸ In the former case damages may still be available.⁶⁹

It is noted however, that in most cases the circumstances that constitute the tort of misfeasance will also constitute the unlawfulness of an official's action.⁷⁰

McBride approaches the tort of misfeasance in a unique fashion. He distinguishes between the acts of an official within his jurisdiction, and those acts outside it. If an official commits an error within his jurisdiction he must act with malice before he is liable in the tort of

⁶³ A label attaching to a body of ad hoc, yet closely related, caselaw.

⁶⁴ Hereafter referred to as the "unlawful exercise of a discretionary power".

⁶⁵ Cf. *Takaro Properties Ltd. v. Rowling* [1975] 2 N.Z.L.R. 62.

⁶⁶ E.g. in exercising the prerogative power to grant his fiat to a relator action, the Attorney-General's actions are unreviewable; *Gouriet v. Union of Post Office Workers* [1978] A.C. 435.

⁶⁷ E.g. *Smith v. East Elloe R.D.C.*, supra.

⁶⁸ E.g. the Attorney-General's fiat.

⁶⁹ *Smith v. East Elloe R.D.C.*, supra; *Smith v. Pyewell*, supra.

⁷⁰ C.S. Phegan, "Damages for Improper Exercise of Statutory Powers", *loc. cit.*, 111 et seq.; B.C. Gould, *loc. cit.*, 116.

misfeasance. If however, he commits an error by exceeding his jurisdiction, he will only be liable if he acts with knowledge of the fact.⁷¹

In this context, McBride treats jurisdiction as being equivalent to jurisdiction in the context of judicial immunity.⁷² He makes the proviso however, that a breach of the rules of natural justice will be an error going to jurisdiction.

It is submitted that McBride's dual principle is an aberration. The single authority that may properly be cited in his support is one of three judgments in *McGillivray v. Kimber*;⁷³ namely that of Idington J.

In the case of *McGillivray v. Kimber* the plaintiff was an harbour pilot, licensed as such under the Pilotage Act 1886. The defendants were the members of the Board responsible for licensing the plaintiff. Without the benefit of a hearing, and apparently motivated by malice, the Board revoked his licence, thereby disqualifying him from future employment as an harbour pilot.

Damages were sought by the plaintiff for, "intentionally preventing him from pursuing his calling without lawful justification or excuse".⁷⁴ In the Supreme Court of Canada, judgment was given for the plaintiff, the Court finding the defendants had in fact acted in such a manner.⁷⁵

In the course of his judgment Idington J. draws McBride's distinction between jurisdictional and non-jurisdictional acts.⁷⁶ On the basis of the line of cases from *Ashby v. White*, he states that if an officer acts within his jurisdiction, he will be liable only if he acts with malice. If he acts outside his jurisdiction however, he will be strictly liable.⁷⁷

As support for this latter proposition, Idington J. cites the authorities of *The Case of the Marshalea*,⁷⁸ *Clark v. Woods*,⁷⁹ *Jones v. Gurdon*⁸⁰ and *Foster v. Dodd*.⁸¹

The Case of the Marshalea was an action in damages for false imprisonment against a Marshal (Judge) of the Court of Marshalea.⁸² The Marshal had a defence of judicial immunity which the plaintiff was able to defeat by showing that the Marshal exceeded his jurisdiction. Deprived of this immunity, the Marshal was then made liable in an action for false imprisonment in the ordinary course.

⁷¹ Knowledge may be imputed however.

⁷² Ante.

⁷³ Supra.

⁷⁴ (1916) 26 D.L.R. 164, 178, per Duff J.

⁷⁵ That finding was, of itself, sufficient grounds for the award of damages.

⁷⁶ *Ibid.*, 171-172.

⁷⁷ McBride treats this as an instance of imputed knowledge.

⁷⁸ Supra.

⁷⁹ (1848) 2 Ex. 395, 154 E.R. 545.

⁸⁰ (1842) 2 Q.B. 600, 114 E.R. 235.

⁸¹ (1867) L.R. 3 Q.B. 67.

⁸² An Inferior Court of the Record.

In *Jones v. Gurdon* there was an action for false imprisonment against a justice of the peace. Again, the absence of jurisdiction was relevant to defeat the defendant's judicial immunity, though in this case the immunity was statutory.

