# MISFEASANCE IN PUBLIC OFFICE, EXEMPLARY DAMAGES AND VICARIOUS LIABILITY

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#### Introduction

Although misfeasance in public office had been recognised and applied occasionally by State Supreme Courts it was not until 1995 that it was first considered by the High Court of Australia in *Northern Territory v Mengel.*<sup>1</sup> That was followed, in Australia, by the High Court decision in *Sanders v Snell*,<sup>2</sup> which added at least some discussion of the tort. The New Zealand Court of Appeal also considered the tort at some length, in *Garrett v Attorney-General*,<sup>3</sup> and rather more briefly in *Hobson v Attorney-General*,<sup>4</sup> while the House of Lords spent a considerable amount of time dealing with a variety of issues concerning this tort, in *Three Rivers District Council v Bank of England (No 3)*.<sup>5</sup> However, despite the extent of discussion in those cases, in none of them was the defendant found to have committed the tort; in each case, the respective courts were dealing with matters of principle, rather than considering how those principles might apply to a particular set of facts.

In the light both of the fact that this tort has had only a relatively brief exposure to judicial consideration, and that such exposure is relatively recent, it is not surprising that there are some aspects of liability that have not been fully developed. It is my purpose in this paper to consider more fully two of the areas where some doubt remains: (a) the circumstances in which an employer may be vicariously liable for the commission of this tort; and (b) whether such vicarious liability extends to a liability to pay exemplary damages.

The reason for considering these two aspects of the tort is that this head of liability is one that can be imposed only on one who holds a "public office" – a phrase which encompasses those who owe duties to members of the public, and who exercise those powers and functions for the benefit of the public. Hence, the rationale for this liability has been put on the basis that in a legal system based on the rule of law, executive and administrative power must be exercised for the public good, and not for an ulterior or improper purpose.<sup>6</sup> However, it is my submission that an employer of such a public officer is likely to be vicariously liable only in limited circumstances, and that such vicarious liability does not extend to the awarding of exemplary damages, with the result that many who have suffered loss by some act of maladministration will be deterred from taking proceedings, as they might find that the public officer who is solely liable does not have the resources to provide the compensation or other damages which have been awarded.

#### The Tort of misfeasance in public office

The tort of misfeasance in public office permits an individual to recover for the loss or damage suffered consequent upon action taken by the holder of a public office, if the officer acted maliciously or knew that the action was beyond power and was likely to harm the

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plaintiff. The action is not confined to positive conduct by the defendant, but includes a deliberate failure to fulfil a public duty cast upon him or her.

It must be stressed that this action requires, as one element, some form of intention to cause harm to the plaintiff. It has been argued on occasion that one who suffers financial harm as the direct consequence of administrative action which turns out to be invalid may recover that loss by an action in tort, but that argument has been steadfastly rejected.<sup>7</sup> No action lies against a public officer who causes loss by reason of an act which is later found to be without force, so long as the officer acted in good faith and without knowledge of the invalidity.<sup>8</sup>

Each of the elements of liability need to be considered in turn. However, before undertaking that consideration, it is useful to consider a relatively recent case, in which the action was successful, in order to get an overall view of liability under this tort.

### A Case study: De Reus v Gray

*De Reus v Gray*<sup>9</sup> serves to illustrate many of the aspects of liability under this tort and is, therefore, an excellent vehicle to introduce a discussion of this form of liability. Ms Grey was a single mother of four children who had accrued some \$400 of parking fines but, being unable to pay that amount, a warrant was issued for her arrest and imprisonment. The warrant was executed by WPC Pike, who took Ms Gray to the Narre Warren Police Station, where Sgt De Reus, the officer at the "Charge Counter", said that he wanted Ms Gray stripsearched. WPC Pike carried out this procedure, assisted by a probationary woman constable. Sgt De Reus gave no reason for this search, and Ms Gray said nothing in response to the order for her to be strip-searched, because she thought that if she resisted she would be forced to comply.

The search involved Ms Gray being asked to remove all her clothes, which she did. While the clothes were being searched, she was not given any alternative clothing. Furthermore, the search took place, not in a cell or enclosed room, but at the end of a corridor, adjacent to a cell which Ms Gray thought (apparently incorrectly) had some sort of two-way mirror in the door, through which she could be observed. In all, Ms Gray was detained for some three to four hours before being released. On the following morning she returned to the Police Station to do two hours community work, in explation of her parking fines. She sued for damages for assault and negligence, as well as for misfeasance in public office. She succeeded in all three causes of action.

To summarise the elements of the action for misfeasance in public office considered more fully below, the Court accepted that Sgt De Reus was the holder of a public office for these purposes, and the jury found that he either knew that he was not authorised to conduct a strip-search in these circumstances, or recklessly disregarded the means of ascertaining whether he had that power, and that his conduct was likely to cause harm to Ms Gray.

### Holder of a public office

As already mentioned, this tort is capable of being committed only by a person or body who fulfils some public function, but the precise circumstances in which a defendant may come within the ambit of the wrong have yet to be authoritatively determined. One can do little more than provide some examples of those who come either within, or outside, this concept.

