THE *ODHAVJI* DECISION: OLD GHOSTS AND NEW CONFUSION IN CANADIAN COURTS

MICHAEL BODNER*

The tort of misfeasance in public office was recently examined by the Supreme Court of Canada in Odhavji Estate v. Woodhouse. *While the case provided a statement on the law in this area, it also left many questions unanswered. This article lays out the factual background of the case, the elements of the tort as laid down by the Court and the tort's relationship with other aspects of Canadian tort law. Further, the author critically examines the ambiguities and additional problems that have arisen in the wake of the decision and how the lower courts have been dealing with the tort in subsequent cases. The author ultimately concludes that it is very likely that the Supreme Court of Canada will need to revisit this area of tort law in the years to come.*

Le fait de commettre une action fautive par un titulaire de charge publique vient d'être examiné par la Cour suprême du Canada dans Odhavji Estate c. Woodhouse. *Bien que le procès fût une déclaration de droit dans ce domaine, il a aussi laissé de nombreuses questions sans réponses. Cet article décrit la toile de fond de fait de l'affaire, les éléments du délit civil tels qu'établis par la cour et la relation entre le délit et d'autres aspects du droit de la responsabilité délictuelle du Canada. De plus, l'auteur examine de manière critique les ambiguïtés et les problèmes additionnels apparus suite à la décision ainsi que la manière que les tribunaux inférieurs ont traité les autres affaires semblables. L'auteur en vient à conclure qu'il est tout à fait vraisemblable que la Cour suprême du Canada doive revoir cet aspect du droit de la responsabilité délictuelle dans les années à venir.*

TABLE OF CONTENTS

I. INTRODUCTION 1061
II. *ODHAVJI ESTATE V. WOODHOUSE*: THE FACTS 1062
III. ELEMENTS OF MISFEASANCE IN PUBLIC OFFICE 1063
A. THE DEFENDANT MUST BE A PUBLIC OFFICER 1063
B. THE ACT/OMISSION MUST BE DONE IN THE DISCHARGE OF A DUTY OR POWER 1066
C. THE CONDUCT MUST BE UNLAWFUL 1068
D. DEFENDANT'S STATE OF MIND 1070
E. CAUSATION 1076
F. REMOTENESS 1077
G. DAMAGES 1078
H. PROXIMITY? 1080
I. DISHONESTY OR BAD FAITH 1082
IV. CONCLUSION 1083

I. INTRODUCTION

Action for misfeasance in public office are no longer rare. Actions attempting to use the tort have become more frequent, often going through the courts on points of pleading (that is, whether a cause of action has been made out).[1] In the last ten years, appellate courts in

* Third Year Law Student, University of Manitoba, Winnipeg, Manitoba.

1 Robert Sadler, "Intentional Abuse of Public Authority: A Tale of Three Rivers" (2001) 21 Aust. Bar Rev. 151 at 153.

England,[2] Australia[3] and New Zealand[4] have all attempted to define the elements of the tort. Though Canadian provincial courts have examined the tort's parameters on occasion,[5] until recently there was no definitive Canadian authority on misfeasance in public office. Now that the Supreme Court of Canada has released the unanimous *Odhavji Estate v. Woodhouse*,[6] lower courts must try to follow the blueprint of the tort described in Iacobucci J.'s *dicta*. Is the judgment clear and thorough enough to beget a unified Canadian approach to misfeasance in public office? How have Canadian courts interpreted and applied the decision?

This article examines how the Supreme Court of Canada's interpretation of misfeasance in public office, as found in the *Odhavji* decision, compares to other interpretations available in common law countries and how this interpretation fits within the general framework of Canadian tort law, notably negligence law. Special attention will be paid to the gaps and ambiguities in the *Odhavji* judgment, as well as the answers (and additional problems) that have surfaced in post-*Odhavji* decisions. The first part of the article will set out the facts and procedural history of the *Odhavji* decision in some detail, as it has become the central authority in Canadian misfeasance claims. The article will then enumerate each of the major components of the tort. For each component, the article will look first at other decisions, then at *Odhavji*, to see how Iacobucci J.'s analysis compares to other misfeasance judgments, and lastly at any post-*Odhavji* decisions that have dealt with that particular aspect of the tort. The article ultimately concludes that although *Odhavji* set out a comprehensible conceptual framework, the Court's desire to retain flexibility left us with more questions than answers. Naturally, this has created some confusion in the lower courts. The Supreme Court of Canada will likely have to revisit the tort again in the near future.

II. *ODHAVJI ESTATE V. WOODHOUSE*: THE FACTS

Manish Odhavji was fatally shot by a police officer. Police had been told that a certain bank was about to be robbed by the "Cherokee Bandits" (named after their trademark getaway vehicle), so a stakeout team was assigned. On 27 September 1997, a Jeep Cherokee arrived at the bank and a robbery ensued. Rather than try to stop the robbery in progress, the officers followed the Cherokee. The robbers drove to a nearby parking lot, where some of them, including the deceased, got into two other vehicles. As the deceased's car exited the parking lot, the police surrounded it; Odhavji got out, and while trying to flee he was shot twice by the officers. He died in a hospital shortly afterwards.

Since Odhavji's death may have resulted from criminal offences committed by police officers, the Special Investigations Unit (SIU) began their mandatory investigation[7] within hours of the shooting. Under the *Police Services Act*, police officers have a duty to

---

2 *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220 (H.L.) [*Three Rivers*].

3 *Northern Territory of Australia v. Mengel* (1995), 185 C.L.R. 307 (H.C.A.) [*Mengel*].

4 *Garrett v. Attorney-General*, [1997] 2 N.Z.L.R. 332 (C.A.) [*Garrett*].

5 See *e.g. Gerrard v. Manitoba and Muirhead* (1992), 81 Man. R. (2d) 295 (C.A.) [*Gerrard*]; *Uni-jet Industrial Pipe Ltd. v. Canada (A.G.)* (2001), 156 Man. R. (2d) 14 (C.A.) [*Uni-jet*]; *First National Properties Ltd. v. Highlands (District of)* (2001), 198 D.L.R. (4th) 443 (B.C.C.A.) [*First National*]; *Alberta (Minister of Public Works) v. Nilsson* (1999), 246 A.R. 201 (Q.B.); and *Wiche v. Ontario* (2001), 9 C.C.L.T. (3d) 72 (Ont. Sup. Ct. J.).

6 [2003] 3 S.C.R. 263 [*Odhavji*].

7 *Police Services Act*, R.S.O. 1990, c. P-15, s. 113.

"cooperate fully" with the SIU.[8] The SIU requested same-day questioning of the officers involved, pre-questioning segregation, medical releases (to enable the SIU to speak with any treating physicians) and surrender of shift notes, on-duty clothing and blood samples.

Most of these requests were not complied with in a timely manner. First, the interviews with the officers did not take place until three days after the shooting. Secondly, the officers defied the segregation request and met as a "crew" prior to the interview. Lastly, shift notes were not submitted until three days after the incident and thus could not be accorded any weight as independent recollections of the event. Despite these shortcomings, the SIU wrapped up its investigation and decided not to press charges against any of the officers.

The family, on behalf of the estate of the deceased and on their own behalf, sued nearly everyone involved in the shooting and the investigation. The police who shot Odhavji, the chief of police and the Police Services Board were all charged with wrongful death/negligence — none of the judgments (to date) relate to this claim. The family/estate also sued the officers who shot Odhavji, the officers who witnessed the shooting and the chief of police for breach of duty/misfeasance in public office in respect of the investigation. Furthermore, the chief, Police Services Board and province of Ontario were sued for negligent supervision in respect of the investigation. The plaintiffs claimed that their extreme frustration with the officers' conduct in the investigation caused the family to suffer major psychological damage (nervous shock). The defendant countered that the pleadings, insofar as the misfeasance and negligent supervision claims were concerned, disclosed no cause of action and moved to strike under r. 21.01(1)(b) of the Ontario *Rules of Civil Procedure*.[9] This argument over striking the pleadings went all the way to the Supreme Court of Canada, and it must be kept in mind that the Supreme Court of Canada only decided whether the case should be allowed to proceed (and not whether the plaintiff should actually win the case).