In *Clark v. Woods* there was an action for assault and false imprisonment. The plaintiff had been arrested and imprisoned under a justices warrant. Both the magistrates who had issued the warrant, and the policeman who had carried it out, were defendants. The warrant, however, had been issued without the jurisdiction to do so and was invalid. Deprived of any authority for their otherwise unlawful actions, the defendants were then made liable in the ordinary course.

Lastly, in *Foster v. Dodd*, the defendants were convicted of trespassing. They had acted pursuant to an order from the Secretary of State, but the order had been made without the jurisdiction to do so and was invalid. Similarly, the defendants were found liable in the ordinary course.

In each of these cases, the absence of jurisdiction prevented the defendant from relying on a defence that he might otherwise have raised. Ultimately however, the basis of liability was in an independent tort and was *not* the absence of jurisdiction itself. Accordingly the authorities cited by Idington J. do not support the proposition that the mere absence of jurisdiction is a sufficient basis for an action in damages.

McBride also lists *Roncarelli v. Duplessis*, *Farrington v. Thomson* and *Wood v. Blair*⁸³ as instances where the court has found an official exceeded his jurisdiction. However, there is no indication in these cases that the absence of jurisdiction was material other than to show that the official had acted unlawfully.

Secondly, Idington J. purports to restrict the authority of the line of cases from *Ashby v. White*, to acts committed within an official's jurisdiction.

It is admitted that examples in that line, of an official exceeding his jurisdiction, are rare. *Whitelegg v. Richards* however, is such an example. More importantly, such a restriction is not suggested in the cases themselves. Indeed, if the absence of jurisdiction is not of itself actionable, the need for such a restriction is less cogent.

Accordingly, the writer respectfully submits that McBride is in error in drawing a distinction between jurisdictional and non-jurisdictional acts. The support which he derives from the judgment of Idington J. in *McGillivray v. Kimber* is unwarranted. The authorities Idington J. cites do not support the distinction he draws and neither of his fellow judges makes reference to it. Moreover, it would appear that no other

⁸³ *The Times*, 3, 4 and 5 July 1957.

judge, before or since, has referred to the distinction and by inference from their omission to do so, it is submitted that there is a considerable body of authority in support of the proposition that no such distinction should be drawn. The writer respectfully follows that body of authority.

Throughout this paper it has been asserted that malice is the basis of liability in the tort of misfeasance. This will be so irrespective of whether the official acts within his jurisdiction, or outside it.⁸⁴ The term malice however, requires further explanation.

Popularly, the term conveys a sense of ill-will. Thus, spite, or a desire for revenge is readily termed malicious. This may be termed express malice. Legally however, the term is broader.⁸⁵ In particular, it is broad enough to include the act of an official in exercising a power which he knows he does not possess. It is in this sense, as well as the narrower sense, that the term malice has been used in the tort of misfeasance.

It is clear that the early authorities required proof of malice to establish the tort of misfeasance. Although the cases of *Beurain v. Scott*,⁸⁶ *Henly v. Mayor of Lyme*⁸⁷ and *Brayser v. Maclean*⁸⁸ are frequently cited as examples of the court finding the defendant strictly liable, only *Beurain v. Scott* is properly classified as an example of this tort.⁸⁹ *Beurain v. Scott* however, runs contrary to an overwhelming current of contemporary authority requiring proof of malice.

The species of malice required was probably express malice or ill-will. Thus in *Harman v. Tappenden*,⁹⁰ where the defendant failed in his action against the defendants for expelling him from a company of Free Fishermen and Dredgermen, Lawrence J. remarked:⁹¹

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

However, in *Ferguson v. Kinnoull*, Lord Cottenham, giving judgment for the House of Lords, described malice, arguably in the con-

⁸⁴ The writer is implicitly supported in this conclusion; B.C. Gould, *loc. cit.*; C.S. Phegan, "Damages for Improper Exercise of Statutory Powers", *loc. cit.*; H.W.R. Wade, *op. cit.*

⁸⁵ G.H.L. Fridman, "Malice in the Law of Torts" (1958), 21 M.L.R. 484, 496; *Ferguson v. Kinnoull* (1842) 9 Cl. & F. 251, 321, 8 E.R. 412, 438; *Roncarelli v. Duplessis* (1959) 16 D.L.R. (2d) 689, 706; *Farrington v. Thomson* [1959] V.R. 286, 293.

⁸⁶ (1813) 3 Champ. 388, 170 E.R. 1420.

⁸⁷ *Supra*.

⁸⁸ *Supra*.

