

The Revival of the
Tort of Misfeasance in Public Office –
A Comparative Study from a Hong Kong Perspective

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Abstract

This paper would examine the emergent tort of “misfeasance in public office”, which would be shown to be an important link between administrative law and civil remedies in common law jurisdictions. As the definition and even the existence of the tort remained to be uncertain until relatively recent times, its rationale, historical origins, constituent elements and remedies would be examined through a comparative approach, with specific reference to Hong Kong law. In particular, given the dearth of local case law on the subject matter, observations and suggestions would be provided as to the future course that the tort should adopt in its development in Hong Kong.

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I. Introduction

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1.1 The Conceptual Framework – Unlawful Administrative Acts and Tortious Liability

No man is above the law. A prerequisite for maintaining law and order in a society must be that all man is equal before the law. Back in the nineteenth century, Dicey stated that:

“[E]very man, whatever his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”...the idea of legal equality, or the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to an utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.”²

In this sense, the common law seems to be a guardian of citizens against abuse of power by public officials since time perennial. Yet the reality may be much less satisfactory than this image presented above. In the sphere of public law, the common law had traditionally only recognized that acts of public officials in such capacity that are beyond their powers as *ultra vires*, or in other words, “invalid”. Prerogative remedies may therefore be available, but this is fundamentally different from an imposition of “liability” thereof.³ The basic premise remains that “*ultra vires* acts *per se* will not give rise to damages liability”,⁴ and that “[i]llegality without more does not give a cause of action”.⁵ This has always been the position under common law. Unlike our continental counterparts, there had never been a “complete dualist” approach demarcating the boundaries of public law and private law.⁶ Nevertheless, it remains to be the case under common law that there is no direct link that binds the public law

² Dicey, *Introduction to the Law of the Constitution* (10th ed. Macmillan 1959), p. 193.

³ Harlow, *Compensation and Government Torts*, (Sweet & Maxwell 1982), p. 87.

⁴ *X (Minors) v Bedfordshire CC* [1995] 2 AC 633, at 730G, per Lord Browne-Wilkinson; *Three Rivers District Council v Bank of England (No 3)* [2000] 3 All ER 1, at 7, per Lord Steyn. See also, Craig, *Administrative Law* (6th ed. Sweet & Maxwell 2008), p 957; Stanton (et al), *Statutory Torts* (Sweet & Maxwell 2003), p. 131.

⁵ *Three Rivers District Council v Bank of England (No 3)* [2000] 3 All ER 1, at 43, per Lord Hobhouse.

⁶ Stanton (et al), *Statutory Torts* (Sweet & Maxwell 2003), p. 58.

concept of “invalidity” with that of “liability” in private law.⁷ This is the “vital missing principle of tortious liability”⁸ which, in continental legal terminology, is known as the doctrine of “abuse of rights”,⁹ and it had never been recognized under common law.¹⁰ As Professor Craig puts it, “we do not therefore have what would be recognised by other legal systems as a general principle of damages liability, nor do we have any wholly separate body of law dealing with damages actions against public bodies”.¹¹ Lord Wilberforce noticed that there is this “unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative action”¹² in the common law which does not arise in “more developed legal systems”.¹³ Even if one for the time being removes the special case of public authorities from the picture and fall back to the general principles of tort law, there is still never a common law principle to the effect that there would be an actionable wrong whenever “a party suffered loss due to an intentional and/or inadvertent act of another”.¹⁴ Neither would the presence of “malice” on the mind of the “wrongdoer” alter the course of the general law, as it is trite law that “malice”, as a species of “motive”, is irrelevant in the law of torts aside from the exceptional situations such as where “malice” is in itself the ingredient of the cause of action.¹⁵ In response to the apparent unfairness of the common law in this respect raised by a counsel, one judge replied:

“I would only cite my nanny’s great nursery proposition: ‘The world is a very unfair place and the sooner you get to know it the better.’”¹⁶

The underlying jurisprudential reason for these principles may be seen in Professor Atiyah’s Hamlyn Lecture twenty years ago, in which he vividly demonstrated how the common law system is pragmatic, and in theory one that is “remedy-orientated” rather than “right-orientated”.¹⁷ It is important to appreciate that, a “legal right” is correlative to a “legal duty”, being “both sides of the same coin”¹⁸ – a right vested in one imposes a corresponding duty on the other. However, such duty is no duty at all if there is no remedy supported by law that could be enforced upon its breach. Having said that, a corresponding legal remedy is thus an essential “prerequisite” for the existence of a “legal duty”. As a “legal right” and its corresponding “legal duty” cannot exist without one another, and that the latter is dependent on the availability of a “legal remedy”, essentially, it is that a “legal remedy” gives rise to a “legal right” but not *vice versa*. To put it starkly, if “a legal right and legal duty can be regarded as merely different sides of the same coin, the legal remedy is the metal out of which that coin is minted”.¹⁹ This is the conceptual relationship between rights, duties and remedies in common law.

As a result, the concepts of “invalidity” of a public act and “liability” arising thereof remain

⁷ See further, Law Commission, *Monetary Remedies in Public Law – A Discussion Paper* (2004) §§5.1 – 5.2.

⁸ Harlow, *Compensation and Government Torts* (Sweet & Maxwell 1982), p. 58.

⁹ See further, Gutteridge, “Abuse of Rights” (1935) Cambridge LJ 22; Devine, “Some Comparative Aspects of the Doctrine of Abuse of Rights” (1964) *Acta Juridica* 48; cited in Heuston & Buckley, *Salmond & Heuston on the Law of Torts* (21st ed. Sweet & Maxwell 1996), p. 18.

¹⁰ Heuston & Buckley, *Salmond & Heuston on the Law of Torts* (21st ed. Sweet & Maxwell 1996), p. 20.

¹¹ Craig, *Administrative Law* (6th ed. Sweet & Maxwell 2008), p. 958.

¹² *Hoffmann-La Roche & Co v Secretary for Trade and Industry* [1975] AC 295, at 359.

¹³ *ibid.*

¹⁴ See McGregor, *McGregor on Damages* (17th ed. Sweet & Maxwell 2003), §1-019.

¹⁵ Heuston & Buckley, *Salmond & Heuston on the Law of Torts* (21st ed. Sweet & Maxwell 1996), p. 18.

¹⁶ *Swedac Ltd v Magnet Southern* [1989] FSR 243, at 349, per Harman J.

¹⁷ Atiyah, *Pragmatism and Theory in English Law* (Stevens & Sons 1987), p. 112.

¹⁸ Higgins, *Elements of Torts in Australia* (Butterworths 1970), p. 42.

¹⁹ *ibid.*

distinct from each other. This lack of linkage between the two concepts, however, does not always result in injustice. Although “invalidity” does not equate to “liability”, neither would “invalidity” prevent “liability” to be imposed otherwise. Having said that, to impose “liability” on public bodies, the claim must be capable of “being fitted into one of the recognized private law causes of action”.²⁰ Failing to find a “pigeon hole”²¹ that matches the facts of the claim, a plaintiff who had been wronged would be left with no private law remedy. In the language adopted by old authorities, this would be what is meant by a situation of *damnum sine injuria* – “being damaged without legal injury”.²²

This may be contrasted with maxims and notions that are often spoon-fed to common law students, such as *ubi jus, ibi remedium*²³ or “equity would not suffer a wrong without a remedy”. In this context, these maxims derived from Roman law hardly throw any light upon the law of torts in the common law,²⁴ as it contradicts the “remedy-orientated” nature of the common law as discussed above.

This approach of the common law may often be seen as a source of injustice, and had been criticized by distinguished members of bench. In the famous case of *Ashby v White*,²⁵ Holt CJ dissented with the majority decision and expressed that:

"If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it, and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal."²⁶

It is not surprising that Lord Denning had also expressed a similar view in *Abbott v Sullivan*²⁷ in his dissenting view that:

"I should be sorry to think that, if a wrong has been done, the plaintiff is to go without a remedy simply because no one can find a peg to hang it on."²⁸

The explanation offered by Justice Holmes did not justify this approach either:

“Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*,²⁹ which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is

²⁰ Craig, *Administrative Law* (6th ed. Sweet & Maxwell 2008), p 957.

²¹ Adopting the wording used by Glanville Williams. But as suggested by Williams, the fact that tort law can be collected into pigeon holes does not mean “they may not be capacious, not does it mean that they are incapable of being added to.” Williams, “The Foundation of Tortious Liability” (1939-41) Cambridge LJ 111, p. 116.

²² *Bradford Corp v Pickles* [1895] AC 587, at 601, per Lord Macnaghten.

²³ Literally, where there is a right, there is a remedy.

²⁴ Higgins, *Elements of Torts in Australia* (Butterworths 1970), p. 42.

²⁵ (1703) 2 Ld Raym 938.

²⁶ *ibid*, at 953.

²⁷ [1952] 1 KB 189.

²⁸ *Ibid*, at 200.

²⁹ Literally, “so use your own as not to injure another's property”.

whether there is a wrong or not, and if not, why not.”³⁰

Despite these views, the common law remained its position to separate “invalidity” and “liability” as distinct concepts, and to allow claims only where they could possibly fit in a more or less closed-list of “pigeon holes”. Facing this approach, one would be inclined to agree with the aphorism of Maitland that “[t]he forms of actions we have buried, but they still rule us from their graves”.³¹ A similar approach could also be seen in the courts of Hong Kong. In *Attorney General v Ng Kee*,³² Briggs CJ held that:

“...there is not a law of tort, there is a law of torts. It is not enough for a plaintiff to prove that the conduct of the defendant has caused him loss. He must prove that the conduct of the defendant complained of constitutes a tort recognized by the law.”³³

Accordingly, in that case, in absence of “malice” being shown, the plaintiff’s claim against the defendant public officer for loss resulting from an *ultra vires* act on the part of the latter was dismissed for the simple reason that it “does not constitute any tort known to English law”.³⁴

In *X (Minors) v Bedfordshire CC*,³⁵ Lord Brown-Wilkinson made it clear that “[t]he breach of a public law right by itself gives rise to no claim for damages”,³⁶ and there could be no cause of action based simply upon the lack of legal authority or even careless performance of duties derived from such authority. A common law right of action must be made out, and these would include: 1) a breach of statutory duty *simpliciter*; 2) an action of breach of common law duty of care “arising from the imposition of a statutory duty or from its performance”; and 3) the tort of misfeasance in a public office.³⁷

It is this third exception to the general common law position that forms the subject matter that this paper is concerned with.

1.2 The Importance of the Subject Matter

1.2.1 *Theoretical Considerations*

Public authorities hold great power. The promulgation of the welfare state implies that the public authorities play a larger role in our lives than ever before. With great power, however, come great responsibilities. In principle, public officers should be no less liable than ordinary citizens in regards to their duties in law, if it is not the case that they should instead be more liable than others due to the importance of the proper exercise of their powers to the society as a whole. This is reflected in the modern approach of the law, as the old rule that “the crown

³⁰ Holmes, “Privilege, Malice and Intent” (1894) 8 Harv LR 1.

³¹ Maitland, *The Forms of Action at Common Law* (Cambridge 1909).

³² [1978] HKLR 52.

³³ *Ibid*, at para. 9.

³⁴ *Ibid*.

³⁵ [1995] 3 All ER 353.

³⁶ *Ibid*, at 363.

³⁷ *Linky Chance v The Commissioner for Television and Entertainment Licensing* [2006] HKCFI 1418, at para. 23, per Chung J, *X (Minors) v Bedfordshire CC* [1995] 3 All ER 353 applied.

could commit no wrong”³⁸ had almost become a relic with little practical significance in law.

Nevertheless, there are still compelling reasons to adopt a distinctive approach in dealing with the liabilities of public authorities. Given the wide array of powers and duties under which public authorities operate and that such claims would ultimately be met by the Treasury, they would practically be vulnerable targets to a wide variety of allegations with pockets deep enough to bear substantial award of damages,³⁹ making them attractive targets in civil litigation. To recognize a tortious right implies a remedy by way of damages, and a new head of civil liability which creates an “expensive drain on state funds” would be created.⁴⁰ In fear of detrimental impacts upon the exercise of important public functions,⁴¹ surge of vexatious litigants⁴² and the depletion of public funds, courts not surprisingly placed limits on private actions against public authorities.⁴³ Moreover, the modern developments in civil procedure effectively place judicial review as the standard means to challenge the legality of actions of public bodies. One chief reason behind this trend rests on the assumption that the interests of public authorities deserve special protection, thus these would be accorded “protection mechanisms” such as the leave requirement⁴⁴ and short limitation period⁴⁵ embodied in the procedures of judicial review.⁴⁶ The philosophical debate as to whether such assumption stands would deserve the treatment of a treatise by itself,⁴⁷ and it would be too ambitious an aim to resolve that issue also in this discussion. However, it is sufficient that it could be at least said that where there is a private right to be vindicated by a party against a public authority, such “special protection” should not apply. This should be so on both principle and law. In principle, since we have now finally buried the rule that “the crown could commit no wrong”, the crown should now “commit wrongs as anyone else”. A public body which is found liable as much as a private party should not be excused on the sole ground that it is a public body, unless, perhaps, horrendously undesirable practical consequences may follow. The law of civil procedure clearly recognizes the vindication of independent private law rights as an exception to the general procedural framework of judicial review. The fact that an assertion of a private law right happens to incidentally involve an issue of validity of law should not be a reason to deny an otherwise successful claim, as a paramount maxim of the common law is that “where there is a right, there is a remedy”. Barring actions by merely considering procedural aspects instead of the merits would bring us back to the days of writs and forms of actions.

Rapid developments could be seen in public law in response to these needs, yet the development of private law actions and remedies have been limited in the same respect. Till this very day, the tort of misfeasance in public office remains to be the only tort of a public

³⁸ A local manifestation of the intention to remove this old rule could be seen in the Crown Proceedings Ordinance (Cap. 300).

³⁹ Lunney & Oliphant, *Tort Law – Text and Materials* (3rd ed. Oxford 2008). p. 500.

⁴⁰ Harlow, *Compensation and Government Torts* (Sweet & Maxwell 1982), p. 46.

⁴¹ Woolf, “Public Law-Private Law: Why the Divide? A Personal View” [1986] P.L. 220, p. 230.

⁴² Craig, *Administrative Law* (6th ed. Sweet & Maxwell 2008), p 896. Note the skepticism of the author regarding this as a reason for according public bodies with special protection in litigation.

⁴³ Lunney & Oliphant, *Tort Law – Text and Materials* (3rd ed. Oxford 2008). p. 500.

⁴⁴ High Court Ordinance (Cap. 4) s25K(3), Rules of High Court (Cap. 4A) O.53 r.4(7).

⁴⁵ Rules of High Court, O.53 r.4. Note that the modern attitude towards protection of the executive branch against civil liability through the use of short limitation periods may have changed. The provisions offering such special protection under the Limitation Act 1939 had long been abolished, although those under the judicial review remain intact. See generally, Wade & Forsyth, *Administrative Law* (Oxford 2004), pp. 788 – 92.

⁴⁶ Craig, *Administrative Law* (6th ed. Sweet & Maxwell 2008), p. 895.

⁴⁷ See generally, Woolf, “Judicial Review: A Possible Programme for Reform” [1992] P.L. 221.

nature at common law.⁴⁸ The tort had been commented by some to be extremely limited in scope,⁴⁹ due to, *inter alia*, the onerous burden in proving the mental requirement, as would be seen later in the discussion. This is especially so when protection and remedies are offered by modern legal devices such as the Human Rights Act 1998⁵⁰ and its foreign counterparts,⁵¹ the developing “Euro-torts”,⁵² and also what is known as a claim through “constitutional infringements *sine damno*”⁵³ developing under Irish law. Having said that, there may be good reasons unique to the Hong Kong jurisdiction to expand the tort. The existence of alternative forms of remedies such as that under s.8 the Human Rights Act 1998 in the United Kingdom may have huge impacts on the development of the tort, as suggested by Professor Cane.⁵⁴ Although the requirement of “fault” under the tort is over and above the criteria for establishing public liability under EC law and may be inconsistent with it, the existence of alternative remedies listed above diminishes the need for the further development of the tort in the jurisdiction, whereas in Hong Kong, the tort of misfeasance in public office remains to be in essence the last “residual option” available for claiming damages against the abuse of power on the part of public authorities, serving probably as the only link between the public law concept of “invalidity” and the private law concept of “liability”.

1.2.2 Practical Considerations

The tort of misfeasance in public office had evolved from the days as being nothing more than a “mere academic curiosity”.⁵⁵ Aside from the theoretical background of the tort, there is much to say about its practical utility. A comparison between the tort and other remedies would be made to illustrate this point.

1.2.2.1 Comparison with Judicial Review

Judicial review has its unique niche in the common law legal system. Given the remedies available⁵⁶ in the nature of a prerogative writ that are not obtainable otherwise, it is an essential platform to seek legal challenge to official actions. Yet judicial review has its practical limits. Despite the possibility to obtain damages in a judicial review application,⁵⁷ the rule exists simply for the purpose of avoiding the need to have two sets of proceedings for the same subject matter but creates no right to damages for public law wrongs in itself.⁵⁸ The general principles regarding the imposition of legal liability in respect of illegal acts as

⁴⁸ Cane, *Administrative Law* (4th ed. Oxford 2004), p. 292; McBride, “Damages as a Remedy for Unlawful Administrative Action” (1979) 38(2) Cambridge LJ 323, p. 323; Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 182; Aronson & Whitmore, *Public Torts and Contracts* (Law Book Co 1982), p. 117; Arrowsmith, *Civil Liability and Public Authorities* (Earlsgate 1991), p. 226.

⁴⁹ Cane, *Administrative Law* (4th ed. Oxford 2004), p. 293.

⁵⁰ *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395. See Dugdale (et al), *Clerk & Lindsell on Torts – 3rd Supplement*, (Sweet & Maxwell 2008), §14-52.

⁵¹ e.g. The New Zealand Bill of Rights Act 1990. Todd (ed.), *The Law of Torts in New Zealand*, (3rd ed. Brookers 2001), pp. 978 - 83.

