

# WHAT IS THE ROLE OF MISFEASANCE IN A PUBLIC OFFICE IN MODERN CANADIAN TORT LAW?

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*This article reviews Canadian cases involving claims for misfeasance in a public office that have been decided since the Supreme Court of Canada's decision in Odhayji Estate v. Woodhouse. Three main trends are apparent. First, plaintiffs who claim in misfeasance have some procedural advantages, including an expanded scope of discovery and greater resistance to defendants' motions to strike. Second, the misfeasance tort serves an "ombudsman" function, tainting the defendant's conduct as abusive and providing a greater degree of psychological vindication to plaintiffs. Finally, in some limited circumstances, misfeasance claims may have a better chance of success than negligence claims, as they dispense with the somewhat troublesome requirements of proximity and policy.*

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*Cet article examine différentes causes canadiennes qui portent sur des actions pour faute dans l'exercice d'une charge publique et qui ont été rendues depuis l'arrêt Odhayji Estate c. Woodhouse de la Cour suprême du Canada. Trois tendances principales se dessinent de manière apparente. En premier lieu, les demandeurs qui intentent une action pour faute d'exécution bénéficient de certains avantages au plan de la procédure, notamment une plus grande latitude en matière de leurs demandes de communication de pièces, ainsi qu'une plus grande capacité d'opposition aux requêtes en radiation des défendeurs. En second lieu, le délit de faute d'exécution remplit une fonction « médiatrice », en ce sens qu'il suggère que le comportement des défendeurs est illicite et, psychologiquement parlant, suscite chez les demandeurs un plus grand sentiment que les procédures leur donnent raison. Enfin, dans certaines circonstances bien précises, les actions pour faute d'exécution pourraient connaître plus de chances de succès que des actions pour négligence, étant donné que les actions pour faute d'exécution évitent les questions quelque peu épineuses de l'exigence d'un lien de proximité ainsi que de l'exigence de l'existence d'une politique.*

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## 1. Introduction

After decades of relative obscurity,<sup>1</sup> the distinctive tort of misfeasance in a public office has received renewed attention from courts and commentators in recent years.<sup>2</sup> The primary catalyst for the fresh discussion was the House of Lords decision in *Three Rivers District Council v. Governor and Company of the Bank of England (No. 3)*,<sup>3</sup> which restated the elements of the tort. In Canada, this was followed by the Supreme Court's decision in *Odhavji Estate v. Woodhouse*,<sup>4</sup> which adopted the tests from *Three Rivers* and applied them in the context of breach of statutory duty. Given this detailed and high-profile treatment, it was perhaps foreseeable that misfeasance would be pleaded more frequently in subsequent years, in an attempt to test the boundaries of the newly-restated tort. While it would be premature to pronounce on the definitive role of misfeasance in the new millennium, there have now been sufficient claims post-*Three Rivers* and *Odhavji Estate* to comment on some general trends.

In Canada, at least, it has become rather commonplace for plaintiffs to plead misfeasance in a public office alongside other torts in actions brought against public authorities. Thus, misfeasance has been added to claims for malicious prosecution, false arrest, and breach of various rights under the *Charter of Rights and Freedoms*.<sup>5</sup> In such claims, the primary benefit of the misfeasance claim is to taint the public officer's actions with the suggestion that they were an abuse of office, that is, that the officer deliberately used his office to injure the plaintiff. To date, it is not clear that

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<sup>1</sup> In *Davis v. Bromley*, [1908] 1 K.B. 170 (C.A.), the Court of Appeal held that misfeasance in a public office was not an actionable tort, even where public power was exercised maliciously. This reflected the relative dearth of litigation in misfeasance during the nineteenth century. Misfeasance was also absent for most of the twentieth century, the notable exceptions being *Roncarelli v. Duplessis*, [1959] S.C.R. 121 [*Roncarelli*]; and *David v. Abdul Cader*, [1963] 3 All E.R. 579 (P.C.).

<sup>2</sup> For a sample of commentary, see Robert J. Sadler, "Liability for Misfeasance in a Public Office" (1992) 14 Sydney L. Rev. 137; Sarah Kneebone, "Misfeasance in a Public Office After Mengel's Case: A 'Special' Tort No More?" (1996) 4 Tort L. Rev. 111; Duncan Fairgrieve and Mads Andenas, "Misfeasance in Public Office, Government Liability, and European Influences" (2002) 51 I.C.L.Q. 757; John Irvine, "Misfeasance in Public Office: Reflections on Some Recent Developments" (2002) 9 C.C.L.T. (3d) 26; Michael Bodner, "The *Odhavji* Decision: Old Ghosts and New Confusion in Canadian Courts" (2005) 42 Alta. L. Rev. 1061; and Harry Wruck, "The Continuing Evolution of the Tort of Misfeasance in Public Office" (2008) 41 U.B.C. L. Rev. 69.

<sup>3</sup> 2001 UKHL 16, [2003] 2 A.C. 1 (H.L.) [*Three Rivers*].

<sup>4</sup> 2003 SCC 69, [2003] 3 S.C.R. 263 [*Odhavji Estate*].

<sup>5</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

adding the misfeasance claim makes it more likely that the plaintiff will succeed in these circumstances. It may, however, have some practical advantages, such as expanding the scope of discovery. Moreover, since misfeasance is typically described as a “developing” tort, it may be less likely to be struck out at the pleadings stage than more established causes of action, thereby allowing the plaintiff to pursue the claim for longer and, potentially, motivating the defendant to settle.

Beyond its value in colouring the defendant’s actions as abusive, misfeasance in a public office may provide some psychological vindication and public attention for plaintiffs who wish to chastise openly the actions of a public official. In the somewhat atypical 2008 case of *McMaster v. The Queen*,<sup>6</sup> the plaintiff prison inmate successfully claimed misfeasance against prison officials for failing to provide him with properly-fitting shoes. While the action could presumably have been framed just as easily in negligence, the plaintiff apparently chose to plead in misfeasance to enhance the public condemnation of the defendant’s conduct. Indeed, the plaintiff’s statements to the media indicate a desire to show that government officials could not take advantage of “the little guy.”<sup>7</sup> Thus, misfeasance in a public office may help to fulfil what Linden J. has termed the “ombudsman” function of tort law.<sup>8</sup>

Nevertheless, misfeasance in a public office is likely to have its greatest substantive impact in claims historically covered by the tort of negligence. As will be discussed, it has often been difficult to bring negligence claims against public authorities, particularly in situations involving policy considerations or the balancing of interests. If the authority’s duties are described as being owed to the public at large, it will be difficult for a plaintiff to show that he has the requisite proximity to establish a duty of care. However, recent Canadian cases indicate that there may be a small window of opportunity to succeed in misfeasance in a public office in situations where negligence claims have historically foundered. For instance, in the Ontario Court of Appeal decision in

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<sup>6</sup> 2008 FC 1158, (2008), 336 F.T.R. 92 (Prothonotary) [*McMaster*], aff’d 2009 FC 937, [2009] F.C.J. No. 1071 (QL) [*McMaster* appeal].

<sup>7</sup> See Cristin Schmitz, “Serial Killer Gets \$6,000 for Pain and Suffering” *The Lawyer’s Weekly* (7 November 2008) 1.

<sup>8</sup> See Allen M. Linden, “Tort Law as Ombudsman” (1973) 51 Can. Bar Rev. 155; Allen M. Linden, “Reconsidering Tort Law as Ombudsman” in Freda Steel and Sanda Rodgers-Magnet, eds., *Issues in Tort Law* (Toronto: Carswell, 1983) 1; and Allen M. Linden, “Torts Tomorrow – Empowering the Injured” in Nicholas J. Mullany and Allen M. Linden, eds., *Torts Tomorrow: A Tribute to John Fleming* (Sydney: LBC Information Services, 1998) 321.