⁸⁹ *Ante*.

⁹⁰ *Supra*.

⁹¹ (1801) 1 East. 555, 562, 102 E.R. 214, 217.

text of the tort of misfeasance,⁹² in these terms:⁹³

... [M]alice in the legal acceptance of the word is not confined to personal spite against individuals, but consists in the *conscious* violation of the law to the prejudice of another.

This statement is made in 1842 and is contemporaneous with several of the older misfeasance cases.

This broader use of the term malice clearly entails an expansion of the grounds for liability in the tort of misfeasance. Thus, because of the ambiguity that surrounds the term malice, the scope of the tort in the nineteenth century is uncertain. Modern cases, however, have avoided this ambiguous use.

In *Farrington v. Thomason*, Smith J. in the Supreme Court of Victoria defined the grounds for liability in the tort, stating:⁹⁴

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 . . . 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.

In the later case of *Tampion v. Anderson* this statement was given its approval by the full court and it is submitted that it accurately represents the present law.

In *Hlookoff v. City of Vancouver*, the British Columbia Supreme Court have adopted a similar approach. Verchere J. stipulates that the defendant will be liable only if he acts with malice. Malice, he then defines as, doing "a wrongful act intentionally without just cause or excuse".⁹⁵

In New Zealand, the question of liability in the tort of misfeasance has been considered by both the Supreme Court and the Court of Appeal in *Takaro Properties Ltd. v. Rowling*. In the Supreme Court, Beattie J. raises the question and states:⁹⁶

The proposition that a malicious exercise of statutory powers is actionable in damages must depend on the meaning of malicious. Is it enough to prove knowledge that the purpose was unlawful, or must the plaintiffs go further and prove malice in the sense that it defeats a plea of qualified privilege? Does it involve proof of positive ill will or vindictiveness . . . ?

Having recognised the problem however, Beattie J. does not provide an answer.

In the Court of Appeal though, Richmond J. clearly recognises a tort involving both express malice and the use of a power which an official knows he does not possess.⁹⁷ In the same case, there are also

⁹² Ante.

⁹³ (1842) 9 Cl. & F. 251, 321, 8 E.R. 412, 438 (emphasis added).

⁹⁴ [1959] V.R. 286, 293.

⁹⁵ (1968) 67 D.L.R. (2d) 119, 132.

⁹⁶ [1976] 2 N.Z.L.R. 657, 662.

⁹⁷ [1978] 2 N.Z.L.R. 314, 338. Richardson J. treats each of these elements as belonging to separate torts. Both however, belong to the tort of misfeasance. It is observed that although he describes the first element as the tort of misfeasance, he lists *Farrington v. Thomson*, an indisputable example of the tort, as an instance of the second.

statements by Woodhouse J. that suggest the tort will be available for deliberate acts other than those involving ill-will.⁹⁸

In *Roncarelli v. Duplessis* the exact grounds for liability are uncertain.⁹⁹ At least one judge¹ however, appears to base liability on the presence of malice and the case is useful at least for his definition of malice. It is defined as:²

. . . [S]imply acting for a reason and purpose knowingly foreign to the administration, to which must be added here the element of intentional punishment . . .

Thus a broad definition of malice is favoured.

In *David v. Abdul Cader* the Privy Council thought that the basis of liability was malice. Viscount Radcliffe, delivering the advice of the Privy Council, further rejected the notion that the term, malice, was limited to circumstances of ill-will.³

That judgment was approved by the New South Wales Court of Appeal in *Campbell v. Ramsay*. They do not however, add to it.

In *Smith v. East Elloe R.D.C.* however, Viscount Simonds stated that the defendant might be liable if he "knowingly acted wrongfully and in bad faith".⁴ This statement may be interpreted either broadly or narrowly.⁵

Lastly in *Wood v. Blair*⁶ the court dispensed entirely with the requirement of malice.

Thus, no recent case has both recognised the tort and unequivocally limited its application to circumstances of ill-will or express malice.⁷ Moreover, the preponderance of recent authority supports the view that an official will be liable in the tort of misfeasance, either if he is motivated by ill-will or if he acts unlawfully with knowledge of that fact.⁸

Notwithstanding the numerous authorities requiring proof of malice,⁹ several authorities would suggest that the tort is one of strict liability. Thus the fact that an official had acted unlawfully would, of itself, be a sufficient basis for an action in the tort. In this context *Beaurain v. Scott*, *McGillivray v. Kimber* and *Wood v. Blair* are frequently cited.¹⁰

⁹⁸ *Ibid.*, 328.

