DANIEL A. NELSON

Barrister, Solicitor & Notary Public
Communications & Project Management Consultant

This memorandum is provided for general information only and may not apply to your unique fact scenario. Canadian law is constantly changing and this article may not represent the current state of the law.

If you have specific questions or concerns, please consult a lawyer.

The Law Chambers 393 University Avenue, Suite 2000,Toronto, Canada, M5G 1E6
t +1.416.388.5936 | f +1.416.364.6902 | **info@danielnelson.ca** | **www.danielnelson.ca**

The Tort of Misfeasance in Public Office for Municipal Officials

Daniel A. Nelson

INTRODUCTION

The memorandum investigates the issue of misfeasance in public office as it relates to municipal politicians, whether they can be sued, in tort and whether the municipal corporation is liable for the misfeance of one its officials.

IS THE OFFICIAL IMMUNE?

The first question we must consider is whether or not a politician can, in fact, be sued. Both federal members of Parliament and provincial members of legislative assemblies enjoy a broad range of privileges and immunities that arise out of the English Parliament's centuries long struggle to gain supremacy over the Crown. Immunity from defamation actions for speech taking place within the House, for instance, was granted by the *Bill of Rights* of 1689, which declared "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Like most early English statutes, this statute is law in Canada under the doctrine of reception. Since this time, Parliament has had the absolute power over its own affairs and the punishment of individual parliamentarians: "What is said or done within the walls of Parliament cannot be inquired into in a court of law." (*Bradlaugh* v. *Gossett* (1884), 12 Q.B.D. 271 (Eng. Div. Ct.) at 275, Lord Coleridge CJ). These various rights are known collectively as Parliamentary privilege or, more rarely, the *lex et conseutudo parlimenti*.[1]

Parliamentary privilege is implicitly included in the Constitution of Canada and is not, therefore, subject to the *Charter of Rights and Freedom*: See *New Brunswick Broadcasting Co*. v. *Nova Scotia*, 1993 CarswellNS 417 (S.C.C). These ancient rights are also enjoyed by provincial legislative assemblies: *R.* v. *Gamble*, 1851 CarswellOnt. 320 (U.C.Q.B.); *R*. v. *Bunting*, [1885] O.J. No. 345 (Ont. C.A.) but the right of provincial legislative assemblies to Parliamentary privilege identical to that of the U.K. and Canadian Parliaments was finally confirmed by the House of Lords in *Fielding* v. *Thomas,* [1896] A.C. 600 (H.L.).

With respect to civil actions, provincial and federal politicians are immune from civil proceedings so long as the civil action deals with matters arising from their duties as legislators. MacLachlin J in *New Brunswick Broadcasting, supra* at para. 132 noted:

[1] The law and custom of Parliament.

> Among the specific privileges which arose in the United Kingdom are the following:
> (a) freedom of speech, including immunity from civil proceedings with respect to any matter arising from the carrying out of the duties of a member of the House; [emphasis added]
> (b) exclusive control over the House's own proceedings;
> (c) ejection of strangers from the House and its precincts; and
> (d) control of publication of debates and proceedings in the House.
> [emphasis added]

O'Conner J. of what is now known as the Ontario Court of Appeal wrote in *R*. v. *Bunting*, [1885] O.J. No. 345 (Ont. C.A.) at para. 187:

> I desire it be understood, however, that I do not hold that a member of Parliament is not amenable to the ordinary Courts for anything he may say or do in Parliament. I merely say he is not so amenable for anything he may say or do within the scope of his duties in the course of parliamentary business, for in such matters he is privileged and protected by *lex et conseutudo parlimenti*; and for his protection, and the preservation of its own integrity, honour, and efficiency, Parliament has reserved to itself the exclusive privilege and authority to investigate and decide all matters that arise concerning either House thereof. [emphasis added]

There are, however, limits to this right. The Quebec Superior Court noted in *Pelletier* v. *Howard*, (1940), 43 Que. P.R. 258 (S.C.) that "these privileges [*i.e.* Parliamentary privilege] do not apply to mere civil actions in which there is no question of arrest of the Member of Parliament." Nor can members of Parliament obtain a stay to delay civil actions until the prorogation of Parliament.