A public officer includes government employees undertaking duties for the purpose of eradicating diseases in stock,<sup>10</sup> a Minister of the Crown either when deciding to withdraw funding from a women's shelter<sup>11</sup> or when considering whether or not to deport a noncitizen,<sup>12</sup> prison officers,<sup>13</sup> parole officers,<sup>14</sup>and a member of the police force, whether carrying out coercive duties<sup>15</sup> or investigating alleged criminal activity.<sup>16</sup> However, the chief executive officer of a government department is not regarded as the holder of a public office for these purposes when exercising managerial functions in relation to the staff of the department.<sup>17</sup> The same is true of counsel briefed to prosecute for the Crown and an instructing solicitor, because neither, in the course of performing their duties, exercises any power which might be misused.<sup>18</sup> So too a subordinate officer of a government department whose task is to prepare a report on the conduct of a fellow officer is not a public officer for these purposes.<sup>19</sup>

A body corporate is just as capable of committing this tort as an individual. So, a statutory corporation has accepted that it may be liable, if the other elements of the tort were to be proved,<sup>20</sup> and a State, acting through its Ministers, its emanations and its officers has been held liable.<sup>21</sup> The same has been held to be true for a local body when exercising a public function such as those relating to town planning.<sup>22</sup> But the Society of Lloyd's, in carrying out its insurance business, is not a public officer for these purposes, as its operations are commercial, not governmental.<sup>23</sup>

Of course, if it is a group of people that is sued — such as the members of a borough or municipal council — to prove the necessary bad faith on the part of all the members of the group may be difficult, but certainly not impossible.<sup>24</sup> Indeed, it appears that, when a local body is purporting to carry out a power which is for the benefit of the borough or municipality as a whole, it is irrelevant that in the particular instance the power is derived from a lease rather than from legislation.<sup>25</sup>

### Acting in bad faith

The second element of this tort which the plaintiff must prove is that the defendant acted in bad faith. This may be established in either of two ways.<sup>26</sup> First, that the defendant was motivated by a purpose quite foreign to that for which the public power or duty had been bestowed, and that the impugned conduct was undertaken with the intention of harming the plaintiff.<sup>27</sup> Secondly, and alternatively, the defendant's lack of good faith will have been demonstrated if the acts or omissions complained of were undertaken in the knowledge that they were beyond power<sup>28</sup> or with reckless disregard of that fact, and were likely to harm the plaintiff.<sup>29</sup> A matter which has not yet been conclusively determined is the extent to which a defendant who acts in conscious disregard of his or her authority must direct the acts to harming the plaintiff. Despite some judicial observations which may suggest otherwise,<sup>30</sup> it is not sufficient that the defendant merely knows that he or she has acted beyond power and that damage has consequently been caused to the plaintiff.<sup>31</sup> The High Court of Australia, in Northern Territory v Mengel,<sup>32</sup> inclined to the view that the defendant's ultra vires acts must have been carried out with the intention of harming the plaintiff or with reckless indifference to the harm that was likely to ensue,<sup>33</sup> while the New Zealand Court of Appeal, in Garrett v Attorney-General,<sup>34</sup> would have limited the tort somewhat, by requiring the plaintiff to show that the public officer actually knew of the consequences for the plaintiff of the disregard of duty, or was recklessly indifferent to those consequences. Subsequently, the House of Lords, in Three Rivers District Council v Bank of England (No 3),35 agreed with the New Zealand Court of Appeal that it is necessary for the plaintiff to show that the defendant has acted in the knowledge that his or her act would probably injure the plaintiff.<sup>36</sup> More recently. the Supreme Court of Canada adopted the same approach as these latter two courts, saying that one element of the tort is that 'the defendant must have been subjectively reckless or wilfully blind as to the possibility that harm was a likely consequence of the alleged misconduct.'37

Whatever precise formulation is eventually decided upon, it may be that Gray J, in *Trevorrow* v *South Australia*,<sup>38</sup> read too much into earlier comments of the High Court on this tort. His Honour concluded<sup>39</sup> that the State, through its Ministers, the members of the Aborigines

Protection Board and other officers, knew that it was unlawful to remove the plaintiff, a 13 month old Aboriginal child, from his natural family, and place him with a non-indigenous family for long-term fostering, and thus fulfilled the first aspect of liability. But in dealing with the intentions of those who authorised that removal, his Honour said that they either foresaw the risks to the plaintiff's health from that removal, or ought to have foreseen those risks.<sup>40</sup> It is not clear that there was a finding of either an intention to harm the plaintiff or reckless indifference to whether harm would ensue.