⁵² Dugdale (et al), *Clerk & Lindsell on Torts* (19th ed. Sweet & Maxwell 2006), p. 866; see further, Stanton (et al), *Statutory Torts* (Sweet & Maxwell 2003) pp. 219 – 70.

⁵³ See *Meskell v CIE* [1973] IR 121; see generally, McMahon & Binchy, *Law of Torts* (3rd ed. Butterworths 2000), pp. 4 - 25.

⁵⁴ Cane, *Administrative Law* (4th ed. Oxford 2004), p. 293.

⁵⁵ McBride, “Damages as a Remedy for Unlawful Administrative Action” (1979) 38(2) Cambridge LJ 323, p. 325; Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 927.

⁵⁶ See generally, Chan PJ (et al), *Hong Kong Civil Procedure* (Sweet & Maxwell 2007), §§53/1, 53/14/14.

⁵⁷ RHC O.53, r.7. See *Hong Kong Civil Procedure* (Sweet & Maxwell 2007), §53/14/34.

⁵⁸ *Ibid.*

discussed earlier remain to apply in this context.

Notwithstanding the practical utility of the remedies under O.53, in some cases, a remedy that is solely in the nature of a prerogative writ, injunction or declaration, may often be a “hollow victory”.⁵⁹ Economic loss caused by official acts could remain to be not compensated. Such examples are not unknown. *Takaro Properties Ltd v Rowling*⁶⁰ is a typical example of this situation. In that case, a declaration of the invalidity of the refusal on the part of the defendant Minister of Finance to consent to the issue shares of a New Zealand company to foreign investors did not prevent the company from entering into receivership, as by then foreign investors have lost their interest in the deal already.⁶¹ A successful action for tort of misfeasance in public office could be the solution for such situations. As would be seen later when the issue of remedies is addressed, not only compensatory damages, but also exemplary damages could often be available in successful claims.⁶² The niche occupied by the tort as being a “hybrid between administrative law and tort law”⁶³ had long been reflected in practice.⁶⁴

Furthermore, as discussed above, the procedural framework of judicial review is designed with an underlying philosophy which warrants special protective mechanisms to be made for public bodies. The leave requirement had been shown by a relatively recently empirical study that it contributes hardly anything to the rectitude of the decision,⁶⁵ but serves more as a “shelter” for public bodies.⁶⁶ There is also prerequisite that judicial reviews must be made “promptly”, and in any event there is also a limitation period of three months for seeking judicial review.⁶⁷ This, in comparison with limitation periods for other actions in general, may seem quite a harsh requirement already. It must be noted that the fact an application for leave has been made within three months does not mean that it is made “promptly” – it could be further limited to a shorter period by statute,⁶⁸ and other factors could also be taken account of.⁶⁹ The recent Civil Justice Reform is unlikely to strike much of a change in this aspect, as evidenced by the English CPR experience.⁷⁰

Aside from the leave requirement and the short limitation period, another weakness in pursuing a claim would be the huge limitation placed on discovery and cross-examination in Hong Kong. After all, “[c]ross examination in judicial review proceedings has historically

⁵⁹ Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 182.

⁶⁰ [1975] 2 NZLR 62.

⁶¹ See also, Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 183.

⁶² *Kuddus v Chief Constable of Leicester Constabulary* [2001] 2 WLR 1789. See the discussion under Part IV for further discussion of this issue.

⁶³ Chamberlain, “The Need for a ‘Standing’ Rule in Misfeasance in Public Office” (2007) 7(2) OUCLJ 215, p. 221.

⁶⁴ See *Harman v Tappenden* (1801) 102 ER 214, where misfeasance proceedings were lodged after an action for *mandamus*, despite the misfeasance claim failed due to the lack of evidence to support the finding of malice. A recent example in Hong Kong could be found in *Gurung Tika Maya v Commissioner of Police* [2009] HKEC 78, para. 9. There, a suit for misfeasance in public office was lodged in addition to the judicial review proceedings.

⁶⁵ Le Sueur & Sunkin, “Applications for Judicial Review: the Requirement of Leave” [1992] P.L. 102, pp. 120-122.

⁶⁶ Sunkin, “Withdrawing: A Problem in Judicial Review?”, in Leyland & Woods (eds), *Administrative Law Facing the Future: Old Constraints & New Horizons* (Blackstone 1997), Ch. 10; cited in Craig, *Administrative Law* (6th ed. Sweet & Maxwell 2008), p. 899. See further, Sunkin, Bridges & Meszaros, *Judicial Review in Perspective* (Cavendish 1995).

⁶⁷ RHC O.53, r.4.

⁶⁸ *Re an Application for Judicial Review by Right Centre Co Ltd* [1990] 1 HKLR 250.

⁶⁹ See generally, *Hong Kong Civil Procedure* (Sweet & Maxwell 2007), §53/14/40.

⁷⁰ Craig, *Administrative Law* (6th ed. Sweet & Maxwell 2008), p 912.

been very rare”,⁷¹ and that although “[d]iscovery is now permitted in judicial review proceedings”, it remains to be the exception rather than the norm.⁷² Although the Civil Justice Reform may hopefully narrow the gap between ordinary private claims and judicial review in this respect, it remains a drawback from a practical perspective.

A claim through the tort of misfeasance in public office could thus prevent the need to cope with the leave requirement,⁷³ the harsh three month time limit⁷⁴ and the traditional limitations on discovery and cross-examination in judicial review proceedings.⁷⁵ Although it would be an overstatement that the tort would be “the new judicial review” as one commentator suggested,⁷⁶ the tort may prove to be particularly useful to fill the gap of judicial review where large economic losses are at stake. A resort to tortious liability would thus be an attempt to address the “legal lacuna, viz. the limited relief afforded by judicial review in turn leading to social injustice.”⁷⁷

1.2.2.2 Comparison with Negligence and Breach of Statutory Duty

The tort of misfeasance in public office’s unique nature places it in its own niche. The tort has significant advantages over negligence and breach of statutory duty in so far as it is not “subject to the limitations which are now placed on these torts in cases brought against public bodies”.⁷⁸ The main “limitations” that the tort of misfeasance in public office could surpass would be where negligence or breach of statutory duty would fail in cases where the public body in question is shielded by an immunity existing at common law or through a statutory clause to that effect. An example of the prior would be where an action on negligence against the police for failure to prevent the occurrence of a foreseeable crime would fail on the public policy ground,⁷⁹ and an example for the latter would be the shielding effect that the Banking Act 1987 grants to the Bank of England in series of litigation against the Bank of England following the collapse of the Bank of Credit and Commerce International, which would be further discussed below. Another example would be the possibility to sue prison officers in cases of false imprisonment of prisoners with the tort of misfeasance despite the protection offered by s12(c) of the Prison Act 1952.⁸⁰ The significance of the tort could particularly be evident where no other statutory duty could be imposed from the facts in question, or that where an immunity clause preventing any claims against acts or omissions of the public authority in question done or made in “good faith” is present. There is also, strictly speaking, no requirement whatsoever for establishment of foreseeability, allowing the tort of misfeasance to be possible where negligence would fail in certain situations.⁸¹ Furthermore,

⁷¹ Clark & McCoy, *Hong Kong Administrative Law* (2nd ed. Butterworths 1993), p. 513.

⁷² *Ibid.*, p. 511.

⁷³ Craig, *Administrative Law* (6th ed. Sweet & Maxwell 2008), p. 865.

⁷⁴ *Ibid.*

⁷⁵ *O’Reilly v Mackman* [1983] 2 AC 237, per Lord Denning. Applied in *Yau Fook Hong Co Ltd v Director of Lands* [1985] HKLR 42, at 52.

⁷⁶ Lloyd, “The Emergent Tort of Misfeasance” (2003) 35 BLJ 7, p. 17.

⁷⁷ Stanton (et al), *Statutory Torts* (Sweet & Maxwell 2003), p. 58.

⁷⁸ *Ibid.*, p. 133.

⁷⁹ *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238.

⁸⁰ *R v Hague* [1992] 1 AC 58, in which Lord Bridge held: “that a prison officer who acts in bad faith by deliberately subjecting a prisoner to a restraint which he knows he has no authority to impose may render himself personally liable to an action for false imprisonment as well as committing the tort of misfeasance in public office. Lacking the authority of the governor, he also lacks the protection of section 12(1).” This had been recently applied in *The Prison Officers Association v Mohammed Nazim Iqbal* [2009] EWCA Civ 1312, at para. 31.

⁸¹ See *Akenzua v Secretary of State for the Home Department* [2003] 1WLR 741

one could avoid the need to go through the cumbersome task of proving legislative intent in a misfeasance claim.

Another significant edge of this tort over other claims is that the regular restrictions on recovery of pure economic loss which applies to negligence claims⁸² seem to have virtually no application at all in the context of misfeasance in public office.⁸³ In fact, it was suggested that there is actually a modern trend for plaintiffs to pursue claims of such nature through this tort.⁸⁴ The possibility of exemplary damages which is not available for negligence claims, and the comparative longer limitation period for the tort than negligence⁸⁵ should also be noted. One commentator also noted that there is “a certain amount of justifiable satisfaction to be derived” from being able to sue the public officer personally for monetary remedies,⁸⁶ as in *Roncarelli v Duplessis*.⁸⁷ This reason may be seen as a “bonus factor” for aggrieved and vengeful plaintiffs to choose to pursue a claim through this tort.

1.2.2.3 Comparison with Other Private Torts which involve Malice

The tort may often overlap with actions that also involve an element of “malice”, such as the tort of “malicious prosecution” and “malicious process”, yet it must be warned that case law suggest that one could not circumvent the other requirements of these torts which require malice also through the use of the tort of misfeasance in public office. For example, the requirement for “lack of reasonable and probable cause” had been held to be essential in such situations even if the plaintiff chose to pursue the claim on misfeasance in public office instead.⁸⁸ Thus it is submitted that, the application of the tort of misfeasance in public office may not be advantageous in situations that are neatly covered a claim based on such torts. However, there had been the suggestion that the tort of misfeasance may apply even where there is mere omission even when other torts would not.⁸⁹

1.2.2.4 Comparison with the Offence of Misconduct in Public Office

There is an offence of “misconduct in a public office” at common law.⁹⁰ The details of the offence is out of the scope of this discussion, but it would suffice to say that the gist of the offence is the “willful neglect of a public officer to perform a duty which he is legally bound to perform”,⁹¹ and thus overlaps with the ambit of the tort of misfeasance in public office.

⁸² *Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] 3 All ER 557. For the Hong Kong position, see Srivastava, *The Law of Tort in Hong Kong* (2nd ed. LexisNexis 2005), pp. 236 – 65.

⁸³ Rogers, *Winfield and Jolowicz on Tort* (17th ed. Sweet & Maxwell 2006), p. 362. See also, *Three Rivers District Council & Ors v Bank of England* [1996] 3 All ER 558, at 584, per Clarke J.

⁸⁴ Rogers, *Winfield and Jolowicz on Tort* (17th ed. Sweet & Maxwell 2006), p. 362.

⁸⁵ The tort of misfeasance in public office, being an intentional tort, would have a limitation period of 6 years: Limitation Ordinance (Cap. 347), s4(1); whereas that for a claim of negligence is only 3 years: Limitation Ordinance s.27. See *Chan Chung Lop v Chan Yun Sun* [1999] 3 HKLRD 442.

⁸⁶ McBride, “Damages as a Remedy for Unlawful Administrative Action” (1979) 38(2) Cambridge LJ 323, p. 345.

⁸⁷ (1959) 16 DLR (2d) 689.

⁸⁸ *McDonagh v Commissioner of Police of the Metropolis* (The Times, Dec. 28, 1989). See Arrowsmith, *Civil Liability and Public Authorities* (Earlsgate 1991), p 232.

⁸⁹ *Karagozlu v Commissioner of the Police of the Metropolis* [2007] 1 WLR 1881, para. 55: “while the officer [who “refuses deliberately and ‘dishonestly’ to carry out his duties”] may not be liable for false imprisonment, he may be liable for misfeasance” (emphasis added), as cited in *The Prison Officers Association v Mohammed Nazim Iqbal* [2009] EWCA Civ 1312, at para. 43.

⁹⁰ See *Archbold Hong Kong* (Sweet & Maxwell 2005), §§35-62 - 65; *Shum Kwok Sher v HKSAR* [2002] 3 HKC 117; *Sin Kam Wah & Anor v HKSAR* [2005] 2 HKLRD 375.

⁹¹ *R v Bowden* [1995] 4 All ER 505; see Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 928.

Lord Steyn started his speech in *Three Rivers* that “the tort bears some resemblance with the crime of misconduct in a public office”,⁹² and it is often said to “closely resembles the tort”⁹³ as both stems from the concept of “abuse of office”.⁹⁴

Yet as a criminal offence serving altogether a different purpose, there may be hardly any practical value in comparing it with its tortious counterpart. Nevertheless, this comparison may serve at least two purposes. In relation to the requisite mental element of the tort, the *mens rea* of the offence may serve as a benchmark to remind us of the boundaries of that of the tort. As Pill LJ observes, “the approach in the *Three Rivers* case appears to us to be consistent with that in the criminal cases...neither the mental element associated with the misconduct, nor the threshold of misconduct should be set lower for the crime than for the tort”.⁹⁵ This may be of assistance in considering the degree of knowledge of the wrongfulness of the act and harm necessary to constitute “malice”. Also, as would be discussed later, the existence of an adequate means to punish the defendant, for example, a criminal charge of “misconduct in public office”, may affect the availability of exemplary damages.⁹⁶

1.3 Methodology and Assumptions

As the title suggests, this essay would adopt a comparative approach and examine how the tort of misfeasance in public office developed throughout the Commonwealth and Hong Kong. Although a full treatment of the subject matter should necessarily at least involve a consideration of developments in continental systems, due to the scale of this research paper, the focus would only be on a few common law jurisdictions, namely: England, Ireland, Australia, New Zealand, Canada and last but not least, Hong Kong.

A brief history of the tort’s development would be set out, followed with a quick summary of the underlying rationale of the tort. The next part would start with an overview of the basic elements of the tort, followed by the remedies available. The major developments in each aforementioned jurisdiction aside from Hong Kong would be first listed out, and a comparative analysis would follow. It is hoped that, equipped with and enriched by a better understanding of the law as a whole achieved through the comparative exercise, a more comprehensive discussion of Hong Kong law, as it is and as it ought to be, could be provided.

It had been said that the absence of local writing “necessarily inhibits local legal development”.⁹⁷ Where possible, local authorities would be cited and more extensive treatment would be accorded to the local cases as compared to those in other jurisdictions.

This paper would be presented with some underlying assumptions.

First, that although the law may differ in certain aspects of the tort and other overlapping remedies across the jurisdictions that were examined, it is assumed that the common theme, or so to speak, underlying rationale of the tort is roughly the same. This assumption may not hold true in light of developments of liability under human rights instruments and

⁹² *Three Rivers DC v Bank of England (No 3)* [2003] 2 AC 1, at 191, per Lord Steyn.

⁹³ Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 928.

⁹⁴ See *Archbold Hong Kong* (Sweet & Maxwell 2005), §35-65; Nicholls, Daniel, Polainie & Hatchard, *Corruption and Misuse of Public Office* (Oxford 2006), p. 92.

⁹⁵ *Attorney-General’s Reference (No 3 of 2003)* [2004] 3 WLR 451, at 466.

⁹⁶ *Archer v Brown* [1984] 2 All ER 267; *Daniels v Thompson* [1998] 3 NZLR 22; *W v W* [1999] 2 NZLR 1.

⁹⁷ Lau (et al), “Towards a Singaporean Jurisprudence” (1987) 8 Singapore L Rev 1, cited in Clark, Lai & Luk, *Hong Kong Administrative Law: A Sourcebook* (Butterworths 1989).

conventions in foreign jurisdictions, such as civil liability under the UK Human Rights Act 1998 s.8, Article 41 of the European Convention of Human Rights, Euro-Torts and so on, which may bear importance implications for the development of the tort of misfeasance in public office. For example, the existence of these remedies may render further development of this tort no longer necessary to comply with the standards of European Community Law,⁹⁸ thus affecting the underlying rationale in determination of its scope and remedies.

Secondly, it is assumed that the so-called “*Beauesert* rule”,⁹⁹ which is essentially an action on the case that allows “anyone who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another is entitled to recover damages from that other”,¹⁰⁰ ceased to exist in any part of the Commonwealth and Hong Kong. The Australian decision had been criticized heavily¹⁰¹ and had been subsequently been overruled by the Australian High Court in *Northern Territory of Australia v Mengel*.¹⁰² The existence of a rule of such breadth is against the general common law principles, and would effectively sap all usefulness from pursuing a claim through the tort of misfeasance in public office.

⁹⁸ Cane, *Administrative Law* (4th ed. Oxford 2004), p. 293.

⁹⁹ *Beauesert Shire Council v Smith* (1966) 120 CLR 145.

¹⁰⁰ *Ibid*, at 156.

¹⁰¹ Dworkin & Harari, “The Beauesert Decision - Raising the Ghost of the Action Upon the Case (Part 1)” (1967) 40 ALJ 296, (Part 2) 40 ALJ 347.

¹⁰² (1995) 185 CLR 307, at 356, per Brennan J.

II. Historical Development of the Tort

Contents

- 2.1 *The Origins and the Early Days*
- 2.2 *Falling into Disuse*
- 2.3 *Revival of the Tort*
- 2.4 *Modern Developments*

2.1 The Origins and the Early Days¹⁰³

Although many modern authorities¹⁰⁴ suggest that the origin of the tort lies in the famous decision in *Ashby v White*¹⁰⁵, the earliest authority appears to be *Turner v Sterling*¹⁰⁶ instead.

The decision had been usually interpreted¹⁰⁷ as “an action on the case” that requires an element of “malice” on the part of a “public officer”, despite it is often suggested that the *Ashby v White* in itself never stated or implied any requirement of “malice”.¹⁰⁸ Yet an argument that all subsequent cases based on this assumption had been wrongly decided may be purely academic as given the existence of this requirement in most if not all subsequent cases in the following century,¹⁰⁹ they could well be said to have “established a line of authority in their own right”.¹¹⁰

Irish authorities could also be found on the subject matter back in 1891,¹¹¹ despite the fact that in none of these cases did the action ever succeed due to lack of *mala fides*.¹¹²

2.2 Falling into Disuse

¹⁰³ For other summaries of the historical development of this cause of action, see Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, pp. 185-90; Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), pp. 926-7; Aronson & Whitmore, *Public Torts and Contracts* (Law Book Co 1982), pp. 121-31. See also, *Three Rivers DC & Ors v Bank of England (No 3)* [1997] 3 C.MLR 429, at 438-44, per Clarke J.