Municipal politicians have no such privilege but may enjoy certain immunities granted by statute. Specifically, the *Local Government Act*, R.S.B.C. 1996, c. 323, s. 287 provides that municipal public officers (which is broadly defined to include members of the council, regional board, cemetery trustees and even volunteer fire fighters) are immune from any action for damages for "anything said or done or omitted to be said or done by that person in the performance or intended performance of the person's duty or the exercise of the person's power" or "for any alleged neglect or default in the performance or intended performance of that person's duty or exercise of that person's power." (*Ibid*., at ss. 2) This immunity specifically does not extend to situations where the municipal public official is found guilty of dishonesty, gross negligence, or malicious or wilful misconduct. (*Ibid*., at ss. 3). Since the tort of misfeasance in public office requires wilfulness and is, of course, misconduct, no municipal public official is immune from this tort.

Persons alleging bribery by candidates for municipal office are entitled to call on the municipal councillor-elect to defend his or her seat. (*R. ex. rel. McKoen* v. *Hogg* (1857), 15 U.C.R. 140 (Q.B.)).

Quaere: If a member of Parliament or of a provincial legislative assembly is immune for all actions taken within the scope of their duties arising from such a role, then is the member immune from the tort of misfeasance in public office? Presumably, the misuse of the powers of office would not fall within the scope of the duties arising from the office and would, therefore be subject to court sanction. However, it is possible to argue that they are immune from the tort but, nevertheless, would still liable to the parliamentary discipline either legislative body may decide to impose upon the member.

MISFEASANCE IN PUBLIC OFFICE

A public officer must specifically intent to injure a person or a class of persons in his/her capacity as a public officer. The actions of the public official must have been deliberate, unlawful and the public officer must have known it would cause harm or likely cause harm to the targeted individual. (*Oldhavji Estate* v. *Woodhouse*, 2003 CarswellOnt 4851 (S.C.C.)

Perhaps the most obvious example of this tort being used against a politician is the infamous case of *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.) even if the court never described the case as a tort for misfeasance in public office. In this case the defendant, the Premier of Quebec, was held liable for directing the Manager of the Quebec Liquor Commission to revoke the plaintiff's liquor license. Premiere Duplessis had no statutory power to interfere in the administration or direction of the Quebec Liquor Commission. Premier Duplessis took this action because he did not approve of the plaintiff's religious beliefs. Justice Rand noted:

> From the evidence of Mr. Duplessis and Mr. Archambault [the sole member of the Liquour Commission] alone, it appears that the action taken by the later as the general manager and sole member of the Commission was dictated by Mr. Duplesis as Attorney-General and Prime Minister of the province; that that step was taken as a means of bring to a halt the activities of the [Jehovah] Witnesses, to punish the appellant for the part he had played not only by revoking the existing license but in declaring him barred from one 'forever', and to warn others that they similarly would be stripped of provincial 'privileges' if they persisted in any activity directly or indirectly related to the Witnesses and to the objectionable campaign. (*Ibid*., at 133)

The use of a statutory power for an improper purpose to destroy a person was clearly tortuous for the Court. As Rand J. observed: "it was a gross abuse of legal power expressly intended to punish him [Roncarelli] for an act wholly irrelevant to the statute, a punishment which inflected on him, as it was intended to do, the destruction of his economic life as a restaurant keeper with in the province." (*Ibid*., at 141)

It is unlikely that such egregious misuse of public power is protected by parliamentary privilege because such acts far outside the scope of their duties: "In my view, the respondent was not acting in the exercise of any official powers which he possessed in doing what he did in this matter." (*Ibid*., at 155, Martland J.)

The Supreme Court of South Australia found misfeasance in public office against a Minister of the Crown in *Rowan* v. *Cornwall (No. 5)*, [2002] S.A.S.C. 160 at para. 588-603. In this case, Dr. Cornwall, Minister of Health and Community Welfare, acted maliciously by withdrawing funding from a women's shelter without turning his mind to the question of procedural fairness. The shelter was not given the opportunity to respond to unsubstantiated allegations in a report before the funding was withdrawn.

The first question before the court was whether or not the defendant, Dr. Cornwall, committed an unauthorised or invalid act. Dr. Cornwall had the authority to withdraw the funding but Debelle J found that Dr. Cornwall included unsubstantiated allegations regarding the shelter in the report to single out the shelter in question and silence political protest from the shelter. The decision to withdraw funding was so closely connected with the decision to include unsubstantiated allegations that failure to provide procedural fairness invalidated both decisions.