*Granite Power Corp. v. Ontario*,<sup>9</sup> the plaintiff was allowed to proceed with its misfeasance claim against the Ontario government for its actions in the privatization of the Ontario power industry. The plaintiff's negligence claim, however, was struck out due to a lack of proximity. The misfeasance tort may thus allow plaintiffs to avoid the pitfalls, like proximity and policy, that have historically acted as barriers in negligence claims against public authorities.

This article begins with a summary of the leading appellate decisions that brought renewed attention to misfeasance in a public office and spawned the new wave of litigation. It then discusses the subsequent decisions on misfeasance claims in the Canadian trial and appellate courts, including several that have proceeded to final judgment. In doing so, it will highlight the value of the misfeasance claim for plaintiffs, and identify the tort's emerging niche as the law moves forward.

## 2. *Background: Misfeasance in the House of Lords and the Supreme Court of Canada*

Before turning to recent Canadian developments, it is necessary to review the leading appellate decisions that charted the course of the misfeasance tort for the new millennium. The House of Lords decision in *Three Rivers* set out the elements of the tort and provided specific guidance on the requirements of malice and duty. The Supreme Court of Canada adopted the *Three Rivers* framework in its leading case of *Odhavji Estate*, explaining the types of official misconduct that can form the basis of the tort. Finally, in *Watkins v. Home Office*,<sup>10</sup> the House of Lords stressed the need for the plaintiff to prove material damage, and not merely the violation of a right. Taken together, these cases set out in considerable detail the underlying rationale for the modern version of misfeasance in a public office. As will be discussed, the tort can essentially be made out whenever a public authority's unlawful actions cause material damage to the plaintiff. The unlawful act need not be directed toward the plaintiff, and the plaintiff need not prove the violation of a pre-existing legal right or breach of duty owed particularly to her.

### A) *Three Rivers District Council v. Governor and Company of the Bank of England*

The House of Lords decision in *Three Rivers* was an attempt to consolidate modern developments in misfeasance and provide further guidance on the elements of the tort. The plaintiffs in *Three Rivers* were over 6,000

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<sup>9</sup> (2004), 72 O.R. (3d) 194 (C.A.) [*Granite Power*].

<sup>10</sup> [2006] UKHL 17, [2006] 2 A.C. 395 [*Watkins*].

depositors with the Bank of Credit and Commerce International (BCCI) in the United Kingdom, who suffered economic losses due to fraud and the eventual liquidation of BCCI. The depositors brought a claim for misfeasance against senior officials at the Bank of England, who allegedly acted in bad faith in licensing BCCI as a deposit-taking institution and in failing to take steps to close BCCI “when the known facts cried out for action.”<sup>11</sup> The claim ultimately came before the House of Lords to determine the correct test for misfeasance in a public office.

Lord Steyn, who delivered the leading opinion, explained that the rationale for 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.”<sup>12</sup> Lord Steyn then set out the “ingredients” of the tort:

1. public office,
2. the exercise of power as a public officer,
3. the state of mind of the defendant,
4. duty to the plaintiff,
5. causation,
6. damage and remoteness.<sup>13</sup>

The main point of contention in *Three Rivers* was the required state of mind in the defendant, which is typically described as malice. As with all torts requiring malice,<sup>14</sup> there has been some debate about how to define a malicious state of mind. The leading historical cases on misfeasance tended to involve some degree of bias or personal ill-will toward the plaintiff, and this has come to be known as “targeted” malice.<sup>15</sup> For instance, in the seminal Canadian case of *Roncarelli v. Duplessis*,<sup>16</sup> the defendant Premier of Quebec had a deliberate intention to harm the plaintiff restaurateur for his involvement with the Jehovah’s Witnesses. He ordered the revocation of the plaintiff’s liquor licence in order that he could

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<sup>11</sup> *Three Rivers*, *supra* note 3 at 188.

<sup>12</sup> *Ibid.* at 190, borrowing from *Jones v. Swansea City Council* [1990] 1 W.L.R. 54 at 85.

<sup>13</sup> *Three Rivers*, *ibid.* at 191-94.

<sup>14</sup> See Gerald H.L. Fridman, “Malice in the Law of Torts” (1958) 21 Mod. L. Rev. 484.

<sup>15</sup> See *Ashby v. White* (1703), 2 Ld. Raym. 938, 92 E.R. 126 (K.B.), rev’d 3 Ld. Raym. 320, 92 E.R. 710 (H.L.); *Tozer v. Child* (1857), 7 El. Bl. 377 at 379, 119 E.R. 1286; and *Cullen v. Morris* (1816-1819), 2 Stark. 577 at 589, 171 E.R. 741 at 745. For more detailed analysis, see Erika Chamberlain, “The Need for a ‘Standing’ Rule in Misfeasance in a Public Office” (2008) 7 O.U.C.L.J. 215.

<sup>16</sup> *Supra* note 1.

cause the plaintiff financial harm. Such conduct falls within Lord Steyn's stated rationale for the tort: the Premier used his influence for the improper purpose of punishing the plaintiff for supporting his coreligionists.

Over the years, a second type of malice or "limb" of the tort has evolved: where the public officer knowingly acts in excess of power, with the knowledge that the plaintiff will probably be harmed by that *ultra vires* action. The relevant actions need not be targeted toward the plaintiff, as long as the plaintiff is within the class of persons who will probably be harmed.<sup>17</sup> In *Three Rivers*, Lord Steyn affirmed that the tort could be committed in either of the above two ways (targeted malice or deliberate unlawfulness). More specifically, he considered the degree of knowledge required to satisfy the second limb of the tort, where the officer acts "knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff."<sup>18</sup> This can be satisfied by actual knowledge that the act is unlawful, but also by subjective recklessness. Recklessness involves bad faith in that the officer does not have an honest belief in the lawfulness of her actions.

This second limb of the tort falls within Lord Steyn's rationale less clearly. As Lord Millett confessed in *Three Rivers*, "The rationale of the second limb is not so transparent,"<sup>19</sup> since the defendant was not explicitly acting for an ulterior motive. Instead, such a motive must be inferred from the fact that the defendant did not have an honest belief in the lawfulness of her actions. A public officer who acts with disregard for the lawfulness of her actions is effectively presumed to be acting for reasons other than the public good.

The other main debate in *Three Rivers* was whether the plaintiff should have to establish the violation of a pre-existing legal right, sometimes framed alternatively as a legal duty owed by the defendant to the plaintiff.<sup>20</sup> This so-called "proximity" requirement had been affirmed by the Supreme Court of Victoria in the relatively modern case of *Tampion v. Anderson*,<sup>21</sup> where the plaintiff sued a board of inquiry examining the practice of Scientology for having exceeded its terms of reference in conducting its inquiry and making its report, claiming damages for loss of reputation to him and his religion. The Court stressed:

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<sup>17</sup> See for e.g., *Bourgoin v. Ministry of Agriculture, Fisheries and Food*, [1986] 1 Q.B. 716 (C.A.) [*Bourgoin*].

<sup>18</sup> *Three Rivers*, *supra* note 3 at 191.

<sup>19</sup> *Ibid.* at 235.

<sup>20</sup> See Chamberlain, *supra* note 15 at 218-20.

<sup>21</sup> [1973] V.R. 715 (S.C.).

...[T]o be able to sustain an action upon this basis a plaintiff must not only show damage from the abuse; he must also show that he was the member of the public, or one of the members of the public, to whom the holder of the office owed a duty not to commit the particular abuse complained of.<sup>22</sup>

Based on these authorities, the defendant in *Three Rivers* had argued that the plaintiffs should have to establish “an antecedent legal right or interest” and some form of proximity to bring them into a legal relationship with the relevant public officers. The majority of the Court of Appeal agreed, finding 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.”<sup>23</sup> Hirst L.J. wrote:

With the possible exception of [*Bourgoin v. Ministry of Agriculture, Fisheries and Food*<sup>24</sup> and *Henley v. Lyme*<sup>25</sup>], all the successful claims for misfeasance in public office... were concerned with a direct and proximate relationship between the plaintiff and the public officer responsible for the acts or omissions complained of. The directness and proximity of the relationship was mirrored in the directness and inevitability, or near-inevitability, of the loss suffered.<sup>26</sup>

The Court of Appeal was careful not to treat the duty requirement in misfeasance as synonymous with the duty of care in negligence; however, their concerns about limiting liability were seemingly justified. The potential plaintiffs were some 6,000 in number, and had no connection with the Bank of England apart from the fact that they had deposits in a regulated financial institution. Moreover, since a large percentage of modern misfeasance claims deal with purely economic interests, which have historically received less protection than physical or property interests, it was not unreasonable for the Court of Appeal to insist on some form of proximity between the plaintiff and the defendant.

