MISFEASANCE IN PUBLIC OFFICE: A TORT IN TENSION

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The rationale for the tort of misfeasance in public office remains the subject of academic speculation. This article adopts the concept of accountability as the tort's guiding rationale, analysing it within the accountability framework: who *is accountable* to whom, for what, *and* how*? Within this framework, it is possible to identify various points of tension between aspects of the tort, as it pulls at different times towards the disparate goals of restoration, desert, and deterrence. Characterising the tort as an accountability mechanism allows us to view it as reflecting a compromise between these accountability goals, and also helps explain why the tort continues to draw interest in public and private law circles, notwithstanding its low rate of success in practice.*

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I Introduction

The tort of misfeasance in public office occupies an uncomfortable position in the private law sphere. Tortious in form, it is a cause of action commenced by individuals for the purpose of repairing harm occasioned by a breach of obligations. Moves to reclassify it as a 'public law tort'[1] reflect some of its more anomalous features — most notably, the significant hurdles imposed by the high-grade mental elements that restrict liability to knowing or subjectively reckless behaviour; the narrow meaning of 'public office'; and the application of principles of vicarious liability. This article explores the concept of accountability as a possible rationale for the misfeasance tort and asks whether adopting this view might assist in explaining some of its more anomalous aspects. Accountability theorists analyse mechanisms within the framework of *who* is accountable *to whom*, *for what*, and *how*? This article adopts that accountability framework to examine the shape of the misfeasance tort. Having done so, it is possible to identify a number of points of tension in the tort, where it pulls towards different goals of accountability: restoration, desert and deterrence. This article concludes that, when conceptualised as an accountability mechanism, the misfeasance tort reflects a compromise between these various rationales for accountability. So, for instance, we can view the high-grade mental element of malice as accommodating the desert rationale (in preference to the restoration rationale), and the requirement of proof of damage as accommodating the restoration rationale (in preference to the desert rationale). Ultimately, thinking of the tort of misfeasance in public office as an accountability mechanism may assist in explaining why the tort remains a focus of fascination for public and private lawyers alike, notwithstanding that public officials are only rarely held accountable for the wrong that it reflects.

II Defining Accountability

The literature on accountability is replete with competing definitions.[2] While almost universally regarded as a desired feature of modern democratic

[1] Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 (July) *Law Quarterly Review* 427, 428 ('Unfinished Business'); Donal Nolan, 'A Public Law Tort: Understanding Misfeasance in Public Office' in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 177; Donal Nolan, 'Tort and Public Law: Overlapping Categories?' (2019) 135 (April) *Law Quarterly Review* 272 ('Tort and Public Law').

[2] See generally Ellen Rock, 'Accountability: A Core Public Law Value?' (2017) 24(3) *Australian Journal of Administrative Law* 189, 192–3 nn 14–38 ('A Core Public Law Value?').

regimes,[3] the precise content of the concept remains elusive.[4] One of the more widely accepted definitions is that offered by Bovens, who defines accountability as 'a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences'.[5] While many theorists dispute the content of the concept of accountability, most agree that accountability mechanisms can be mapped out by reference to the answers to a series of questions: *who* is accountable *to whom*, *for what*, and *how*?[6] When asking *who* is held accountable, authors are seeking to identify the party that will play the role of account-giver in a particular situation.[7] The answer might be relatively straightforward in cases where one person is solely and directly responsible for exercising a particular power and producing a particular result (individual accountability). However, the answer to this question will be more complex in cases where multiple parties have contributed to an impugned outcome, or where the responsibility for performance rests on someone other than the person who has in fact exercised the power. In such cases, it may be appropriate to designate a group entity as the relevant

[3] Mark Bovens, 'Analysing and Assessing Accountability: A Conceptual Framework' (2007) 13(4) *European Law Journal* 447, 448–9 ('Analysing and Assessing Accountability'). It is described as a 'golden [concept] that no one can be against': at 448.

[4] Sinclair describes the study of accountability as the exploration of 'a "bottomless swamp", where the more definitive we attempt to render the concept, the more murky it becomes': Amanda Sinclair, 'The Chameleon of Accountability: Forms and Discourses' (1995) 20(2–3) *Accounting, Organizations and Society* 219, 221. Sinclair borrows this phrasing from Robert A Dahl, 'The Concept of Power' (1957) 2(3) *Behavioral Science* 201, 201.