¹⁰⁴ Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 185.

¹⁰⁵ (1704) 14 St Tr 695.

¹⁰⁶ (1672) 86 ER 287. Lord Steyn suggested that the tort is traceable to this case also: *Three Rivers District Council v Bank of England (No 3)* [2000] 3 All ER 1, at 7, per Lord Steyn.

¹⁰⁷ Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 185.

¹⁰⁸ *Drewe v Colton* (1787) 102 ER 217, at 218, per Wilson J.

¹⁰⁹ See, e.g. *Williams v Lewis* (1797) 170 ER 229; *Harman v Tappenden* (1801) 102 ER 214; *Cullen v Morris* (1819) 171 ER 141; *Cave v Mountain* (1840) 113 ER 330; *Davis v Black* (1841) 113 ER 1376; *Linford v Fitzroy* (1849) 13 QB 240; *Tozer v Child* (1857) 119 ER 1286; *Partridge v General Medical Council* (1890) 25 QB 90; see further, Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, pp. 185-6.

¹¹⁰ Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 185.

¹¹¹ *Johnston v Meldon* (1891) 30 LR Ir 13. See also, *O’Conghaile v Wallace* [1938] IR 526; cited in G. Hogan & D. Morgan, *Administrative Law* (3rd ed. Round Hall, 1998), pp. 812-5.

¹¹² *Ibid.*

In 1908, Vaughan Williams LJ held in *Davis v Bromley Corporation*¹¹³ that:

“In my opinion...no action will lie against a local authority in respect of its decisions, even if there is some evidence to show that the individual members of the authority were actuated by bitterness or some other indirect motive.”¹¹⁴

The denial of its existence in this decision led the tort to fall into disuse and virtually disappeared in the following fifty years,¹¹⁵ aside from the first case that appeared in the Canadian courts.¹¹⁶

2.3 *Revival of the Tort*

The tort seemingly appeared again in 1956 where liability was imposed where a public official “knowingly acted wrongfully and in bad faith”.¹¹⁷ Though admittedly, in nowhere in the judgment could it be evidenced that Viscount Simonds was relying on, or so to speak, “even aware of”¹¹⁸ the tort of misfeasance in public office, despite the essential ingredients could be noticed.

Three years later, the existence of liability of such a nature was approved in Victoria subsequently in *Farrington v Thomson*.¹¹⁹ One month later, the Supreme Court of Canada made the landmark decision in *Roncarelli v Duplessis*.¹²⁰ There had been suggestions¹²¹ as to that the judgment was made on the basis of Art. 1053 of the Quebec Civil Code which provides, *inter alia*, a general liability for everyone person “capable of discerning right from wrong” to be “responsible for the damage caused by his fault to another”, but that it had also been said that the concept of “fault” is common law based, noting that *McGillivray v Kimber*¹²² and other previous cases have been cited extensively by the Supreme Court.¹²³ At any rate, it had been treated as a decision based on common law in subsequent cases,¹²⁴ putting a stop to the academic debate surrounding the basis of that decision. Though the Supreme Court decision did not expressly refer to the tort of misfeasance in public office, it had been ever since taken as the landmark decision in the jurisdiction, given being decided “at the time it was, and in circumstances closely resembling those of the tort”.¹²⁵ This was said to be the beginning of the tort’s revival in the Commonwealth.¹²⁶

A few years after these decisions, the Privy Council overruled *Davis v Bromley Corporation*

¹¹³ [1908] 1 KB 170.

¹¹⁴ *Ibid*, at 172, per Vaughan Williams LJ

¹¹⁵ Lloyd, “The Emergent Tort of Misfeasance” (2003) 35 BLJ 7, p. 17.

¹¹⁶ *McGillivray v Kimber* (1916) 26 DLR 164.

¹¹⁷ *Smith v East Elloe R.D.C* [1956] AC 736, at 752, per Viscount Simonds.

¹¹⁸ Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 187.

¹¹⁹ [1959] VR 715.

¹²⁰ (1959) 16 DLR (2d) 689.

¹²¹ See Sheppard, “*Roncarelli v Duplessis*: Art 1053 c.c. Revolutionised” (1960) 6 McGill LJ 75.

¹²² (1916) 26 DLR 164.

¹²³ See Eade, “*Roncarelli v Duplessis*” (1961) Can Bar Rev 665; Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 189.

¹²⁴ *Hlookoff v City of Vancouver* (1968) 67 DLR (2d) 119; see Gould, “Damages as a Remedy in Administrative Law” (1972) 5 NZULR 105; Phegan, “Damages for Improper Exercise of Statutory Powers” (1980) 9 Syd LR 92.

¹²⁵ Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 189.

¹²⁶ Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 927.

in an appeal from Ceylon concerning a cinema licence¹²⁷ and for the first time clearly recognized the tort's existence.

Such notion of liability was rejected in Tasmania within months.¹²⁸ However, the authority has been criticized to be poorly reasoned as despite the judge's acknowledgement that it would be "strange" to accord a remedy in damages where there had been a negligent use of power, but none where there is a fraudulent abuse of power,¹²⁹ he maintained his position that the only proper remedy in such a situation would be to seek judicial review¹³⁰ after characterizing previous authorities on the subject matter to be based on other torts such as trespass.¹³¹

Eight years down the road, New Zealand approved the imposition of such form of tortious liability in *Campbell v Ramsay*¹³² when it finally arrived at its shores.

It was only until 1978 that the first Hong Kong reported case with reference to this public tort appeared. In reliance of earlier authorities, including *Farrington v Thomson*,¹³³ the Hong Kong Court of Appeal recognized the existence of the tort¹³⁴ after initial doubts as to its existence.¹³⁵ Citing *Farrington v Thomson*, the position in Hong Kong was said to be that:

"If a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, an action in tort for misfeasance in a public office will lie against him at the suit of that person."¹³⁶

Further, the Court of Appeal cited¹³⁷ the following quote from *Everett v Griffiths*,¹³⁸ approving that it "undoubtedly states the true position":¹³⁹

"If a man is required in the discharge of a public duty to make a decision which affects, by its legal consequences, the liberty or property of others, and he performs that duty and makes that decision honestly and in good faith, it is, in my opinion, a fundamental principle of our law that he is protected. It is not consonant with the principles of our law to require a man to make such a decision in the discharge of his duty to the public and then to leave him in peril by reason of the consequences to others of that decision, provided that he has acted honestly in making that decision."¹⁴⁰

*Dunlop v Woollahra Municipal Council*¹⁴¹ is a milestone for the development of this tort. The Privy Council for the first time unequivocally recognized the existence of this tort, with Lord

¹²⁷ *David v Abdul Cader* [1963] 1 WLR 834.

¹²⁸ *Poke v Eastburn* [1964] Tas SR 98.

¹²⁹ Aronson & Whitmore, *Public Torts and Contracts* (Law Book Co 1982), pp. 128-9.

¹³⁰ *Poke v Eastburn* [1964] Tas SR 98, at 103, per Gibson ACJ.

¹³¹ *Ibid*, at 102. He referred to *Smith v East Elloe Rural DC* [1956] AC 736.

¹³² (1967) 87 WN (Pt.2) (N.S.W.) 153.

¹³³ [1959] VR 715.

¹³⁴ *Attorney General v Ng Kee* [1978] CA 226, at para. 13, per Briggs C.J.

¹³⁵ *Ibid*, at para. 9, per Briggs C.J.

¹³⁶ *Attorney General v Ng Kee* [1978] CA 226, at para. 13, per Briggs C.J.

¹³⁷ *Ibid*, at para. 17.

¹³⁸ [1921] 1 AC 631.

¹³⁹ *Attorney General v Ng Kee* [1978] CA 226, at para. 17, per Briggs C.J.

¹⁴⁰ [1921] 1 AC 631, at 695, per Lord Moulton.

¹⁴¹ [1981] 1 All ER 1202.

Diplock describing it as a tort that is “well established”.¹⁴² Since then the authority has been extensively cited by many¹⁴³ and paved the way for the tort’s “full renaissance”.¹⁴⁴

2.4 *Modern Developments*

The subsequent high-profile cases on UK that relied on this tort, such as the successful claim of French turkey producers against the wrongful decision of the Ministry of Agriculture Fisheries and Food to ban importation of French turkeys,¹⁴⁵ attracted further attention and was said to have contributed to the tort’s gradual general acceptance.¹⁴⁶

The collapse of the Bank of Credit and Commerce International (BCCI) in 1991 provided the perfect stage for the tort’s development.¹⁴⁷ The creditors of BCCI launched an astronomical £850 million claim against the Bank of England through the tort of misfeasance in a public office on the ground that, as a regulator of the banking industry, the latter had wrongly granted a licence to BCCI and/or wrongly failed to revoke that licence. The claim was not pursued on the basis of other causes of actions such as negligence since the Bank was shielded from any claim of damages for its acts and/or omissions by s.1(4) of the Banking Act 1987 “unless it is shown that the act or omission was in bad faith”. The tort of misfeasance was chosen as it fits in the bad faith exception, and as a result, it was extensively considered by the House of Lords.¹⁴⁸

Very shortly afterwards, before the law reports of the aforementioned decision in *Three Rivers* were even published,¹⁴⁹ the Hong Kong Court of Appeal had already adopted the view of the House of Lords in the local decision of *Tang Nin Mun v Secretary for Justice*,¹⁵⁰ and it remained to be the leading local authority on the subject matter as of date.

¹⁴² *ibid.*, at 1210, per Lord Diplock.

¹⁴³ *Three Rivers District Council v Bank of England (No 3)* [2000] 3 All ER 1, at 34, per Lord Hutton; Rogers, *Winfield and Jolowicz on Tort* (17th ed. Sweet & Maxwell 2006), p. 362; Stanton (et al), *Statutory Torts* (Sweet & Maxwell 2003), p. 131.

¹⁴⁴ Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 927.

¹⁴⁵ *Bourgoin SA v Minister of Agriculture Fisheries and Food* [1986] QB 716.

¹⁴⁶ Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 927; Stanton (et al), *Statutory Torts* (Sweet & Maxwell 2003), pp. 131-2.

¹⁴⁷ *Three Rivers District Council v Bank of England (No 3)* [2000] 3 All ER 1.

¹⁴⁸ It had been reported that more than £100 million in costs had been spent by the plaintiff in the series of cases, reflecting the scale of the litigation.

¹⁴⁹ *Tang Nin Mun v Secretary for Justice* [2000] 2 HKLRD 324, at 325, per Ribeiro JA.

¹⁵⁰ [2000] 2 HKLRD 324.

III. The Tort of Misfeasance in Public Office

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3.1 Rationale and the Nature of the Tort

The rationale of the tort had been stated in *Jones v Swansea City Council*¹⁵¹ by Nourse LJ as 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 or improper purposes” and was adopted by the House of Lords in *Three Rivers District Council v Bank of England*.¹⁵² The tort is said to be predicated upon the “absolute need to prevent the abuse of power by public officers charged with the exercise of public functions.”¹⁵³

The notion of an “abuse of a public position” or an “abuse of power”¹⁵⁴ (or alternatively termed as dishonesty or bad faith)¹⁵⁵ lies at the heart of the remedy. It is the link between the two limbs of the tort and justifies the departure from the rule that damage caused by an *ultra vires* act is not actionable,¹⁵⁶ serving as the bridge between the public law concept of invalidity and the private law concept of liability.

The tort had been described by Lord Millett as an intentional tort,¹⁵⁷ and despite earlier suggestions that the tort may be actionable *per se*¹⁵⁸ as no proof of actual damage seems to be required in early authorities such as *Ashby v White*,¹⁵⁹ it seems clear under modern authorities¹⁶⁰ that damage is required to be proved to sustain a claim under this tort.

The tort is thus a public intentional tort which is not actionable *per se*.

3.2 Overview

The constituent elements of the tort in each jurisdiction would first be set out.

3.2.1 *England*¹⁶¹

The essential elements of the tort were set out in *Three Rivers District Council v Bank of England (No. 3)*¹⁶² by Lord Steyn in his leading judgment as:

- (1) the defendant is/was at material times a public officer;
- (2) the defendant, at material times, was exercising power as a public office holder;
- (3) the defendant acted, or made an omission, in subjective bad faith;

¹⁵¹ [1990] 1 WLR 54, cited in Stanton (et al), *Statutory Torts* (Sweet & Maxwell 2003), p. 131.

¹⁵² [2000] 3 All ER 1, at 7, per Lord Steyn.

¹⁵³ Todd (ed.), *The Law of Torts in New Zealand*, (3rd ed. Brookers 2001), p. 972.

¹⁵⁴ The same rationale could be seen in Canadian authorities: *Odhavji Estate v Woodhouse* (2000) 194 DLR (4th) 577, per Borins JA.

¹⁵⁵ Stanton (et al), *Statutory Torts* (Sweet & Maxwell 2003), p. 133.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Three Rivers District Council v Rank of England* [2003] 3 AC 1, at 290, per Lord Millett; approved in *Tso Yung v Cheng Yeung Hing & Anor* [2003] HKCFI 233, at para. 74

¹⁵⁸ Arrowsmith, *Civil Liability and Public Authorities* (Earlsgate 1991), p. 233.

¹⁵⁹ (1704) 14 St Tr 695.

¹⁶⁰ *Watkins v Secretary of State for the Home Department* [2006] 2 AC395; *Karagozlu v Commissioner of the Police of the Metropolis* [2007] 1 WLR 1881.

¹⁶¹ See generally, Dugdale (et al), *Clerk & Lindsell on Torts* (19th ed. Sweet & Maxwell 2006), pp. 867 – 75.

¹⁶² [2003] 2 AC 1.

- (4) the plaintiff has sufficient interest or nexus to bring an action;
- (5) causation;
- (6) recklessness on the part of the defendant as to the consequence of his act, in the sense of not caring whether the consequences would come about or not.¹⁶³

Lord Hutton listed his understanding of the ingredients of the tort in the same decision as:

- (1) an act or omission by a public officer;
- (2) amounting to a breach of duty;
- (3) the act of omission must be deliberate, and must be one involving an actual decision – mere inadvertence or oversight, even if injury or damage results, with not be sufficient;
- (4) the plaintiff must prove that the public office holder foresaw that his action/omission would probably cause injury or damage to the plaintiff;
- (5) in the event that the plaintiff is able to show that defendant public officer knew that his or her unlawful conduct would probably injure or damage another person, or was reckless as to that consequence, no link, nexus or relationship between the plaintiff and the defendant public officer need to be proven otherwise.¹⁶⁴

3.2.2 *Australia*¹⁶⁵

The classic definition of the tort in Australia could be found in *Farrington v Thomson*,¹⁶⁶ in which Smith J held:

“If a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person.”¹⁶⁷

The elements of the tort in Australia had been fleshed out by Deane J in *Northern Territory of Australia and Others v Mengel and Others*¹⁶⁸ as being:

- (i) an invalid or unauthorized act;
- (ii) done maliciously;
- (iii) by a public officer;
- (iv) in the purported discharge of his or her public duties;
- (v) which caused loss or harm to the plaintiff.¹⁶⁹

¹⁶³ *Ibid*, at 191-94; Nicholls, Daniel, Polainie & Hatchard, *Corruption and Misuse of Public Office* (Oxford 2006), p. 89.

¹⁶⁴ *Ibid*, p. 90.

¹⁶⁵ See generally, Trindade & Cane, *The Law of Torts in Australia* (3rd ed. Oxford 1999), pp. 242 – 248.

¹⁶⁶ [1959] VR 286.

¹⁶⁷ *Ibid*, at 293.

¹⁶⁸ (1996)185 CLR 307.

¹⁶⁹ *Ibid*, at 370.

3.2.3 *New Zealand*¹⁷⁰

The following elements need to be established for the tort in New Zealand:

- (1) the defendant must be a public officer;¹⁷¹
- (2) the defendant must have acted in the exercise of purported exercise of his or her office;¹⁷²
- (3) the defendant must have acted with malice towards the plaintiff, or with knowledge that, or with reckless indifference as to whether, he or she was acting invalidly;¹⁷³ and
- (4) the plaintiff must have suffered damage which is not too remote.¹⁷⁴

3.2.4 *Canada*¹⁷⁵

Canadian law refuses to recognize the tort of breach of statutory duty despite its prominence in other jurisdictions, and had been relative restrictive in its approach towards claims of negligence against public authorities.¹⁷⁶ Fortunately, this did not prevent the tort of misfeasance in public office from being recognized. The elements of the tort in Canada had been defined as follows:

- (a) the actor must be a public official;
- (b) the activity in question must relate to an exercise of a statutory authority or power; and
- (c) the wrongdoing must be intentional.¹⁷⁷

3.2.5 *Ireland*

In *Pine Valley Developments Ltd v Minister for the Environment*,¹⁷⁸ Finlay CJ adopted Sir Wade's summary of the law¹⁷⁹ and held that an action for misfeasance in public office would be found in any of the following situations where there is an *ultra vires* administrative act:¹⁸⁰

- (1) which actuated by malice, e.g. personal spite of a desire to injure for improper reasons; or
- (2) where the authority knows that it does not possess the power which it purports to exercise."¹⁸¹

¹⁷⁰ See generally, Todd (ed.), *The Law of Torts in New Zealand*, (3rd ed. Brookers 2001), pp. 971-77.

¹⁷¹ *Tampion v Anderson* [1973] VR 715, at 720.

¹⁷² *E v K* [1995] 2 NZLR 239, at 249.

¹⁷³ *Simpson v A-G* [1994] 3 NZLR 667, at 675.

¹⁷⁴ *Garrett v A-G* [1997] 2 NZLR 332.

¹⁷⁵ See generally, Klar, *Tort law*, (3rd ed. Carswell, 2003), pp. 290 - 94.

¹⁷⁶ *Ibid*, p. 290.