### Damage

This tort is derived from the action on the case, with the result that the plaintiff must show that loss or damage has been suffered. Hence when a prisoner complained that prison officers had wrongfully opened his correspondence with his legal advisers, the House of Lords held that, although the officers had acted beyond power and in bad faith, the plaintiff could not show that he had suffered material damage and hence his claim was dismissed.<sup>41</sup> The damage which is the gist of the action may assume a variety of different forms; it includes the adverse effects of the administrative action on the plaintiff's person – whether the injury is physical<sup>42</sup> or psychological<sup>43</sup> - or on his or her property<sup>44</sup> or reputation.<sup>45</sup> Thus a person may sue for the revocation of a licence to sell alcohol<sup>46</sup> or to pilot a ship<sup>47</sup> or to import turkeys.<sup>48</sup> The action also lies for damage resulting from striking a dentist off the register of practitioners,<sup>49</sup> forcing the closure of an hotel,<sup>50</sup> refusing to acknowledge the legality of a tax minimisation scheme,<sup>51</sup> or denying consent to a change of use of land.<sup>52</sup>

## Vicarious liability

A plaintiff who seeks redress under this tort, and brings the proceedings against the employer of the perpetrator, faces a number of difficulties in seeking to impose vicarious liability on the employer. First, if the public officer who is alleged to have committed the tort is employed by, or in the service of, the Crown, the latter will not be vicariously liable if the tortfeasor, in the course of committing the acts or omissions which constitute the relevant tort, was carrying out an independent duty cast upon him or her by the law. However, this rule has been abrogated with respect to the conduct of police officers. In all jurisdictions in Australia, and in New Zealand, police officers may render the Crown vicariously liable for torts committed by them in the exercise, or purported exercise, of their duty.

Another difficulty which a plaintiff faces, even if the tortfeasor was not exercising an independent discretion, is that vicarious liability still requires that the employee be acting in the course of employment in order to fix the employer with liability. But this tort is committed only when the employee is either using his or her position for a purpose quite foreign to that for which it had been bestowed, or is acting in conscious disregard of his or her lack of authority. In neither case, it may be argued, is the employee's conduct in the course of employment.

The "independent duty" rule, its abrogation for police officers, and the question of what comes within the course of employment for these purposes may each be considered in turn.

## The "independent duty" rule

This rule is based on the rather dubious notion that a public employee who is obeying the authority of an Act of Parliament is not at that time subject to the control of the employer, and thus liability ought not to be imposed on that employer.<sup>53</sup> These comments were made at a time when the general immunity of the Crown had only recently been removed,<sup>54</sup> and it is understandable that a degree of caution was exercised in re-imposing liability on to the Crown. More recently, the rule has come under sustained criticism,<sup>55</sup> since it transfers the plaintiff's loss to an individual who is unlikely to be able to distribute that loss, rather than

putting the liability on the Crown, where it could be readily absorbed. In view of such comments, it is not surprising that this anomalous rule has been abrogated completely in New South Wales,<sup>56</sup> South Australia<sup>57</sup> and New Zealand,<sup>58</sup> and proposed for abolition in Victoria,<sup>59</sup> Queensland<sup>60</sup> and with respect to the Crown in right of the Commonwealth,<sup>61</sup> although none of those proposals has yet been implemented.

In those jurisdictions where it has not been abrogated, the rule has been applied to negative vicarious liability in the case of magistrates,<sup>62</sup> legal aid officers,<sup>63</sup> Crown prosecutors,<sup>64</sup> collectors of customs,<sup>65</sup> the Commissioner of Taxation<sup>66</sup> and the former Director of Native Affairs in the Northern Territory<sup>67</sup> but has not been applied to school teachers<sup>68</sup> nor to such statutory office-holders as the Comptroller-General of Prisons<sup>69</sup> or the Director of Community Welfare.<sup>70</sup> The exception may also apply to a Minister of the Crown in the conduct of his or her portfolio.<sup>71</sup>

### Vicarious liability for police officers

At common law, the above "independent duty" rule applied to police officers while carrying out functions special to their appointment.<sup>72</sup> However, in all Australian jurisdictions that rule has been abrogated by statute, and the Crown is vicariously liable for torts committed by police officers in the exercise or purported exercise of their duty.<sup>73</sup>

The legislation for the Commonwealth and Queensland treats the Crown, for all purposes, as a joint tortfeasor with the police officer.<sup>74</sup>

The legislation in the other jurisdictions provides that if a police officer is alleged to have committed a tort, he or she does not incur any civil liability, and that such liability attaches instead to the State or Territory. However, in all jurisdictions other than New South Wales, that transfer of liability applies only when the police officer was acting in "good faith",<sup>75</sup> or honestly<sup>76</sup> or "without corruption or malice".<sup>77</sup>

As a matter of statutory interpretation, this limitation renders it unlikely that the Crown would be vicariously liable for a police officer who had committed the tort of misfeasance in public office. As Evans J, in the Supreme Court of Tasmania, said in *Holloway v Tasmania*,<sup>78</sup> in order for the plaintiffs to establish liability "for the tort of misfeasance in public office, they must prove that [the defendant's] conduct was otherwise than an honest attempt to perform the functions of his office. Such conduct would not be in good faith for the purposes of" the legislation. This view was upheld on appeal to the Full Court.<sup>79</sup> Similarly, in *Victoria v Horvath*,<sup>80</sup> the Court of Appeal considered that the conduct of a police officer warranting the award of exemplary damages must necessarily be the antithesis of conduct for which the legislation provides immunity.