III. ELEMENTS OF MISFEASANCE IN PUBLIC OFFICE

A. THE DEFENDANT MUST BE A PUBLIC OFFICER

It almost goes without saying that before people can be sued for misfeasance in public office, it must be proved that they are "public officers." In an influential 1992 article, Australian scholar Robert Sadler noted that there has been surprisingly little judicial consideration of this requirement.[10] Typically, reference is made to *Henly v. Lyme Corporation*,[11] which offers the following definition:

> [I]f a man takes a reward ... whether it be in money from the crown, whether it be in land from the crown, whether it be in lands or money from *any individual*, — for the discharge of a public duty, that instant he becomes a public officer; and if by any act of negligence or any act of abuse in his office, any individual sustains an injury, that individual is entitled to redress in a civil action.[12]

---

8 *Ibid.*, s. 113(9).
9 R.R.O. 1990, Reg. 194.
10 Sadler, *supra* note 1 at 169.
11 (1828), 5 Bing. 91, 130 E.R. 995 (C.P.) [*Henly*].
12 *Ibid.* at 1001 [emphasis added].

This gets us little further than saying "public officers are people charged with public duties," which only begs the question of what exactly is a "public duty." We can tentatively say that that "public duties" are the obligations owed by an individual who works for the public as a whole rather than for an individual employer. This "employee," though not commonly conceived as such, must always try, in good faith, to act in the best interests of the public as a whole.

The above *dicta*, however, state that a "public officer" need not be a public employee *per se*; he/she can be paid by "any individual." How could a privately paid official possibly have a public duty? There would be no privity of contract between the public and the so-called "public official," and the duty of good faith that is crucial to misfeasance in public office would not exist. It therefore makes more sense to narrow the pool of potential defendants to those whose income comes from the public purse, either in part (for example, where part of the money comes from private donations and the rest from tax revenue) or in full.

It might be illuminating to consider who has been held a "public officer" in previous case law. Pre-eminent Canadian tort scholar Lewis Klar tells us that misfeasance actions have been brought against mayors, municipal officers, premiers, RCMP officers, police officers, attorney generals and cabinet ministers.[13] One Alberta case recently affirmed that some quasi-judicial tribunals, such as the Workers' Compensation Board, are not immune from the tort,[14] though each case will depend on the level of immunity granted in the governing legislation, whether the actions were *bona fide* and whether the actions were within their jurisdiction.[15] The tort is not limited to those in the upper echelons of government — it also applies to police and RCMP, whose actions largely take place in the "operational" sphere of government action.[16] Furthermore, it can lie against a public *body* acting collectively, as opposed to an individual, provided that a majority of the individuals within that public body were acting improperly (according to the other requirements of the tort).[17]

Robert Sadler wrote, "The defendant must have statutory powers. The misfeasance must occur during the purported exercise of those powers or in exercising ancillary common law powers."[18] In *Tampion v. Anderson*, the Victorian Supreme Court added that the office must be one the holder of which owes a duty to members of the public regarding how that power is exercised.[19] Thus we see that there must be some interplay between the powers given to the defendant and the duties they hold to members of the public. The powers given *give rise* to the duty. The powers given are not conferred for personal advantage, but for the public (or

---

13 Lewis Klar, *Tort Law*, 3rd ed. (Toronto: Carswell, 2003) at 291, n. 154.

14 See *e.g. Shuchuk v. Wolfert* (2001), 98 Alta. L.R. (3d) 346 (Q.B.) [*Shuchuk*]; in fact, the first major Canadian misfeasance in public office case, *McGillivray v. Kimber* (1915), 52 S.C.R. 146, upheld a claim for damages against a quasi-judicial tribunal.

15 *Dechant v. Stevens* (2001), 89 Alta. L.R. (3d) 246 at para. 72 (C.A.).

16 I refer to the policy/operational dichotomy in public negligence law, as stated in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) [*Anns*]; *Kamloops (City of) v. Nielson*, [1984] 2 S.C.R. 2.

17 *Jones v. Swansea City Council* (1989), 3 All E.R. 162 (H.L.) [*Jones*].

18 Robert Sadler, "Liability for Misfeasance in Public Office" (1992) 14 Syd. L.R. 137 at 143 [Sadler (1992)].

19 *Tampion v. Anderson*, [1973] V.R. 715 (Vict. S.C.).

at least a section of the public, though how large that section must be is unclear).[20] If the power is misused or the duty breached, liability follows.

In *Odhavji*, Iacobucci J. made no reference to who might be considered to be a "public officer," though each of his requirements describe the actions of a "public officer."[21] The classic *Henly* case[22] was listed in the cases considered, thus we can perhaps assume a fairly broad interpretation of "public officer" was intended.

Without clear guidance as to who will be considered a public officer, we cannot distinguish between which breaches of duty are actionable and which are not. Will the tort be applied as an alternative to negligence in medical cases?[23] What about reckless teachers or education administrators?[24] Will those who *delegate* the exercise of their statutory powers or duties be liable for the intentional acts of others?[25] How does vicarious liability apply if the public officer or delegate *knowingly* exceeded his or her jurisdiction?[26] These questions were left unexplored.

Since *Odhavji*, there has been no rigorous examination of this question. Though in most cases liability was asserted against those who clearly fall within the definition,[27] the problem was alluded to in *V.M. v. Stewart*[28] — a case dealing with a doctor who sexually assaulted 19 women between the years 1969 and 1996. They had complained to the College of Physicians and Surgeons (the College), but claimed that the College failed to discipline the doctor effectively and that the College was thus liable for negligence and misfeasance in public office. Unfortunately, the Supreme Court of British Columbia declined to decide whether the College was a "public official."[29] One can understand their hesitation: the College is not paid directly from the public purse (at least not entirely as some of their operating revenue comes from dues paid by doctors). Perhaps more to the point is the fear that labelling the College as "public officials" will set us on the slippery slope to recognizing *all* organizations that regulate and discipline members of a profession (including law societies) as public officials.

The British Columbia Court of Appeal's decision in the same case seemed to be less cautious insofar as the public official issue is concerned.[30] The Court examined the recent

---

20 *Jones*, *supra* note 17.

21 *Supra* note 6 at paras. 22–32.

22 *Supra* note 11.

23 J.K. Mason & G.T. Laurie, "Misfeasance in Public Office: An Emergent Medical Law Tort?" (2003) 11 Medical L. Rev. 194.

24 Duncan Fairgrieve, "A Tort Remedy for the Untaught? Liability for Educational Malpractice in English Law" (2000) 12:1 Child & Fam. L.Q. 31.

25 The question was considered in terms of negligence law of public authorities in *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, but has never been considered in a misfeasance context.

26 See *Racz v. Home Office*, [1994] 2 A.C. 45, in which the House of Lords held that vicarious liability would apply to the Crown even where the officer knowingly exceeded his jurisdiction.

27 For example, in *Granite Power Corp. v. Ontario* (2004), 72 O.R. (3d) 194 (C.A.) the defendants were government officials.

28 (2003), 229 D.L.R. (4th) 342 (B.C.S.C.) [*Stewart* (B.C.S.C.)].

29 *Ibid.* at para. 112.

30 *V.M. v. Stewart* (2004), 245 D.L.R. (4th) 162 [*Stewart* (B.C.C.A.)].

Supreme Court of Canada case *Finney v. Barreau de Quebec*,[31] in which liability was imposed on the Barreau de Quebec for failing to discipline one of its members. Though the Supreme Court of Canada used the *Civil Code of Quebec*,[32] Lebel J. *in obiter* wrote:

> The decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. The common law would have been no less exacting than Quebec law on this point.[33]

Despite Lebel J.'s gratuitous use of negligence terminology, the British Columbia Court of Appeal in *Stewart* held that *Finney*, minus the *Civil Code*, would fall under "the common law rubric of misfeasance in public office."[34] Though the Court did not explicitly make the connection, if the Barreau de Quebec could be a "public official" then the same should apply to the College. Since, however, the actual *dicta* of Lebel J. point so clearly to negligence, it is difficult to put much stock in the British Columbia Court of Appeal's *dicta*.

B. THE ACT/OMISSION MUST BE DONE IN THE DISCHARGE OF A DUTY OR POWER

The act complained of in *Odhavji* is an omission. Omissions have been held to satisfy the tort's requirements, provided there is a clear decision not to act.[35] In *Three Rivers*, Lord Millett stipulated three requirements for complaints relating to a failure to act: 1) there must be a duty to act; 2) the official must be aware of this and decide not to act; and 3) he does so realizing it will probably injure the plaintiff.[36] It is the *consciousness* of the decision that removes it from the realm of negligence.

Assume we have identified an individual who is clearly a public officer: is she potentially liable for *all* the acts or omissions done in the course of her tenure/employment? Should there not be some connection between the powers given and the duty breached? Police officers, for example, are given the power to detain people. Misfeasance in public office would clearly apply if the power to detain people was exercised maliciously or with knowledge that the detention was outside the actual power of the officer, but what of the officers' statutory duty in *Odhavji* to comply with the SIU investigation? How does a breach of that duty relate to the powers (such as the power of detention) that police officers are given? Should there not be a connection between the duty and the power?