⁹⁹ Uncertainty is caused both by the lack of clarity in the judgments, and by the involvement of Art. 1053 c.c.; ante.

¹ Rand, J.

² (1959) 16 D.L.R. (2d) 689, 706.

³ [1963] 1 W.L.R. 834, 838.

⁴ [1956] A.C. 736, 752.

⁵ This statement has been interpreted broadly in *Farrington v. Thomson* [1959] V.R. 286, 293. It has been interpreted narrowly by H.W.R. Wade, *op. cit.*, p.639.

⁶ *Supra*.

⁷ In *Poke v. Eastburn* the Court denied the existence of the tort. This case must now be considered as wrongly decided.

⁸ This is malice in the broad sense of the term.

⁹ The older cases appear to have required express malice.

¹⁰ *Henley v. Mayor of Lyme* and *Brayser v. Maclean* have already been discussed; ante.

Beaurain v. Scott has already been discussed.¹¹ It is clearly aberrant and should be treated as such.

In *McGillivray v. Kimber* the court found the defendants liable in an action for damages without proof of malice.¹² On one view, liability was based on the mere absence of jurisdiction. Idington J. in particular relies on this ground.¹³ However, the imposition of liability on this basis may be criticised as none of the authorities cited by the court appear to justify the result.¹⁴ More importantly though, irrespective of any criticism, the decision in *McGillivray v. Kimber* does not appear to be based on the tort of misfeasance. Idington J. provides the only link between this case and the tort, and he does so by *distinguishing* it.¹⁵ Moreover, Duff J. and Anglin J. appear to base liability on broader grounds than the mere absence of jurisdiction; namely the intentional and unlawful interference with the plaintiff's rights.¹⁶ These grounds bear a surprising resemblance to those in the comparatively recent case of *Beaudesert Shire Council v. Smith*.¹⁷ In that case, the High Court of Australia found the Council liable in damages for unlawfully removing gravel from a riverbed, destroying a pool from which the plaintiff lawfully pumped water. Liability was based on the principle that:¹⁸

[Where] a person suffers harm or loss as the inevitable consequence of the unlawful intentional and positive acts of another [he] is entitled to recover damages from that other.

This judgment has been strongly criticised.¹⁹ It is unnecessary however, to consider its merits. Though related to the tort of misfeasance, it is clearly a separate tort. There is no requirement that the defendant be a public officer, or that he act maliciously.

Analogously, it is submitted that the judgments in *McGillivray v. Kimber* do not concern the tort of misfeasance. They are not authority for the proposition that the tort is one of strict liability.

Lastly there is the case of *Wood v. Blair*. This is a case in the English Court of Appeal where Parker L.J. awarded "damages for misfeasance", despite the "best of motives" on the part of the defendants. This however, is one of the earliest cases in the revival of the

¹¹ Ante.

¹² Although malice was not the basis of liability the defendants appear to have acted maliciously; (1916) 26 D.L.R. 164, 169, 178, 184.

¹³ *Ibid.*, 171-173.

¹⁴ Ante, for a discussion of the authorities cited by Idington J.

¹⁵ *Ibid.*, 172.

¹⁶ *Ibid.*, 176, 184.

¹⁷ (1966) 120 C.L.R. 145.

¹⁸ *Ibid.*, 156.

¹⁹ G. Divorkin and A. Harari, "The *Beaudesert* Decision—Raising the Ghost of the Action upon the Case" (1966-67), A.L.J. 296 and 347; M.J. Standish, "*Beaudesert Shire Council v. Smith*" (1967-68), 6 M.U.L.R. 68; *Takaro Properties v. Rowling* [1978] 2 N.Z.L.R. 314, 317, 328, 339.

tort. In view of the uncertainty that surrounded the tort at that time,²⁰ its authority may be doubted. Subsequent authorities have in each case required malice of some form to establish liability. Moreover the tort has its origins in an action based on malice.

The *coup de grâce* however, is delivered with the decisions of the Supreme Court and Court of Appeal in *Takaro Properties Ltd. v. Rowling*.

In the Supreme Court, there was an action before Beattie J. to strike out parts of the plaintiff's statement of claim on the grounds that it did not disclose an arguable cause of action. Beattie J. observed that the court would not consider such action:²¹

. . . [E]xcept in a plain and obvious case so that a judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiffs to the relief for which they ask.