But as a matter of practice, the State may, if it wishes, concede the point. Thus, in *De Reus* v Gray,<sup>81</sup> the action for misfeasance in public office which I discussed earlier and in which the State was joined with the police officers as a defendant, Winneke P noted that admissions were made by the State "of the relevant facts necessary to transfer to the State any liability incurred by the two police officers … in accordance with [the relevant legislation]."

## The Course of employment

Vicarious liability is established by showing that the alleged tortfeasor (a) is an employee of the defendant; and (b) committed the tort in the course of that employment.<sup>82</sup> Assuming that a tortfeasor is, for these purposes, an employee, because he or she is not regarded as exercising an independent duty, it is still necessary to show that the impugned conduct is within the course of employment. Although authority is sparse, it is my contention that the

courts in Australia would be unlikely to find that an employee who commits this tort fulfils this requirement.

The only High Court comment directly in point is that made by the majority of that Court, in *Northern Territory v Mengel*,<sup>83</sup> that "although the tort is the tort of a public officer, he or she is liable personally and, unless there is de facto authority, there will ordinarily only be personal liability." The Full Court in South Australia made the same point, in *Rogers v Legal Services Commission*,<sup>84</sup> that because the tort is one of intention, the employer would not normally be liable unless it had authorised the conduct, at least impliedly, an authorisation which would be difficult to establish.<sup>85</sup> The House of Lords appears to be more ready to find vicarious liability. Lord Jauncey, in *Racz v Home Office*,<sup>86</sup> was prepared to concede – for the purpose of refusing to strike out a statement of claim – that if (in that case) prison officers were shown to have been engaged in a misguided and unauthorised method of performing their authorised duties, that might be sufficient to impose vicarious liability on the respondent.<sup>87</sup> It might, however, be argued that if the prison officers' lack of authority were "misguided", they would be unlikely to have the necessary knowledge of, or reckless indifference to, that fact, and therefore not be liable in any event.

Of course, the whole matter of vicarious liability for deliberate conduct has been considered by the High Court in *New South Wales v Lepore.*<sup>88</sup> But the principles to be derived from the various judgments in that case are not easy to state, and do not appear to support a finding of vicarious liability for a tort such as misfeasance in public office. Thus, Gleeson  $CJ^{89}$  and Kirby  $J^{90}$  were of the view that vicarious liability might be imposed if there is a sufficiently close connection between the tortfeasor's conduct and the type of conduct which he or she was engaged to perform. But misfeasance in public office is committed when the tortfeasor is either knowingly going beyond what he or she is authorised to do, and acting in such a way as to be likely to harm the plaintiff, or is motivated by a purpose which is quite foreign to that for which the power or duty has been bestowed. In either case, it is submitted, any connection between that conduct and that for which the employee was engaged is no more than temporal. Similarly, while Gummow and Hayne  $JJ^{91}$  were prepared to allow vicarious liability for some intentional torts of an employee, their Honours considered that such liability should not be extended beyond the two kinds of case identified by Dixon J in *Deatons Pty Ltd v Flew*.<sup>92</sup>

first, where the conduct of which complaint is made was done in the intended pursuit of the employer's interests or in the intended performance of the contract of employment or, secondly, where the conduct of which complaint is made was done in the ostensible pursuit of the employer's business or the apparent execution of the authority which the employer held out the employee as having.

It is suggested that the commission of the tort of misfeasance in public office does not come within either of those kinds of case.

### Vicarious liability and exemplary damages

Since the tort of misfeasance in public office is founded on the ill-will of the defendant, it is one which is peculiarly appropriate for the award of exemplary damages. But the purposes of awarding exemplary damages have been variously described as imposing punishment on the defendant for a high-handed disregard of the plaintiff's rights, deterring the defendant in order to prevent him or her from reaping a gain from the wrongdoing, assuaging any feelings on the part of the plaintiff to seek revenge for the hurt done, and marking the condemnation of the court for the defendant's conduct.<sup>93</sup> Such purposes appear not to be applicable to an employer whose only connection with the commission of the tort is the fact of employing the tortfeasor.

In the light of my submission above, that an individual who commits the tort of misfeasance in public office is unlikely to render his or her employer vicariously liable, it might be thought that any discussion of vicarious liability for exemplary damages is unnecessary. If the employer is not vicariously liable for compensatory damages, I can see no basis for such an employer being liable for exemplary damages. However, I am prepared to concede that that submission as to vicarious liability for compensatory damages may not be correct. If that is the case, and if an employer is vicariously liable for compensatory damages, I submit that there are two bases at least for arguing that such an employer would also be liable for any exemplary damages that may be awarded.

Before considering those two bases for the award of exemplary damages against an employer, it is necessary to refer briefly to the legislation mentioned above, which renders governments liable for the torts of police officers.

#### In Relation to police officers

Of the legislation discussed above which renders a government liable for the torts of a police officer, four jurisdictions expressly proscribe that liability extending to the payment of exemplary damages.