Nevertheless, the House of Lords in *Three Rivers* concluded that the element of proximity or “duty” was not essential to a misfeasance claim, agreeing with the trial judge that no antecedent right is required, “beyond the right not to be damaged or injured by a deliberate abuse of power by a public officer.”<sup>27</sup> Thus, according to *Three Rivers*, it is not necessary to

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<sup>22</sup> *Ibid.* at 720.

<sup>23</sup> *Three Rivers*, *supra* note 3 at 57.

<sup>24</sup> *Supra* note 17.

<sup>25</sup> (1828), 5 Bing. 91, 130 E.R. 995.

<sup>26</sup> *Three Rivers*, *supra* note 3 at 55.

<sup>27</sup> *Ibid.* at 193, quoting *Three Rivers District Council v. Bank of England (No. 3)*, [1996] 3 All E.R. 558 at 584.

prove a pre-existing right on the plaintiff's part, or any form of proximity, in order to bring a successful misfeasance claim.

As will be explained, this absence of a "duty" or "proximity" requirement may, in some instances, make misfeasance in a public office an easier tort to make out than simple negligence. Many negligence actions against government authorities fail at the proximity stage of the duty of care analysis, especially in situations where the defendant is required to balance competing interests. Indeed, negligence claims against banking regulators were specifically rejected by the Privy Council in *Yuen Kun Yeu v. Attorney General of Hong Kong*<sup>28</sup> and *Davis v. Radcliffe*.<sup>29</sup> In the latter case, Lord Goff explained why a duty of care could not be imposed:

But it must have been the statutory intention that the licensing system should be operated in the interests of the public as a whole; and when those charged with its operation are faced with making decisions with regard, for example, to refusing to renew licences or to revoking licences, such decisions can well involve the exercise of judgment of a delicate nature affecting the whole future of the relevant bank in the Isle of Man, and the impact of any consequent cessation of the bank's business in the Isle of Man, not merely upon the customers and creditors of the bank, but indeed upon the future of financial services in the island. In circumstances such as these, competing considerations have to be carefully weighed and balanced in the public interest....<sup>30</sup>

The Privy Council concluded, in both of the above negligence cases, that the need to balance competing interests militated against a finding of proximity between the plaintiffs and defendants.

A plaintiff claiming in misfeasance, by contrast, does not have to establish a duty of care, and thus may avoid some of the difficulties associated with the requirement of proximity. This may explain, in part, why the plaintiffs in *Three Rivers* brought their claim in misfeasance rather than negligence.<sup>31</sup> Similarly, as discussed below, the Ontario Court of Appeal's decision in *Granite Power* demonstrates that some plaintiffs may have an easier claim in misfeasance in circumstances where the relevant duty involves the balancing of interests or is owed to the public at large.

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<sup>28</sup> [1988] 1 A.C. 175 (P.C.).

<sup>29</sup> [1990] 1 W.L.R. 821 (P.C.).

<sup>30</sup> *Ibid.* at 827.

<sup>31</sup> The plaintiffs in *Three Rivers* were also faced with an immunity provision in the *Banking Act 1987* (U.K.), 1987, c. 22, s. 1(4), which precluded liability unless the Bank were acting in bad faith.



*B) Odhavji Estate v. Woodhouse*

The Supreme Court of Canada's decision in *Odhavji Estate*<sup>32</sup> adopted the main principles set out in *Three Rivers* and applied them in the Canadian context. The main issue in *Odhavji Estate* was the type of conduct that could form the basis of a claim. Was it limited to abuse of power, or could it also include breach of statutory duty?

In 1997, Toronto police shot and killed Odhavji, a fleeing robbery suspect who was unarmed at the time. The Special Investigations Unit (SIU), whose purpose is to investigate police misconduct, was notified immediately. The SIU requested same-day questioning of the officers involved in the shooting, and wanted the officers to be segregated prior to questioning. The SIU also requested the officers' shift notes, on-duty clothing, and blood samples. The alleged facts suggest that the police officers did not comply with these requests. The SIU was nonetheless able to complete its investigation, and no charges were brought against the officers.

The Odhavji family then commenced an action against the officers involved in the shooting, the Chief of Police, the Police Services Board and the Solicitor General. Their claim alleged wrongful death in association with the shooting itself, and negligence and misfeasance in a public office in association with the SIU investigation. The alleged misfeasance was a failure to comply with section 113(9) of the *Police Services Act*,<sup>33</sup> which states: "Members of police forces shall cooperate fully with the members of the [SIU] in the conduct of investigations." It was alleged that the police officers' failure to cooperate with the SIU investigation deprived the Odhavji family of a "thorough, competent and credible" investigation and undermined their confidence in police authorities.

The defendants brought a motion to have the claims struck out. For present purposes, the most relevant actions were those against the officers who failed to comply with the SIU instructions, that is, who breached the obligation in section 113(9) of the *Police Services Act*. The Ontario Court of Appeal was divided on whether mere breach of statute was sufficient to ground a claim for misfeasance in a public office, or whether the tort required an abuse of power, authority or discretion. The main thrust of the majority's decision, written by Borins J.A., is as follows:

Although it is common ground that the defendants... are public officers, they were not engaged in the exercise of a power during the time the S.I.U. was conducting its

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<sup>32</sup> *Supra* note 4.

<sup>33</sup> R.S.O. 1990, c. P.15.

investigation of the shooting of Manish Odhavji. At most, they were under a statutory obligation to “co-operate fully” with the S.I.U. in the conduct of the investigation as required by s. 113(9) of the *Police Services Act*. . . . In the language of the law Lords in *Three Rivers*, they were not the recipients of an executive or administrative power by which they were required to make decisions affecting members of the public. They were not in the position of a public official to whom a power is granted for a public purpose who exercised the power for his or her own private purposes. The most that can be said . . . is that they failed to comply with the duties imposed on them by s. 113(9) of the Act.<sup>34</sup>

The majority concluded that the mere breach of statutory obligation could not be the foundation for a claim of abuse of office, and struck out the relevant cause of action.

Feldman J.A. dissented, concluding that “[a]n attempt to depict a power and a duty as mutually exclusive concepts is ultimately a semantic exercise that ignores the close connection between them.”<sup>35</sup> In her view, there was no principled reason to distinguish between a power and a duty; indeed, many of the leading decisions, including *Roncarelli*,<sup>36</sup> involved situations where the public officer had acted in excess of his powers, “and therefore could not be said to have involved the exercise of a statutory power or the exercise of a discretion.”<sup>37</sup>

Feldman J.A.’s opinion was upheld by the Supreme Court, which unanimously allowed the appeal and allowed the misfeasance claim to proceed. Iacobucci J., for the Court, concluded that the tort was not limited to the abuse of statutory or prerogative powers, but was “more broadly based on unlawful conduct in the exercise of public functions generally.”<sup>38</sup> He wrote:

...[T]here is no principled reason . . . why a public officer who wilfully injures a member of the public through intentional *abuse* of a statutory power would be liable, but not a public officer who wilfully injures a member of the public through an intentional excess of power or a deliberate failure to discharge a statutory duty.<sup>39</sup>

Thus, Iacobucci J. concluded that the tort could be grounded in “a broad range of misconduct,” and that the essential question is “whether the

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<sup>34</sup> *Odhavji Estate v. Woodhouse* (2000), 52 O.R. (3d) 181 (C.A.) at 194 [*Odhavji Estate* (C.A.)].