¹⁷⁷ *Ibid*.

¹⁷⁸ [1987] ILRM 747.

¹⁷⁹ *Ibid*, at 757.

¹⁸⁰ McMahon & Binchy, *Law of Torts* (3rd ed. Butterworths 2000), p. 548.

3.2.6 Further Discussion

Browsing through the definitions offered from these jurisdictions, the following common factors could be distilled out:

- (1) a public officer;
- (2) in the purported exercise of powers and/or discharge of duties of his or her public office;
- (3) invalidity of the act/ omission;
- (4) with “malice”;
- (5) damage to the plaintiff; and
- (6) causation.

Generally speaking, the courts across the Commonwealth seem to be in agreement on the general elements required to sustain such a claim. What remain less clear would be the actual definition of “malice” and the minimum requirement of “damage”, as discussed below.

3.2.7 Hong Kong

The leading Hong Kong authority on this topic is *Tang Nin Mun v Secretary for Justice*,¹⁸² and had been constantly referred as such in virtually all subsequent decisions on the subject matter.¹⁸³ The elements required for the court to find liability for the tort had been summarized by Au J in a recent district court decision with reference to *Three Rivers* and *Ashley v The Chief Constable of Sussex Police*¹⁸⁴ as:

- (1) The defendant must be a public officer;
- (2) The exercise of power complained of is made in the capacity as a public officer;
- (3) There is either a targeted malice or an untargeted malice on the part of the defendant in the exercise of his power as a public officer. Targeted malice refers to conducts specifically intended by the public officer to injure the plaintiff or a class of persons in the position of the plaintiff. Untargeted malice refers to the situation where public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It also involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful;
- (4) Duty to the plaintiff;

¹⁸¹ Wade, *Administrative Law* (5th ed. Oxford 1982), p. 673, applied in *O'Donnell v Dun Laoghaire* [1990] ILRM 301, at 320, per Costello J.

¹⁸² [2000] 2 HKLRD 324.

¹⁸³ *Ting Kwong Lun & Ors v Secretary for Justice* [2002] HKCFI 223, at para. 12, per Cheung J; *Wong Tai Wai David v HKSAR* [2004] HKCA 261, at para. 18, per Cheung J; *Liem Hung & Ors v Building Authority & Ors* [2004] HKCFI 908, at para. 19, per Poon J; *Iu Po Cheung v The Commissioner for Census and Statistics* [2008] HKCFI 483, at para. 5, per Cheung J; *Hui Kee Chun v The Privacy Commissioner for Personal Data* [2008] HKCFI 941, at para. 11.

¹⁸⁴ [2005] EWHC 415, at para. 46, per Dobbs J.

(5) Causation;

(6) Damages and Remoteness. The defendant must act in the knowledge that his act will probably injure the plaintiff or person [for] a class of which the plaintiff was a member. This was clarified in *Akenzua v SSHD*¹⁸⁵ that it is not necessary that the victim be known to the defendant at the time of the commission of the tort.¹⁸⁶

Having the constituent elements for establishing the tort set out in each jurisdiction, each element would be examined in turn with further detail.

3.3 Physical Elements

3.3.1 *Public Officer*

The definition of “public officer” would first be examined.

3.3.1.1 *England*¹⁸⁷

The concept of “public officer” had already been defined by the English courts nearly two centuries ago. In *Henly v Mayor of Lyme*,¹⁸⁸ it had been held to cover:

“...everyone who is appointed to discharge a public duty and recovers compensation in whatever shape, whether from the Crown or otherwise, is constituted a public officer...”¹⁸⁹

As there is no logical reason why it should not cover those who perform public functions voluntarily also,¹⁹⁰ the concept was subsequently expanded in when the Australian decision *Tampion v Anderson*¹⁹¹ was accepted under English law:¹⁹²

“The office must be one the holder of which owes duties to members of the public as to how the office shall be exercised”.¹⁹³

In *Three Rivers*, Lord Hobhouse described the definition of “public officer” as a “broad concept,”¹⁹⁴ and Lord Steyn said it had been to understood “in a relatively wide sense”.¹⁹⁵ It is

¹⁸⁵ [2003] 1 WLR 741.

¹⁸⁶ *Asher Model Management Ltd v Francis Carroll* [2008] HKDC 127, at para. 17, per Au J. See also, *Tso Yung v Cheng Yeung Hing & Anor* [2003] HKCFI 223, at para. 72, per Deputy Judge Fung.

¹⁸⁷ See generally, Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 928 – 29.

¹⁸⁸ (1828) 130 ER 995.

¹⁸⁹ *Ibid.*, at 1001, per Best CJ.

¹⁹⁰ Gould, “Damages as a Remedy in Administrative Law” (1972) 5 NZULR 105, p. 117;

¹⁹¹ [1973] VR 715.

¹⁹² Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 928 – 29.

¹⁹³ *Ibid.*, at 720.

¹⁹⁴ *Three Rivers District Council v Bank of England (No 3)* [2000] 3 All ER 1, at 44.

now said to encompass all natural persons and legal persons¹⁹⁶ “whose action are subject to judicial review”, irrespective of the authority they derive their powers from, as long as they exercise public functions.¹⁹⁷

3.3.1.2 Australia

Similar to the position in England, the definition offered by Best CJ in *Henly v Mayor of Lyme*¹⁹⁸ had been adopted in Australia,¹⁹⁹ and the general definition had been held to be that a person who “takes a reward...whatever be the nature of that reward...from the crown...for the discharge of a public duty”.²⁰⁰ This was subsequently expanded in *Tampion v Anderson*,²⁰¹ discussed above. A broad concept was adopted in Australia, and in the list of example offered by Professor Trindade and Professor Cane, we could see that the concept had been held to be wide enough to cover: public officers,²⁰² stock inspectors,²⁰³ barristers acting on a board of inquiry under an Order-in-Council,²⁰⁴ a minister of the Crown,²⁰⁵ Crown prosecutors,²⁰⁶ the secretary of a professional body exercising disciplinary functions,²⁰⁷ and a statutory corporation exercising local government functions.²⁰⁸

3.3.1.3 New Zealand²⁰⁹

The definitions offered in *Henly v Mayor of Lyme*²¹⁰ and *Tampion v Anderson*²¹¹ were also accepted in the courts of New Zealand.²¹² Unpaid officials may also be included within the concept.²¹³ The concept covers both natural persons and corporations.²¹⁴ Local examples include: ministers of the crown,²¹⁵ police officers,²¹⁶ local authority councillors²¹⁷ and its employees,²¹⁸ and the Accident Compensation Corporation.²¹⁹ Previously there were

¹⁹⁵ Dugdale (et al), *Clerk & Lindsell on Torts* (19th ed. Sweet & Maxwell 2006), p. 871.

¹⁹⁶ *Jones v Swansea City Council* [1989] 3 All ER 162, at 173, per Slade LJ.

¹⁹⁷ Arrowsmith, *Civil Liability and Public Authorities* (Earlsgate 1991), p. 226.

¹⁹⁸ (1828) 130 ER 995.

¹⁹⁹ Trindade & Cane, *The Law of Torts in Australia* (3rd ed. Oxford 1999), pp. 245 – 6.

²⁰⁰ (1828) 130 ER 995, at 1001, per Best CJ.

²⁰¹ [1973] VR 715.

²⁰² *Farrington v Tomson and Bridgland* [1959] VR 289; *Elliott v Chief Constable of Wiltshire*, *The Times*, December 5, 1996.

²⁰³ *Northern Territory of Australia v Mengel* (1996) 185 CLR 307.

²⁰⁴ *Tampion v Anderson* [1973] VR 715.

²⁰⁵ *Sanders v Snell* (1997) 143 ALR 426.

²⁰⁶ *Grimwade v State of Victoria* (1997) 90 A Crim R 526, at 567.

²⁰⁷ *Little v Law Institute of Victoria* [1990] VR 257.

²⁰⁸ *Dunlop v Woollahra Municipal Council* [1982] AC 158, at 172.

²⁰⁹ See generally, Todd (ed.), *The Law of Torts in New Zealand*, (3rd ed. Brookers 2001), pp. 973 – 74.

²¹⁰ (1828) 130 ER 995.

²¹¹ [1973] VR 715.

²¹² Todd (ed.), *The Law of Torts in New Zealand*, (3rd ed. Brookers 2001), p. 973.

²¹³ *Murcia Holdings Pty Ltd v City of Nedlands* (2000) 22 WAR 1, at 37, per Anderson J.

²¹⁴ *Bayley-Jones v University of Newcastle* (1990) 22 NSWLR 424.

²¹⁵ *Takaro Properties Ltd v Rowling* [1978] NZLR 314.

²¹⁶ *Simpson v A-G* [1994] NZLR 667; *Garrett v A-G* [1997] 2 NZLR 332.

²¹⁷ *Murcia Holdings Pty Ltd v City of Nedlands* (2000) 22 WAR 1.

²¹⁸ *E v K* [1995] 2 NZLR 239.

²¹⁹ *Rogers v ARCIC* HC Auckland CP 538/96.

uncertainties as to where judicial officers are included, but this had been answered in the positive by the Court of Appeal.²²⁰

3.3.1.4 Canada

The definition of a public official is widely construed, and referred to “those who hold public office or act under statutory authority”.²²¹ The crucial test is whether there was an exercise of a public function on the part of the defendant. It had been held to be wide enough to cover a peace officer who was a member of the Royal Canadian Mounted Police.²²² The concept was commented as “wide and has not posed a problem in any of the recent cases”.²²³ Case law reveals that the concept covers both natural and legal persons.²²⁴

3.3.1.5 Ireland

The concept of “public officer” is also a broad one under Irish law, and had been held to include both natural persons and corporations.²²⁵ It had been also held that police officers (Gardaí) of any rank could be included by the concept.²²⁶ Examples would include the Law Society,²²⁷ tribunals,²²⁸ county councils,²²⁹ and various different ministers.²³⁰

3.3.1.6 Further Discussion

By now it seems clear that the concept of “public officer” is well-established and posed no difficulties in application. The authorities in these jurisdictions show that the courts are in consensus that the concept of “public office” is a broad one which looks into substance rather than form, and applies equally to natural persons and incorporated bodies.

3.3.1.7 Hong Kong

The only decision in Hong Kong in which the definition of a “public officer” was at issue in a misfeasance in public office claim could be found in *Hui Kee Chun v The Privacy*

²²⁰ *Rawlinson v Rice* [1998] 1 NZR 454; Todd (ed.), *The Law of Torts in New Zealand*, (3rd ed. Brookers 2001), p. 973.

²²¹ Klar, *Tort law*, (3rd ed. Carswell, 2003), p. 290.

²²² *Uni-Jet Industrial Pipe Ltd v Canada (A-G)* 2001] 9 CCLT (3d) 1.

²²³ Klar, *Tort law*, (3rd ed. Carswell, 2003), p. 291.

²²⁴ *Alberta (Minister of Public Works, Supply & Services) v Nilsson* [2000] 2 WWR 688.

²²⁵ *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301.

²²⁶ *Hanahoe v Judge Hussey* HC, 14/11/1997.

²²⁷ *Kennedy v The Law Society & Ors* [2005] IESC 23.

²²⁸ *Beatty v The Rent Tribunal* [2005] IESC 66.

²²⁹ *Glencar Explorations Plc v Mayo County Council* [1998] IEHC 137.

²³⁰ *Comcast International Holdings Inc & Ors v Minister for Public Enterprise & Ors* [2007] IEHC 297; *McGrath v Minister for Justice* [2003] IESC 29.

Commissioner for Personal Data.²³¹ At first instance, the argument that the defendant, the Privacy Commissioner for Personal Data, is a “mere corporate sole” under Section 5 of the Personal Data (Privacy) Ordinance was held to be “not arguable”,²³² yet on appeal the same argument was accepted and it was held that the defendant was not a public officer for this reason.²³³ No further reasoning was provided. It seems to be erroneous for Yuen JA to conclude that as claims of negligence and so forth may be available, thus the defendant, as “mere corporate sole” would fall out of the scope of the tort of misfeasance in public office. There is no requirement for exhaustion of other available remedies before a claim could be brought through misfeasance, and English authorities and case law from other jurisdictions are in consensus that the concept of “public officer” in this context includes legal persons also.²³⁴ It is submitted that a “broad concept” of “public officer”, as suggested by Lord Hobhouse,²³⁵ should be adopted in Hong Kong for this purpose.

3.3.2 Act or Omission made or done “in the exercise of power”

3.3.2.1 England²³⁶

The traditional emphasis of English law in this respect is to classify the act in question as a discretionary duty or a ministerial duty.²³⁷ The reasoning behind is that, to attract tortious liability, “malice” is to required to be proven in the case of discretionary duties but not ministerial duties.²³⁸ In theory, the latter attracts strict liability²³⁹ and is the “forerunner of the modern tort of breach of a statutory duty”.²⁴⁰ An example of the latter would be where custom officers refuse to accept a correctly tendered customs duty,²⁴¹ while an example of the prior would be a wrongful refusal to grant bail by a magistrate.²⁴²

However, like what has been done with the concept of “public office”, modern English law had been said to have taken a “broad approach” in respect of this element.²⁴³ Despite the general rule that the tort would only cover acts committed by the official in his or her official capacity vis-à-vis merely private acts, the courts of England are now prepared to hold that where such private acts are conducted ultimately for the benefit of the public or are tantamount to a discharge of a public function, an exception to the general rule would be made. This could be best understood through the judgment in *Jones v Swansea CC*,²⁴⁴ in

²³¹ [2008] HKCFI 941; [2009] HKCA 94.

²³² [2008] HKCFI 941, paras. 14-15, per Chan J.

²³³ *Hui Kee Chun v The Privacy Commissioner for Personal Data* [2009] HKCA 94, at para. 25, per Yuen JA.

²³⁴ See, e.g. *Jones v Swansea City Council* [1989] 3 All ER 162, at 173, per Slade LJ; *O'Donnell v Dun Laoghaire Corporation* [1991] ILRM 301.

²³⁵ *Three Rivers District Council v Bank of England (No 3)* [2000] 3 All ER 1, at 44.

²³⁶ Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), pp. 929 - 30.

²³⁷ Wade & Forsyth, *Administrative Law* (9th ed. Oxford 2004), p. 781; Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 183.

²³⁸ *Linford v Fitzroy* (1849) 13 QB 240, at 247, per Lord Denman C.J.

²³⁹ *Barry v Arnaud* (1939) 113 ER 245; *Ferguson v Kinnoull* (1842) 8 ER 412.

²⁴⁰ Wade, *Administrative Law* (4th ed. 1997), p. 632.

²⁴¹ *Barry v Arnaud* (1939) 113 ER 245.

²⁴² *Linford v Fitzroy* (1849) 13 QB 240.

²⁴³ *Ibid*, p. 929.

²⁴⁴ [1989] 3 All ER 162.

which Slade LJ held that a malicious exercise of a contractual power²⁴⁵ would fall within the ambit of the tort also:

“I think the boundaries of the respective remedies of judicial review and...misfeasance in public office are by no means necessarily coterminous...I see no reason why a decision taken by the holder of a public officer, in his or its capacity as such holder..should be incapable of giving rise to an action in tort for misfeasance of public officer merely because the decision is taken in the exercise of a power conferred by a contract and in this sense has no public element...in the present context...it is not the juridical nature of the relevant power but the nature of the council’s office which is the important consideration.”²⁴⁶

Thus it is clear now, that the test is one of substance and not of form. The crucial test should be whether the power was discharged in fulfillment of a public duty or for the public benefit otherwise, instead of whether the act could be characterized as derived from a contractual or a prerogative power. It is worthy to note that the tort had been held to cover not only “misfeasance” in public office, but would in some instances cover “non-feasance” in public office also.²⁴⁷ But as the requirement of the mental element of malice still needs to be satisfied, as would be discussed below, the decision to not act must be a conscious decision as opposed to a “mere failure, oversight or accident”.²⁴⁸ A duty to act should exist in such situations.. The often-cited example would be where a police officer, actuated by his personal grievances against the victim, deliberately refrained from helping a man who was eventually beaten to death outside a club.²⁴⁹

3.3.2.2 *Australia*

Professor Trindade and Professor Cane commented that in Australia, “[t]he decided cases do not disclose any difficulty with the fulfilment of this element of the tort”,²⁵⁰ and that it is “likely to be the position in most cases” that the court would simply rule that the defendant acted in “purported exercise of his public duties” upon finding that the defendant is a “public officer”, as had been done in *Sanders v Snell*.²⁵¹ The Australian courts initially adopted a narrower approach in dealing with this element. For example, an unfair dismissal of an employee of a public body was held to be out of the scope of the tort.²⁵² Yet, in a subsequent decision the Australian High Court ruled that it does.²⁵³ The position now seems to be that, a broad approach which is similar to the English position is now adopted by the Australian courts. It is worthy to note that the concept now covers both misfeasance and non-feasance.²⁵⁴

²⁴⁵ In that case, it was a refusal to allow a tenant to change the use of a commercial property rented to him by the defendant council.

²⁴⁶ [1989] 3 All ER 162, at 174 – 5.

²⁴⁷ Gould, “Damages as a Remedy in Administrative Law” (1972) 5 NZULR 105, p. 117.

²⁴⁸ *Three Rivers District Council v Bank of England (No 3)* [2000] 3 All ER 1, at 42, per Lord Hutton.

²⁴⁹ *R v Dytham* [1979] 3 All ER 641; cited in Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p.30.

²⁵⁰ Trindade & Cane, *The Law of Torts in Australia* (3rd ed. Oxford 1999), p. 245.

²⁵¹ (1997) 143 ALR 426.

²⁵² *Pemberton v A-G* [1978] Tas SR 1.

²⁵³ *Sanders v Snell* (1998) 196 CLR 329.

²⁵⁴ Trindade & Cane, *The Law of Torts in Australia* (3rd ed. Oxford 1999), p. 245.

3.3.2.3 *New Zealand*

The general requirement was said to be that the defendant public officer must act “in the exercise or purported exercise of some power or authority with which he is clothed by virtue of the office he holds”²⁵⁵ and not in his or her private capacity.²⁵⁶ Having said that, the New Zealand courts seems to be not prepared to expand the scope of the tort to cover private acts such as exercising a power under a lease contract as the English courts did in *Jones v Swansea CC*.²⁵⁷ Issues of employment law were held to out of the scope of the tort²⁵⁸ as the New Zealand courts adopted a somewhat narrow approach in this respect.