The next question was whether or not Dr. Cornwall was a public official but this was resolved quickly since Dr. Cornwall was a Minister of the Crown; his actions were in the purported discharge of a public duty.

The final question was whether Dr. Cornwall's actions caused harm to the plaintiff. The court noted that an intention to cause harm exists where the act is done deliberately and with knowledge of its consequences. The court found that Dr. Cornwall deliberately included the unsubstantiated allegations knowing that the plaintiff would suffer harm to her reputation and thereby suffer loss.

Dr. Cornwall had legitimate reasons for withdrawing funding but there would have been political consequences to using those reasons. The unsubstantiated allegations served to silence the plaintiff because they were so extensive and so lacking in particularity.

The court concluded that the test for the tort was made out and that Dr. Cornwall, as a Minister of the Crown was guilty of misfeasance in public office and was liable to the plaintiff for damages for the loss she suffered in consequence.

ARE MUNICIPAL OFFICIALS PUBLIC OFFICIALS?

Unfortunately, the British Columbia *Interpretation Act,* R.S.B.C. 1996, c. 238 at s. 1 does not provide a useful definition of the meaning of public officer; the statute defines a "public officer" as "a person in the public service of British Columbia." Usually, the term "public service" denotes a civil servant in the employ of the government. *Black's Law Dictionary*, 7th ed., *s.v*. "public service" defines the term as "Government employment; work performed for or on behalf of the government."

Nevertheless, I would posit that a municipal politician is still a public official within the meaning of the tort. Hope J. A., in *R.* v. *McMorran*, [1948] O.R. 348 (C.A.) at 388 noted that:

> At common law the term "public officer" has been broadly defined. A very early definition is that of Best C.J. in *Henly* v. *The Mayor and Burgesses of Lyme* (1828), 5 Bing. 91 at 107, 130 E.R. 995, viz., 'every one who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise' is a public officer. In *Rex* v. *Whitaker*, [1914] 3 K.B. 1283, 10 Cr. App. R. 245, the term was defined (as stated in the headnote in Cr. App. R.) as 'one who discharges any duty in which the public is interested, for which he is paid out of moneys provided for the public service, and must be either a 'judicial' or a 'ministerial' officer'."

Black's Law Dictionary, 8th ed., *s.v*. "public office" provides the following definition: "a position whose occupant has legal authority to exercise a government's sovereign powers for a fixed period."

CAN A MUNICIPAL COUNCIL COMMIT THE TORT?

The leading case on whether an entire municipal council can commit the tort of misfeasance in public office is *Jones* v. *Swansea City Council*, [1990] 3 All ER 737 (HL).

In this case, the plaintiff obtained a 99 year lease from the local council for vacant land. She applied for and obtained a change of use on the land from the council but the leader of the minority party in the council warned that if they obtained a majority in the forthcoming election then they would rescind the change. In the subsequent election the minority party became the majority and a motion passed rescinding the change of use on the leased land.

The House of Lords agreed with the trial judge and the court of appeal, which both held that misfeasance of public office could be made out against the counsel even if they were acting in a private law capacity as landlord to the property (*Ibid*., at 741). Specifically, the court held that "generally speaking, if a plaintiff *alleges and proves* that

a majority of the councillors present, having voted for a resolution, did so with the object of damaging the plaintiff, he thereby proves *against the council* misfeasance in a public office." (*Ibid*.)

Lord Lowry, who delivered the verdict of the court, adopted and quoted extensively from the Court of Appeal majority decision as well as the decision of Slade L.J of the court of first instance. With respect to the issue of how one councillor may taint the decisions of other councillors so as to give rise to misfeasance in public office, Lord Lowry adopted the reasoning of Stuart-Smith L.J. of the Court of Appeal. To quote Lord Lowry: "…the judge had held that one councillor's malice will only taint the actions of fellow councillors if either they know of that malice and acquiesce in it or the councillor who is malicious is in a position to, and does, apply a party whip so that the whole of his party group votes in the way he desires at his direction…" (*Ibid*., at 752)

Lord Lowry, in the present decision, noted that there was no standing orders involving party whipping in place nor any evidence that the "other Labour councillors *knew* that he [the malicious councillor] was malicious, especially since there existed grounds for genuinely holding and supporting the view" that the change in use should not be adopted. (*Ibid*., at 753)

The case itself failed because the plaintiff, Jones, argued that the entire council was tainted by the malice of one councillor; the council was able to prove that at least a few members were not tainted by malice but had voted in such a way for their own reasons.