The plaintiff had alleged, *inter alia*, that the invalid exercise of the defendant's power could, of itself, be the basis of an action for damages.

Beattie J. considered the authorities, including those on the tort of misfeasance, and concluded by striking out the claim. Thus, in his own terms, this was such an obvious case, that it could be said at once not to disclose an arguable cause of action.

The plaintiff appealed and the Court of Appeal had no hesitation in turning the appeal down. Richmond P. states:²²

I agree with Beattie J. and with my brothers Woodhouse and Richardson that the cause of action is *clearly so untenable* that it cannot possibly succeed. [emphasis added]

Even a strong line of authority might wilt in the face of such condemnatory language. It is submitted that the few existing authorities that do not require malice cannot be considered as representative of the present law.

In conclusion, there is ample authority for the proposition that an official will be liable in the tort of misfeasance either if he is motivated by ill-will or if he acts unlawfully with knowledge of that fact. Though some uncertainty surrounds this proposition, it is no more than might be expected in view of the relative youth of the modern tort and its haphazard revival.

III. A COMPARISON OF TWO VIEWS—SUBSTANCE OR SEMANTICS?

McBride stipulates that an official will be liable in the tort of misfeasance either if he acts maliciously within his jurisdiction or if he acts outside his jurisdiction with actual or *imputed* knowledge of the fact.

²⁰ The year 1957.

²¹ [1976] 2 N.Z.L.R. 657, 659.

²² [1978] 2 N.Z.L.R. 314, 317.

In this context, McBride gives malice the broad meaning discussed, that is to say, ill-will or acting unlawfully with knowledge of that fact.

Assuming McBride is correct in drawing a distinction between jurisdictional and non-jurisdictional acts, it is submitted that nevertheless his use of imputed knowledge cannot be sustained.

The effect of imputing knowledge is that once an official has acted beyond his jurisdiction he will be immediately liable. He may lack the knowledge that he has exceeded his jurisdiction, but it will be imputed to him.

The rationale for imputing knowledge in this way is that it "imposes no great burden on public authorities since they are in a position to obtain good legal advice".²³ It is submitted however, that the courts will not impute knowledge in the tort of misfeasance.

It is noted that imputed knowledge is merely a gimmick by which liability is imposed without knowledge. This is clearly a backdoor method of imposing strict liability in the tort of misfeasance. Yet, as has been observed, the possibility of such an action has been roundly rejected. There is no reason to suppose that the courts will be more amendable to such an action through indirect means.

Quite apart from the courts' reluctance to allow such a claim on the grounds that it imposes strict liability, it is by no means self-evident that the concept of imputed knowledge "imposes no great burden on public authorities". How reasonable is it, for example, to expect lay tribunals to observe fine legal distinctions concerning the rules of natural justice;²⁴ rules which frequently cause judicial disagreement?

It may be argued however, that the public body has caused the loss, and should therefore bear it. Consider however, the facts of *Takaro Properties Ltd. v. Rowling*, where the defendant acting from the highest of motives is alleged to have caused \$1.75 million damage. Will a public authority necessarily be in a better position to bear that loss?

It thus seems clear, that even accepting McBride's jurisdictional distinction, *actual* knowledge will be required to establish the tort of misfeasance. His proposition may accordingly be amended and restated as imposing liability either if an official acts maliciously²⁵ or if he acts beyond his jurisdiction with knowledge of that fact.

It is observed that if an official exceeds his jurisdiction, that fact

²³ J. McBride, *loc. cit.*, 329. A similar view of a public officer's duty to obtaining legal advice is taken by Disberry J. in *Central Canade Potash Co. Ltd. v. A-G for Saskatchewan* (1975) 57 D.L.R. (3d) 7, [1975] W.W.R. 193; reversed on appeal (1977) 79 D.L.R. (3d) 303.

²⁴ E.g. *Partridge v. General Medical Council* where the Court found that the defendants had acted with "care" and in perfect good faith, but had nevertheless breached the principles of natural justice. McBride, unlike the Court, would find liability in damages.

²⁵ This is malice in the broad sense of the term.

will be a ground for review, making his act unlawful. Accordingly if he acts beyond his jurisdiction with knowledge of that fact, he acts unlawfully with knowledge of that fact. That is to say he acts with malice.