3.3.2.4 *Canada*

This element had rarely been raised as an issue in the Canadian experience, as the focus of the courts tend to be on the unlawfulness of the administrative act in question and the presence of malice rather than on characterizing the act in question as one falling within the “public powers” of the defendant or not.²⁵⁹ The general principles in determining this question should be the same under Canadian law, but with one caveat. As Canadian law refuses to accept the doctrine of breach of statutory duty, there may be practical problems in establishing the tort where the “unlawful administrative act” tantamount to a breach of statutory duty.²⁶⁰ This argument could at least be seen in *Odhavji Estate v Woodhouse*.²⁶¹

3.3.2.5 *Ireland*

Similar to the situation in Canada, there is a paucity of Irish authorities on this issue. The argument had not been raised in the reported decisions on the subject matter. It is uncertain as to whether the approach in *Jones* would be applied also in Ireland.

3.3.2.6 *Further Discussion*

By now we could see, that this element does not pose much of a problem in practice. Generally speaking, as where it could be shown that there is an *ultra vires* administrative act in question, there would be little doubt as to where it is made in “the exercise or the purported exercise of a public power”. The main divergence between jurisdictions that may exist in respect of this element is whether the concept should be extended to cover private acts such as exercise of contractual rights. It is submitted that the approach in *Jones* ought to be adopted, as there is no logical reason to shield malicious public authorities once they are able to characterize their acts to be of “private law” nature while in reality a “public function” is

²⁵⁵ Adopting the test suggested in *Caveley v Chief Constable of Merseyside Police* [1989] AC 1228, at 1240.

²⁵⁶ Todd (ed.), *The Law of Torts in New Zealand*, (3rd ed. Brookers 2001), p. 974.

²⁵⁷ [1990] 1 WLR 1453, at 1458.

²⁵⁸ *MacKenzie v MacLachlan* [1979] 1 NZLR 670.

²⁵⁹ Klar, *Tort law*, (3rd ed. Carswell, 2003), p. 291.

²⁶⁰ *Ibid*, p. 291.

²⁶¹ (2000) 194 DLR (4th) 577.

still being discharged. This is particularly so where exemption and/or immunity clauses exist, rendering it impractical to pursue claims through private law.

3.3.2.7 *Hong Kong*

Although this element has been recognized as essential to establish the tort, arguments had not been raised Hong Kong authorities in respect of when does a public officer act in the “exercise or purported exercise” of his or her powers. However, given that the definition of the tort in *Three Rivers* had been adopted²⁶² and the desirability of maintaining a broad approach in dealing with the concept as discussed above, it is hoped that the *Jones* approach would be accepted by the Hong Kong courts.

3.3.3 *Unlawfulness*

There is not much to be said about this element. Perhaps, on the contrary, there would be too much to be said if this element is explored in full. It is essentially the concept of *ultra vires* in public law, and it would be out of the scope of this discussion to examine the whole concept once again here. But it would suffice to say that, it would be broad enough to cover breaches of public law, and in the European context, that would also include EC Law.²⁶³

All that could be usefully said is that, the discretion in question must not be “unimpeachable”,²⁶⁴ for example, the Attorney-General’s prerogative power to grant his fiat.²⁶⁵ To the very least, it had been said the “unlawfulness” of the act or omission would “in most cases” be satisfied by the circumstances constituting the tort.²⁶⁶ The proof of malice would often be sufficient – it would fit perfectly under the heading of “taking account of irrelevant considerations”.

3.3.4 *Damage & Causation*

3.3.4.1 *England*

It was once thought that, as the facts in *Ashby v White*²⁶⁷ did not reveal any “actual loss”, this tort would seem to be actionable *per se*.²⁶⁸ Previously the Court of Appeal held that, where the unlawful conduct interferes with a “right of the kind which the law protects without proof of damage”, for example, a constitutional right, the interference of the right would suffice to

²⁶² See, e.g. *Asher Model Management Ltd v Francis Carroll* [2008] HKDC 127, at para. 17, per Au J; *Tso Yung v Cheng Yeung Hing & Anor* [2003] HKCFI 223, at para. 72, per Deputy Judge Fung.

²⁶³ *Bourgoin SA v Minster of Agriculture Fisheries and Food* [1986] QB 716.

²⁶⁴ Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 190.

²⁶⁵ *Gouriet v Union of Post Office Workers* [1978] AC 435; see Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 190.

²⁶⁶ See Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 190; Phegan, “Damages for Improper Exercise of Statutory Powers” (1980) 9 Syd LR 92, p. 111; Gould, “Damages as a Remedy in Administrative Law” (1972) 5 NZULR 105, p. 116.

²⁶⁷ (1704) 14 St Tr 695.

²⁶⁸ McBride, “Damages as a Remedy for Unlawful Administrative Action” (1979) 38(2) Cambridge LJ 323, p. 336.

complete the tort.²⁶⁹ This had been reversed by the House of Lords who expressly stated that “material damage” to the plaintiff is an essential element to the cause of action, or at least had been always assumed to be so,²⁷⁰ regardless of whether the right in question is a constitutional right or not. The loss of the “right to vote” in *Ashby v White* was interpreted in a proprietary right by the House of Lords, and that it was suggested that the claim under *Watkins* should be made under the Human Rights Act 1998 instead.²⁷¹ In *Three Rivers*, following the line of reasoning for claims of public nuisance, Lord Hobhouse held that the plaintiff must also show “special damage in the sense of loss or injury which is specific to him and which is not being suffered in common with the public in general”.²⁷² Having said that, it is now essential under English law to prove “financial loss, physical injury or mental injury amounting to a psychiatric illness” in order to succeed in a claim of misfeasance in public office.²⁷³

Even where the plaintiff establishes that he or she had suffered material loss, the proof of a causal connection between the unlawful administrative act and the loss may be difficult. The situation is easier for cases where a direct and wrongful positive act could be identified, such as where there was a malicious revocation of a liquor licence.²⁷⁴ But for other cases, McBride pointed out that, in cases concerning licences, permits or authorizations to act:

“...there is scope for the argument that the disability of the applicant is to be treated as too remote as consequence²⁷⁵ ...Since in 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?...it might still have been refused as a matter of discretion.”²⁷⁶

Notwithstanding these uncertainties, it could be at least be concluded that English law insists on the essential requirement of proof of material damage, and that ordinary requirement of causation apply²⁷⁷ even though the onus may be excessively burdensome in certain situations as discussed above.

3.3.4.2 Australia

In *Farrington v Thomson*²⁷⁸ it was held by Smith J that, “proof of damage is, of course, necessary in addition”.²⁷⁹ This requirement could be seen to have been consistently applied in

²⁶⁹ *Watkins v Secretary of State for the Home Department* [2004] 4 All ER 1158.

²⁷⁰ *Watkins v Secretary of State for the Home Department* [2006] 2 All ER 353.

²⁷¹ *Ibid.*, at para. 55, per Lord Rodger.

²⁷² *Three Rivers District Council v Bank of England (No 3)* [2000] 3 All ER 1, at 45.

²⁷³ Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 934.

²⁷⁴ *Roncarelli v Duplessis* (1959) 16 DLR (2d) 698.

²⁷⁵ Bradley, “Liability for Malicious Refusal of Licence” (1964) 22 CLJ 4; cited in McBride, “Damages as a Remedy for Unlawful Administrative Action” (1979) 38(2) Cambridge LJ 323, p. 335.

²⁷⁶ McBride, “Damages as a Remedy for Unlawful Administrative Action” (1979) 38(2) Cambridge LJ 323, p. 335.

²⁷⁷ Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 935.

²⁷⁸ [1959] VR 285.

²⁷⁹ *Ibid.*, at 293.

Australian cases,²⁸⁰ and acted as the basis for awards of compensatory damages. The ordinary rules of causation apply²⁸¹ and the position seems to be same as that as in England.

3.3.4.3 *New Zealand*

Damage and causation essential ingredients for the tort in New Zealand.²⁸² It had been held that “material damage” is required, for example where mental illness is caused by the unlawful act or omission,²⁸³ but humiliation, anxiety or distress on its own may not be enough.²⁸⁴

3.3.4.4 *Canada*

The requirement of proof of actual damage and causation had been spelled out in *Odhavji Estate v Woodhouse*,²⁸⁵ and had been consistently applied in the Canadian courts.²⁸⁶

There is a lack of Canadian authorities that specifically dealt with the issue of causation in this context. In the only recent case that reached the Federal court on the issue of causation in a claim of misfeasance in public office, the plaintiff had been estopped from raising the argument due to procedural reasons.²⁸⁷ However, it is submitted that in theory there should be no difference with the rest of the Commonwealth in this respect under Canadian law.

3.3.4.5 *Ireland*

Proof of actual loss seems to have been a requirement for the tort as shown in *Hanahoe v Hussey*.²⁸⁸ In *Blascaod Mor Teoranta v Commissioner of Public Works in Ireland (No 4)*,²⁸⁹ the adoption of the definition from *Mengel*²⁹⁰ that the tort consists of “a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her office whereby *loss is caused* to a plaintiff”.²⁹¹ Again, there is no case law that specifically dealt with causation in this context, but it would be reasonable to

²⁸⁰ See, e.g. *Haine v Bendall* (1991) 172 CLR 60.

²⁸¹ Trindade & Cane, *The Law of Torts in Australia* (3rd ed. Oxford 1999), p. 246.

²⁸² *Garrett v A-G* [1997] 2 NZLR 332; Todd (ed.), *The Law of Torts in New Zealand*, (3rd ed. Brookers 2001), pp. 976-77.

²⁸³ *Niao v A-G* (1999) 5 HRNZ 269.

²⁸⁴ *Garrett v A-G* [1993] 3 NZLR 600, at 608.

²⁸⁵ (2000) 194 DLR (4th) 477, at para. 21, per Borins JA.

²⁸⁶ *Longley v Canada* (2000) 184 DLR (4th) 577; *Whiten v Plot Insurance Co* (2002) 209 DLR (4th) 257.

²⁸⁷ *LeBlanc v Canada* (2004) FC 774, at para. 4, per Campbell J.

²⁸⁸ [1998] 3 IEHC 173. Note the references to “loss” throughout the judgment and the heading of para. 60 reads “There exists an independent tort of misfeasance by a public officer or authority which consists in the *infliction of loss* by the deliberate abuse of statutory power”. (Emphasis added)

²⁸⁹ [2001] IEHC 130.

²⁹⁰ *Northern Territory of Australia v Mengel* (1995) 185 CLR 307.

²⁹¹ [2001] IEHC 130, at para. 8, per Budd J.

assume that the position would be similar as that under English law, given that the rules on causation in other torts are so.²⁹²

3.3.4.6 Further Discussion

Given the difficulties in proving causation in cases where no particular wrongful act could be identified as directly attributing to the loss, Arrowsmith went as far to suggest that the burden of proof should be reversed for the element of causation.²⁹³ If Lord Rodger was right in *Watkins* in saying that the proper claim is under the Human Rights Act 1998, would it not be somewhat illogical that exemplary damages could not be awarded in cases where there was a flagrant and malicious invasion of constitutional rights, while it could be awarded in less serious violations of rights provided some “material loss” could be shown? It is awkward and unfair, and the 2004 discussion paper published Law Commission reflected the same view.²⁹⁴ Given the obligations under EC Law, it may be hard for England to “try to be fair” and allow exemplary damages for Human Rights Act or “Euro-Tort” claims. Yet in the case where there are no such obligations and restrictions, the approach could be more flexible.

3.3.4.7 Hong Kong

The courts of Hong Kong had expressly laid down the requirements of proof of damage and causation in claims of misfeasance in public office,²⁹⁵ following the definition offered by the House of Lords in *Three Rivers*.

The issue of what constitute “damage” and “causation” for the purpose of misfeasance in public office had been dealt with in the interesting case of *Fung Lai Ying & Ors v Secretary for Justice*.²⁹⁶ In that case, the plaintiffs were unsuccessful right of abode seekers in the Hong Kong. The first judgment in Court of Final Appeal on their right of abode were in favour of them, but under the subsequent interpretation by the Standing Committee of the National People's Congress, they would not fulfil the requirements of Article 24(2)(3) of the Basic Law which governs this issue. The defendant had promised to abide and enforce the Court of Final Appeal judgment, yet in between the first judgement made by the Court of Final Appeal and the Interpretation by the National People's Congress, the defendant allegedly maliciously announced an inaccurate assertion that there would be 1.67 million potential immigrants within the class that the plaintiff belongs to and that the cost to settle them would amount to a figure that Hong Kong could not cope with. The defendant relied on the declaratory theory of law and argued that, since at all material times that had been only one true interpretation of the Basic Law and the subsequent interpretation does not amount to an amendment of the law, it cannot be said that the plaintiffs suffered any form of loss as they had never enjoyed any right of abode before. Cheung J accepted this argument and held there had been no loss suffered, and further added that the test of causation in this context is whether there is a *novus*

²⁹² See generally, McMahon & Binchy, *Law of Torts* (3rd ed. Butterworths 2000).

²⁹³ Arrowsmith, *Civil Liability and Public Authorities* (Earlsgate 1991), p. 233.

²⁹⁴ Law Commission, *Monetary Remedies in Public Law – A Discussion Paper* (2004), §§8.15 – 8.31.

²⁹⁵ *Asher Model Management Ltd v Francis Carroll* [2008] HKDC 127, at para. 17.

²⁹⁶ [2002] HKCFI 225.

actus interveniens between the allegedly unlawful administrative act and the loss that had been suffered.²⁹⁷ The case thus failed on the facts.

Claims would be impossible in the *Watkins* situation, that is, where all the ingredients for a claim of misfeasance had been set out other than proof of “material loss”, but that there had been violation of a constitutional right or its equivalent, for example, those under BORO and ICCPR. The recent decision in *Leung Kwok Hung v Secretary for Justice*²⁹⁸ confirms this requirement of “material loss” and led to the action to fail on the basis.²⁹⁹ It is submitted that there is no stringent need for Hong Kong to adopt the approach of the House of Lords in *Watkins*, given that we are not bound by EC Law considerations. The court is free to adopt the approach of the Court of Appeal in *Watkins* if it agrees with views along the lines of the English Law Commission that human rights violations are not sufficiently protected by prerogative remedies. There may be this need for Hong Kong where there is no equivalent of the foreign human rights compensation mechanisms.

3.4 The Mental Element

3.4.1 **Overview – The Requirement of Malice**

Despite the general position that, like all other variations of motive, “malice” is irrelevant in the determination of the existence of a tortious liability, on occasion, “malice” may turn a otherwise lawful act into a tortious one.³⁰⁰

Viewing the law of torts as a model of protects of rights, it has been said that, the respect that the common law has for different kinds of rights vary greatly.³⁰¹ The concept of common law “rights” is a relative one. On one end of the spectrum we would find rights such as those to physical integrity and personal liberty being strongly protected from all forms of acts, intentional or negligent. As Lord Reid puts it, “English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty...it would be unwise to make even minor concessions”.³⁰² Yet on the other end of the same spectrum, we find rights that are accorded hardly any protection at all. These would include, for example, the right to “not be prosecuted in absence of guilt”, the right to “not be harmed by abuse of legal process”, or the right to not “be affected by unlawful administrative acts *per se*”. These rights are much more limited as compared to rights in the upper end of the spectrum. We had seen already above about how these rights give way to the wider public interest – which may be, the detrimental effect it may pose to the investigation of crime in the case of the tort of malicious prosecution, or the detrimental impacts on the discharge of important public functions in the case of the tort of misfeasance in public office. Rights of such a “low rating” in this “hierarchy of tort-protected interests”, would warrant protection in the eyes of law only in exceptional circumstances. And in the context of the subject matter this discussion is

²⁹⁷ *Ibid*, para. 32.

²⁹⁸ [2009] 4 HKLRD 257.

²⁹⁹ *Ibid*, para. 76.

³⁰⁰ Harlow, *Compensation and Government Torts*, (Sweet & Maxwell 1982), p. 60.

³⁰¹ *Ibid*, p. 58.

³⁰² *S v McC* [1972] AC 24, at 43, per Lord Reid: cited in Harlow, *Compensation and Government Torts*, (Sweet & Maxwell 1982), p. 58.

concerned with, as Street suggests, only where there is a “malicious invasion” of the right concerned. This has translated into the mental requirement of “malice” in this tort. We shall now see how these theories manifested themselves into the law across the Commonwealth and Hong Kong.

3.4.2 England

“Popularly, the term conveys a sense of ill-will. Thus, spite, or a desire for revenge is readily termed malicious”,³⁰³ and this is what is known as “express malice”. An early definition defining malice in this sense could be found in the 1801 decision in *Harman v Tappenden*:³⁰⁴

“...contriving and intending to injure and prejudice the plaintiff and to deprive him of the benefit of his profits...he was entitled to...”³⁰⁵

But the term “malice” is much broader than this narrow sense,³⁰⁶ and had been held in 1801 that it includes “exercising a power which [a public official himself] knows that he does not possess”.³⁰⁷ In 1842, the House of Lords held that “malice” in this context is “not confined to personal spite against individuals, but consists in *conscious violation* of the law to the prejudice of another”.³⁰⁸

In 2000, the House of Lords clarified the meaning of “malice” in the *Three Rivers* decision and separated the concept into two alternative limbs: the “targeted malice limb”, in which the central theme is an intent to injure; and the “illegality limb”,³⁰⁹ in which the central theme is the knowledge of the illegality of the unlawful administrative conduct in question.³¹⁰ The two limbs substantially overlap in practice,³¹¹ as usually where there is intent to injure, such intent would taint the conduct in question to become “illegal” through being “an irrelevant consideration” in itself or otherwise, and it would be likely that the public officer in question would have knowledge of this. It had been commented that the illegality limb is merely an extension of the targeted malice limb.³¹² Although the two limbs are separately dealt with, it must be stressed that they are one cause of action with one underlying theme: an abuse of power in *mala fide*.³¹³

Under the first limb, the mental requirement is equivalent to what is known as a “specific intent” in criminal law. It must be shown that, the public officer acts with “intent to harm the claimant or a class of which the claimant is a member”.³¹⁴ Anything short of this mental state,

³⁰³ Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 193.