I should also point out that municipal politicians cannot be sued individually for their collective acts. Justice Lamont, of the Supreme Court of Canada, in *Kelliher (Village)* v. *Smith*, 1931 CarswellSask 101 adopted the reasoning of Kelly C.B., in *Mill* v. *Hawker* (1874), L.R. 9 Ex. 309 at 321:

> I conceive it to be settled law that no action lies against the individual members of a corporation for a corporate act done by the corporation in its corporate capacity, unless the act be maliciously done by the individuals charged, and the corporate name be used as a mere colour for the malicious act, or unless the act is *ultra vires*, and is not, and cannot be in contemplation of law, a corporate act at all.

Lord Jauncey of Tullichettle, for the House of Lords, in *Racz* v. *Home Office*, [1994] 1 All ER 97 (HL) at 102 held that the Home Office could be vicariously liable for the actions of prison guards whose actions amounted to misfeasance of public office. The question that must be determined before the Home Office was found liable was whether or not the prison guards were engaged in unauthorised or misgauged means of performing their duties or were these actions taken by the prison guards completely unconnected so as to be independent of these duties. The application to strike out the statement of claim related to misfeasance in public office was denied. This suggests that the municipal corporation could be liable for this tort if committed by its employees.

A REVIEW OF CASE LAW CITING *JONES* v. *SWANSEA*

Regent Plaza Inc. v. Corporation of the Regional Municipality of Hamilton- Wentworth et al. (1990), 12 O.R. (3d) 750.

The municipality enacted a by-law that authorized the municipality to sign an agreement to lease premises in a project developed by the plaintiff. After a municipal election, the individual councillors named as defendants voted in favour of a resolution that the agreement be re-evaluated and then later voted to repeal the by-law.

The plaintiff sued the councillors of the municipality for conspiracy, abuse of power, inducing breach of contract and breaching the duty of acting in good faith.

The defendants moved for an order striking out the Statement of Claim and dismissing the action because it disclosed no cause of action and for being deficient in not providing material facts. As such, most of the case deals with procedural questions unrelated to the issue at hand. Nevertheless, the court did make a few important remarks on misfeasance in public office.

With respect to the issue of who the proper defendant was:

> Individual members of a municipal corporation can only be sued for the act as members or officers of the corporation if the act was done maliciously and thus constitutes a misfeasance in public office. (*Ibid*., at 755)

The court cited the English Court of Appeal decision in *Jones v. Swansea* as authority for this proposition as well as *Harman v. Tappenden* (1801), 1 East 555 at 563, 102 E.R. 214 (K.B.); *Mill v. Hawker* (1874), L.R. 9 Ex. 309 at 321; *Kelliher (Village) v. Smith*, [1931] S.C.R. 672 at 681.

Rosenberg J found that:

> Such improper motive will not be assumed nor will a lack of good faith. On the contrary, <u>there is a presumption that a vote is made in good faith and for a proper motive</u>. [emphasis added] (*Ibid*.)
>
> …
>
> On the other hand, it is acknowledged by the applicants that in the event that they were in breach of good faith or if the acts that were done by proposing the motion and passing it were designed not to further the interest of Hamilton--Wentworth but to intentionally injure Region Plaza, that they may be actionable, or, if the defendants acted with malice and/ or recklessly abused the public office held by each of them, they may be liable. (*Ibid*., at 755-756)

In other words, while there is a presumption that a vote was made in good faith, this can be rebutted if it can be shown that the councillor intentionally voted to injure the defendant.

The court referenced the English Court of Appeal decision in *Jones* v. *Swansea* to demonstrate the allegations required in a statement of claim for the tort of misfeasance in public office:

- the plaintiff was a political foe of the defendant councillor
- the council decision was born of a grudge
- the same councillors voted *en bloc* at the instigation of a few councillors.

The court denied the motion to strike the statement of claim for reasons relating to the *Rules of Civil Procedure*; the facts pleaded must give rise to the conclusions necessary to support the cause of action.

The case also cites *The Ontario Society for the Prevention of Cruelty to Animals* v. *Ontario Veterinary Association et al*. (1985), 51 O.R. (2d) 183 with respect to motions dismissing claims. I consulted the case and while not strictly on point, Callaghan J does make an comment useful to us at 186: "…where tort law crosses into the area of public law relationships, as in this case, proof of improper motive may be fatal to a defence of statutory authority to commit an act which is *prima facie* tortious." The motive that drove the Association to act in the way it did is a question of fact to be determined by the trier of fact.