McBride's proposition may thus be restated as imposing liability if an official acts with malice, whether within or beyond his jurisdiction. These grounds of liability are effectively identical to those proposed in this paper. There are therefore grounds for suggesting that McBride has inadvertently rephrased the grounds for liability without altering their substance.

McBride's dual principle is susceptible to further limitation. Since *Anisminic v. Foreign Compensation Commission*²⁶ an official who acts maliciously, commits an error going to jurisdiction.

McBride draws a distinction between jurisdictional and non-jurisdictional acts. If an official commits an error within his jurisdiction he will be liable only if he acts with malice. Yet if he acts with malice, the effect of *Anisminic v. Foreign Compensation Commission* is to cause his error to become jurisdictional.²⁷

Consequently, it will be impossible for an official to be liable in the tort of misfeasance for an act within his jurisdiction. If he acts with malice, he acts beyond his jurisdiction.

Accordingly, the distinction between jurisdictional and non-jurisdictional acts is obsolete in the context of the tort of misfeasance.²⁸ An official will be liable if he acts with malice, a statement identical to that proposed in this paper. The mention of jurisdiction is unnecessary.

McBride asserts however, that the courts will decline to follow *Anisminic v. Foreign Compensation Commission* in the context of the tort of misfeasance.²⁹ That view is based on the assumption that knowledge may be imputed. The courts however, are unlikely to impute knowledge³⁰ and that view is without foundation.

In conclusion, it appears that McBride's treatment of the tort of misfeasance, though unique on its face, may be manipulated to resemble an orthodox view of the tort. It is submitted that the basis of the tort is malice, and that indirectly McBride's treatment of the tort supports this conclusion.

²⁶ [1969] A.C. 147.

²⁷ *Ibid.*, 171, per Lord Reid. It is assumed that their Lordship's remarks apply equally to malice in the broad sense.

²⁸ The effect of the jurisdictional distinction on privative provisions is irrelevant to the tort; ante.

²⁹ J. McBride, *op. cit.*, 330.

³⁰ Ante.

IV. FURTHER ASPECTS OF THE TORT OF MISFEASANCE

It has been suggested that, despite its name, the tort of misfeasance is not limited in its application to circumstances of misfeasance.³¹ *David v. Abdul Cader* is cited in this context as an example of a court recognising a claim for non-feasance.

In *David v. Abdul Cader*, the plaintiff had been denied a cinema licence. The plaintiff then claimed damages, charging that the defendant, who was responsible for issuing the licence, had acted wrongfully and maliciously. The Privy Council recognised that in the appropriate circumstances, such a claim could succeed.

It is submitted however, that the misfeasance/non-feasance distinction is a diversion.³² The real question to be answered, and the true basis of the decision in *David v. Abdul Cader*, is whether a duty is owed to the plaintiff.

Thus, Viscount Radcliffe, delivering the advice of the Privy Council states:³³

It does not appear to [their Lordships] that a right to damages is excluded by the mere circumstance that the applicant could not lawfully operate his cinema without a licence. Plainly the law forbade him doing so. But the question to be determined is not what rights he had without a licence but rather what rights were created between the two parties *by the relationship* under which one wished to operate a cinema and had applied for a licence to do so and the other had a statutory responsibility for deciding how to deal with that application. . . . [I]t seems to their Lordships impossible to say that the [defendants] did not owe some *duty* to the applicant with regard to the execution of his statutory power . . . [I]t 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. [emphasis added]

It is clear from this passage that their Lordships contemplated that an action might be maintained against the defendant because, and only because, he was a person to whom the defendant owed a duty in the exercise of his office. It is equally clear that the existence of such a duty cannot depend on whether or not the defendant chooses to exercise his discretion.³⁴

The question was subsequently raised in *Tampion v. Anderson*. In that case, the plaintiff was engaged in the practice of Scientology. The defendant had constituted a Board of Inquiry to inquire into its practice, teaching and application.

The Board's report was unfavourable to the plaintiff who sought damages in the tort of misfeasance for loss of reputation, both to himself and his religion, resulting in a loss of income.

³¹ B.C. Gould, *loc. cit.*, 117; E.J. Haughey, "The Liability of Administrative Authorities", Occasional Paper No. 9, Legal Research Foundation, (Auckland) 1975, p.81.

³² It is doubtful whether *David v. Abdul Cader* is actually an example of nonfeasance at all. It is not an example of a total failure to exercise a discretion, but of a discretion actually exercised, albeit invalidly.