In the Ontario Court of Appeal's analysis of the *Odhavji* case,[37] the claim for misfeasance was struck because, *inter alia*, there was no connection between the powers the police are given and their conduct during the investigation. In Canada, we do not have a tort of breach of statutory duty.[38] To hold the officers liable would effectively make all public officers liable

---

31 [2004] 2 S.C.R. 17 [*Finney*].
32 S.Q. 1991, c. 64 (C.C.Q.) [*Civil Code*].
33 *Supra* note 31 at para. 46.
34 *Stewart* (B.C.C.A.), *supra* note 30 at para. 19.
35 *Three Rivers*, *supra* note 2 at 1269.
36 *Ibid.* at 1275-76.
37 *The Estate of Manish Odhavji v. Woodhouse* (2000), 52 O.R. (3d) 181.
38 *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205.

for every knowing breach of statute that relates to their job, regardless of the intent of the statute or the relative importance of the duty within the general scheme of the act in which the duty is imposed. Moreover, according to the majority of the Ontario Court of Appeal, the officers' failure to cooperate was a breach of duty but *not* an improper exercise of executive/administrative power or authority; this was fatal to the claim in the Court of Appeal.[39] A mere breach of duty would not suffice — there must be an improper exercise of power, and the power must be of the executive/administrative type.

Should we distinguish between the unlawful exercise of a power and the breach of a duty (statutory or otherwise), as the Court of Appeal did in *Odhavji*? Should breaches of duty be left to negligence? Lewis Klar suggested that the distinction is warranted: "[A]n over-extension of the tort of misfeasance in a public office can clash with Canadian law's refusal to recognize a tort of breach of statutory duty and its restrictive attitude to negligence claims against public authorities."[40] Justice Iacobucci, on the other hand, concluded that there was no principled reason for the distinction — if the conduct is *deliberate*, the tort can apply to either intentional abuses of power or intentional breaches of statutory duties.[41] He quoted the judgment of the Australian High Court in *Mengel*, in which Brennan J. held, "Any act or omission done or made by a public official in purported functions of the office can found an action for misfeasance in public office."[42]

Thus, a public officer might owe no private law duty of care to an individual or group of individuals, but may nevertheless be liable for failing to comply with a statutory obligation, provided it is done deliberately (and, as we shall see, with an awareness that it will cause the plaintiff harm). While that awareness usually entails some proximity between the plaintiff and defendant, there is not necessarily enough proximity to establish a private law duty of care.[43] Moreover, there does not need to be a connection between the powers given and the duty breached when the actor is a "public official" — merely being a public officer appears to trigger liability when a law is deliberately breached and there is some consciousness of harm. This is consistent with the House of Lords' decision in *Jones v. Swansea City Council*,[44] in which the Lords said that a local authority would be liable for misfeasance if, for example, it maliciously refused to allow a change of use in a building (where the authority was the landlord and the source of its power to refuse was purely contractual, rather than statutory).

Can we therefore assume that all public officials have a duty to act in "good faith" that other actors do not have? Did the plaintiff in *Martel Building Ltd. v. Canada*[45] simply pick the wrong tort? Or does misfeasance in public office require more than what occurred in *Martel*, namely, hard bargaining by a public official during negotiations? The next requirements might help to answer some of these questions.

---

39 *Supra* note 36. Trying to define "executive" or "administrative" creates even more problems. Whatever the definition, the Court held that in this particular case the power was *not* executive/administrative.

40 *Supra* note 13 at 292.

41 *Odhavji*, *supra* note 6 at para. 30.

42 *Supra* note 3 at 355, quoted in *Odhavji*, *supra* note 6 at para. 20.

43 See *infra* Part III.H.

44 *Supra* note 17.

45 *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860 [*Martel*].

C. THE CONDUCT MUST BE UNLAWFUL

Obviously, there can be no liability for the valid, lawful exercise of power.[46] Government officials must be able to make policy decisions that, though they will benefit the majority, will also clearly harm the interests of other individuals or groups. The tort thus requires more than foreseen harm. But what kinds of conduct will be considered "unlawful"? According to Winfield and Jolowicz's leading English text on tort law:

> The tort has considerable reach, for there is no requirement that the conduct should be actionable in its own right: it covers non-actionable breach of statutory duty and a decision which is taken contrary to the requirements of natural justice.[47]

This is a broader conception of the tort than is found in most Canadian authorities since it includes procedural errors of administrative law (that are probably more likely to attract judicial review in Canada than damages).

Lord Hobhouse wrote that the unlawfulness of the act "may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose";[48] this was quoted with approval in *Odhavji*.[49] The three possible routes to unlawfulness, however, are far from equal. If the "improper purpose" happens to be intent to injure the plaintiff or a class of persons of which the plaintiff is a member, the rules are different. Where a person acts with the motive of injuring a person (what is sometimes called "targeted malice" or "category A"),[50] the conduct is automatically unlawful. No one has the authority or power to act out of spite as malice is *ipso facto* an abuse of jurisdiction.[51] Such cases are comparatively rare.[52]

Breaches of statutory duties are similarly *ipso facto* outside actors' jurisdiction, but are all breaches of statute equally unlawful? Is a breach of a statute that says "Thou shalt not do X" the same as "Thou shalt do X to the best of your abilities?" The end result might be the same (that is, the conduct becomes unlawful), but if the statute is of the second type it is harder to locate the point at which we can say that the statute has been breached. Do we look for substantial compliance? Again, *Odhavji* offered no guidance, even though the relevant statute is of the latter type. Perhaps guidance on this point is impossible, as each case will depend upon the wording of the relevant legislation. Still, it could be argued that *any* statute must be substantially breached as opposed to it merely being more likely than not that it was breached. Should liability for misfeasance ever become too commonplace, this control device remains available for the courts.

---

46 Sadler, *supra* note 1 at 168.

47 W.V.H Rogers, ed., *Winfield and Jolowicz on Tort*, 16th ed., (London: Sweet & Maxwell, 2002) at 281.

48 *Three Rivers*, *supra* note 2 at para. 124.

49 *Supra* note 6 at para. 24.

50 John Irvine, "Misfeasance in Public Office: Reflections on Some Recent Developments" (2002) 9 C.C.L.T. (3d) 26 at 26.

51 Sadler (1992), *supra* note 18 at 148.

52 Irvine, *supra* note 50 at 30.

A recent case decided by a three-judge panel of the Ontario Superior Court of Justice, *Mitchell Estate v. Ontario*,[53] demonstrated the connection between the previous requirement that the act/omission must be done in the discharge of a duty or power and the requirement that the act be unlawful. The plaintiffs complained that their infant had not received proper medical treatment and consequently died, in part because of funding cuts and restructuring, and sued the former Premier, Health Minister and other ministry employees for negligence and misfeasance in public office. The misfeasance claim was struck because, *inter alia*, there was no statutory *duty* or *power* that necessitated funding hospitals.[54] The plaintiffs countered that the Health Minister had a duty under the *Canada Health Act*,[55] but the Court insisted that the *Act* only sets out an objective; the Minister therefore had only a discretion, not a duty.[56] Though the federal government is able to impose financial sanctions upon provinces that fail to meet the *Act*'s criteria, the Court emphasized that these were funding considerations only and that the province had not acted illegally.[57] This was justified with reference to s. 4 of the *Act*, which describes the purpose of the *Act*: "to establish criteria and conditions in respect of insured health services and extended health care services provided under provincial law that must be met before a full cash contribution may be made."

The plaintiffs also tried to use international law instruments as a basis for finding the defendants' conduct illegal, arguing that the conduct was against the spirit of some of Canada's international obligations. Unfortunately, they did not plead any specific instruments nor did they refer to any particular provisions; not surprisingly, the Court dismissed the argument. The Court did, however, caution that any such argument will face another problem: international instruments signed and/or ratified by the executive are not binding upon courts. In the past, Canadian courts have frequently dismissed international obligations as non-binding.[58] Furthermore, the Court warned that, *at most*, ignoring international obligations might warrant judicial review but ignoring international instruments will not establish the necessary bad faith or awareness necessary for misfeasance in public office.[59]

Without a clear statutory duty, one might try the third possible route to finding behaviour unlawful for the purposes of the tort — acting in excess of jurisdiction. Of course, there are complications with this as well: how far outside of the jurisdiction must the actor go before the act is unlawful? If one public officer fills in for another as a personal favour, does he assume liability in misfeasance for any harm that he had foreseen? In Iacobucci J.'s discussion of "category A" in *Odhavji*, he initially described it *only* in terms of intent to injure the plaintiff.[60] Later, however, he wrote:

---

53 (2004), 242 D.L.R. (4th) 560 (Ont. Sup. Ct. J.) [*Mitchell*].