R. v. Derbyshire County Council ex parte The Times Supplements Ltd. and Others, (The Times 19th July, 1990 CO/362/90); (1991) 3 Admin. L.R. 241. (Eng. Div. Ct.)

The applicants (The Times Supplements Ltd., et al) sought leave to apply for judicial review of a decision of Derbyshire County Council and sought *certiorari* if the leave was granted.

Derbyshire made the decision, purportedly an education decision, to stop advertising educational appointments nationally in the Times Educational Supplement and also to stop advertising in any publications owned by Mr. Rupert Murdoch.

The County Council consisted of eighty-four councillors of whom fifty-two were members of the Labour group or take the Labour whip and were, therefore, controlled by the Labour Party.

Two days before the decision was made to oppose a ban on advertising in the Murdoch papers, Councillor Bookbinder served a writ on The Times Newspaper Ltd. and others

for aggravated damages and for libel for articles that suggested that Mr. Bookbinder had caused the Council to engage in improper behaviour and legally doubtful transaction using monies from the superannuation fund. The court noted:

> It cannot possibly be gainsaid, I think, that the Labour group on the County Council decided to sever all links with Mr. Murdoch's publication, gave instructions to councillor Bookbinder to that end, secured an immediate order from Mr. Raine imposing the ban and then set about trying to discover whether there was available the reality or semblance of unlawful excuse for that conduct.

The court concluded, *inter alia*, that the decision to cancel advertising with the applicant was related solely to the control of the council by the Labour Party and that the party whip on the topic was fierce. This led to the "irresistible inference" that all of the Labour councillors were of the same mind that the cancellation of the advertising was directly linked with the unflattering articles published in The Times. The decision was activated by bad faith and the application was granted. The court also noted if it had been open to the court, it would have declared the decision perverse with no sensible or justifiable basis.

IW v. City of Perth and Others (1997), 146 A.L.R. 696 (H.C. Aust.)

A group called People Living with Aids (PLA) applied to the City of Perth for approval to use certain premises as a daytime drop-in centre for persons who were HIV infected. The appellant, a member of PLA lodged a complaint with a human rights tribunal claiming that they had been denied services on the grounds of impairment. The tribunal concluded that the council (and thus the City) had discriminated against the complainants. The tribunal concluded that 5 councillors out of the 13 reached a decision based on the "AIDS factor" and another councillor encouraged councillors to vote against the motion because of the "AIDS factor". The full court of the Supreme Court of Western Australia held that the tribunal had erred in law. The majority of the full court concluded that only a state of mind possessed collectively by a majority of councillors voting could be attributed to the City.

The majority of the High Court of Australia noted that the appellants referred to the dictum of Lord Lowry in *Jones v. Swansea* that the tort of misfeasance in public office might be established by a plaintiff who alleged and proved that the majority of councillors present and who voted for the resolution did so with the object of damaging the plaintiff. The court noted, however, that it and several other cases did not deal with the question of an impermissible purpose moving some but not all of the directors or some but not all of the directors comprising a majority of a divided board (*Ibid*, at 128). The appeal was rejected.

Barnard v. Restormel Borough Council, [1998] 3. P.L.R. 27 (Eng.C.A.).

In this case, two parties independently sought planning permission for two separate but adjacent sites. The planning committee considered both applications on the same date. The defendants appealed the lower court judge's refusal to strike out the statement of claim for disclosing no cause of action.

Both the Adams and Barnard applications sought to have access to the further un-owned piece of development property; the grant of access would have dramatically increased the value of each person's property. After the Adams' application was approved, the Barnard application came up and was passed. The mayor of the Borough then indicated that the council had already passed the access earlier and could not grant access to the second site owned by Barnard as well. A re-vote was held and the approval was refused. While twenty councillors were present at the meeting, only eight voted on the re-vote and some twelve other councillors must have abstained. The plaintiff alleged that this second vote was illegal.

Barnard brought proceedings against the Borough Council and alleged misfeasance on the grounds that three members of the committee had been motivated by malice and the eight remaining members of the committee had been deceived. Most damning, one of those three members, Burdon, accused of malice was, in the views of Barnard, acting as an agent for Adams.