³³ [1963] 1 W.L.R. 834, 839-840.

³⁴ Accordingly, the distinction between acts of misfeasance and nonfeasance is irrelevant.

The Court made short work of the plaintiff's action, describing it as:³⁵

... [A]nother in a long series of attempts that have been made on unsustainable grounds to escape the restrictions which the law imposes, in the public interest, upon the bringing of an action in respect of words used in the course of judicial proceedings.

The defendant neither owed a duty to the plaintiff, nor had he abused his powers. It was stated that:³⁶

... [T]o be able to sustain an action [in the tort of misfeasance] the plaintiff plainly must not only show damage from the abuse, but he must also show that he was a member of the public to whom the holder of the office owed a duty not to commit the particular abuse complained of. [emphasis added]

It is submitted that, in order to succeed in the tort of misfeasance, it is not sufficient for the plaintiff to show that he has suffered damage as a result of the defendant's malicious act. He must also show that he is one of the people to whom the defendant owes a duty in the exercise of his office. In this sense the duty is directly analagous to a duty of care in the tort of negligence. Without the duty, an action cannot be maintained, but the presence of the duty is not itself sufficient grounds to maintain an action.

It appears however, that the question of a duty will seldom be at issue. It will always be owed to those members of the public³⁷ for whose benefit the office is directly exercised.³⁸ The duty, however, must exist.

The question arises as to exactly who is a public official?

In 1928 in *Henley v. Mayor of Lynne*, Best C.J. described a public official as:³⁹

... [E]veryone who is appointed to discharge a public duty and recovers compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer.

B.C. Gould⁴⁰ denies that this statement is a comprehensive definition. He writes:

... [T]he emphasis on "compensation" for example, may not be appropriate to modern circumstances when many public functions are performed voluntarily.

In 1972 in *Tampion v. Anderson*, Smith J. reemphasised that a public official need not be employed by the Crown and adds:⁴¹

The office must be one the holder of which owes duties to members of the public as to how the office shall be exercised.

No hint is given however, as to when that duty will be owed.

Generally it appears that the limits of the tort have yet to be tested on the question of who is a public official. It is nevertheless evident

³⁵ [1973] V.R. 715, 722.

³⁶ *Ibid.*, 720.

³⁷ Not to other public officials; *MacKenzie v. MacLachlan*.

³⁸ Contrast the facts of *Tampion v. Anderson*.

³⁹ (1828) 5 Bing 91, 107, 130 E.R. 995, 1001.

⁴⁰ *Loc. cit.*, 117.

⁴¹ [1973] V.R. 715, 720.

that the term, public officer, is not to be given a restricted meaning.⁴²

V. CONCLUSION

The tort of misfeasance clearly exists and has its roots in eighteenth and nineteenth century caselaw. To this extent the writer agrees with McBride. The essence of his article however, is a distinction between jurisdictional and non-jurisdictional acts. It has been submitted that this distinction is unjustified. However, Mr McBride's treatment does not materially differ from a more orthodox treatment of the tort.

If the plaintiff is owed a duty, the tort will be available against a public official for damages resulting from the unlawful and malicious exercise of his office. In this context an official will have acted maliciously, either if he is motivated by ill-will, or if he acts unlawfully with knowledge of that fact. In no case will he be strictly liable.

This broad view of malice is probably an expansion of the tort from its nineteenth century predecessor. The prospect of further expansion, however, appears slim, particularly following the restrictive decisions of *Takaro Properties Ltd. v. Rowling*.

Nevertheless, the tort has achieved substantial recognition, and in its present form, may yet prove a valuable form of action. To date however, the difficulties in proving malice have limited the usefulness of the tort, but with the expanded definition of the term, greater success may be anticipated.

Finally, it is observed that the question of causation, which is considered in McBride's article, may, notwithstanding adequate proof of the tort, preclude proof of damage, and consequently preclude success.

Ed. Note: The Privy Council in *Dunlop v. Woollahra Municipal Council* [1981] 1 All E.R. 1202, 1210 reaffirmed that malice is a necessary element in this tort.

⁴² The list of public officials appears sufficiently broad to include magistrates (*Linford v. Fitzroy*), policemen (*Farrington v. Thomson*), licensing authorities (*David v. Abdul Cader*), Boards of Inquiry (*Tampion v. Anderson*) and returning officers (*Ashby v. White*).