In the Commonwealth and Queensland – where the legislation treats the Crown and the police officer as joint tortfeasors – that joint liability does not "extend to a liability to pay damages in the nature of punitive damages",<sup>94</sup> thereby leaving the police officer as the only one liable to pay such damages. In Western Australia, where the Crown is liable, instead of the police officer, for damages arising from the officer's tortious conduct, if done "without corruption or malice", any such substitution of liability "does not extend to exemplary or punitive damages."<sup>95</sup> And in the Northern Territory, where the legislation merely imposes vicarious liability on the Territory for the conduct of police officers, that liability does not extend to one to pay exemplary or punitive damages.<sup>96</sup> In both of the two last-named jurisdictions, the individual police officer remains liable for exemplary damages.

Despite these provisions, it can scarcely be said that there is any national legislative policy against rendering a government liable for exemplary damages based solely on the conduct of an employee. In the other four States – New South Wales, South Australia, Victoria and Tasmania – it appears that if the State is liable for compensatory damages for the conduct of a police officer,<sup>97</sup> it will also be liable for such exemplary damages as may be awarded.<sup>98</sup>

### In Relation to other holders of public office

Assuming that the tortfeasor who has committed misfeasance in public office is not exercising an independent duty, and therefore may render his or her employer vicariously liable, and assuming further that, despite having either knowingly gone beyond what he or she is authorised to do, and acting in such a way as to be likely to harm the plaintiff, or being motivated by a purpose which is quite foreign to that for which the power or duty has been bestowed, the tortfeasor is nevertheless found to have rendered his or her employer vicariously liable for any compensatory damages, the question remains whether such conduct may render the employer also vicariously liable for exemplary damages.

It is submitted that there are two arguments – each quite separate from the other – which support an employer's vicarious liability for exemplary damages.

The first argument is based on comments of the High Court in *New South Wales v Ibbett.*<sup>99</sup> Police officers had trespassed on Mrs Ibbett's property, and in her action against the State she was awarded exemplary, as well as compensatory, damages in the District Court, an award which was upheld by the Court of Appeal. The State appealed to the High Court, one

of its arguments being that it was wrong in principle to "fix the State with vicarious liability for the conduct of persons who are not before the court, who have not been identified, whose conduct is not the subject of allegations in the pleadings, whose conduct has not been investigated at the trial and against whom no specific findings have been made."<sup>100</sup> A unanimous High Court rejected the State's submission, and quoted with approval the comments of Priestley JA in *Adams v Kennedy*,<sup>101</sup> that the amount of exemplary damages awarded against the State for the conduct of police officers

should indicate my view that the conduct of the [police officer] defendants was reprehensible, [and] mark the court's disapproval of it. The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen.

The court noted that similar views had been expressed by Lord Devlin in *Rookes v Barnard*,<sup>102</sup> by Lord Hope in *Kuddus v Chief Constable of Leicestershire Constabulary* (*'Kuddus'*),<sup>103</sup> and by the Federal Court of Appeal in Canada, in *Peeters v Canada*.<sup>104</sup> The comments of Lord Hope in *Kuddus* have since been followed by the English Court of Appeal in *Rowlands v Chief Constable of Merseyside Police*,<sup>105</sup> in holding the defendant vicariously liable for exemplary damages awarded to a plaintiff who had succeeded in an action for assault, false imprisonment and malicious prosecution.

In light of the fact that *Kuddus* was an action for misfeasance in public office, it might be said that the High Court's approval of the views expressed there is authority for the proposition that an award of exemplary damages against the Crown as an employer serves the useful purpose of bringing it home to senior officers in a position of control within the Public Service that conduct meriting the award of such damages by junior officers in public employment will not be tolerated, and that the senior officers must maintain discipline and proper behaviour at all times.

The second argument in support of an employer's vicarious liability for exemplary damages depends upon identifying the theory by which vicarious liability is imposed in any particular situation.

There are two such theories. The first is that it is only the acts of the employee – and not his or her liability – which is imputed to the employer (the so-called "master's tort" theory); the second, a theory of strict liability, would impute to the employer the wrong which the employee has committed in the course of employment.<sup>106</sup> It is well known that in *Darling Island Stevedoring & Lighterage Co Ltd v Long ('Darling Island')*,<sup>107</sup> while Kitto and Taylor JJ<sup>108</sup> supported the first of these theories, Fullagar J<sup>109</sup> supported the second.

The second theory is now settled law in England<sup>110</sup> and, it is suggested, in Australia. Subsequent to the *Darling Island* case, Windeyer J in *Parker v Commonwealth*<sup>111</sup> said that an employer "is only liable for the acts or omissions of an employee if the employee would himself be liable", a view subsequently followed by State courts.<sup>112</sup> More recently, the High Court, in *Hollis v Vabu Pty Ltd*,<sup>113</sup> acknowledged the correctness of the view expressed by Fullagar J in the *Darling Island* case, that the "modern doctrine respecting the liability of an employer for the torts of an employee was adopted … as a matter of policy.

In that case, if an employee has committed the tort of misfeasance in public office in such circumstances as to merit the plaintiff being awarded exemplary damages, and if, further, that tort was committed in the course of employment, there is no difficulty in saying that since the wrong of the employee merited the award of both compensatory and exemplary damages, that wrong, and the concomitant liability for damages, is transferred to the employer by the operation of the doctrine of vicarious liability. Furthermore, an award of exemplary damages made against an employer would meet many of the purposes of such

an award.<sup>114</sup> It would assuage any feelings on the part of the plaintiff for revenge, it would mark the condemnation of the court for the conduct complained of and, as mentioned above, it would fulfil the deterrent purpose by seeking to ensure that senior officers in an organisation maintain discipline and proper behaviour at all times.