The court held that the committee members accused of malice by Barnard constituted a minority and it was to be assumed that the majority had directed their minds properly to the issues before them. None of the deceits alleged by Barnard were sufficient to offset that presumption: "If it is necessary to show that both A and B were malicious, the seriousness or intensity of A's malice does not establish anything against B unless it can be shown that in some way B partook of that malice."

The court cited the case of *Jones v. Swansea City Council* as authority for the proposition that a majority of the decision-makers must be malicious in order to make the decision itself malicious and therefore the council itself guilty of misfeasance in public office.

With respect to Mr. Burdon, the alleged agent, the court noted that "It is difficult to see how Mr Burdon's failure to declare an interest can advance any allegation of corporate misfeasance; and no details are given of any actual fault by Mrs Court [another councillor] save for her wanting the vote to be taken again."

In this case, only three councillors were alleged to have committed the tort of misfeasance in public office. The rest of the councillors, it was alleged, were merely deceived.

The Court of Appeal, after analysing the *Jones* case in detail concluded that one malicious councillor does not mean that every councillor is malicious:

> I do not exclude the possibility that in some circumstances of maliciously induced mistake could affect the whole community, and not just the malicious councillors, with misfeasance, though that would not be easy in view of the strong emphasis placed in the tort of misfeasance in public office on the requirement of subjective bad faith. However, in my view, what is alleged here falls very far short of being anything that could be sufficient….It is to be assumed, as Slade L.J. said, that the members who were not themselves malicious[,] directed their minds property to the issues. None of the deceits alleged practiced on them were in any way sufficiently fundamental to offset that assumption.

The court cited the decision of Lord Lowry in *Jones* who noted that the decision could only become tainted if the other councillors knew of the malice and acquiesced to it or if the councillor with malice can and does apply a party whip to the other councillors who are thereby forced to vote with the maliced councillor.

The appeal was successful and the statement of claim was struck out in its entirety.

First National Properties Ltd. v. Highlands (District) et al., 2001 B.C.C.A 305 (B.C. C.A.)

The plaintiff, First National, owned approximately 1,767 acres of land on Vancouver Island. The mayor of the Highland District, within which the property was located, wrote a letter to the President of the Nature Conservancy of Canada which had been involved in negotiations earlier over the purchase of the property. The President of the Nature Conservancy forwarded copies of the letter sent by the mayor to three persons in the Ministry of Land and Parks. The mayor did not want the property to be developed and, instead, tried to have the property become a park but the Nature Conservancy came to the conclusion that there was no realistic possibility it could purchase the property.

The province established new funding that made it possible for the province to purchase this property for a provincial park but a certain section of the property would be reserved for First National to develop. However, First National could only make a profit if the reserved land was zoned to higher density than was allowed. First National's application to re-zone the land was refused.

First National took the District to court over the refusal. The Court of Appeal concluded that the mayor's behaviour was not improper or dishonest but was more kin to a political belief:

> Courts should be and are cautious in attributing in propriety to such beliefs thus tainting otherwise lawful conduct with the sting of corruption

> or dishonesty. Perhaps because of this fact there are very few instances in which elected officials have been found to have abused their office. *Roncarelli* is one of those few and was a highly unusual case. (*Ibid*., at para. 64).

The court cited *Jones v. Swansea City Council* with regard to settled intention. Down-zoning of property may not be palatable to the plaintiff but it does not necessarily mean that it is unlawful (*Ibid*., at para. 69). The court also quoted *Jones v. Swansea* to support the proposition that misfeasance in public office against an entire council can only arise when the plaintiff alleges and proves that the majority of the councillors present voted for a resolution with the object of damaging the plaintiff.

Cornelius v. London Borough of Hackney, [2002] E.W.C.A. Civ. 1073 (Eng. C.A.).

Mr. Cornelius, the defendant, was an accountant employed by the Borough Council. In August 1988, he discovered that fraud or other corrupt irregularities had been committed by a senior manager who had recently left the employ of the council. Rather than act on these allegations, the council suspended Mr. Cornelius on charges of professional misconduct on the basis that he passed documents and his comments thereon to the chairman of the committee investigating those irregularities.

An industrial tribunal concluded that the defendant had been unfairly dismissed and the full council made a full and unreserved apology to the claimant for his unfair dismissal and for the distress caused to him and his family. Nevertheless, a number of comments were circulated by members of the Borough Council in the media regarding the claimant's behaviour. These comments included suggestions that he was unfit for public office, was a swindler, was incompetent, was responsible for his own dismissal, was lacking in professional integrity and was wrongly and unjustly successful at the tribunal.