³⁰⁴ (1801) 102 ER 214.

³⁰⁵ (1801) 102 ER 214, at 217, per Lawrence J.

³⁰⁶ Fridman, “Malice in the Law of Torts” (1958) 21 MLR 484, p. 496.

³⁰⁷ Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 193.

³⁰⁸ *Ferguson v Kinnoull* (1842) 8 ER 412, at 438, per Lord Cottenham. (Emphasis added) cf. *David v Abdul Cader* [1963] 1 WLR 834, at 838 in which the Privy Council limited the concept of malice to only where there is “ill-will”.

³⁰⁹ Also known as the “untargeted malice” limb – see, e.g. Dugdale (et al), *Clerk & Lindsell on Torts* (19th ed. Sweet & Maxwell 2006), p. 868.

³¹⁰ *Three Rivers District Council v Bank of England* [2000] 3 All ER 1; Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 930.

³¹¹ Arrowsmith, *Civil Liability and Public Authorities* (Earlsgate 1991), p. 229.

³¹² McBride & Bagshaw, *Tort Law* (Longman 2001), p. 405.

³¹³ *Three Rivers District Council v Bank of England* [2000] 3 All ER 1, at 8 – 9, per Lord Steyn.

³¹⁴ *Ibid*, at 49, per Lord Millett.

such as recklessness, would not suffice.³¹⁵ It had been pointed out in none of the authorities had it been mentioned that a knowledge of illegality is also required under this limb, and it may be absurd if there is no such requirement as it may cover the situation where a defendant wishes to punish (thus injure) the plaintiff on the honest belief that it is within his authority to do so.³¹⁶ However, the proper approach should be that the mental requirement should be read together with the underlying theme that Lord Steyn suggested – “subjective bad faith”. The example that was given previously may thus fall out of the ambit of the first limb for the clear absence of bad faith evidenced from the honest belief of legality. It had been noted in *Clerk & Lindsell* that examples under this limb could rarely be found³¹⁷ and it is of limited practical value.

The second limb requires:

- i) knowledge on the part of the defendant public officer that the act or omission is unlawful or reckless indifference thereof; and
- ii) subjective foresight of to the type harm to the plaintiff or a person of the class in which the plaintiff was a member, or reckless indifference thereof.³¹⁸

The recklessness referred to here is what is known *Cunningham* recklessness³¹⁹ in criminal law. The rationale seems to be simply that, as in other intentional torts, a reckless indifference as to the result of a tortious act is as blameworthy as intending that result to occur.

Proving the first requirement of knowledge of illegality or recklessness thereof is a matter of fact. Past experience had shown this is not the hardest obstacle in establishing the mental element, as it had been said that it imposes no great burden on public authorities since they are in a position to obtain good legal advice,³²⁰ and the courts had often been prepared to find that there is such knowledge or reckless indifference of the illegality of the conduct. The true difficulty lies in proving subjective foresight of injury or reckless indifference thereof. Lord Steyn spoke of a requirement that “in both forms of the tort the [state of mind] required must be directed ...at least to harm of the type suffered by the plaintiffs”.³²¹ The *Hughes v Lord Advocate*³²² style requirement of foreseeability of the “type of harm” is problematic and paradoxical in application for an intentional tort, as would be discussed below.³²³ Lord Steyn’s requirement that damage must be foreseen to the plaintiff or the class in which he or she belongs to also caused practical problems. Fortunately, the requirement was effectively abolished when the Court of Appeal held in *Akenzua v Secretary of State for the Home Department*³²⁴ that the requirement of the knowledge of injury to the class which the plaintiff belongs to is “not a free standing requirement of tort...[but one] derived from the antecedent proposition that the intent or recklessness must related (‘be directed’) to the kind of harm

³¹⁵ *Bennett v Metropolitan Police Commissioner* [1995] 2 All ER 1, at 14, per Rattee J.

³¹⁶ McBride & Bagshaw, *Tort Law* (Longman 2001), p. 406.

³¹⁷ Dugdale (et al), *Clerk & Lindsell on Torts* (19th ed. Sweet & Maxwell 2006), p. 868.

³¹⁸ *Northern Territory of Australia v Mengel* (1995) 185 CLR 307, at 347, per Mason CJ.; see Oliphant (ed.), *The Law of Tort* (2nd ed. LexisNexis 2007), p. 932.

³¹⁹ *R v Cunningham* [1957] 2 QB 396.

³²⁰ See McBride, “Damages as a Remedy for Unlawful Administrative Action” (1979) 38(2) Cambridge LJ 323, p. 323, p 329; *Central Canade Potash Co Ltd v A-G for Saskatchewan* (1975) 57 DLR (3d) 7.

³²¹ *Three Rivers District Council v Bank of England (No 3)* [2000] 2 WLR 1220, at 1235.

³²² [1963] AC 837.

³²³ See §3.4.7, below.

³²⁴ [2003] 1 WLR 741.

suffered”.³²⁵ On the facts of the case, the administrators of the estate of the deceased successfully claimed in misfeasance for the wrongful procurement of the release of a dangerous criminal by the police who as a result murdered the deceased. The fact that it is impossible to construe “a class” which the deceased belongs to when in reality it would be including the whole population of London did not prevent the administrators from succeeding in the claim. Thus, it could be concluded in light of modern authorities that, the ease of establishing the tort is substantially increased under English law.

3.4.3 Australia

In the early authority of *Farrington v Thomson*³²⁶, the concept of malice was said to cover both the situation where the public officer has “an intention to injure” and where he “acted with knowledge that what he did was an abuse of his office”.³²⁷ The modern position had defined the mental requirement as a “lack of an honest attempt to perform the functions of his or her office”, and “[m]alice, knowledge and reckless indifference are states of mind that stamp...the character of abuse of, or misfeasance, in public office”.³²⁸

Both the “targeted malice” and “illegality” limbs are covered in Deane J’s definition of malice in leading case of *Mengel*:

“Such malice will exist if the act was done with an actual intention to cause such injury. The requirement of malice will also be satisfied if the act was done with knowledge that it would cause or likely to cause injury... malice will exist if the act is done with reckless indifference or deliberate blindness.”³²⁹

In the same decision, Deane J ruled out the possibility of an objective test in this tort and insisted on a requirement of subjective reckless.³³⁰ It is submitted that the position in Australian law is the same as that in *Three Rivers*.

3.4.4 New Zealand

The concept of “malice” in New Zealand is similar to that in England and Australia. In *Takaro Properties Ltd v Rowling*,³³¹ “malice” had been held to cover “both express malice and the use of a power which an official know he does not possess”.³³²

The “targeted malice” and “illegality” limbs had been recognized under New Zealand law in *Garrett v A-G*.³³³ The ambit of this tort revealed in this decision is substantially the same as that in *Mengel* and *Three Rivers*.

³²⁵ *Ibid*, para. 79, per Sedley LJ.

³²⁶ [1959] VR 285.

³²⁷ *Ibid*, at 293, per Smith J; approved in *Tampion v Anderson* [1973] VR 715.

³²⁸ *Northern Territory of Australia v Mengel* (1995) 185 CLR 307, at 357, per Brennan J.

³²⁹ (1996) 185 CLR 307, at 370.

³³⁰ Trindade & Cane, *The Law of Torts in Australia* (3rd ed. Oxford 1999), pp. 247 – 8.

³³¹ [1978] 2 NZLR 314.

³³² *Ibid*, at 338, per Richardson J, quoting *Farrington v Thomson* [1959] VR 285.

³³³ [1997] 2 NZLR 332.

3.4.5 Canada

In Canada, the first definition offered by the Supreme Court of Canada for a “malicious act” was “simply acting for a reason and purpose knowingly foreign to the administration, to which must be added here the element of intentional punishment”,³³⁴ which was expanded by Verchere J as one which is done “intentionally without just cause or excuse”³³⁵ in *Hlookoff v City of Vancouver*.³³⁶

The “targeted malice” limb had been established clearly in Canadian in *Roncarelli v Duplessis*.³³⁷ In light of decision in *Three Rivers*, the scope of the “targeted malice” limb now also follows the English formulation in *First National Properties Ltd v Highlands (District)*.³³⁸

The “illegality” limb had been considered in *Alberta (Minister of Public Works, Supply & Services) v Nilsson*,³³⁹ and the subjective recklessness test in *Three Rivers* is now also adopted as Canadian law.

3.4.6 Ireland

The decision in *Pine Valley* initially referred only to “personal spite or a desire to injure for improper motive”,³⁴⁰ and subsequent decisions once seem to support the position that “unfairness” and “unreasonableness” is sufficient to establish liability,³⁴¹ causing uncertainties as to the scope of the tort.³⁴² However, these doubts are resolved when the definition in *Mengel* for the mental requirement of this tort was adopted in recent cases such as *Blascaod Mor Teoranta v Commissioners of Public Works in Ireland (No 4)*.³⁴³ The concept had been further expanded to include the illegality limb and recklessness in the *Three Rivers* sense,³⁴⁴ bringing Irish law in consensus with English law in this respect.

3.4.7 Further Discussion

In summary, aside from peculiar and scattered cases that went as far as suggesting that the tort is one of strict liability,³⁴⁵ authorities that had been looked at all tend to restrict the

³³⁴ *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689, at 706.

³³⁵ (1968) 67 DLR (2d) 119, at 132, per Vechere J.

³³⁶ *Ibid.*

³³⁷ [1959] SCR 121. The case emanated from Quebec and was based on the Civil Code. The principle it satisfied, however, would apply to common law jurisdictions as well and has been used as the basis of the common law cases.

³³⁸ (2001) 198 DLR (4th) 443, 9 CCLT (3d) 34 (BCCA), leave to appeal refused (2001) 169 BCAC 320 (note) (SCC) reversing (1999) 48 CCLT (2d) 94, 178 DLR (4th) 505 (BCSC). The Court of Appeal judgment was decided after the House of Lords decided *Three Rivers* and provides a good review of the jurisprudence.

³³⁹ [2000] 2 WWR 688.

³⁴⁰ [1987] ILRM 747.

³⁴¹ *Callinan v Voluntary Health Insurance Board* (unreported, Supreme Court, 1994); cited in McMahon & Binchy, *Law of Torts* (3rd ed. Butterworths 2000), p. 552.

³⁴² McMahon & Binchy, *Law of Torts* (3rd ed. Butterworths 2000), p. 553.

³⁴³ [2000] IEHC 130.

³⁴⁴ *Kennedy v The Law Society & Ors* [2005] IESC 23.

³⁴⁵ *McGillivray v Kimber* (1916) 26 DLR 164.; *Wood v Blair* (The Times, 3-5 July, 1957); *Henley v Mayor of Lyme* (1828) 130 ER 995; see Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 195.

concept where there is “express malice”, or to the least, where there is “knowledge of wrongfulness of the act or reckless indifference thereof”, irrespective of the wording used. The authorities throughout the common law jurisdictions are generally in agreement in respect of the mental element required for establishing liability through the “first limb”, yet there may be in theory some difference as to the actual mental state required for liability arising through the minimal requirement of the “second limb”.

Throughout all these jurisdictions that we have considered, it seems that the mental element for the tort goes beyond the general notion of “intention” required for what is known as “intentional torts” in general, and further requires an element of “malice”. “Malice”, no matter whether it is used in the sense of “express malice” or the “lower form” identified in the form of “untargeted malice”. This requirement is essentially a “motive”. It does not mirror the general principle in tort law that a “good motive” adds nothing to an act otherwise unlawful, nor would a “bad motive” render an otherwise lawful act to become tortious.³⁴⁶ Lord Macnaughten held that it is trite law that “motive” (and with particular reference to “malice”) is generally irrelevant in establishing liability in tort law³⁴⁷ - aside from a few peculiar exceptions where the element of “maliciousness” is the crux of the tort, such as malicious prosecution, conspiracy and injurious falsehood.³⁴⁸ There is also much to say on the position that acting with knowledge of possibility of harm is tantamount to an intention for that result, as criticized by Professor Finnis,³⁴⁹ but accepting that what is ruled in *Three Rivers* is just that acting with such foresight of harm is as *blameworthy* as intending it, the philosophical difference between the two may not matter much as matter of practice.

Another point to comment on is that, there is an intrinsic absurdity in subjective knowledge of a matter of law is seen as a matter of fact under the second limb. It is an exception to the general notion of *ignorantia juris non excusa*, and is only truly possible to determine with hindsight since only the court is competent to determine illegality from legality. But this has not posed a problem in the cases, as fortunately the test is knowledge of illegality instead of “absent of knowledge of legality”. Together with the rule that reckless indifference is also sufficient for fulfillment of this mental requirement, the rule proves itself to be workable.

Now, assuming the tort does fall within such a class as it may be futile in arguing otherwise given that the modern authorities are all in favour of this position, there is still one problem to point out in Lord Steyn’s formulation. As McBride and Bagshaw pointed out, Lord Steyn’s formulation of the targeted malice limb may be potentially erroneous.³⁵⁰ The requirement that “in both forms of the tort the [state of mind] required must be directed at the harm complained of, or at least to harm of the type suffered by the plaintiffs”³⁵¹ revealed in his Lordship’s speech may be paradoxical where the defendant intended to harm the plaintiff or believed that the plaintiff will be harmed in one way, but nevertheless harmed the plaintiff in another way. By applying Lord Steyn’s test, such defendants would not be liable. However, in such situations, the blameworthiness, or in other words, the “maliciousness” on the part of the defendant is no different. The notion of “bad faith” or “abuse of power” which the tort serves to guard against, remains present. It would be an illogical result, as effectively a public

³⁴⁶ Higgins, *Elements of Torts in Australia* (Butterworths 1970), pp. 48-49.

³⁴⁷ *Bradford Corp v Pickles* [1895] AC 587, at 601, per Lord Macnaughten. See also, *Allen v Flood* [1898] AC 1.

³⁴⁸ Higgins, *Elements of Torts in Australia* (Butterworths 1970), p. 48.

³⁴⁹ Finnis, “Intention in Tort Law”, in Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford 1995), pp. 229 – 248.

³⁵⁰ McBride & Bagshaw, *Tort Law* (Longman 2001), pp. 407-8.

³⁵¹ *Three Rivers District Council v Bank of England (No 3)* [2000] 2 WLR 1220, at 1235.

official full of ill will and spite would be able to escape liability for being foolish enough to predict the wrong “type” of damage that the victim would suffer. This would also be contrary to the general principles in imposition of liability through intentional torts.³⁵²

This is however not to say that this requirement of the plaintiff to be suffering from a certain “type” of damage to the defendant’s knowledge serves no useful purpose. It had been argued that this is, in the language of Professor Zipursky, a manifestation of the general tortious requirement of “substantial standing” in this tort. It serves to limit the tort “within reasonable bounds”.³⁵³

There is also an argument as to whether the mental requirement of *Cunningham* recklessness is too high for the tort, as it is essentially the same standard as that required for the offence of misconduct in public office. The counterargument is that, to lower it any further, e.g. to an objective test, and given the benefits for a claim in misfeasance has as compared with negligence as discussed above, misfeasance may usurp the role of the tort of negligence altogether.

Both viewpoints are valid, but there are a few points should be noted. First, given that the jurisprudence and the body of case law of the tort of misfeasance stem from the notion of “abuse of power” and “bad faith”, it would be inappropriate for it to cover areas which are properly addressed by the tort of breach of statutory duty and negligence. Certainly, the fact that misfeasance in public office would overlap with other torts is not a valid reason *per se* for objection. However, given that exemplary damages and recovery of pure economic loss are unavailable under negligence, it may present an absurd situation where substantially different remedies would be awarded on the same facts. One reason that the tort of misfeasance should enjoy these “benefits” over negligence should be the moral culpability of abusive use of powers on the part of malicious public officials when they are entrusted by the people and the state to discharge important public functions. Although the lack of monetary remedies for human rights violations in jurisdictions such as Hong Kong gives the courts a stronger reason to strengthen the utility of this tort, this should be done so through means such as lenient interpretation of the meaning of “public officer” and the award of exemplary damages. It would be unwise to effectively allow a *Beaudesert* principle³⁵⁴ to crawl in through the guise of misfeasance in public office, which had been rejected in the common law with cogent reasons.³⁵⁵ The notion of “abuse of power” and “bad faith” must continue lie at the very core of the tort of misfeasance in public office.

3.4.8 Hong Kong

Both limbs of the tort had been recognized in *Wong Cheong-Kwok v The Commissioner of Police*,³⁵⁶ in which Keith J held that:

“[N]ecessary ingredients for [the mental element] include either malice in the sense of

³⁵² McBride & Bagshaw, *Tort Law* (Longman 2001), pp. 407.

³⁵³ Chamberlain, “The Need for a ‘Standing’ Rule in Misfeasance in Public Office” (2007) 7(2) OJCLJ 215, p. 235.

³⁵⁴ *Beaudesert Shire Council v Smith* (1966) 120 CLR 145.

³⁵⁵ See generally, Dworkin & Harari, “The Beaudesert Decision – Raising the Ghost of the Action upon the Case” (1967) A.L.J. 296; Standish, “*Beaudesert Shire Council v Smith*” (1968) 6 MULR 68; Dench, “The Tort of Misfeasance in a Public Office” (1983) 4 Auckland ULR 182, p. 196.

³⁵⁶ [1991] HKCFI 229.

bad faith, or knowledge that, in making the decision alleged to constitute the tort, the Defendant knew that it was acting beyond its powers.”³⁵⁷

The recent decision in *Hui Kee Chun v The Privacy Commissioner for Personal Data*³⁵⁸ provides a definition of the mental requirement for establishing the tort:

“There were three variants of subjective knowledge, namely where the officer:

- (a) specifically intended to injure the plaintiff; or
- (b) knew that in the ordinary course, injury to the plaintiff would follow, even though that was not his purpose; or
- (c) was recklessly indifferent as to whether or not his actions would cause the injury.

Further, the subjective knowledge must be directed towards the actual injury or type of injury suffered”³⁵⁹.