#### Conclusion

In summary, if an individual (the **tortfeasor**) has committed misfeasance in public office, the Crown:

- will **not** be liable for compensatory damages if:
  - the tortfeasor is not a police officer, and:
    - was exercising an independent function; or
    - was acting outside the course of employment;
  - the tortfeasor is a police officer, and the fact of the commission of the tort (having been in "bad faith") takes him or her out of the protection of the legislation relating to police officers (in SA, Tas, Vic, WA and NT).
- will **not** be liable for exemplary damages if:
  - it is not liable for compensatory damages; or
  - the tortfeasor is a police officer, and the legislation of the Commonwealth, Queensland, Western Australia or the Northern Territory applies.

#### Endnotes

- 1 (1995) 185 CLR 307.
- 2 (1998) 196 CLR 329.
- 3 [1997] 2 NZLR 332
- 4 [2007] 1 NZLR 374.
- 5 [2003] 2 AC 1
- 6 See the comment of Nourse LJ in *Jones v Swansea City Council* [1989] 3 All ER 162 at 186, quoted with approval by Lord Steyn in *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 at 190.
- 7 See Macksville & District Hospital v Mayze (1987) 10 NSWLR 708 at 724–5 per Kirby P (CA); Chan v Minister for Immigration (1991) 31 FCR 29 at 40–1 per Einfeld J; R v Knowsley Metropolitan Borough Council, Ex parte Maguire (1992) 90 LGR 653 at 664–5 per Schiemann J (Eng HC).
- 8 Pemberton v A-G [1978] Tas SR 1 at 29 per Chambers J; Dunlop v Woollahra Municipal Council [1982] AC 158 at 172 (PC); see also Northern Territory v Mengel (1995) 185 CLR 307 at 346.
- 9 (2003) 9 VR 432.
- 10 In Northern Territory v Mengel (1995) 185 CLR 307 the issue was accepted without question.
- 11 Cornwall v Rowan (2004) 90 SASR 269 at [257] (FC).
- 12 Chan v Minister for Immigration (1991) 31 FCR 29 at 39 per Einfeld J; see also Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1986] QB 716 (CA).
- 13 Racz v Home Office [1994] 2 AC 45.
- 14 Hobson v Attorney-General [2007] 1 NZLR 374 (CA).
- 15 Farrington v Thomson [1959] VR 286; De Reus v Gray (2003) 9 VR 432 (CA);.
- 16 Garrett v A-G [1997] 2 NZLR 332 (CA); Odhavji Estate v Woodhouse (2003) 233 DLR (4th) 193 (SCC); and see Kuddus v Chief Constable of Leicestershire Constabulary [2002] 2 AC 122, where the point was admitted.
- 17 Pemberton v A-G [1978] Tas SR 1 at 14 per Neasey J (FC); cf Sanders v Snell (1998) 196 CLR 329 and the passing remark of Lord Bridge in Calveley v Chief Constable of Merseyside [1989] AC 1228 at 1240 that a decision to suspend a police officer from duty, if done maliciously, would be capable of constituting this tort.
- 18 Cannon v Tahche (2002) 5 VR 317 (CA) at [61]; and see Leerdam v Noori (2009) 255 ALR 553 (NSW CA) at [26] per Spigelman CJ, at [103]-[109] per Macfarlan JA (solicitors for Government Minister not public officers).
- 19 Calveley v Chief Constable of Merseyside, above; see also Henderson v McCafferty [2002] 1 Qd R 170 at [33] per Williams J (President of the Queensland Law Society held not to be a public officer for these purposes).