<sup>35</sup> *Ibid.* at 214.

<sup>36</sup> *Supra* note 1.

<sup>37</sup> *Odhavji Estate* (C.A.), *supra* note 34 at 207.

<sup>38</sup> *Odhavji Estate*, *supra* note 4 at 278.

<sup>39</sup> *Ibid.* at 286 [emphasis in original].

alleged misconduct is deliberate and unlawful.”<sup>40</sup> In addition, Iacobucci J. stressed the public officer’s disregard for the plaintiff’s interests:

Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties.<sup>41</sup>

So, instead of a proximity requirement, which might be complicated by competing interests or policy considerations, the Court only required that the defendant have subjective foresight of the potential damage to the plaintiff.

The claims in *Odhavji Estate* were therefore reinstated; the defendant police officers knew that they were under a statutory duty to cooperate with the SIU investigation, but they deliberately failed to do so. Accordingly, if the plaintiffs could establish the requisite malicious state of mind at trial, and establish that they had suffered compensable damage, they could be successful in their misfeasance claims.

### C) *Watkins v. Home Office*

Misfeasance in a public office descends from the action on the case,<sup>42</sup> and therefore is not actionable unless it results in damage. This was affirmed by the House of Lords in *Watkins*.<sup>43</sup> The plaintiff was a life prisoner who was engaged in legal proceedings and therefore had considerable correspondence with his legal advisors. Contrary to prison regulations, several prison officers opened and read Watkins’s legal correspondence. Watkins consequently brought a claim for misfeasance in a public office. The main issue before the courts was whether the tort required proof of material damage in order to be actionable. The Court of Appeal concluded that it was sufficient if the defendant had interfered with the plaintiff’s “constitutional” rights.<sup>44</sup> Indeed, Laws L.J. suggested that interference with a constitutional right represented an independent form of the tort that is actionable *per se*.

The House of Lords reversed this decision and reaffirmed that misfeasance requires proof of material damage. Lord Bingham recognized

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<sup>40</sup> *Ibid.* at 280, 282.

<sup>41</sup> *Ibid.* at 285.

<sup>42</sup> John H. Baker, *An Introduction to English Legal History*, 4th ed. (London: Butterworths, 2002) at 431-32.

<sup>43</sup> *Supra* note 10.

<sup>44</sup> *Watkins v. Home Office*, [2004] EWCA Civ 966, [2004] 4 All E.R. 1158.

that the case involved divergent goals of the misfeasance tort. On the one hand, “if a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands. There is an obvious public interest in bringing public servants guilty of outrageous conduct to book.”<sup>45</sup> On the other, “the primary role of the law of tort is to provide monetary compensation for those who have suffered material damage rather than to vindicate the rights of those who have not.”<sup>46</sup> Citizens who have not suffered material damage should seek alternative redress, whether through judicial review or disciplinary proceedings against the relevant officers. In addition, the House of Lords stressed the difficulty of defining constitutional rights in a country without a codified constitution, and the undesirability of awarding damages in tort simply to punish the defendant.<sup>47</sup> As misfeasance in public office descends from the action on the case, the gist of the tort is material damage.<sup>48</sup> Breach of the plaintiff’s rights, constitutional or otherwise, is not sufficient to complete the cause of action.

The decision in *Watkins* is undoubtedly correct; it may, however, have the effect of putting undue emphasis on the element of material damage. While the tort historically focused on the bad faith of the defendant, *Watkins* may alter the focus toward the causal connection between the defendant’s actions and the plaintiff’s damage. The mental element of the tort is downplayed. The potential implications of this shift in focus are evident in the Canadian cases discussed below, where the plaintiffs’ allegations of malice tend not to be subjected to extensive scrutiny.

### 3. *Recent Developments in the Canadian Courts*

Since the decisions in *Three Rivers*, *Odhavji Estate*, and *Watkins*, numerous cases on misfeasance in a public office have been decided by provincial superior and appellate courts. While it would be hasty to draw any hard and fast conclusions about the future of misfeasance in Canada, some noteworthy trends have emerged. First, because it lacks a “proximity” requirement, misfeasance may, in some narrow circumstances, provide plaintiffs with a better claim than negligence against certain public authorities. Second, the evolving elements of misfeasance make it less likely to be struck out a preliminary stage, thereby prolonging litigation and increasing pressure on defendants to settle. Finally, because it carries a taint of bad faith, misfeasance in a public office

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<sup>45</sup> *Watkins*, *supra* note 10 at 403.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.* at 408; see also 415 *ff.* for a discussion of the nature of British constitutional rights.

<sup>48</sup> See *ibid.* at 424.

seems to offer plaintiffs a greater sense of vindication than other torts. As set out below, all of these trends increase the likelihood that we will see more actions for misfeasance in the coming years, at least until it has attained greater doctrinal stability.

### *A) Avoiding the Pitfalls of Negligence Claims*

Bringing a successful negligence claim against a public authority is no easy task. Perhaps more than any other type of defendant, public authorities have been able to challenge the existence of a duty of care at both stages of the test outlined by the House of Lords in *Anns v. Merton London Borough Council*<sup>49</sup> and restated by the Supreme Court of Canada in *Cooper v. Hobart*.<sup>50</sup> The test was described in *Cooper* as follows:

At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the *relationship* between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.<sup>51</sup>

It is often difficult for plaintiffs in negligence actions to establish that they were in a proximate relationship with a public authority defendant, particularly if the defendant's functions involve the weighing of competing interests. Indeed, in *Cooper* itself, the *prima facie* duty of care was denied for such a lack of proximity. The plaintiff investor sued the Registrar of Mortgage Brokers for failing to suspend the licence of Eron Mortgage Corporation in a timely manner. She alleged that the Registrar was aware that Eron was in violation of the *Mortgage Brokers Act*,<sup>52</sup> and that, had the Registrar acted sooner to suspend Eron's licence, investors' losses would have been avoided or substantially diminished.

The Supreme Court of Canada concluded that the plaintiff's allegations did not disclose a cause of action because the Registrar of Mortgage Brokers did not owe the plaintiff a duty of care. McLachlin C.J.C. and Major J. examined the governing statute and explained:

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<sup>49</sup> [1978] A.C. 728 (HL).

<sup>50</sup> 2001 SCC 79, [2001] 3 S.C.R. 537 [*Cooper*].

<sup>51</sup> *Ibid.* at 550-51 [emphasis in the original].

<sup>52</sup> R.S.B.C. 1996, c. 313.

The regulatory scheme governing mortgage brokers provides a general framework to ensure the efficient operation of the mortgage marketplace. The Registrar must balance a myriad of competing interests, ensuring that the public has access to capital through mortgage financing while at the same time instilling public confidence in the system by determining who is “suitable” and whose proposed registration as a broker is “not objectionable.” All of the powers or tools conferred by the Act on the Registrar are necessary to undertake this delicate balancing. Even though to some degree the provisions of the Act serve to protect the interests of investors, the overall scheme of the Act mandates that the Registrar’s duty of care is not owed to investors exclusively but to the public as a whole.<sup>53</sup>

As a result, the Court concluded that there was insufficient proximity between investors and the Registrar to impose a *prima facie* duty of care.