In the leading local authority on the subject matter, Ribeiro JA pronounced the following test for the purpose of determining the existence of the requisite mental element:

“It follows that the plaintiff’s claim...is only viable if he is in a position to allege and ultimately to establish that in abusing his...powers...the [defendant] either intended to injure the plaintiff or knew that such conduct would in the ordinary course directly cause injury to the plaintiff of the type actually suffered...or that he was recklessly indifferent as to whether such injury would ensue.”³⁶⁰

Discharging the burden proof for this element proved to be extremely onerous. The tort had never succeeded in Hong Kong up to date, and had been said that a claim of misfeasance in public office involves “extremely serious allegations”.³⁶¹ The requirement of knowledge of both the unlawfulness of the act and the type of harm the plaintiff may be subject to or recklessness thereof places a heavy burden of proof on the plaintiff in practice. A few local cases could serve to illustrate this point.

In *Tso Yung v Cheng Yueng Hing & Anor*,³⁶² two police officers refused to attend to the complaint that the plaintiff had been subject to false imprisonment and subsequently threatens the plaintiff that she could be charged with obstructing police and wasting police time. The plaintiff subsequently developed psychiatric illnesses and claimed against the police on the basis of the tort of misfeasance in public office. Yet, taken into account how calm the plaintiff looked and other factors, it was held that the police officers had honestly believed that there was no *prima facie* case of false imprisonment, thus the claim failed as the mental element was negated.

³⁵⁷ *Ibid*, para. 26,

³⁵⁸ [2007] HKCFI 1237.

³⁵⁹ *Tang Nin Mun v Secretary for Justice* [2000] 2 HKLRD 324 (*Northern Territory of Australia v Mengel* (1995) 69 ALJR 527, *Garret v Attorney General* [1997] 2 NZLR 332, *Three Rivers District Council v Bank of England (No 3)* [2000] 2 WLR 1220 applied).

³⁶⁰ *Tang Nin Mun v Secretary for Justice* [2000] HKCA 298, at para. 17.

³⁶¹ *Iu Po Cheung v The Commissioner for Census and Statistics* [2008] HKCFI 483, at para. 3, per Cheung J.

³⁶² [2003] CFI 233.

*Tang Nin Mun v Secretary of Justice*³⁶³ serves as a good example to illustrate how onerous is the burden in proving such knowledge. In this case, the plaintiff and his wife were stabbed and seriously wounded in an unprovoked attack by a neighbouring hawkker. The defendant police constable carried out investigation of the case, and induced the plaintiff and his wife to sign blank sheets of paper on which the constable subsequently concocted statements falsely purporting to have been made by them. Those fabricated statements wrongly stated that the attack had been preceded by a dispute between the assailant and the plaintiff's wife and also significantly understated the seriousness of the injuries inflicted by the assailant. As a result, the assailant was charged with relatively minor offences and was merely fined \$1,000 and subjected to a sentence of 2 months' imprisonment suspended for 12 months. When the plaintiff discovered that the course of justice had been so perverted, he suffered mental distress and developed a serious psychiatric condition. However, as there is "quite plainly no realistic prospect of the plaintiff establishing that the constable was subjectively aware that his fabrication of the evidence would, in the ordinary course of events, lead to the plaintiff suffering psychiatric disorders of the type of which he complains", there is "quite plainly no realistic prospect"³⁶⁴ for the plaintiff to succeed in the claim.

Ribeiro JA concluded with stating that:

"We would however wish to add that we have considerable sympathy for the sense of grievance that the plaintiff undoubtedly feels as a result of the apparent perversion of the course of justice by the constable in question. We were told that disciplinary action could not be taken against him as he had left the police force not long after the events complained of and that, in consequence of advice said to have been received from the Department of Justice, no prosecution was mounted. The plaintiff's case is however for damages for psychiatric injury and pecuniary loss resulting from the tort of misfeasance in public office. That case is not sustainable."³⁶⁵

In applying the *Three Rivers* decision, the Hong Kong court followed Lord Steyn's formulation regarding that the "type of harm" that the plaintiff eventually suffered must be foreseen. The alternative of obtaining nominal damages then pegging on it exemplary damages, however attractive, is probably theoretical unworkable for reasons discussed above. One may feel that injustice had been done in this case as the plaintiff was left without a remedy despite the wrongful conduct of the defendant. Yet this brings us back to square one – returning to the question of whether a legal injury brings a legal wrong, or a legal wrong brings along a legal injury. One could of course indulge in a philosophical inquiry as to the existence of internal, non-functionalist moral objectives within tort law to seek the answer,³⁶⁶ but then at the moment it would be sufficient to say that, there is no legal injury in the correct sense of the phrase. No subjective foreseeability of harm could possibly be shown on the facts and that is the end of the matter. That gut feeling of that there is something wrong with the system should not be used to doubt the correctness of this civil case. If there is any fault in the system, it lies in the lack of disciplinary or criminal actions against the defendant.

³⁶³ [1999] HKCFI 981.

³⁶⁴ *Ibid*, para. 20, per Ribeiro JA.

³⁶⁵ *Ibid*, para. 21.

³⁶⁶ See generally, Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice', University of Oxford Legal Research Paper Series (Paper No 1/2010).

IV. Remedies

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4.1 Overview

As stated previously, the importance of the tort of misfeasance in public office lies in the fact that it provides a pathway from a declaration of invalidity of an unlawful administrative act to a monetary claim. This may be particularly useful for claim of loss of profits in cases where licences are wrongfully revoked or refused.

Despite its unique public nature, the primary remedy available for a successful action of misfeasance in public office is an award of damages. As a general principle of tort law, the quantum of damages would depend on the actual loss sustained. What, however, that is worthy to note is that as discussed earlier, it seems that restrictions on recovery of pure economic loss that applies to negligence claims do not seem to have any application in the tort of misfeasance in public office, thus there is an inclination for plaintiffs seeking redress under this tort to claim damages on such basis.³⁶⁷ Another point to note would be that, given the high standard of mental requirement in establishing the tort, the conduct in question in a misfeasance claim would often be oppressive (if not also outrageous and unconstitutional). Thus, the courts may also be inclined to grant exemplary damages for successful claims of misfeasance.³⁶⁸

4.2 Compensatory Damages

The award of compensatory damages had not caused much of a problem, as it is clear that the ordinary tort principle of *restitutio in integrum* would apply where the plaintiff succeeds in a

³⁶⁷ Rogers, *Winfield and Jolowicz on Tort* (17th ed. Sweet & Maxwell 2006), p. 362.

³⁶⁸ See, e.g, *Kuddus v Chief Constable of Leicester Constabulary* [2001] 2 WLR 1789, discussed below.

claim of misfeasance in public office.³⁶⁹ Examples could be readily found in Canada,³⁷⁰ Australia,³⁷¹ New Zealand,³⁷² Ireland,³⁷³ and so on. The plaintiff will be put into the position in which he would have been had the tort not occurred – that is, as if the power in question had been exercised in accordance with the rules of natural justice, taking into account relevant considerations only, etc.³⁷⁴

4.3 Nominal Damages

Arrowsmith suggested that as misfeasance may be a tort that is actionable *per se*, it follows that “even where no substantial damage has been suffered an action may be brought...the nominal damages recoverable may serve as a peg on which to hang an award of exemplary damages”.³⁷⁵ This view may be incorrect. As a general principle in the law of torts, nominal damages ought to be granted only in limited situations. Adopting the terminology used by McGregor, nominal damages for tort claims could be granted only:

- 1) where there is *injuria sine damno*; or
- 2) where damage is shown but its amount is not sufficiently proven.³⁷⁶

The prior would refer to the situation where a tort which is actionable *per se* is successfully claimed but there is no loss,³⁷⁷ and the latter would be the very rare situation that loss is shown, but the necessary evidence is not provided.³⁷⁸

Given that the modern authorities on the subject matter characterize the tort of misfeasance to be not one that is actionable *per se*, the first situation listed above in which nominal damages could be awarded would be inapplicable. As to the second situation, it is an extremely rare situation and no case law had been established so far in respect of its applicability in the tort of misfeasance. The utility of obtaining such a remedy may also be questionable – if it is merely for the vindication of a right, seeking a declaration would achieve exactly the same effect.³⁷⁹ Following the Civil Justice Reform, the argument as to that a nominal damages could be used as a “peg” to hang cost orders³⁸⁰ may seem weak in light of modern authorities on cost orders.³⁸¹ As to the argument suggested by Arrowsmith that nominal damages could serve as a peg to hang exemplary damages, this may be a particularly objectionable approach in light of the speech of Lord Bingham in *Watkins v Secretary of State for the Home Department*,³⁸² in which an award by the Court of Appeal for exemplary damages pegging on

³⁶⁹ Arrowsmith, *Civil Liability and Public Authorities* (Earlsgate 1991), p. 226.

³⁷⁰ *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689.

³⁷¹ *Haine v Bendall* (1991) 172 CLR 60.

³⁷² *Niao v A-G* (1999) 5 HRNZ 259.

³⁷³ *CW Shipping Co Ltd v Limerick Harbour Commissioners* [1989] ILRM 416 (*obiter*).

³⁷⁴ *Ibid*, p. 227. See e.g. *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689; *Farrington v Thomas* [1958] VR 286.

³⁷⁵ Arrowsmith, *Civil Liability and Public Authorities* (Earlsgate 1991), p. 233.

³⁷⁶ McGregor, *McGregor on Damages* (17th ed. Sweet & Maxwell 2003), §§10-001 - 5.

³⁷⁷ *Constantine v Imperial London Hotels* [1944] KB 693; *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024.

³⁷⁸ *Twyman v Knowles* (1853) 13 CB 222.

³⁷⁹ Todd (ed.), *The Law of Torts in New Zealand*, (3rd ed. Brookers 2001), p. 1189.

³⁸⁰ *Baumont v Greathead* (1846) 2 CB 494, at 499, per Maule J.

³⁸¹ *Hyde Park Residence Ltd v Yelland* [1999] RPC 655. See generally, McGregor, *McGregor on Damages* (17th ed. Sweet & Maxwell 2003), §10-010; Cameron & Kelly, *Principles and Practice of Civil Procedure in Hong Kong* (2nd ed. Sweet & Maxwell 2009), pp. 375-404.

³⁸² [2006] 2 AC 395.

nominal damages in absence of actual loss was successfully appealed against. With reference to the award of exemplary damages in a claim for misfeasance in public office, his Lordship stated that “I would not for my part develop the law of tort to make it an instrument of punishment in cases where there is no material damage for which to compensate”.³⁸³ As would be discussed below, pegging exemplary damages in absence of proof of actual loss may not be a justifiable approach.

4.4 *Exemplary Damages*

4.4.1 *England*

Nearly a century ago, Duff J had expressed his view that the issue of exemplary damages for an action of misfeasance in public office “is emphatically not a case for measuring damages with nicety”.³⁸⁴

The general principle of English Law in this regard has been that, “punitive damages could be awarded to express the court’s disapproval with the defendant’s exceptionally bad conduct”.³⁸⁵ The situations in which an award of exemplary damages could be made had been delineated by Lord Devlin as into three circumstances: first, where there is oppressive, arbitrary or unconstitutional action by any government servant; secondly, where the defendant has sought to make a profit from his own tort, the “object being to teach the defendant that tort does not pay”;³⁸⁶ thirdly, where exemplary damages are expressly authorized by statute.³⁸⁷ Nearly 30 years later, the award of exemplary damages had been further restricted with a “cause of action test” in *AB v South West Water Services Ltd*,³⁸⁸ meaning that the grant of such damages would be restricted to causes of action that have been awarded prior to *Rookes v Barnard*,³⁸⁹ effectively excluding the application of this remedy for, *inter alia*, claims of negligence,³⁹⁰ breach of statutory duty³⁹¹ and misfeasance in public office.³⁹² Yet in 2001 the House of Lords displaced the “cause of action test” for a claim of misfeasance in public office in *Kuddus v Chief Constable of Leicester Constabulary*,³⁹³ in which Lord Hutton held that:

“[exemplary damages] serves to uphold and vindicate the rule of law because it makes clear that the courts will not tolerate such conduct. It serves to deter such actions in future as such awards will bring home to officers in command of individual units that discipline must be maintained at all times.”³⁹⁴

³⁸³ *Ibid*, at para. 26.

³⁸⁴ *McGillvray v Kimber* (1916) 26 DLR 164, at 181, per Duff J; J. McBride, “Damages as a Remedy for Unlawful Administrative Action” (1979) 38(2) Cambridge LJ 323, p. 340.

³⁸⁵ *Rookes v Barnard* [1964] AC 1129.

³⁸⁶ Srivastava, *The Law of Tort in Hong Kong* (2nd ed. LexisNexis: Butterworths 2005), p. 69.

³⁸⁷ Todd (ed.), *The Law of Torts in New Zealand*, (3rd ed. Brookers 2001), p 1191.

³⁸⁸ [1993] QB 507.

³⁸⁹ [1964] AC 1129.

³⁹⁰ *AB v South West Water Services Ltd* [1993] QB 507.

³⁹¹ *R v Secretary of State for Transport ex parte Factortame (No 5)* The Times, 11 September 1997.

³⁹² Adenas & Fairgrieve, “Misfeasance in Public Office: Governmental Liability and European Influences” (2001) 5 Y.B. Int’l Fin & Econ L 375, p. 397.

³⁹³ [2001] 2 WLR 1789.

³⁹⁴ [2002] 2 AC 122, at para. 79; see Dugdale (et al), *Clerk & Lindsell on Torts* (19th ed. Sweet & Maxwell 2006),

As a successful proof of “malice” on the part of the defendant may often neatly fit in the category of “oppressive, arbitrary or unconstitutional action by any government servant”,³⁹⁵ in light of the decision of *Kuddus*, it seems to follow that there may be a stronger case for imposing exemplary damages in successfully claims under this tort. Nevertheless, the House of Lords retreated from the position in *Kuddus* and recently held in *Watkins v Secretary of State for the Home Department*³⁹⁶ that:

“Notwithstanding the fact that the House has ruled in [*Kuddus*] that exemplary damages may in principle be awarded in cases of misfeasance in public office, I should myself prefer to confine the award of such damages very closely indeed.”³⁹⁷

However, it should be noted that the underlying reason that such an award of damages is confined may be found in Lord Rodger’s concern expressed in the same decision that such a development of the tort of misfeasance in public office would be inconsistent with EC Law as exemplary damages are not available in equivalent proceedings for breach of the relevant Convention Right.³⁹⁸ *Ministry of Defence v Fletcher*³⁹⁹ maintained the position that “exemplary damages are to be reserved for the very worst cases of oppressive use of power by public authorities”.⁴⁰⁰

On the assessment of damages, Moore-Bick LJ held in *Rowlands v The Chief Constable of Merseyside Police*⁴⁰¹ that “the question of awarding exemplary damages must be considered in the light of the award of compensatory damages in order to ensure that the total award is not excessive.”⁴⁰² Lord Woolf laid down guidelines in *Thompson and Hsu v Commissioner of Police of the Metropolis*⁴⁰³ on the amount to be awarded:

Where exemplary damages are appropriate they are unlikely to be less than £5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent.⁴⁰⁴

This was recently applied also in *Ministry of Defence* by Slade J, noting that the guideline of minimum awards of on the lower end of the spectrum to be “unlikely to be less than £5,000” had been “uprated by inflation to £6,000 by December 2006 in [*Rowlands*]”.⁴⁰⁵

p. 874.

³⁹⁵ Emery, *Administrative Law: Legal Challenges to Official Action* (Sweet & Maxwell 1999), p. 230.

³⁹⁶ [2006] 2 AC 395.

³⁹⁷ *Ibid.*, at para. 81, per Lord Carswell; see Dugdale (et al), *Clerk & Lindsell on Torts – 3rd Supplement*, (Sweet & Maxwell 2008), §14-66.

³⁹⁸ [2006] 2 AC 395, at para. 64.

³⁹⁹ [2010] IRL.R. 25.

⁴⁰⁰ *Ibid.*, para. 105.

⁴⁰¹ [2006] EWCA Civ 1773.

⁴⁰² *Ibid.*, para. 50.

⁴⁰³ [1998] QB 498.

⁴⁰⁴ *Ibid.*, at 517.

⁴⁰⁵ para. 118

4.4.2 Australia⁴⁰⁶

Lord Devlin's restrictive approach had been rejected by the High Court of Australia in *Uren v John Fairfax & Sons Pty Ltd.*⁴⁰⁷ Despite there had been initial reluctance to award exemplary damages in cases of misfeasance in public office in Australia,⁴⁰⁸ it was held in *Sanders v Snell*⁴⁰⁹ that:

“These actions have already been the subject of an award of compensatory damages, but it is not ‘double dipping’ to identify it with the punitive and deterrent elements that are the essential ingredients of exemplary damages. [The defendant’s] conduct calls for condign punishment. Any award must be of a size sufficient to serve as a deterrent to others—particularly to those who abuse a position of public office to the detriment of others.”⁴¹⁰

It is thus clear by now that exemplary damages could be awarded in appropriate claims of misfeasance in public office where criteria such as the need to condign punishment is met.⁴¹¹

4.4.3 New Zealand

The notion that damages in tort law could contain an element of punishment⁴¹² had been viewed with skepticism in New Zealand.⁴¹³ Nevertheless, the courts of New Zealand had followed the approach of the Australian High Court as could be seen in *Taylor v Beere*.⁴¹⁴ The remedy remains to be one that is generally available in tort law in cases where the court finds fit, and had been applied even in cases of negligence.⁴¹⁵ There is no requirement of malice, and the essence of any claim is to establish “sufficiently outrageous or high-handed behavior”.⁴¹⁶ The precise basis for a grant of such an award remains unclear under New Zealand law. On one view, it had been held that it is more than merely compensatory, and such damages act as a device to provide for “public interest concerns which beyond the private interests of parties”.⁴¹⁷ On the other hand, it had been said that such claims are “thinly disguised claims for compensation”,⁴¹⁸ and this may particular true in cases of personal injury. There is also force in the argument that the nature of it is punitive, as could be seen in certain authorities⁴¹⁹ where the assessment of damages was essentially like a “sentencing

⁴⁰⁶ See generally, Trindade & Cane, *The Law of Torts in Australia* (3rd ed. Oxford 1999), pp. 245 – 7.