- 20 Gimson v Victorian Workcover Authority [1995] 1 VR 209 at 226 per McDonald J; and see Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1.
- 21 Trevorrow v South Australia (2007) 98 SASR 136 at [978]; but see my subsequent comments on the issue of intention in that case.
- 22 Dunlop v Woollahra Municipal Council [1982] AC 158 at 172; Murcia Holdings Pty Ltd v City of Nedlands (1999) 22 WAR 1; Deepcliffe Pty Ltd v Gold Coast City Council (2001) 118 LGERA 117 (Qld CA) (although neither the Council nor the individual councillors in the two last mentioned cases were held to have the necessary intent).
- 23 Society of Lloyd's v Henderson [2008] 1 WLR 2255 (CA).
- 24 Jones v Swansea City Council [1990] 3 All ER 737 at 741 per Lord Lowry (HL).
- 25 Jones v Swansea City Council [1989] 3 All ER 162 at 174–5 (CA), aff'd on this point [1990] 3 All ER 737 at 741 per Lord Lowry (HL).
- 26 Three Rivers District Council v Bank of England (No 3) [2003] 2 AC 1 at 191 per Lord Steyn (HL).
- 27 Bennett v Metropolitan Police Commissioner [1995] 2 All ER 1 at 13–14 per Rattee J; Roncarelli v Duplessis (1959) 16 DLR (2d) 689 (SCC); Cornwall v Rowan (2004) 90 SASR 269 at [251]-[256] (FC).
- 28 Which in this context may be constituted by a denial of procedural fairness: *Sanders v Snell* (1998) 196 CLR 329 at [45]. There having been no findings of fact by the trial judge on that issue, the matter was remitted for re-trial; the Full Court of the Federal Court, overturning the decision of the Norfolk Island Supreme Court, held that there was no proof that the defendant had known of, or been recklessly indifferent to, the unlawfulness of his actions: see *Sanders v Snell* (2003) 198 ALR 560.
- 29 Northern Territory v Mengel (1995) 185 CLR 307 at 347.
- 30 See Farrington v Thomson [1959] VR 286 at 293 per Smith J, but cf Tampion v Anderson [1973] VR 715 at 720 per Smith J (FC); Little v Law Institute of Victoria (No 3) [1990] VR 257 at 270 per Kaye and Beach JJ (App Div).
- 31 Northern Territory v Mengel (1995) 185 CLR 307 at 346-7.
- 32 (1995) 185 CLR 307 at 347.
- 33 Which may be described as 'objective recklessness'.
- 34 [1997] 2 NZLR 332 at 349.
- 35 [2003] 2 AC 1.
- 36 Which might be described as 'subjective recklessness'.
- 37 Odhavji Estate v Woodhouse (2003) 233 DLR (4th) 193 at [38] per lacobucci J.
- 38 (2007) 98 SASR 136.
- 39 At [978].
- 40 At [885].
- 41 Watkins v Home Office [2006] 2 AC 395.
- 42 See Brasyer v Maclean (1875) LR 6 PC 398; Karagozlu v Metropolitan Police Commissioner [2007] 2 All ER 1055 (CA) (both cases of wrongful loss of liberty).
- 43 See Odhavji Estate v Woodhouse (2003) 233 DLR (4th) 193 at [41] per lacobucci J (SCC).
- 44 Eg, Smith v East Elloe Rural District Council [1956] AC 736 (compulsory acquisition of land).
- 45 Cornwall v Rowan (2004) 90 SASR 269 at [729]-[734] (FC).
- 46 Roncarelli v Duplessis (1959) 16 DLR (2d) 689 (SCC).
- 47 McGillivray v Kimber (1915) 26 DLR 164 (SCC).
- 48 Bourgoin SA v Ministry of Agriculture, Fisheries and Food [1986] QB 716 (CA).
- 49 Partridge v General Medical Council (1890) 25 QBD 90 (action dismissed for lack of malice); and see Little v Law Institute of Victoria (No 3) [1990] VR 257 (App Div), in which the action related to the defendant's attempts to restrain the plaintiff from practising as a solicitor.
- 50 Farrington v Thomson [1959] VR 286.
- 51 Longley v Minister for National Revenue (1999) 176 DLR (4th) 445 at [133]-[135] per Quijano J (BC SC)
- 52 Cf Jones v Swansea City Council [1990] 3 All ER 737 (HL), in which the plaintiff failed to show malice on the part of the Council.
- 53 See Enever v R (1906) 3 CLR 969 at 982-3 per Barton J.
- 54 In the case of the Crown in right of the Commonwealth, by s 64 Judiciary Act 1903 (Cth).
- 55 See, eg, Sawer, 'Crown Liability in Tort and the Exercise of Discretions' (1951) 5 *Res Jud* I; Atiyah, *Vicarious Liability in the Law of Torts*, 1967, pp 75–8; Finn, 'Claims Against Government Legislation' in *Essays on Law and Government*, Vol 2, 1996, pp 36–7.
- 56 Law Reform (Vicarious Liability) Act 1983 (NSW) ss 7,8.
- 57 The exception was abolished by the Crown Proceedings Act 1972 (SA) s 10(2) (see *South Australia v Kubicki* (1987) 46 SASR 282 (FC); *De Bruyn v South Australia* (1990) 54 SASR 231 at 242 per Legoe J (FC)), and has not been revived by the subsequent repeal of that Act.
- 58 Crown Proceedings Act 1950 (NZ) s 6(3).
- 59 Kneebone, 'The Independent Discretionary Function Principle and Public Officers' (1990) 16 Mon L R 184 at 203–4.
- 60 Queensland Law Reform Commission, *Vicarious Liability*, Report No 56, 2001, Recommendation 3.5.
- 61 Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, Report 92, 2001, Recommendation 25-1.
- 62 Thompson v Williams (1915) 32 WN (NSW) 27.
- 63 Field v Nott (1939) 62 CLR 660.