Subsequent cases support the conclusion that, if the defendant public authority can be said to owe duties to the public as a whole, or is required to balance various competing interests, then there will not be sufficient proximity to ground a duty of care. For example, in *Wynberg v. Ontario*,<sup>54</sup> the Ontario Court of Appeal concluded that, in designing a program for autistic children, the Ontario government did not owe a duty of care to individual users of the program. The Court explained that the statutory provisions contemplated “the allocation of public funds and the balancing of competing interests,” and thus, did not create a relationship of proximity between the government and the autistic plaintiffs.<sup>55</sup> Similarly, in *Attis v. Canada (Minister of Health)*,<sup>56</sup> the Ontario Court of Appeal found that Health Canada did not owe a duty of care to potential recipients of silicone breast implants to ensure that the implants were safe for use. Rather, Health Canada’s obligations were owed only to the public as a whole, as part of a complex delivery system for health-related devices.<sup>57</sup> Therefore, since *Cooper*, it has seemed increasingly difficult for plaintiffs to establish a relationship of proximity with a public authority defendant.<sup>58</sup>

Further, even if a plaintiff is successful in establishing a *prima facie* duty of care owed by a public authority, that duty may well be negated under the second stage of the *Anns/Cooper* test, which examines “residual” policy considerations. In *Cooper*, the Court concluded that any *prima facie*

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<sup>53</sup> *Cooper*, *supra* note 50 at 558-59.

<sup>54</sup> (2006), 82 O.R. (3d) 561 (C.A.).

<sup>55</sup> *Ibid.* at 628.

<sup>56</sup> (2008), 93 O.R. (3d) 35 (C.A.).

<sup>57</sup> *Ibid.* at 55; see also *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.).

<sup>58</sup> See generally Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Butterworths, 2006) at 297 *ff.*

duty of care would be negated on the grounds that the Registrar of Mortgage Brokers' decision to suspend a broker is quasi-judicial and involves questions of policy.<sup>59</sup> In addition, the Court argued that imposing a duty would give rise to the potential for indeterminate liability toward investors.<sup>60</sup> Finally, the Court reasoned that imposing a duty of care would be tantamount to creating an insurance scheme for investors, at the expense of the taxpaying public.<sup>61</sup> Thus, even if they had found sufficient proximity for a *prima facie* duty of care, they would have negated it for broader policy reasons at the second stage of the *Anns/Cooper* analysis.

While the “residual policy” component of duty analysis has been used less frequently than proximity in the years since *Cooper*, it can still be a stumbling block for plaintiffs claiming against public authorities.<sup>62</sup> Regardless of the stage at which the analysis occurs, what seems clear is that plaintiffs claiming in negligence against public authorities have faced an uphill battle since at least the turn of the millennium. The courts have seemed reluctant to impose a private law duty of care, and have relied fairly heavily on statutory provisions to conclude that the defendants' obligations are owed to the public as a whole, rather than to individual plaintiffs. Given this trend, it is not surprising that more plaintiffs are framing their actions as misfeasance in a public office, which lacks a “duty” requirement and may thereby provide a better chance of success.

The 2004 Ontario Court of Appeal decision in *Granite Power*<sup>63</sup> illustrates how misfeasance in a public office overlaps with and potentially fills certain gaps in the tort of negligence. The plaintiff, Granite Power, was a small private utility company which had supplied electricity to the Town of Gananoque since 1885. Granite Power had an exclusive agreement to supply electricity to the town from 1994 to 2014. However, in 1997, the defendant Ontario government changed the provincial energy policy to allow for open competition. The relevant statute, the *Electricity Act, 1998*,<sup>64</sup> allowed the province to grant exemptions from the new policy, allegedly to allow private suppliers to continue their exclusive agreements with small municipalities. Granite Power petitioned the government to receive such an exemption.

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<sup>59</sup> *Cooper*, *supra* note 50 at 560.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> See also *Mitchell Estate (Litigation Administrator of) v. Ontario* (2004), 71 O.R. (3d) 571 (Div. Ct.) at 583; and *L.(A.) v. Ontario (Minister of Community and Social Services)*, (2006) 83 O.R. (3d) 512 (C.A.) at 525.

<sup>63</sup> *Supra* note 9.

<sup>64</sup> S.O. 1998, c. 15, Schedule A, s. 114(1)(m).

Although the exemption was granted in 2002, the government's communications in the interim had been non-committal and ambiguous. Moreover, the province had allowed widespread advertising and promotions that suggested that Granite Power's monopoly would be abrogated. The Town of Gananoque allegedly used the new provincial policy as leverage to challenge its exclusive agreement with Granite Power. Granite Power argued that its supply agreement consequently had become worthless, and claimed damages from the provincial government for its economic loss.

Granite Power brought claims for both negligence and misfeasance in a public office, and a comparison of these claims illustrates how misfeasance might supersede negligence in some circumstances. Moldaver J.A., for the Court, dismissed the negligence claim on the grounds that there was no duty of care. While Granite Power, as a small private supplier, stood to suffer foreseeable economic loss if an exemption from the *Electricity Act, 1998* were not granted, this was not sufficient to create a relationship of proximity with the government. Moldaver J.A. wrote:

While Granite was clearly a stakeholder, it was one of many to be considered by the Minister in determining the reach of the new legislation. As a small private utility, it was decidedly vulnerable to the proposed changes and justifiably concerned with the nature, extent and timing of their implementation. In the circumstances, Granite's efforts to have the Minister protect its interests by recommending that it be fully exempted from the open-market regime are clearly understandable. In my view, however, Granite cannot rely on those efforts to saddle the Minister with a duty of care that otherwise did not exist.

Manifestly, under the legislative scheme, the Minister did not owe a duty of care exclusively to Granite. On the contrary, he owed a duty of care to the public as a whole, of which Granite was but one constituent.<sup>65</sup>

Further, Moldaver J.A. found that any *prima facie* duty of care would have been negated for policy reasons under stage two of the *Anns/Cooper* test, since it involved a government policy decision which was non-justiciable.<sup>66</sup>

Nonetheless, the Court of Appeal allowed Granite Power's claim for misfeasance in a public office to proceed. There were sufficient allegations that the province had acted maliciously and in bad faith toward Granite Power. Specifically, it was alleged that the province had deliberately delayed its decision whether to grant an exemption to Granite Power,

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<sup>65</sup> *Granite Power*, *supra* note 9 at 202.

<sup>66</sup> *Ibid.*



making it difficult for the company to make critical business decisions. In the meantime, the province had promoted the new energy policy in a way that allowed other energy retailers to get a foothold in the town and allowed the municipality to challenge its exclusive agreement with Granite Power. Moldaver J.A. concluded that, if these allegations could be proven, the claim for misfeasance in a public office could be successful.

*Granite Power* is an interesting case; it is typically easier to bring a claim for negligence than for an intentional tort with a malice requirement. Misfeasance in a public office may sometimes, however, allow plaintiffs to avoid the various obstacles posed in negligence claims against public authorities, particularly the requirement of proximity and the policy considerations that can negate a duty of care at the second stage of the *Anns/Cooper* analysis. Indeed, misfeasance might be most useful to plaintiffs in situations where the public authority's actions involve weighing competing interests and/or duties owed to the public at large. As *Granite Power* illustrates, these policy or discretionary functions are typically immune from liability in negligence; but if it can be shown that the authority was pursuing some ulterior objective, and that damage to the plaintiff was a foreseeable result, the plaintiff might be able to challenge a policy decision through the misfeasance tort.

It remains to be seen whether *Granite Power* is anomalous in potentially providing redress in misfeasance but not in negligence. It is worth noting, however, that the misfeasance claim against the individual officers in *Odhavji Estate* might well have been struck out if it had been brought in negligence.<sup>67</sup> The relevant statutory duty to cooperate with SIU investigations could easily be framed as being owed to the public as a whole, rather than to individual plaintiffs. Indeed, the courts have consistently held that individual victims of crime do not have a legal right to see a defendant charged, convicted and punished.<sup>68</sup> Thus the plaintiffs in *Odhavji Estate* would likely have had difficulty proving the proximate relationship with the individual officers that is necessary to establish a *prima facie* duty of care. Further, even if a *prima facie* duty could be established, it would likely be negated under stage two of the *Anns/Cooper* test for residual policy considerations, in particular the

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<sup>67</sup> The plaintiffs in *Odhavji Estate* brought negligence claims against the Chief of Police, the Metropolitan Toronto Police Services Board, and the Solicitor General of Ontario, but not against the individual officers who breached the duty to cooperate with the SIU investigation. The negligence claim was only allowed to proceed against the Chief of Police. For more detailed analysis of this issue, see Chamberlain, *supra* note 15 at 233-34.