⁴⁰⁷ (1966) 117 CLR 118.

⁴⁰⁸ *Farrington v Thomson* [1959] VR 285, at 293.

⁴⁰⁹ (1997) 143 ALR 426. See also *Sanders v Snell* [1998] HCA 64.

⁴¹⁰ (1997) 143 ALR 426, at 455-6.

⁴¹¹ Trindade & Cane, *The Law of Torts in Australia* (3rd ed. Oxford 1999), p. 246.

⁴¹² See, e.g. *Wilkes v Wood* (1763) 98 ER 489, at 498 – 99, per Pratt CJ.

⁴¹³ S. Todd (ed.), *The Law of Torts in New Zealand*, 3rd ed. Brookers (2001), p 1190. See further, S. Todd, “Exemplary Damages” (1998) 18 NZULR 145; J. Smillie, “Exemplary Damages and the Criminal Law” (1998) 6 Tort L Rev 113.

⁴¹⁴ [1982] 1 NZLR 81.

⁴¹⁵ *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424.

⁴¹⁶ *Ellison v L* [1998] NZLR 416; *Auckland C.C. v Blundell* [1986] 1 NZLR 732. See further, S. Todd (ed.), *The Law of Torts in New Zealand*, 3rd ed. Brookers (2001), p 1194.

⁴¹⁷ *Taylor v Beere* (1982) 1 NZLR 81, at 90, per White J.

⁴¹⁸ *Akavi v Taylor Preston Ltd* [1995] NZAR 33, at 43. *S v G* [1995] 3 NZLR 681; see further, S. Todd (ed.), *The Law of Torts in New Zealand*, 3rd ed. Brookers (2001), p 1192.

⁴¹⁹ *G v G* (199) 15 FRNZ 22; *B v R* (1996) 10 PRNZ 73.

exercise”,⁴²⁰ where the court took account of the ability of the defendant to pay⁴²¹ and emphasized on the level of payment being appropriate to “mark the degree of the court’s disapproval.”⁴²² Note also the view that, where there is a criminal process, there would not be an award of exemplary damages,⁴²³ and the argument the plaintiff would have to prove his case to a criminal standard of proof, i.e. beyond reasonable doubt, to establish such a claim.⁴²⁴

But it seems to suffice to say that, following that the New Zealand courts had been prepared to grant exemplary damages where there is “sufficiently outrageous or high-handed behavior” regardless of whether “malice” could be shown, it is likely that such damages could be awarded in cases of misfeasance in public office in which such conduct are often the subject of the claim, particularly where the tort was established through the “targeted malice” route.

4.4.4 Canada

The Canadian Supreme Court declined to follow Lord Devlin’s approach⁴²⁵ and held that the proper approach is not to restrict it to certain categories of cases, but the court should instead rationally determine “circumstances that warrant the addition of punishment to compensation in a civil action”.⁴²⁶ An earlier test adopted was where the conduct represents a “marked departure from ordinary standards of decency”.⁴²⁷ Subsequent cases enunciate other requirements that has be shown,⁴²⁸ for example, that “the misconduct in question would be otherwise unpunished”;⁴²⁹ “inadequacy of other penalties to achieve the purpose of retribution, deterrence and denunciation” and that the amount awarded should be no greater than that “rationally necessary to achieve such purpose”.⁴³⁰

4.4.5 Ireland

The Supreme Court of Ireland also rejected the approach of Lord Devlin.⁴³¹ No case law could be found among Irish cases in which exemplary damages had been awarded for a claim of misfeasance in public office, but it is submitted that a claim under this tort would not fail in obtaining exemplary damages for being a claim of misfeasance in public office *per se*. General rules of Irish law regarding exemplary damages should apply. Plaintiffs could be often seen in recent case law⁴³² claiming damages for misfeasance in public office in Ireland,

⁴²⁰ S. Todd (ed.), *The Law of Torts in New Zealand*, 3rd ed. Brookers (2001), p 1194.

⁴²¹ *G v G* (199) 15 FRNZ 22; *B v R* (1996) 10 PRNZ 73.

⁴²² *L v Robinson* [2000] 3 NZLR 499.

⁴²³ *Daniels v Thompson* [1998] 3 NZLR 22; *W v W* [1999] 2 NZLR 1.

⁴²⁴ *B v R* (1996) 10 PRNZ 73; see also, *Tak & Co v A.E.L. Corp. Ltd* (1995) 5 NZBLC 103.

⁴²⁵ *Vorvis v Insurance Corp of British Columbia* (1989) 58 DLR (4th) 193.

⁴²⁶ *Whiten v Plot Insurance Co* (2002) 209 DLR (4th) 257, at 287, per Binnie J. See Bokhary, Sarony & Srivastava (eds.) *Tort Law and Practice in Hong Kong* (Sweet & Maxwell 2005), p. 1048.

⁴²⁷ *Hill v Church of Scientology of Toronto* (1995) 126 DLR (4th) 129.

⁴²⁸ *Longley v Canada* (2000) 184 DLR (4th) 590.

⁴²⁹ *Whiten v Plot Insurance Co* (2002) 209 DLR (4th) 257; see Bodner, “The Odhavji Decision: Old Ghosts and New Confusion in Canadian Courts” (2005) 42 *Alta L Rev* 1061, p. 1079.

⁴³⁰ *Whiten v Plot Insurance Co* (2002) 209 DLR (4th) 257; See Bokhary, Sarony & Srivastava (eds.) *Tort Law and Practice in Hong Kong* (Sweet & Maxwell 2005), p. 1048.

⁴³¹ *Conway v Irish National Teachers’ Organization* [1991] 11 ILRM 497.

⁴³² See, e.g. *Murray & Anor v Fitzgerald & Ors* [2009] IEHC 101, at para. 3; *Burns v Bank of Ireland & Ors* [2007] IEHC 318.

and this practice may suggest that it is possible in theory despite the lack of a successful precedent up to date.

4.4.6 Further Discussion

The word “exemplary” in the phrase “exemplary damages” derives from the Latin noun *exemplaris*, which means “an example for others”.⁴³³ Traditionally,⁴³⁴ the term “vindictive damages”⁴³⁵ was used instead of “exemplary damages”.⁴³⁶ It had also been alternatively referred to as “penal damages”⁴³⁷ and “punitive damages”.⁴³⁸ Whatever it is called, the purpose of such remedies is to “act as once as a penal imposition upon the defendant and a solace to the feelings of the plaintiff”.⁴³⁹ It had been said to be awarded where “the court is entitled and sees fit to mulct the defendant in respect of the heinousness of his conduct”.⁴⁴⁰ The same view is echoed by McGregor.⁴⁴¹

Yet, criticism as to that such a purpose is inconsistent with tort law could often be seen. A few examples quoted by Professor Edelman could illustrate this point:⁴⁴²

“[exemplary damages] confuse the civil and criminal functions of the law”;⁴⁴³

“a claimant cannot justly demand to be put in a better position than she would have been in had she not been wronged. She cannot be owed a windfall”⁴⁴⁴

“the idea [of exemplary damages] is wrong. It is a monstrous heresy. It is an unsightly and unhealthy excrescence, deforming the symmetry and body of the law”⁴⁴⁵

Even if we accept this proposition, it is questionable whether such an award could really serve its purpose to punish and deter. Where the claim is not pursued personally against the public officer at fault, is it realistic to see it as an effective tool for punishment and deterrence where the damages are not paid out of his or her own pocket? What justifies the plaintiff to gain a windfall profit? If the award of exemplary damages is effectively a fine that goes into the plaintiff’s pockets, why do procedural safeguards found in criminal law not apply?⁴⁴⁶ It may be helpful to consider these arguments when deciding the future path of the law of exemplary damages.

⁴³³ Edelman, “In Defence of Exemplary Damages”, in Rickett (ed.), *Justifying Private Law Remedies* (Hart 2008), p. 225.

⁴³⁴ Arnold, *The Law of Damages and Compensation* (2nd ed. Butterworth 1919), pp. 6 – 7.

⁴³⁵ *Crouch v G.N. Railway Co* (1856) 1 Exch. 742, at 759, per Martin B.

⁴³⁶ *Finlay v Chirney* (1888) 20 QBD 494, at 507, per Bowen LJ.

⁴³⁷ *Adams v Coleridge* (1884) 1 TLR 84.

⁴³⁸ *The Mediana* [1900] AC 113, at 118, per Lord Halsbury LC.

⁴³⁹ *Livingstone v Rawyards Coal Co* (1880) 5 AC 25, at 39, per Lord Blackburn.

⁴⁴⁰ *Tullidge v Wade* (1769) 3 Wils 18.

⁴⁴¹ McGregor, *McGregor on Damages* (17th ed. Sweet & Maxwell 2003), §11-001.

⁴⁴² Edelman, “In Defence of Exemplary Damages”, in Rickett (ed.), *Justifying Private Law Remedies* (Hart 2008), p. 231.

⁴⁴³ *Rookes v Barnard* [1964] AC 1129, at 1136, per Lord Devlin; see also, Law Commission, *Aggravated, Exemplary and Restitutionary Damages* (1997), §5.16.

⁴⁴⁴ Beever, “The Structure of Aggravated and Exemplary Damages” (2003) 23 OJLS 87, at 105.

⁴⁴⁵ *Fay v Parker* (1873) 55 NJU 342, at 382.

⁴⁴⁶ See Stevens, “Torts, Rights and Losses” (2006) 122 LQR 565, p. 568.

4.4.7 Hong Kong

The general principles under English law in this respect had been constantly applied in the Hong Kong courts.⁴⁴⁷ Recent case law would reveal that the new approach laid down in *Kuddus v Chief Constable of Leicester Constabulary*⁴⁴⁸ had already been accepted by the High Court of Hong Kong also. As Gill J puts it in *Deacons v White & Case LLP & Ors*,⁴⁴⁹

“...the law on exemplary damages has moved on from the views expressed by Lord Devlin nearly 40 years ago; that it is the conduct giving rise to the breach and not the cause of action that is significant, and that that conduct must be so outrageous with so contumelious a disregard of the plaintiff’s rights that nothing less than an award of exemplary damage would achieve justice...”⁴⁵⁰

It could well be said that the “cause of action test” is now also put into rest in Hong Kong. Recently, Reyes J held in *Lau King Ting Katie v Cheng Miu Har Stella & Ors*⁴⁵¹ that:

“...Lord Nicholls has ventured that at times a defendant’s conduct is so outrageous that the law must be able to award exemplary damages to show displeasure...[h]e thought that there might well be situations where a malicious motive may attract exemplary damages, regardless of whether Lord Devlin’s criteria are met...I am not convinced that the bounds of exemplary damages should be extended beyond what they presently are. Like Lord Scott in *Kuddus*...I wonder if recent developments in judicial review and the law of restitution have not rendered awards of exemplary [sic] in civil proceedings unnecessary.”

Nevertheless, although developments in judicial review and the law of restitution may replace the second heading of Lord Devlin’s categories as suggested by McGregor,⁴⁵² there may still be sound reasons to retain it for oppressive conduct of civil servants or violations of constitutional rights. As there had been still no case in which an action for the tort of misfeasance in public office had even succeeded in Hong Kong up to date,⁴⁵³ there is no Hong Kong authority as to whether exemplary damages would be available for the tort of misfeasance in public office.

The House of Lords decision in *Watkins v Secretary of State for the Home Department*⁴⁵⁴ effectively serves as a discouragement of imposition of exemplary damages in claims of misfeasance in public office. However, as discussed above, it is likely that the decision had been based on potential inconsistencies with EC law, which may be inapplicable in the Hong Kong context. We have yet to see how *Watkins* would be applied under Hong Kong law, but it may not be appropriate to rely solely upon the reasoning in *Watkins* to limit the availability of exemplary damages for misfeasance claims.

⁴⁴⁷ Srivastava, *The Law of Tort in Hong Kong* (2nd ed. LexisNexis: Butterworths 2005), p. 69.

⁴⁴⁸ [2001] 2 WLR 1789.

⁴⁴⁹ [2003] 3 HKLRD 670.

⁴⁵⁰ *Ibid.*, at para. 248.

⁴⁵¹ [2009] HKCFI 216.

⁴⁵² McGregor, *McGregor on Damages* (17th ed. Sweet & Maxwell 2003), §11-046.

⁴⁵³ There is, however, an action that is still pending at the time of writing, in which the defendant’s striking out application had failed: *Asher Model Management Ltd v Francis Carroll* [2008] HKDC 127. Note also that, there is an impending appeal to the Indian Supreme Court on the tort from the decision in *Pradeep Sancheti v Union of India & Ors* (WP No. 457 of 2002) in 2010.

⁴⁵⁴ [2006] 2 AC 395.

Furthermore, in the context of Hong Kong law, there may be an argument that such an award of exemplary damages may be against Articles 10 and 11 of section 8 of the Bill of Rights Ordinance. As recently decided in *Koon Wing Yee v Insider Dealing Tribunal & Anor*,⁴⁵⁵ the scope of Article 11 of BORO regarding procedural safeguards for “criminal charges” may cover fines irrespective of whether they are labelled as civil or criminal in nature. Reasoning by analogy, an award of exemplary damages with an underlying purpose which is purely punitive seems no different with a fine and may well demand procedural safeguards of a criminal standard.

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⁴⁵⁵ FACV No. 20 of 2007.

V. Conclusions

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5. *Conclusions*

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It had been said that the Industrial Revolution was the catalyst for modern developments of the law of torts.⁴⁵⁶ It is submitted that, the raise of the welfare state, the shift from private law, concerned with security of the individual, to public law, which is concerned with welfare and social utility instead⁴⁵⁷ and all these changes in modern society call for an innovative approach in the shaping of tort law and its principles. The tort of misfeasance in public office, as a public tort, would be especially susceptible to policy arguments along these lines.

We had seen already in the preceding sections how the tort of misfeasance in public office had been shown to be highly difficult to assert. In particular, the burden of proof in respect of the mental element had shown itself to be tremendously difficult to overcome in both foreign and local decisions. This may be justified in foreign Commonwealth jurisdictions, as alternative monetary remedies are now available under human rights legislation and EC Law, and had been taken into account when the boundaries of the tort of misfeasance in public office were demarcated. In absence of these alternative remedies in Hong Kong, misfeasance in public office remains to be the sole residual link between unlawful administrative acts and monetary remedies. There is thus indeed a stronger case for the courts of Hong Kong to display the “wit and courage of 17th Century English judges”⁴⁵⁸ in drawing the line for the minimum requirement for establishing the tort, rather than a straightforward application of House of Lords decisions. At any rate, the Public Law Team of the UK Law Commission had already made proposals back in 2004 regarding the extension of private law liability on public bodies in administrative acts. One suggestion was to lower the degree of fault required for an action in misfeasance in public office by making the requisite mental state an objective one.⁴⁵⁹ This may be too bold a change to be made overnight, but perhaps lowering the requirement of knowledge of harm under the second limb of the tort may already be sufficient to prevent deserving parties such as those in *Tang Nin Mun* to suffer a loss without a remedy. A point had been made by the Law Commission that the current law is unfair in the sense that whether parties could recover their economic losses depends ultimately on whether the claim could be shaped into a pigeon hole under the private law,⁴⁶⁰ and on occasions, judges could

⁴⁵⁶ White, *Tort Law in America: An Intellectual History* (Oxford 1980), pp.20-62; Harlow, *Compensation and Government Torts*, (Sweet & Maxwell 1982), p. 37; see also Srivastava, *The Law of Tort in Hong Kong* (2nd ed. LexisNexis: Butterworths 2005), p. 559.

⁴⁵⁷ Kamenka & Tay, “Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology”, in Kamenka & Neale (eds.), *Feudalism, Capitalism and Beyond* (Edward Arnold 1975), p. 127.

⁴⁵⁸ Lloyd, “The Emergent Tort of Misfeasance” (2003) 35 BLJ 7, p. 7.

⁴⁵⁹ Law Commission, *Monetary Remedies in Public Law – A Discussion Paper* (2004), §9.14.

⁴⁶⁰ *Ibid*, §8.15.

do nothing more but express sympathy with the deserving plaintiffs,⁴⁶¹ stating “we do not have in our law a general right to damages for maladministration”,⁴⁶² and requesting that parliamentary attention should be given to the present situation.⁴⁶³ A potential argument that the apparent unequal and unfair treatment accorded to different individuals under the current law being contrary to Article 22 of section 8 of the Hong Kong Bill of Rights Ordinance may possibly be made out, by reason of analogy with the argument that, in absence of “Euro-torts”, English law may be contrary to EC Law.

The points noted regarding the definition of “public officer”, “damage” and the availability of exemplary damages may be helpful in fine-tuning the ambit of this tort. As Professor Cane rightly points out, the way in which we think about remedies in public law should not be taken for granted.⁴⁶⁴ The policy reasons in shielding public authorities from civil liability may not be as compelling as they appear to be.

It is hoped that, at the end of the day, the tort of misfeasance in public office would not follow the fate of the rule in *Rylands v Fletcher*,⁴⁶⁵ on which Lord Hoffmann commented that “it is hard to escape the conclusion that the intellectual effort devoted to the rule by judges and writers over many years has brought forth a mouse”.⁴⁶⁶

⁴⁶¹ *Chagos Islanders v Attorney-General* [2004] EWCA Civ 997.

⁴⁶² *R v Knowsley Metropolitan Borough Council, ex parte Maguire* [1992] COD 499, per Schiemann J.

⁴⁶³ *R (Quark) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2003] EWHC 1743, at para. 14, per Collins J.

⁴⁶⁴ Quoted in Craig, *Administrative Law* (6th ed. Sweet & Maxwell 2008), p 957; Stanton (et al), *Statutory Torts* (Sweet & Maxwell 2003), p. 919.

⁴⁶⁵ (1868) LR 3 HL 330.

⁴⁶⁶ *Transco Plc v Stockport Metropolitan Borough Council* [2004] 2 AC 1, at 19; cited in Srivastava, *The Law of Tort in Hong Kong* (2nd ed. LexisNexis: Butterworths 2005), p. 577.

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