- 64 Grimwade v Victoria (1997) 90 A Crim R 526 (Vic SC).
- 65 Baume v Commonwealth (1906) 4 CLR 97.
- 66 Clyne v Deputy Commr of Taxation (NSW) (No 5) (1982) 13 ATR 677 at 682–3 per McGregor J.
- 67 *Cubillo v Commonwealth* (2000) 103 FCR 1 at [1120] per O'Loughlin J, aff'd (2001) 112 FCR 455 at [288]– [293] (FC).
- 68 Ramsay v Larsen (1964) 111 CLR 16.
- 69 Thorne v Western Australia [1964] WAR 147; see also Cowell v Corrective Services Commn (1988) 13 NSWLR 714 at 741 per Clarke JA, cf at 724 per McHugh JA (CA).
- 70 Bennett v Minister for Community Welfare (1988) Aust Torts Reports 80-210 at 68,089 per Nicholson J (WA SC); the point was not considered on appeal: (1990) Aust Torts Reports 81-048 (WA FC); (1992) 176 CLR 408.
- 71 Unilan Holdings Pty Ltd v Kerin (1993) 44 FCR 481 at 483–4 (FC); McKellar v Container Terminal Management Services Ltd (1999) 165 ALR 409 at [220] per Weinberg J (Fed Ct).
- 72 Enever v R (1906) 3 CLR 969; Irvin v Whitrod (No 2) [1978] Qd R 271; Griffiths v Haines [1984] 3 NSWLR 653.
- 73 Australian Federal Police Act 1979 (Cth) s 64B; Law Reform (Vicarious Liability) Act 1983 (NSW) Part 4; Police Service Administration Act 1990 (Qld) s 10.5; Police Act 1998 (SA) s 65; Police Service Act 2003 (Tas) s 84; Police Regulation Act 1958 (Vic) s 123; Police Act 1892 (WA) s 137; Police Administration Act 1978 (NT) Part VIIA.
- 74 Cth s 64B(1); Qld s 10.5(1A).
- 75 Tas s 84(1); Vic s 123(1); NT s 148B(2).
- 76 SA s 65(1).
- 77 WA s 137(3).
- 78 (2005) 15 Tas R 127 at [11].
- 79 Ibid at [20].
- 80 (2002) 6 VR 326 (CA) at [62].
- 81 (2003) 9 VR 432 at [5].
- 82 See, eg, Balkin and Davis, *Law of Torts*, 4th ed, 2009, [26.1].
- 83 (1995) 185 CLR 307 at 347.
- 84 (1995) 64 SASR 572 at 587 per Lander J
- See McKellar v Container Terminal Management Services Ltd (1999) 165 ALR 409 at [253] per Weinberg J.
  [1994] 2 AC 45 at 53.
- [1994] 2 AC 45 at 55.
   In *Three Rivers* [2003] 2 AC 1 at 191, Lord Steyn took that concession as establishing that "the principles of vicarious liability apply as much to misfeasance in public office as to other torts involving malice, knowledge
- or intention." 88 (2003) 212 CLR 511.
- 89 At [40]-[42].
- 90 At [315]-[320].
- 91 At [239].
- 92 (1949) 79 CLR 370 at 381.
- 93 See, eg, XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd (1985) 155 CLR 448 at 471 per Brennan J; Lamb v Cotongo (1987) 164 CLR 1 at 8-9; Taylor v Beere [1982] 1 NZLR 81 at 89 per Richardson J (CA).
- 94 Australian Federal Police Act 1979 (Cth) s 64B(3); Police Service Administration Act 1990 (Qld) s 10.5(2).
- 95 Police Act 1892 (WA) s 137(6).
- 96 Police Administration Act 1978 (NT) s 148C(3).
- 97 But see *Holloway v Tasmania* (2005) 15 Tas R 127, in which the police officer's commission of the tort of misfeasance in public office was regarded as taking him out of the protection provided by the legislation.
- 98 For two recent examples of the award of exemplary damages against a State for the conduct of police officers, see *De Reus v Gray* (2003) 9 VR 432 and *New South Wales v Ibbett* (2006) 229 CLR 638.
- 99 (2006) 229 CLR 638
- 100 The State supported the views of Ipp JA in the Court of Appeal, quoted by the High Court at [25].
- 101 (2000) 49 NSWLR 78 at 87; quoted by the High Court at [51].
- 102 [1964] AC 1129 at 1223
- 103 [2002] 2 AC 122 at 149
- 104 (1993) 108 DLR (4th) 471 at 482.
- 105 [2007] 1 WLR 1065.
- 106 Although an argument was raised in *Ibbett* that the second of these theories was relevant to that case, the High Court did not agree: see at [56].
- 107 (1957) 97 CLR 36.
- 108 At 58 and 66 respectively.
- 109 At 57.
- 110 See Majrowski v Guy's and St Thomas's NHS Trust [2007] 1 AC 224 at [15] per Lord Nicholls
- 111 (1965) 112 CLR 295 at 301.
- 112 Commonwealth v Connell (1986) 5 NSWLR 218 at 223 per Glass JA (CA); Cowell v Corrective Services Commn of NSW (1988) 13 NSWLR 714 at 731–2 per Clarke JA (CA); De Bruyn v South Australia (1990) 54 SASR 231 at 235 per King CJ (FC); Bell v Western Australia (2004) 28 WAR 555.

113 (2001) 207 CLR 21 at [34] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ.114 See, eg, Balkin and Davis, *Law of Torts*, 4th ed, 2009, [27.10].