<sup>68</sup> See *Garrett v. Attorney General*, [1993] 3 N.Z.L.R. 600 (H.C.), *aff'd* [1997] 2 N.Z.L.R. 332 (C.A.); and *Norris v. Gatten* (2001), 56 O.R. (3d) 441 (C.A.).

availability of alternative remedies through disciplinary proceedings against the officers. In short, as in *Granite Power*, the plaintiffs in *Odhavji Estate* may well have had a better claim in misfeasance in a public office than they would have had in negligence.

The potential number of claims where misfeasance has a better chance of success than negligence is admittedly small. Moreover, the plaintiffs would still have to establish the requisite malicious state of mind, which may be a daunting task. Nevertheless, given the recent difficulties faced by plaintiffs in negligence claims against public authorities, we can expect more plaintiffs to begin claiming in misfeasance, either in addition or as an alternative to their claims in negligence.

### *B) Procedural Advantages*

Irrespective of its substantive advantages, adding a claim for misfeasance in a public office has had some procedural advantages for Canadian plaintiffs in recent years. Because the law on misfeasance is in flux, it may prove more resistant to striking out applications than other torts.<sup>69</sup> The standard for striking out a cause of action, provided in *Hunt v. Carey Canada Inc.*,<sup>70</sup> is quite high; it must be “plain and obvious” that the cause of action will not succeed or, phrased alternatively, the plaintiff’s action must be “certain to fail.”<sup>71</sup> Given that the misfeasance tort has only recently been restated, and that several elements of the tort have been redefined, it may be less likely for a court to strike out a misfeasance claim than it would a claim in a more stable tort.

For instance, there has been considerable debate about who counts as a “public officer” capable of being sued for misfeasance in a public office.<sup>72</sup> In *Freeman-Maloy v. Marsden*,<sup>73</sup> the plaintiff brought a misfeasance claim against Dr. Lorna Marsden, the President of York University, for improperly subjecting him to academic discipline. Dr. Marsden brought a motion to strike out the claim, arguing that she was not a “public officer” for the purposes of the tort. The motions judge agreed, relying in part on jurisprudence indicating that universities are independent and are not “government” for the purposes of the *Charter of*

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<sup>69</sup> Indeed, the pro-plaintiff interpretation of the rules on striking out causes of action is even greater in situations where the law is evolving; see *R.D. Belanger & Associates v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778 at 782 (C.A.).

<sup>70</sup> [1990] 2 S.C.R. 959.

<sup>71</sup> *Ibid.* at 975.

<sup>72</sup> See Wruck, *supra* note 2 at 87-93; see also *Keene v British Columbia*, 2005 BCSC 1547, [2005] B.C.J. No. 2395 (QL).

<sup>73</sup> (2006), 79 O.R. (3d) 401 (C.A.) [*Freeman-Maloy*].

*Rights and Freedoms*.<sup>74</sup> The Ontario Court of Appeal allowed the appeal, however, and permitted the action to proceed, suggesting that the degree of governmental control was not necessarily determinative of Dr. Marsden's status. While universities are autonomous in terms of academic freedom, Dr. Marsden had exercised her statutory powers of discipline under the *York University Act*,<sup>75</sup> which are subject to judicial review.<sup>76</sup> This susceptibility to the rules of public law indicated that it was not "plain and obvious" that Dr. Marsden was not a public officer for the purposes of the misfeasance tort.

Further, in *Swift Current (City) v. Saskatchewan Power Corp.*,<sup>77</sup> the Saskatchewan Court of Appeal examined the definition of "public office" as it related to a Crown corporation. The plaintiff complained that, as a result of its monopoly position, the defendant had, *inter alia*, engaged in predatory pricing, breached its contracts, and unilaterally altered its terms of service. The plaintiff argued that this amounted to misfeasance in a public office. The defendant brought a motion to strike out the claim on the basis that the plaintiff had not identified any human being as having the requisite bad faith or malice to make out the tort; a corporation, on its own, was incapable of having the necessary *mens rea*. The Court of Appeal, however, found that this was not fatal to the claim. Lane J.A., for the court, took a broad interpretation of "public office" and concluded that there was no reason to distinguish between the office-holder and the office itself.<sup>78</sup> Thus, the claim was allowed to proceed.

In addition to the flexible definition of public office, the evolving mental element in misfeasance in a public office has tended to keep claims alive beyond the pleadings stage. In fact, the rules of civil procedure seem almost to assist plaintiffs who make little more than assertions of bad faith. The rules typically require a plaintiff who is alleging a state of mind such as malice to provide full particulars.<sup>79</sup> That is, the plaintiff must allege which actions of the defendant were performed maliciously. The plaintiff need not explain the circumstances from which malice can be inferred,

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<sup>74</sup> *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229.

<sup>75</sup> S.O. 1965, c. 135, s. 13, which confers powers on the President of York University.

<sup>76</sup> *Freeman-Maloy*, *supra* note 73 at 410.

<sup>77</sup> (2006), 293 Sask. R. 6 (C.A.).

<sup>78</sup> *Ibid.* at 16; see also *Georgian Glen Development v. Barrie (City)* (2005), 13 M.P.L.R. (4th) 194 (Ont. S.C.J.), where Howden J. found that a municipality could be a "public officer" for the purposes of the tort.

<sup>79</sup> See e.g. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 25.06(8); *Court of Queen's Bench Rules*, Man. Reg. 553/88, Rule 25.06(11); and *Rules of Court of New Brunswick*, N.B. Reg. 82-73, Rule 27.06(9).

however, nor provide evidence of the alleged malice.<sup>80</sup> So, for example, a plaintiff claiming that a municipal council acted maliciously in making a planning decision need allege only that; it need not set out the basis from which the inference of malice should be drawn.

This is demonstrated by *Bellan v. Curtis*,<sup>81</sup> a class action brought after the collapse of the Crocus Investment Fund in Manitoba. The plaintiffs alleged that provincial employees were improperly shielding the Fund from investigation and compliance with securities regulations. In claiming misfeasance in a public office against the province, the plaintiffs alleged that the province was aware that its employees were improperly protecting the Fund, and aware that these actions were likely to injure investors. If these facts could be proved, they would satisfy the element of malice in the second “limb” of the misfeasance tort by showing that the actions were deliberately unlawful and the defendant knew that they were likely to injure the plaintiffs. Accordingly, Hanssen J. found that this was a sufficient pleading, and refused to strike out the cause of action against the province.

The relatively liberal test for malice at the pleadings stage was explained by the Ontario Court of Appeal in *Miguna v. Toronto (City) Police Services Board*.<sup>82</sup> The plaintiff in *Miguna* was a lawyer who was accused of sexual assault by some of his clients. He was acquitted on all charges, and subsequently brought a “galaxy” of civil claims, including misfeasance in a public office, against police, prosecutors and the provincial government.<sup>83</sup> His statement of claim, filed initially in 2004 and amended in 2006, was struck out on both occasions by lower court judges.<sup>84</sup> However, in 2008, the Court of Appeal reinstated most of the claim and allowed it to proceed.

One of the primary defects that had been cited by the defendants was that the plaintiff’s claim did not include sufficient particulars of malice, as required to support the claims in misfeasance in a public office and malicious prosecution. The motions judge, Spence J., had found the pleadings inadequate, using what the Court of Appeal described as an

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<sup>80</sup> Nevertheless, a plaintiff cannot simply allege that “the impugned conduct” was malicious; see *Hester v. Canada*, [2007] O.J. No. 4719 (S.C.J.) (QL), aff’d 2008 ONCA 634, [2008] O.J. No. 3557 (C.A.) (QL). Nor can the plaintiff state malice as a bald legal conclusion; see *Deep v. Ontario*, [2004] O.T.C. 541 (S.C.J.), aff’d [2005] O.J. No. 1294 (C.A.) (QL).