54 *Ibid.* at para. 39.

55 *Canada Health Act*, R.S.C. 1985, c. C-6.

56 *Mitchell*, *supra* note 53 at para. 40.

57 *Ibid.* at para. 42.

58 See *e.g. Ahani v. Canada (A.G.)* (2002), 58 O.R. (3d) 107 (C.A.), decided in contravention of the UN *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 302; *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, decided in contravention of the UN *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, UN GAOR, Supp. No. 51, UN Doc. A/39/51 (1984) 197.

59 *Mitchell*, *supra* note 53 at para. 43.

60 *Odhavji*, *supra* note 6 at para 22.

> In category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, *such as* deliberately harming a member of the public.[61]

Thus, although "category A" is limited to acts done with *intent* to injure, we see how broad the idea of acting in excess of jurisdiction could be. Any "improper purpose," whatever that might entail, and perhaps even *any* breach of statute, might qualify as "unlawful" for the purposes of this tort. Is there therefore a requirement for the Crown to bargain in good faith? Can it intentionally breach a contract that has turned out to be disadvantageous? While the vast majority of cases will probably be clear-cut, there is a great deal of ambiguity at the edges.

D. DEFENDANT'S STATE OF MIND

Misfeasance in public office is an intentional tort; liability therefore requires the defendant to have had a certain state of mind. As Lord Steyn noted in *Three Rivers*,[62] quoting legal scholars Winfield and Jolowicz, misfeasance is therefore an "exception to the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will not make him liable."[63] Which state of mind is required depends upon which type of unlawful conduct applies. With "category A's" targeted malice, no more than proof of intent to injure is required because it is *assumed* that public officers know they do not have jurisdiction to act out of such spite. Furthermore, because of the very nature of targeted malice, the defendant must have been aware that the act would likely cause the plaintiff harm since that is what he intended.[64] The actor's *motive* takes the act outside her jurisdiction (and into the realm of tortious liability), thus the courts will only find targeted malice when it is readily apparent.[65] Also, as the British Columbia Supreme Court noted recently in *D.E. (Guardian ad litem of) v. British Columbia*, since the defendant in category A would have, but for the malice, been acting *within* her powers, the threshold for dishonest intent is higher than it would be in "category B."[66]

It is because of the implications of the actor's purpose that courts often distinguish between officials who *would* have had the power to do the act but for the improper purpose, and those who have knowingly exceeded their jurisdiction.[67] If X has the power to refuse licenses, then courts must be very careful about imputing targeted malice. But what if X *does not* have the power to refuse licenses and does so anyway out of a desire to harm the plaintiff, knowing that the act is unlawful and probably harmful to the plaintiff? Should we not

---

61 *Ibid.* at para. 23 [emphasis added].

62 *Supra* note 2 at para. 11.

63 *Winfield and Jolowicz on Tort*, 15th ed. (London: Sweet & Maxwell, 1998) at 55, quoted in James Bailey, "Misfeasance in Public Office: The Tort Defined" (2001) 16 B.F.L.R. 317 at 322.

64 The possibility of a person being injured by necessary implication in a targeted malice case (where the target of spite's loss will generally cause another's loss by necessary implication) has never been raised.

65 *First National*, *supra* note 5; malice was clearly present in *Gerrard*, *supra* note 5.

66 (2003), 18 C.C.L.T. (3d) 169 at para. 93.

67 Irvine, *supra* note 50.

distinguish between those who would have had the power (again, but for their purpose) and those who do not? Are both acts *equally* wrongful?

Since both acts would fall within Iacobucci J.'s description of "category A" in *Odhavji*, one would have to presume his answer is "yes." Although Iacobucci J. uses the terms "category A" and "category B," the categories in his model have nothing to do with whether or not the power would have been held. If there is intent to injure, one can bypass the need to prove awareness of unlawfulness and awareness of harm to the plaintiff. Since no one has the authority to act maliciously, it makes little or no difference what the official *could* have done once she has acted with intent to injure. Though this makes some sense, a nagging feeling persists that perhaps the age-old distinction was warranted. The officer who acts with intent to injure *and* with knowledge that the act was far outside her jurisdiction (even if done for a proper purpose) has behaved even worse than one who would have had the power but for the intent.

On the other hand, as the charges become more serious, one must remember that we are in the borderlands between tort and criminal law; the charges could ruin a public official's career, yet tort law does not give the same procedural safeguards that criminal law affords an accused. In any "category A" case, courts must exercise great caution before finding intent to injure — once the intent is established, there is very little else for the plaintiff to do. Whether the defendant actually had the power is relevant, since a lack of power can make the act even more repugnant. It is therefore an issue to be taken into account when assessing damages, but it should not change any of the actual requirements of the tort.

In *Odhavji*, Iacobucci J. never used the word "malice" — "category A" involves "conduct that is specifically intended to injure a person or a class of persons."[68] By avoiding the term "malice," Iacobucci J. deftly avoided having to define malice. In *Roncarelli v. Duplessis*, Rand J. noted that "malice ... is simply acting for a reason and purpose knowingly foreign to the administration."[69] Though an improper motive will always make the act *ultra vires*, there may be no liability under Iacobucci J.'s formulation of "category A" without intent to injure.

When the defendant has not acted out of targeted malice, the plaintiff must prove that the defendant *knowingly* exceeded his jurisdiction in so acting, and also that the defendant was *aware* that harm would befall the plaintiff as a result of this act. This is "category B."[70] According to most authorities, including Iacobucci J., recklessness or wilful blindness in terms of knowledge of a circumstance (that is, that the act was outside the defendant's jurisdiction) will suffice for the first step in "category B."[71] Lord Steyn remarked that it was "settled law" that recklessness as to consequences will also suffice for the second step (harm to the plaintiff);[72] this was affirmed in *Odhavji*.[73]

---

[68] *Supra* note 6 at para. 22.

[69] [1959] S.C.R. 121 at para. 42 [*Roncarelli*].

[70] Irvine, *supra* note 50 at 27 and *Odhavji*, *supra* note 6 at para. 22.

[71] *Three Rivers*, *supra* note 2 at paras. 133, 18; *Mengel*, *supra* note 3, Brennan J.; *Rawlinson v. Rice*, [1997] 2 N.Z.L.R. 651 (C.A.); *Odhavji*, *ibid.* at para. 25, quoting *Uni-jet*, *supra* note 5.

[72] *Three Rivers*, *supra* note 2 at 1232.

[73] *Supra* note 6 at para. 38.

The problem with recklessness is that the Supreme Court of Canada has never elucidated what "recklessness" means in *tort* law. Assuming, perhaps wrongly, that there is no difference between recklessness in tort law and recklessness in criminal law, we are still left with a host of questions. Since Iacobucci J. referred specifically to "subjective recklessness,"[74] can we safely assume that some kind of advertence to a risk is necessary? This is, after all, an intentional tort. Justice Iacobucci repeatedly emphasized that "inadvertence or negligence will not suffice,"[75] nor will foreseeability alone.

The language, however, is somewhat confusing. In the same paragraph, Iacobucci J. stated first that "the defendant must have been *aware* that his or his conduct was unlawful,"[76] then that "the officer must deliberately engage in conduct that he or she *knows* to be inconsistent with the obligations of the office."[77] "Knowledge" and "awareness" are used interchangeably throughout the judgment. The difference that Iacobucci J. ignored is a matter of degree — if "knowledge" is required, then the plaintiff must prove an advertence that is tantamount to knowledge. Awareness, on the other hand, suggests that the tort would be made out where one merely had a fleeting consideration of the risk. A defendant might be "aware" of a risk of a circumstance or consequence and then cognitively dismiss the risk as being negligent or even impossible. Is this the same as "knowing"? How probable must the risk be in the eyes of the defendant, and how do we separate terms such as "impossible," "unlikely," "likely," "probable" and "substantially certain"?