The Court quoted an unreported case called *Peter Elliott v. The Chief Constable of Wiltshire Constabulary* (1996). In this case, Vice-Chancellor Sir Richard Scott was called to consider the question of whether or not to strike out a Statement of Claim based on an allegation of misfeasance by a police officer in his public office. The allegation against the police officer was that he had deliberately and falsely supplied details of convictions to the press. Vice-Chancellor Scott said:

> I would agree that the tort of misfeasance in public office does require that the misconduct complained of should be sufficiently connected with the public office that has allegedly been abused. A police officer may out of hours and not in uniform commit an assault. In doing so, he does not abuse his office as a police officer, not withstanding that he will of course be liable for damages for assault and may have committed a criminal

> offence. On the other hand, a police officer who as a police officer affects an arrest but does so unlawfully, either without reasonable cause or with excessive violence, and with a malicious motive - for example, with the intention of revenging himself against an individual against whom he had a grudge - does I would have thought, clearly abuse his office. Both cases involve unlawful assault, but the latter involves as the former does not, an abuse of office.

Adopting the reasoning of Vice-Chancellor Scott, the court concluded that there must be a connection between the misconduct complained of and the office to which the conduct is related. It appeared to the court that the Chief Executive of the Borough and the other councillors were abusing their position as public officers. (*Ibid*., at para. 16-17). The court concluded that it was not appropriate to strike out the case.

Porter v. MaGill; Weeks v. Magill, [2002] 2 A.C. 357 (H.L.).

Conservative party members of the Westminster City Council devised a plan to sell off council properties because they believe that homeowners were more likely than council tenants to vote for the Conservative Party. An auditor concluded that the council had adopted a policy with the predominant purpose of achieving electoral advantage for the majority party. Porter and Weeks were parties to its adoption and implementation in the full knowledge that it was unlawful and that the policy would have caused financial loss to the council.

The House of Lords concluded that the public power given to a local authority may only be exercised for a public purpose. Anyone who acted otherwise misconducted themselves and where they acted knowingly or recklessly, they were guilty of wilful misconduct. Councillors do not act improperly or unlawfully if they exercise a power on behalf of a council for a proper purpose. They may still hope to obtain the support of the electorate, strengthening their electoral position, and support party policy so long as they do not abdicate their responsibility. The council may lawfully dispose of property but cannot do so lawfully if it is designed to promote the electoral advantage of one party represented on the council.

The House of Lords cited *Jones v. Swansea City Council* as authority for finding misfeasance in public office against a local authority.

Sanders v. Snell (2003), 198 A.L.R. 560 (Fed. Ct. Aust.).

Sanders was the Minister of Tourism in the Government of Norfolk Island. In that capacity, he directed the Tourist Bureau of the island to dismiss its executive officer, Snell. The relationship between Sanders and Snell had deteriorated since Sanders was appointed the Minister of Tourism for the Island. A spot audit by the accounting firm Ernst & Young noted a number of problems with Snell's expense accounts. Members of the Bureau frequently pre-signed cheques. Snell was unable to provide vouchers in

support of travel allowances, entertainment allowances, car hire and other expenditures and, further, Snell provided payments to his wife and other family members but there was no documentary evidence to support the expenditures.

Sanders directed the chairman of the tourism office to terminate Snell's employment. The Board endorsed the director's position that Sanders reconsider his position in view of the fact that he had not had ample opportunity to fully digest the auditors' report. Shortly after receiving this information from the Chairman, Sanders revoked the appointment of the members of the Bureau and appointed four new members and then directed these members to terminate Snell's employment.

The court referencing the case of *Rowan v. Cornwall* (No.5), (2002) 82 S.A.S.R. 152 at 358 noted:

> "That was a case in which the tort was made out against a Minister of the Crown who without observing procedural fairness, and in the process of denying funding to a women's shelter, published a report containing unsubstantiated allegations against the shelter operators. This was done, so it was found, with the intention of silencing the shelter operators in any subsequent political debate. Debelle, J. found that the Minister had acted in an improper way and with the intention to cause harm." (at 20).

The court concluded that Sanders believed that Snell was incompetent and should therefore be terminated. This did not constitute targeted malice in the tort of misfeasance in public office.