<sup>81</sup> (2007), 219 Man. R. (2d) 175 (Q.B.).

<sup>82</sup> 2008 ONCA 799, (2008), 301 D.L.R. (4th) 540.

<sup>83</sup> *Ibid.* at 544.

<sup>84</sup> The history of the pleadings can be found at 544-45 of the Court of Appeal’s decision, *ibid.*

overly critical approach to the pleadings and an overly narrow test for malice.<sup>85</sup> In correcting the lower court's error, the Court of Appeal stressed that the motion to strike is not the place to assess whether there is sufficient evidence to support the allegation of malice. Blair J.A. explained,

Whether the evidence supporting the material facts pleaded in the claim is direct or circumstantial cannot be determined at this stage of the proceedings. Indeed, whether malice is the only reasonable inference that can be drawn from the facts pleaded is not something that is readily determined at the pleading stage. So much depends upon the testimony of the witnesses and the inferences and nuances to be drawn from that evidence. *The proper test to be applied is whether it is plain and obvious that the material facts as pleaded could not lead to a finding of malice.*<sup>86</sup>

The Court of Appeal hence stated the test in the negative: the action should only be struck out if it is plain and obvious that malice *cannot* be found. This is a relatively pro-plaintiff test, and will result in striking out only in the rare cases where the plaintiff has not identified a malicious act or malicious actor.<sup>87</sup>

The generous interpretation of the rules of civil procedure as they pertain to malice in misfeasance claims is consistent with the more general principle that plaintiffs should have the opportunity to prove their claims in court. Further, once the plaintiff makes an allegation of malice, it becomes a relevant issue on discovery. This occurred in *D.G. Regan and Associates Ltd. v. Whitehorse (City)*,<sup>88</sup> where the plaintiff was claiming in misfeasance for city council decisions that were adverse to its business. The plaintiff had not provided any details of the alleged bad faith, but the Court granted the plaintiff's application to ask members of council, on discovery, why they voted the way that they did. Hence the discovery process can be used as a means of eliciting potential evidence of malice, even when it might appear to be a fishing expedition.<sup>89</sup>

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<sup>85</sup> *Ibid.* at 552.

<sup>86</sup> *Ibid.* [emphasis added].

<sup>87</sup> See *Deep v. Ontario*, *supra* note 80 (plaintiff failed to identify what powers were abused, and by whom); *Roeder v. Lang Michener Lawrence & Shaw*, 2005 BCSC 1784, [2005] B.C.J. No. 2830 (QL) (plaintiff failed to identify any unlawful conduct); *Country Plaza Motors Ltd. v. Indian Head (Town)*, 2005 SKQB 442, 272 Sask. R. 198 (plaintiff failed to identify unlawful conduct by individual actors); and *L.R.F. v. Hartlieb*, 2006 NSSC 3, (2006), 240 N.S.R. (2d) 246 (plaintiff simply described the defendants as "abusive" child welfare authorities).

<sup>88</sup> (2004), 5 M.P.L.R. (4th) 61 (Y.S.C.).

<sup>89</sup> See also *Commonwealth Marketing Group Ltd. v. Manitoba (Securities Commission)*, 2005 MBQB 256, [2005] M.J. No. 432 (QL); *Fletcher v. Barrett*, 2006 MBQB 14, [2006] M.J. No. 34 (QL); and *Reynolds v. Kingston (City) Police Services Board* (2007), 84 O.R. (3d) 738 (C.A.) [*Reynolds*].

Finally, even where allegations of malice are more specific, they tend to raise questions of credibility between the parties that cannot be resolved on motions to strike or applications for summary judgment.<sup>90</sup> In *McNutt v. Canada (Attorney General)*,<sup>91</sup> the plaintiff brought claims against various police officers and a Crown prosecutor for improperly subjecting him to a psychiatric evaluation. The plaintiff had been arrested on charges of theft and uttering threats. During processing, the police officers observed erratic, unstable and irrational behaviour by the plaintiff, and suggested in a written report to the Crown that he should be given a psychiatric evaluation. The Crown requested that the plaintiff be remanded pending his bail hearing under section 516 of the *Criminal Code*.<sup>92</sup> While there was discussion about the plaintiff's mental health by both the Crown and defence counsel, there was no specific order from the Provincial Court judge that the plaintiff undergo psychiatric assessment.<sup>93</sup> Instead, the Court acceded to the request under section 516, and ordered that the plaintiff receive medical treatment for injuries to his thumb.

Nevertheless, when the plaintiff was sent for treatment, the Crown prosecutor filled out a request for psychiatric assessment, noting the police officers' observations about his bizarre behaviour. The plaintiff was accordingly assessed by a psychiatrist, who concluded that he had no mental health concerns. The plaintiff was later released and acquitted of all charges. He then brought an action against the police and the Crown prosecutor, alleging conspiracy and misfeasance in a public office. He claimed for mental distress, as well as for violation of his liberty and privacy interests, and damage to his reputation. He alleged that the defendants ordered the psychiatric evaluation with the intention of injuring him, and of portraying him as mentally ill.

The Crown prosecutor brought a motion to have the action against her struck out, arguing that the mental element of the misfeasance tort could not be made out. She referred to Crown procedure, attested to by the regional Crown, of referring an accused for psychiatric evaluation under section 516 of the *Criminal Code*, without a court order.<sup>94</sup> The defendant argued that she had followed this procedure in good faith, and had

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<sup>90</sup> See *Reynolds, ibid.* Obviously, where the evidence is uncontroverted, and there is no evidential support for the allegations of bad faith, the action may be dismissed on summary judgment. See for instance, *Brains II Inc. v. Craig*, 2004 ABQB 376, [2004] A.J. No. 559 (QL) where there was no support for the plaintiff's allegations that the defendant's tendering process was deliberately unlawful.

<sup>91</sup> 2004 BCSC 1113, [2004] B.C.J. No. 1718 (QL) [*McNutt*].

<sup>92</sup> R.S.C. 1985, c. C-46.

<sup>93</sup> Normally, this would be ordered pursuant to section 672.11 of the *Criminal Code*.

<sup>94</sup> *McNutt, supra* note 91 at para. 20.

therefore not committed any intentional wrongdoing, as required to establish misfeasance in a public office. While Allan J. acknowledged that this argument might succeed on its merits at trial, she concluded that it was not a reason to strike out the action at the pleadings stage. McNutt's action was allowed to proceed.

The preceding discussion is not intended to argue that the above claims ought to have been struck out, or that they will not ultimately be successful. It is only to stress that bringing a claim for misfeasance in a public office may provide some strategic or procedural advantages to plaintiffs. Because the tort is currently in a state of doctrinal instability, the courts seem reluctant to strike out claims in their preliminary stages. Even where the plaintiff has little support for its allegations of malicious intent, the rules of civil procedure will rarely allow for early termination of the claim. Thus even if the plaintiff would not be successful at trial, the claim may persist long enough to encourage the defendant to settle.

#### *D) Providing Psychological Vindication or an Ombudsman Function*

For some plaintiffs, the primary benefit of bringing a claim for misfeasance in public office is that it adds colour to the claim and taints the defendant's conduct with an air of abusiveness or malice. Otherwise routine decisions about licensing or municipal planning appear more sinister if they are framed as public misfeasance. Indeed, after a successful misfeasance claim against prison officials in the recent Federal Court decision in *McMaster*,<sup>95</sup> plaintiff's counsel stressed the importance of holding government officials accountable through the misfeasance tort. He explained:

If we run into situations where people at city hall, or people in the provincial government, or people of the federal government start abusing our rights, or not seeing that we are properly served, ... [the tort of misfeasance in public office] is something that the average citizen can use to effect some sort of remedy.<sup>96</sup>

*McMaster* is noteworthy on various fronts, but particularly because it frames the defendant's actions solely in misfeasance, when they might conventionally have been described as negligence. The plaintiff, a federal inmate, has very wide feet. In accordance with a directive from the Commissioner of the Correctional Service of Canada, each federal inmate is entitled to one pair of running shoes each year. The plaintiff regularly requested extra wide shoes, and did so again in 2004. However, for some unknown reason,<sup>97</sup> the Acting Chief of Institutional Services at the prison

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<sup>95</sup> *Supra* note 6.