Perhaps foreseeing this problem, in his discussion of recklessness as to the plaintiff's harm, Iacobucci J. elucidated: "[T]he defendant must have been subjectively reckless or wilfully blind to the possibility that harm was a *likely* consequence of the alleged misconduct."[78] Choosing a rigid adjective such as "likely," though probably used in the spirit of making the law as clear as possible, ended up doing a disservice to the flexibility that Iacobucci J. had carefully been crafting. Recklessness is more than simply advertence to a risk preceding harm — there is an *objective* element in recklessness. The risk must be one that is unreasonable to take in the circumstances. According to Smith and Hogan's leading English criminal law text:

> Whether it is justifiable to take a risk depends on the social value of the activity involved relative to the probability and the gravity of the harm which might be caused. The question is whether the risk was one which a reasonable and prudent man might have taken.[79]

Thus, a public official might be horrifyingly reckless if he adverts to a risk that has even a *one percent* chance of coming true. Lord Hope's judgment in the House of Lords' revisitation of *Three Rivers* in 2001 is more ambiguous but far more sensible: he rejected the need for

---

74 *Ibid.*
75 *Ibid.* at paras. 26, 37.
76 *Ibid.* at para. 28 [emphasis added].
77 *Ibid.* [emphasis added]. See also para. 32.
78 *Ibid.* at para. 38.
79 J.C. Smith & Brian Hogan, *Criminal Law*, 7th ed. (London: Butterworths, 1992) at 60.

"likely" or "probable" loss, as these are a "matter of fact and degree to be determined by a judge at trial."[80]

Three Canadian cases, one decided prior to *Odhavji* and two decided subsequent to it, have attempted to elucidate how recklessness functions within misfeasance in public office. In the pre-*Odhavji* judgment, *Shuchuk v. Wolfert*,[81] a claim against the Workers' Compensation Board was allowed to go forward. The defendants had tried to get the plaintiff's workers' compensation claims disallowed even though there was objective evidence that the plaintiff's disabilities were genuine. The Alberta Court of Queen's Bench confirmed that there must be subjective advertence to risk, but added that it must be "recklessness so flagrant that blind-eye knowledge will be imputed to the public officer."[82] Since there had been steps taken in reckless disregard of specific warnings, the Court was willing to infer not only *awareness* of risk but imputed *knowledge* of the true state of affairs, which therefore served as a basis for finding bad faith. Thus, although the Court wrote that subjective recklessness is the proper test, in practice it appears that an abundance of objective evidence could suffice — the Court can say "you must have known" and impute the knowledge accordingly.

If Canadian civil courts are going to adopt criminal law concepts such as wilful blindness, it would be wise to clarify exactly how the concept operates. Many courts consider wilful blindness in terms of *either* criminal circumstances (such as deliberately not investigating whether or not your sexual partner is consenting) or criminal consequences (such as ignoring the possibility that this bottle I am throwing out the window could hit someone on the sidewalk below). If wilful blindness is going to make any sense, however, we need to confine it to knowledge of specific circumstances because, as English criminal law scholar Glanville Williams sagely pointed out, one cannot *wilfully* suppress consciousness of a risk without being aware of it.[83] Thus, if my thrown bottle hits someone on the street, it should be irrelevant that I tried to block the thought out of my mind — as long as the thought occurred to me before throwing it, I have adverted to the risk. Wilful blindness should be used to impute knowledge only where the crime or tort involves the knowledge of a certain fact. If the wrongdoer considered the possibility of the fact existing (for example, that some of the movies he is selling are criminally obscene) and decided not to investigate to avoid a charge (of "knowingly selling obscene material"), the law will *impute* the knowledge regardless of the wrongdoer's lack of actual knowledge.[84] It is only in this limited sense that knowledge should ever be imputed due to wilful blindness; thus, in misfeasance claims, wilful blindness should only be used to impute knowledge of the illegality in "category B." It should never be used to infer knowledge of consequences, that is, knowledge of the harm suffered by the plaintiffs. With consequences, the plaintiff has either considered the risk or she has not. A risk that carries particularly nasty consequences and is of no potential benefit to society will

---

80 *Three Rivers District Council v. Bank of England (No. 3)*, [2001] 2 All E.R. 513 at 527; though Lord Hope later muddied the waters immeasurably by stating that a *lack* of an honest belief in the conduct's lawfulness will ground recklessness, which flies in the face of most theories of "subjective recklessness" (since lacking belief is a species of inadvertence).

81 *Supra* note 14.

82 *Ibid.* at para. 37.

83 Glanville Williams, "Recklessness Redefined" (1981) 40 Cambridge L.J. 252 at 260.

84 See *R. v. Jorgenson*, [1995] 4 S.C.R. 55.

require only awareness for a defendant to be reckless; a risk that carries comparatively milder consequences and has some social benefit will need to be much more likely before taking the risk will be considered reckless.[85] There is no room for imputation.

The second case, *CADNET Productions v. Canada*,[86] suggests that the test for recklessness in tort law is actually much stricter than the one used in *Shuchuk*.[87] An agent of the defendant Human Resources Development Canada (HRDC) mistakenly froze the plaintiff's corporate account. The plaintiff had failed to reimburse HRDC for an overpayment of employment insurance benefits he had received. The agent had no right to freeze the account — he had completely overlooked the separate legal personality of the corporation. Though the frozen account caused the plaintiff inconvenience, it was an honest mistake and the plaintiff did not sue. Another agent was then assigned to the case and made precisely the same mistake as the first agent, freezing the plaintiff's corporate assets and causing more inconvenience and frustration. The plaintiff sued for misfeasance and negligence, but the Federal Court of Appeal held that the defendant's actions fell within the lacuna in *Odhavji* — conduct that was negligent but inadvertent, or a mistaken but honest belief.[88] Despite the objective evidence, the Court was unwilling to impute any knowledge.

A similar situation had occurred in a major Canadian criminal law case, but the Supreme Court of Canada came to the opposite conclusion regarding recklessness. In *R. v. Sansregret*,[89] a man beat and raped his girlfriend; she feigned consent to sex during the beating to placate him. Since consent is subjective to the *complainant*, the accused could have been charged with rape, though a defence of mistaken but honest belief in consent would have been available. No charges were laid for the first rape, but two weeks later the same events occurred, with somewhat escalated violence. Again the victim feigned consent, and after initial suspicions, he claimed to have believed her performance. The accused thus pleaded that he had an honest but mistaken belief. In an unanimous decision, the Supreme Court of Canada held that the similarity of the second event to the first meant that the accused *must have* either known the consent was feigned or been wilfully blind.[90] Knowledge was therefore imputed. The decision has since been criticized,[91] as the Court's reasoning seems to stem from an objective standard: Sansregret should have known, therefore he must have known.

In *CADNET*,[92] the Federal Court of Appeal could have followed *Sansregret* but chose instead to uphold a more rigorously subjective test. Admittedly, the situation differed in many respects, notably in that the two mistakes were committed by two different agents, but the identity of the organization or principal is the same. One could easily assume that the first agent's actions would be on file and that the second *must* have been warned in some fashion, perhaps to explain why he was taking over the file. Unlike the Supreme Court of Canada in

---

85 Michael Bodner, "Recklessness: Eliminating the Risk" [forthcoming 2005, available from author].

86 (2004), 25 C.C.L.T. (3d) 297 [*CADNET*].

87 *Supra* note 14.

88 *Ibid.* at para. 5.

89 [1985] 1 S.C.R. 570 [*Sansregret*].

90 *Ibid.* at para. 25.

91 See *e.g.* Allan Manson, "Annotation to *R. v. Sansregret*" (1985), 45 C.R. (3d) at 194–95.

92 *Supra* note 86.

Sansregret, however, the Federal Court of Appeal refused to make that logical connection in the absence of any evidence to that effect. Courts will typically need to make some inferences even in subjective tests, and though it is a little surprising that the Court did not do so here, it is worth pointing out that this case was *not* brought forward on a point of pleading — this was a decision from the actual trial. Thus, the Court might have drawn some inferences, perhaps enough to let the issue go to trial, but here the inferences were not enough to attract liability. Whether other courts will follow *CADNET*'s caution remains to be seen.

From the perhaps overly generous (to the plaintiff) decision in *Shuchuk* to the more careful approach in *CADNET*, we now come to the third recklessness case. In *Stewart* (B.C.C.A),[93] the British Columbia Court of Appeal affirmed a test for recklessness that I would argue is far too *restrictive*. The Supreme Court of Canada had struck a claim for misfeasance in public office, holding that, because of the way the pleadings were worded, it was plain and obvious that the claim would fail.[94] In paragraph 53 of their statement of claim, the plaintiffs had described the College of Physicians and Surgeons as "reckless and grossly negligent" in failing to adequately investigate the claim; later, they added that the College was also "recklessly indifferent to the consequences for the plaintiffs flowing from its failure to investigate."[95] Although recklessness had thus been pleaded for both the illegality of the act and the consequences (a "category B" claim), Smith J. held:

> [F]or this tort to be established, proof either that the public official intentionally exercised his or her power in order to injure the plaintiff, or that the public official acted knowing that he or she had no power to do the act and that the conduct would probably injure the plaintiff. Proof of "reckless indifference" on its own does not suffice.[96]

It is not clear whether Smith J. meant to say that recklessness will *never* suffice in "category B" claims (in which it has been overruled by *Odhavji*,[97] and the Supreme Court of Canada and Court of Appeal decisions are wrong in law). Perhaps Smith J. was assuming that the plaintiffs had only pleaded objective recklessness — in other words, that the inadvertence goes beyond mere negligence into recklessness, though it remains only inadvertence.

The language of the pleadings, however, was not specific enough to rule out the possibility of subjective recklessness. Though Smith J. wrote, "[p]roof of 'reckless indifference' on its own does not suffice,"[98] she never explained why not. I would argue that "reckless indifference" should suffice, since one cannot be indifferent to something without being aware of it. If the defendant was aware of the illegality or consequences, then a subjective test could have been satisfied, depending on the level of awareness necessary to establish recklessness. As argued earlier, the test for recklessness should be flexible and take into account factors such as the social value and the potential harm of the activity. Where the consequences are severe — as I would argue, they are in a case where the consequences are continued sexual assaults by a rogue doctor — a state of aware indifference could be enough

---

93 *Stewart* (B.C.C.A.), *supra* note 30.
94 *Stewart* (B.C.S.C.), *supra* note 28 at para. 112.
95 *Ibid.* at para. 5.
96 *Ibid.* at para. 112.
97 *Odhavji*, *supra* note 6 at paras. 25 (illegality) and 38 (consequences).
98 *Stewart* (B.C.S.C.), *supra* note 28.

to satisfy a subjective test for recklessness. It would not be enough to impute knowledge, however, but if recklessness must always be equivalent to knowledge in tort law (instead of confining imputation, as I have suggested, to cases of true wilful blindness), then the courts are in for a very long and confusing ride. Recklessness is meant to be a substitute for intent, not a substitute for knowledge. Canadian courts will need to reconcile *Shuchuk*, *CADNET* and *Stewart* (B.C.C.A.) and find an approach to *mens rea* in tort that is neither too eager to impute knowledge (*Shuchuk*) or too reluctant to allow recklessness to be a component of the tort (*Stewart* (B.C.C.A.)). A more balanced approach that borrows from the accumulated wisdom of criminal law scholars should be adopted.

The final question regarding state of mind is whether the defendant must advert to the risk of harming the *individual* plaintiff, as opposed to the plaintiff as a member of an identifiable group or class. Orthodox recklessness as to consequences to the plaintiff can involve either adverting to the risk that the plaintiff herself will be harmed *or* adverting to the risk that a "person of a class of which the plaintiff was a member" might be harmed.[99] Although Iacobucci J. in *Odhavji* refers to an ascertainable class when describing "category A" (intent to injure), during the remainder of the judgment he refers exclusively to harm to the *plaintiff* only.[100] Is there any principled *reason* for this distinction? If the distinction was intentional, it would amount to a considerable narrowing of the tort.

E. CAUSATION

Before damages can be awarded, it must be proved that the defendant's deliberate, unlawful act *caused* the plaintiff's loss. Even in a case of targeted malice, there must be a nexus between the act and the loss. This is not always easy to prove. In an influential article that predated the recent boom in misfeasance cases, English scholar Jeremy McBride noted that the refusal of a licence may fail the "but for" test:

> Since the principle which directs an award of damages in tort cases is *restitutio in integrum*, how sure can one be that the applicant would have had the licence if the tort had not been committed? Although the licence may have been wrongfully refused, it may still have been refused as a matter of discretion.[101]

The key to causation, McBride hypothesized, might lie in the amount of discretion the public official held — where granting of a licence is practically certain upon completion of the licencing requirements, "[i]t would be difficult to say that the refusal was too remote a cause."[102]

Causation requirements do not appear to differ between "category A" and "category B," nor does there seem to be any distinction based on whether or not the officer actually held the power exercised. Should a public officer's deliberate exceeding of his jurisdiction be regarded as sufficient to create a causal link to the loss? Is it an egregious enough event that we can say with confidence that the usurpation of powers caused the plaintiff's loss? Very

---

[99] See *e.g. Three Rivers*, *supra* note 2 at para. 29.

[100] *Odhavji*, *supra* note 6 at *e.g.* paras. 22, 32.

[101] Jeremy McBride, "Damages as a Remedy for Unlawful Administrative Action" (1979) 38 Cambridge L.J. 323 at 335.

[102] *Ibid.*

little is said about causation in *Odhavji*, apart from the fact that Iacobucci J. was not willing to delve too deeply into causation questions in a motion to strike.[103] Unfortunately, none of the cases that have followed *Odhavji* deal with causation in any detail.

F. REMOTENESS

According to Winfield and Jolowicz, the plaintiff's loss must arise *directly* from the plaintiff's act.[104] Moreover, the harm to which the defendant adverted must be of the type suffered by the claimant.[105] This is confirmed by Lord Steyn's judgment in *Three Rivers*: "[The] intent required must be directed at the harm complained of, or at least to harm of the type suffered by the plaintiffs."[106] There is obviously some flexibility here concerning "types" of harm (given the inherent elasticity of the remoteness doctrine), yet remoteness has been applied in misfeasance cases.

For example, in *Tang Nin Mun v. Secretary for Justice*,[107] the facts resembled the facts in *Odhavji*. A hawker had attacked a neighbouring and presumably rival hawker with a knife. A policeman sought to reconcile the families and took some questionable steps in an effort to downplay the events: he got the victim's family to sign blank sheets of paper and later invented statements that ultimately led to the attacker being charged with the comparatively minor offense of "wounding." The family claimed to have suffered nervous shock as a result of the officer's misfeasance. The Hong Kong Court of Appeal, referring to Lord Steyn's *dicta* quoted above, dismissed the claim as disclosing no reasonable cause of action. The officer could not have foreseen that this *type* of harm would have resulted from his acts.

Justice Iacobucci, on the other hand, was willing to let the Odhavji family have their day in court. He warned them that "they may well face an uphill battle,"[108] but wrote that the claim should be allowed to go forward. Unfortunately, he did not refer to remoteness in the judgment, and the *extent* to which courts will insist on direct consequences remains unknown, as is the *specificity* of the consequences. Do the plaintiffs need to prove that the officers foresaw nervous shock (that is, genuine psychological damage) as a consequence of their acts and omissions, or do the plaintiffs only need to prove foresight of mental harm, distress, *etc.*? Will courts take the route of the House of Lords in the negligence case *Hughes v. Lord Advocate*[109] and ignore the specifics so long as injury is foreseeable? Will courts use the negligence technique that Canadian tort scholar Phil Osborne calls "linkage" and "divide the causal sequence into a number of discrete steps each of which is a readily foreseeable consequence of the preceding step"?[110]

---

103 *Odhavji*, *supra* note 6 at para. 41.
104 *Supra* note 47 at 281.
105 *Ibid.*
106 *Supra* note 2 at para. 29.
107 [2000] H.K.C. 749 (Hong Kong C.A.).
108 *Odhavji*, *supra* note 6 at para. 42.
109 [1963] A.C. 837.
110 Phil Osborne, *Law of Torts*, 2d ed. (Toronto: Irwin Law Book, 2003) at 89, citing *Assiniboine South School Division No. 3 v. Greater Winnipeg Gas Co.* (1971), 21 D.L.R. (3d) 608 (Man. C.A.), aff'd [1973] S.C.R. vi.

Also, is there any difference here between "category A" and "category B"? If a public officer acts with an intent to injure someone, anticipating result X, is it really equitable to deny the plaintiff a remedy if the result happens to be Y? Even if the claim relates to "category B" and is thus less overtly malicious — should it matter *which* result the defendant foresaw, so long as the conduct is deliberate and unlawful? The courts must locate a balance that takes into account both the need for appropriate compensation to injured plaintiffs as well as the need to spare those public officials who could not have foreseen the harm that ultimately occurred.

G. DAMAGES

As scholars Mads Andenas and Duncan Fairgrieve pointed out, given the difficulties in collecting damages for economic loss, it is hardly a coincidence that most misfeasance in public office cases tend to be ones in which damages for economic loss are claimed.[111] Perhaps because of the impression that the other requirements of the tort are able to keep the tort from rushing out of the flood gates, the spectre of unlimited liability (à la *Ultramares Corporation v. Touche Niven & Co.*)[112] has not prompted the courts to disallow claims for pure economic loss. Without any express guidance, one is probably safe to assume that all types of damages are recoverable, though whether damages for physical injury are easier to obtain is unknown. The opportunity to explore the issue in *Stewart* (B.C.C.A.), a misfeasance claim for physical injury alone, was unfortunately lost when the Court struck the misfeasance claim from the pleadings.