<sup>96</sup> Quoted in Schmitz, *supra* note 7 at 17.

<sup>97</sup> The Acting Chief did not provide evidence by affidavit or testimony. As a

repeatedly stalled in her attempts to procure the appropriate-sized shoes. She forced him to accept improperly-sized shoes, and insinuated that he was making a frivolous request. As a result, the plaintiff continued to wear his old, properly-sized shoes, which gave out while he was exercising, causing the knee injury for which he sued.

The action was brought by simplified procedure and was heard before Aalto, Prothonotary, who reviewed and applied the tests from *Odhavji Estate*. He found that the Acting Chief's actions were unlawful, since she was required by the directive to provide the plaintiff with shoes, and she deliberately refused to do so.<sup>98</sup> With respect to the malice requirement, the Prothonotary found that prison officials were aware that ill-fitting shoes could lead to foot ailments and injury and thus knew that their unlawful denial of properly-fitting shoes could cause harm to the plaintiff.<sup>99</sup> The Prothonotary's analysis of damages was rather scant, owing in part to the apparent lack of authority on damages for personal injuries occasioned by misfeasance in a public office. He assessed the plaintiff's pain and suffering at \$9,000, and reduced this by a third to reflect the plaintiff's contributory negligence in exercising while wearing worn-out shoes.<sup>100</sup>

The Crown unsuccessfully appealed the decision in *McMaster*.<sup>101</sup> Among other things, the Crown had argued that misfeasance in a public office should be reserved for "grave and intentional abuses of power."<sup>102</sup> While this argument may have held some weight historically, it is unlikely to be successful with respect to the modern version of the tort. There is no longer a need for targeted malice; all that is required is deliberately unlawful action that may foreseeably cause harm to the plaintiff. Since *Odhavji Estate*, the majority of claims for public misfeasance in Canada have involved questions of licensing or municipal zoning – hardly areas normally associated with grave abuses of power. According to the plaintiff's lawyer in *McMaster*, however, misfeasance in public office should be used more routinely to hold officials accountable in these situations: "What is really at stake here is not so much that [McMaster] got compensated, but the fact that he has taken the public service to task and exacted some sort of penalty for their not doing their jobs."<sup>103</sup>

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result, the Prothonotary drew the adverse inference that her evidence would not have supported the lawfulness of her actions; see *McMaster*, *supra* note 6 at para. 50.

<sup>98</sup> *Ibid.* at para. 48.

<sup>99</sup> *Ibid.* at paras. 55-56.

<sup>100</sup> *Ibid.* at para. 68.

<sup>101</sup> *McMaster* appeal, *supra* note 6.

<sup>102</sup> *McMaster*, *supra* note 6 at para. 57.

<sup>103</sup> Quoted in Schmitz, *supra* note 7.



The McMaster litigation suggests that misfeasance in a public office holds some promise in achieving psychological vindication for plaintiffs or, in other words, serving an ombudsman function. It may allow plaintiffs who feel mistreated by government officials the opportunity to bring that mistreatment to public attention and hold the officials accountable. While administrative or disciplinary procedures may be available, often they do not provide monetary compensation to complainants. Even worse, some administrative review processes may be thwarted by the same officials about whose conduct the citizen wishes to complain, as occurred in *O'Dwyer v. Ontario (Racing Commission)*.<sup>104</sup> The defendant had received allegations that the plaintiff race official had hidden ownership interests in a horse owned by his step-daughter. An employee of the defendant called the Rideau-Carlton Raceway, where the plaintiff worked, suggesting that, on account of the allegations, the plaintiff was not likely to be approved as a starter for the upcoming race season. As a result of this conversation, the plaintiff's name was excluded from the list of proposed officials, and he was not re-hired by the Raceway.

In the months that followed, the plaintiff and his solicitor contacted the defendant numerous times to refute the allegations against him and have the decision regarding his approval reversed. The applicable statute provided that a person aggrieved by a decision of the Racing Commission had a right to a hearing by the Commission.<sup>105</sup> However, the defendant insisted that no "decision" had been made, as no raceway had actually included him on a list for approval as a starter. The plaintiff was, thus, effectively cut off from the appropriate administrative review procedures.

The Court of Appeal had to decide whether the defendant's telephone call to the Rideau-Carlton Raceway and/or its subsequent unresponsiveness to the plaintiff's inquiries constituted an intentional illegal act sufficient to bring a claim in misfeasance. Rouleau J.A., for the Court, concluded that the initial phone call was not itself an illegal act; the defendant had legitimate concerns about the approval of the plaintiff as a starter, and was acting to pre-empt the problems that might arise if the raceway included the plaintiff in its application, which was already late.<sup>106</sup>

Nevertheless, the Court found that the phone call, in combination with the Commission's subsequent actions, was sufficient to complete the tort of misfeasance in a public office. Rouleau J.A. concluded that the initial phone call, while informal, was effectively a "decision" to deny the plaintiff approval as a starter for the race season. This was sufficient to

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<sup>104</sup> (2008), 293 D.L.R. (4th) 559 (Ont. C.A.) [*O'Dwyer*].

<sup>105</sup> *Racing Commission Act, 2000*, S.O. 2000, c. 20, s. 11(7).

<sup>106</sup> *O'Dwyer*, *supra* note 104 at 568.

trigger section 11(7) of the *Racing Commission Act*,<sup>107</sup> which provides the opportunity of a hearing to anyone who feels aggrieved by a decision of the Commission. Accordingly, the Commission's persistent denial that there had been a "decision" with respect to the plaintiff, and its refusal to review or explain the reasons for that decision, were a violation of the plaintiff's right to a hearing under section 11(7) of the *Act*. Having found that the Commission engaged in "unhelpful and misleading correspondence" with the plaintiff, Rouleau J.A. found it reasonable to conclude that "Commission officials were recklessly indifferent or wilfully blind as to the illegality" of their actions and their potential to harm the plaintiff.<sup>108</sup> This was sufficient to make out the tort, and the plaintiff was able to successfully claim for his lost wages.

Cases like *McMaster*, *O'Dwyer*, and *McNutt* suggest that actions for misfeasance in a public office may be an effective means by which to bring to light government conduct that runs roughshod over a citizen's rights or interests. While some actions might just as well be framed in terms of more established torts like negligence, the action for misfeasance is more apt to paint the government conduct as unfair, abusive or high-handed. This may not provide any tangible benefit to the plaintiff; however, it appears to provide enhanced psychological vindication for the plaintiff who believes that his rights have been infringed. It provides a means to hold defendants accountable, *qua* government actors, for misusing the powers that have been entrusted to them.

#### 4. Conclusion

The tort of misfeasance in a public office is emerging from obscurity to become a powerful tool against government officials in the twenty-first century. While it overlaps with several established torts, recent Canadian cases indicate that it has unique procedural, substantive, and psychological advantages. The elusive element of malice, along with a degree of doctrinal instability, make misfeasance a potentially difficult claim to strike out at the pleadings stage, thus prolonging litigation and encouraging efforts at settlement. In addition, it may be a more successful cause of action than negligence in certain situations, particularly where the official's duties involve weighing competing interests or the public good. Finally, with its connotations of abuse of power, misfeasance provides a degree of psychological vindication that other causes of action may lack.

Misfeasance in a public office continues to evolve, and it will be some time before its role in the broader framework of tort and administrative law

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<sup>107</sup> *Supra* note 105.

<sup>108</sup> *O'Dwyer*, *supra* note 104 at 572.

becomes entrenched. The cases discussed in this article provide a glimpse of what the misfeasance tort may achieve in the coming years. Perhaps the only thing that can be said with some certainty is that misfeasance in a public office will be pleaded on an increasingly frequent basis in the Canadian courts.