Jeremy McBride noted that another potential issue in misfeasance claims is exemplary or punitive damages.[113] In the words of Lord Holt C.J., "if public officers will infringe men's rights, they ought to pay greater damages than other men to deter and hinder others from the like offences."[114] The Supreme Court of Canada's decision in *Whiten v. Pilot Insurance Co.*[115] suggested a multi-faceted approach, based on a theme of proportionality, to punitive damages that takes into account all of the circumstances of the case. Many claims for misfeasance in public office, however, and especially the "category A" claims, will satisfy even the strictest *Rookes v. Barnard* test for punitive damages ("oppressive, arbitrary or unconstitutional action by the servants of government").[116]

Punitive damages in tort, however, do not require as strict a test as punitive damages in contract law, as there is no need for a separate actionable wrong.[117] Moreover, since misfeasance in public office is an intentional tort, the likelihood of the plaintiff being awarded punitive damages are higher, especially where the conduct is "particularly malicious and high-handed."[118] They will only be awarded, however, if the defendant has not been

---

111 Mads Andenas & Duncan Fairgrieve, "Misfeasance in Public Office, Governmental Liability, and European Influences" (2002) 51 I.C.L.Q. 757 at 777.

112 (1931), 174 N.E. 441 (N.Y.C.A.).

113 McBride, *supra* note 101 at 336.

114 *Ashby v. White* (1704), 14 St. Tr. 695, quoted in McBride, *ibid.* at 341.

115 [2002] 1 S.C.R. 595 [*Whiten*].

116 *Rookes v. Barnard*, [1964] A.C. 1129 at 1226 (H.L.).

117 See *e.g. Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R 1085.

118 Jamie Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law Inc., 2000) at 262.

sufficiently punished by the other damages and punishments and extra damages are required to accomplish the three goals of punitive damages: retribution, denunciation and deterrence.[119] McBride argued that although the deterrent effect will not work if the punitive damages are paid out of public funds, it will at least draw attention to the misfeasance and perhaps lead to more political accountability.[120] In *Uni-Jet*,[121] the Manitoba Court of Appeal awarded $10,000 in punitive damages to each plaintiff, affirming that the defendants, as RCMP officers, should be held to a stricter standard given their position of public responsibility.[122] On the other hand, the damages in misfeasance claims already take into account the malice and/or bad faith of the defendant. Punitive damages awards should not be routine, otherwise the defendant will be paying for the same malice twice. It is only where the conduct is egregious that punitive damages should be awarded.

In most misfeasance cases, aggravated damages will not be available. In *Walker v. CFTO*, aggravated damages were defined as follows:

> Aggravated damages are damages which take into account the additional harm caused to the plaintiff's feelings by such reprehensible or outrageous conduct on the part of the defendant. Their purpose is compensatory and, being compensatory, they properly form part of a general damage award.[123]

Since damages in misfeasance cases are awarded "at large," they have probably already taken into account any injury to the plaintiff's feelings or reputation. In *Uni-Jet*, the Court concluded that this type of damage had been suffered, but it had already been taken into account in the general sum.[124] Thus, it would only be in the rarest of cases that an additional award of aggravated damages should be given.

In *Odhavji*, the only limitations that Iacobucci J. imposed upon damages for misfeasance claims are that the damages must be "compensable"[125] and "of sufficient magnitude to warrant compensation."[126] This must be read with the facts in mind: we are dealing with a claim for nervous shock, therefore the harm must pass a certain threshold of seriousness before damages will be ordered. As Iacobucci J. remarked, "grief or emotional distress is insufficient."[127] The only statement in the judgment that suggests economic loss might be more difficult to recover is Iacobucci J.'s general statement that, after state of mind is proved, "the other requirements common to all torts" will apply.[128] If by "all torts" the Court had *negligence* in mind, the Court has left open the possibility of shutting down some claims for economic loss. That being said, it seems unlikely that the Court intended to disallow

---

119 *Whiten*, *supra* note 115 at para. 74.
120 McBride, *supra* note 101 at 341.
121 *Uni-jet*, *supra* note 5.
122 *Ibid.* at para. 89.
123 *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 at para. 17 (C.A.).
124 *Supra* note 5 at para. 81.
125 *Supra* note 6 at para. 39.
126 *Ibid.* at para. 41.
127 *Ibid.*
128 *Ibid.* at para. 32.

economic loss claims, especially after quoting liberally from both *Three Rivers*[129] and *Mengel*,[130] both cases being claims for economic loss that were allowed to go forward.

Damages issues are not likely to be resolved until misfeasance law matures beyond the point of preliminary motions to have the cause of action struck out. While some cases have gone to trial, the vast majority of recent reported decisions are from pre-trial motions. Now that *Odhavji* is out, we need to re-clarify the rules, even if it is only to say that the rules have not changed.

H. PROXIMITY?

One question that keeps popping up in misfeasance cases is whether or not there must be any proximity or duty owed as between the plaintiff and defendant. Sadler recommended that the *Anns*[131] two-stage test be imported into the tort of misfeasance in public office. He wrote, "To impose a requirement of proximity, although not necessarily decisive, is justifiable in order to limit the consequences of the wrongful decision and prevent limitless actions."[132] In the Australian case of *Tampion v. Anderson*,[133] the Victorian Supreme Court held that there should be a duty owed to a *particular* plaintiff, though the High Court of Australia in *Mengel*[134] expressly disagreed. The U.K. Court of Appeal in *Three Rivers* held that a general requirement of proximity "should have a significant part to play in the tort of misfeasance."[135] Confusing matters slightly, the Court of Appeal then approved dicta from *Garrett*, in which the New Zealand Court of Appeal held that misfeasance does not require a duty of care *per se*.[136] This model of proximity for misfeasance is therefore weaker than its counterpart in negligence, though exactly *how weak* it is remains anyone's guess.

When *Three Rivers* came before the House of Lords, they rejected the Court of Appeal's proximity requirement.[137] The Lords all agreed with Clarke J.'s initial ruling,[138] namely, that there was no reason to circumscribe the tort any further (since the many requirements of the tort, especially the mental requirement, kept the tort within reasonable bounds).[139] This approach to proximity seems to have been adopted by Iacobucci J. in *Odhavji*. The tort was divided into three requirements: deliberate and unlawful conduct done while acting as a public officer;[140] the defendant must have been aware that his/her conduct was unlawful *and*

---

129 *Supra* note 2.
130 *Supra* note 3 at 360, Brennan J.
131 *Supra* note 16.
132 Sadler (1992), *supra* note 18 at 147.
133 *Supra* note 19.
134 *Mengel*, *supra* note 3 at 346-47, Mason, Dawson, Toohey, Gaudron and McHugh JJ.
135 *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 15 at 66A (C.A.).
136 *Supra* note 4 at 346.
137 *Supra* note 2.
138 *Three Rivers District Council v. Bank of England (No. 3)*, [1996] 3 All E.R. 558 at 584 (Q.B.).
139 *Three Rivers*, *supra* note 2 at 1220, 1233, 1267, 1276, Lords Steyn, Hutton & Millett.
140 *Odhavji*, *supra* note 6 at para. 23. In "category A" cases, the awareness of both illegality and harmful consequences is inferred from the intent to injure, even though one can easily imagine a situation in which the public official genuinely believes that she has every right to act with intent to injure, so long as the action would otherwise be within her control. If the *mens rea* of the tort is truly subjective, then the official should have a defence of mistake available in such situations.

that it was likely to harm the plaintiff;[141] and in addition to the first two, the plaintiff must prove "the other requirements common to all torts," later alluding specifically to the need to prove "that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law."[142]

With all of these supposedly strict requirements, Iacobucci J. wrote, "As a matter of policy, I do not believe that it is necessary to place any further restrictions on the ambit of the tort."[143] The clear inference is that proximity and/or duty to the plaintiff is not required, though Iacobucci J. never actually *wrote* that they are not required. Perhaps this was intentionally left unsaid as a kind of insurance policy (in case the requirements of the tort turn out to be less restrictive than originally contemplated). Should the tort require to be further circumscribed, the Court would not need to overrule what is only an inference (that is, that proximity is not required).

At this point, however, a lack of a proximity requirement is probably one of the major reasons for the tort's renaissance. In England and Canada, for example, the proximity requirement has been the undoing of many negligence claims against statutory regulators.[144] Now that misfeasance claims are being allowed to go forward, the question arises: were they simply using the wrong tort? Negligence claims against police in England have failed for lack of proximity,[145] yet in *Akenzua v. Secretary of State for the Home Department*,[146] the English Court of Appeal allowed a misfeasance claim (for failure to warn) to go forward even though the victim was not identifiable/foreseeable as an individual or even as a member of a group likely to be harmed. The advantage to a family like the Odhavji's in an exemption from a proximity requirement is considerable, considering how strict Canadian courts have become with proximity, negligence claims involving public officials and negligence claims for nervous shock.[147] The second half of the *Odhavji* judgment, in which the negligence claims against public authorities are considered (and mostly denied), is vivid proof of how restrictive the proximity requirement can be.

Some of the post-*Odhavji* cases reinforce the utility of sidestepping the proximity requirement in negligence, though proximity is such an elastic concept that the results have occasionally been surprising. Certainly the *Mitchell* case, in which the Court found no private law duty of care between the Health Minister *et al* and the plaintiff, reaffirmed the difficulty

---

141 *Ibid.*

142 *Ibid.* at para. 32.

143 *Ibid.* at para. 28.

144 See *e.g. Yuen Kun Yeu v. Hong Kong (A.G.)*, [1988] A.C. 175 (P.C.); *Cooper v. Hobart*, [2001] 3 S.C.R. 537 [*Cooper*].

145 *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (H.L.).

146 (2003), 1 W.L.R. 741 (C.A.).

147 See *e.g. Rhodes v. Canadian National Railway* (1990), 5 C.C.L.T. (2d) 118 (B.C.S.C.). The Odhavji family has to contend with *both* the restrictions against claims for negligent performance of a statutory function *and* negligence claims for nervous shock. Such a claim failed miserably in the House of Lords (*Alcock v. Chief Constable of South Yorkshire*, [1992] 1 A.C. 310), though in *Cooper*, *supra* note 144 at para. 36, the Supreme Court of Canada mysteriously quoted it to show how such claims have been allowed. But then, in the same paragraph, they also quote "misfeasance in public office" as an established duty of care category in negligence cases, so perhaps one should not expect too much from *Cooper*.

of establishing proximity when the actors are politicians.[148] In *Stewart* (B.C.C.A.),[149] however, the British Columbia Court of Appeal went through the new *Cooper v. Hobart* test for duty of care, in which it is difficult to establish a duty of care unless a "category" already exists (that is, that a duty of care had previously been found in prior cases involving similar relationships).[150] Surprisingly, the British Columbia courts found a duty of care existed despite the fact that one had not previously been recognized, though it must be remembered that claims in *Stewart* (B.C.C.A.) were for physical injury.[151] In *Stewart* (B.C.C.A.), the Court of Appeal in particular was much influenced by the Supreme Court of Canada decision in *Finney*, noting that were it not for the *Finney* decision, the Court would have ruled that no action would lie in negligence.[152] Presumably, this is because the Court would have found proximity to be lacking. It will be interesting to see whether this new, more liberal approach to proximity will reduce the need for misfeasance in public office claims or whether it is limited to claims of physical or moral injury.

I. DISHONESTY OR BAD FAITH

Often, misfeasance judgments speak of bad faith or dishonesty as a requirement. In the second *Three Rivers* judgment at the House of Lords, Lord Hope wrote, "I consider that dishonesty is a necessary ingredient of the tort ... [and] in this context dishonesty means acting in bad faith."[153] Similar language was used by Iacobucci J. in *Odhavji*: "Knowledge of harm is ... an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly."[154] Dishonesty and bad faith, however, are not separate from the other requirements of the tort; rather, the requirements of awareness of unlawfulness and harm are a *means* by which the necessary bad faith and dishonesty are proven. They are, however, available to the court as separate requirements should the need to circumscribe the tort further arise.

In *Shuchuk*,[155] where the Worker's Compensation Board *et al.* ignored objective evidence of the plaintiff's disability, the Alberta Court of Queen's Bench used bad faith to fulfil both aspects of the tort. Even though the bad faith involved was not as *malum in se* as the Premier's actions in the famous *Roncarelli* case,[156] the Court substituted bad faith with intent to injure[157] and essentially created a new "category A." The case preceded *Odhavji*, however, and the stricter requirements that Iacobucci J. set out for the tort have most likely overruled *Shuchuk* (though one cannot be sure that bad faith could not be used to substitute the knowledge of both illegality and awareness in "category B").

---

148 *Supra* note 53.

149 *Supra* note 30.

150 *Cooper, supra* note 144 at para. 31.

151 Similarly, the damages in *Finney* (*supra* note 33), though ultimately attributable to *Civil Code* liability rather than common law liability, were for the plaintiff's "moral injury" (*ibid.* at para. 47) and not for pure economic loss.

152 *Stewart* (B.C.C.A.), *supra* note 30 at para. 14.

153 *Three Rivers, supra* note 2 at para. 111.

154 *Odhavji, supra* note 6 at para. 28.

155 *Supra* note 14.

156 *Supra* note 69.

157 *Shuchuk, supra* note 14 at para. 27.

Taking the requirements of the tort into account, the actual breadth of the tort is fairly limited. It is true that a public official cannot breach a contract (with a concomitant awareness of harm flowing to the plaintiff), but liability for breach of contract is nothing new — it would merely be the same damages by another name. In cases such as *Martel*,[158] where there was an awareness of harm, there would be no liability unless the act was *ultra vires* or in breach of a duty. The tort does not prohibit public officials from harming anyone because that would be absurd — the nature of society is such that *any* political action is likely to benefit some while harming others.

While the goal is to harm others as little as possible, we cannot impose liability upon, for example, health ministers because they lacked perfect foresight of what would be of the greatest benefit to the highest number. Such questions are the meat and potatoes of political debate; the law has never been able to stomach them. As the British Columbia Court of Appeal noted in *Powder Mountain Resorts Ltd. v. British Columbia*, in misfeasance cases courts should not begin to engage in political decision-making and "becom[e] the arbiters of the personal thought processes of public officials."[159] The fact that people are beginning to take political claims to court is perhaps a sad commentary on society's faith in democratic institutions. Democracy will be in trouble if we start to look more to the courts than the ballot boxes for political change.

This is not to say that there is no place in the common law for the tort of misfeasance in public office. The tort, properly understood, has nothing to do with political decisions. Quite the opposite: the tort is needed where public officials act using considerations that are totally incompatible with their duties or powers — malice or intent to injure, generally arising from self-interest — when they *should* be acting for the good of the public that has entrusted them with those duties and powers. The public official is punished for acting *apolitically*. Understood as such, there is plenty of room for the tort in the common law, and it need not step on the toes of negligence.

IV. CONCLUSION

In *Odhavji*, the Supreme Court of Canada was given an excellent opportunity to set out clear parameters for misfeasance in public office. Unlike the House of Lords' *Three Rivers* decision, in which four separate Law Lords delivered lengthy (though well-crafted) concurring judgments that are difficult to separate from one another, the Supreme Court of Canada had an opportunity to speak with *one voice* through Iacobucci J. Though what is included in the judgment is reasonably clear, much has been left unexplored. It is likely the tort will need to be revisited again in the near future. Subsequent cases have tried to apply the Supreme Court of Canada's blueprint, but because the Supreme Court of Canada's judgment is so skeletal, differences between approaches in lower courts are beginning to appear. The *mens rea* requirement and the knowledge/awareness distinction is particularly unclear, and courts will need to elucidate how recklessness and wilful blindness are to function in tort law before there can be a uniform Canadian approach.

---

158 *Supra* note 45.

159 (2001), 94 B.C.L.R. (3d) 14 at para. 2.

One gets the sense that the Supreme Court of Canada did not *want* to be too defined. In leaving some of the questions unexplored the Court retained the ability to constrict the tort without having to overrule itself and admit error. It is also possible that they wanted to keep the tort flexible enough to compensate plaintiffs who, if left with the tort of negligence, would be denied a remedy due to problems either with the proximity between the parties or with the type of damages that are involved (economic loss or nervous shock). If the problem is in fact with negligence, then recent decisions such as *Cooper v. Hobart*[160] should be re-crafted instead of stretching the tort of misfeasance in public office past the point of intelligibility. Negligence has proven to be the most productive and flexible creation of the common law in the last hundred years, and it makes more sense to continue its expansion, where expansion is necessary, than it does to exhume misfeasance and its attendant difficulties only because negligence has been prematurely pruned.

[160] *Supra* note 144.