[5] Bovens, 'Analysing and Assessing Accountability' (n 3) 450. See also Mark Bovens, 'Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism' (2010) 33(5) *West European Politics* 946, 951; Mark Bovens, Thomas Schillemans and Paul 't Hart, 'Does Public Accountability Work? An Assessment Tool' (2008) 86(1) *Public Administration* 225, 225.

[6] See, eg, Bovens, 'Analysing and Assessing Accountability' (n 3) 454–5; Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave Macmillan, 2003) 22–3; Jerry L Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance' in Michael W Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006) 115, 118; Mark Philp, 'Delimiting Democratic Accountability' (2009) 57(1) *Political Studies* 28, 42; Colin Scott, 'Accountability in the Regulatory State' (2000) 27(1) *Journal of Law and Society* 38, 41; Ruth W Grant and Robert O Keohane, 'Accountability and Abuses of Power in World Politics' (2005) 99(1) *American Political Science Review* 29, 34.

[7] See, eg, Mulgan (n 6) 23; Bovens, 'Analysing and Assessing Accountability' (n 3) 454.

account-giver (corporate accountability),[8] or to hold a superior accountable for the conduct of inferiors (hierarchical accountability).[9] The analysis will be further complicated in circumstances where there are multiple contributors who have no direct relationship with one another — for example, where two separate entities each made decisions that were partly responsible for the impugned result.[10] In the context of public law accountability, one important subsidiary question is whether private contractors should fall within the class of government officials *who* should be held accountable for the exercise of public power.[11]

When asking *to whom* an account is rendered, there is a divergence in the literature. Some authors focus on the identification of the forum in which accountability is to be adjudicated, such as the courts.[12] Other authors are more concerned with identifying the party who is entitled to bring the actor before that forum. The entitlement to hold someone accountable may arise on the basis that a person who authorised the exercise of power in the first place is entitled to supervise its performance (delegation model).[13] Alternatively, a person who is affected by the exercise of power may be seen as entitled to hold the person who exercised it accountable.[14] In the case of this latter premise, there may be a need to distinguish between those who are affected by the exercise of power, so as to afford them a formal right to demand an account, and those stakeholders who are merely interested in the outcome.[15]

The question of *about what* an account is rendered is necessarily context-specific, to the extent that it involves analysis of an actor's compliance with standards of conduct. At a general level, it is possible to think about the sources of such standards (for example, legal instruments, economic imperatives, and social or democratic obligations),[16] or the nature of the conduct that

[8] Bovens, 'Analysing and Assessing Accountability' (n 3) 458. Bovens also identifies 'collective' accountability as a dynamic in which various actors are jointly accountable for the result: at 458–9.

[9] Ibid 458.

[10] Mulgan (n 6) 23.

[11] See, eg, Scott (n 6) 41; Mashaw (n 6) 151–2.

[12] See, eg, Bovens, 'Analysing and Assessing Accountability' (n 3) 455–7.

[13] Grant and Keohane (n 6) 31.

[14] Ibid.

[15] Mulgan (n 6) 24–5.

[16] Ibid 28.

might be the subject of those standards (for example, contravention of rules relating to procedure, performance, fairness, continuity, and security).[17]

The question of *how* accountability is enforced is focused on the procedure pursuant to which an actor is held accountable. For some authors, this question is already answered in part by the second question — *to whom* an account should be rendered — as they focus on the relevant forum in which accountability is adjudicated.[18] For others, this question involves a more in-depth analysis, not only of the accountability forum, but also of the process, procedure, and outcome of the enquiry.[19] For example, Mulgan sees the accountability process as involving the three stages of 'information' (being 'initial reporting and investigating'), 'discussion' (being 'justification and critical debate'), and 'rectification' (being 'the imposition of remedies and sanctions').[20] Other authors do not adopt a prescriptive approach to the question of how accountability is to be enforced, preferring the view that the relevant procedure should be the one best suited to serving the purposes of accountability.[21]

Beyond this mechanical framework for analysis of accountability mechanisms, however, the literature again diverges in specifying the purpose of (or rationale for) accountability. There are a number of potential rationales evident in the literature. Perhaps the broadest overarching rationale for accountability is to support the legitimacy of government.[22] On this view, we are more likely to regard our system of government as legitimate if we regard it as accountable, and less likely to regard it as legitimate if accountability mechanisms are lacking.[23] But this broad objective does not take us very far in thinking about what we expect of accountability mechanisms in concrete

[17] See Scott (n 6) 42; Bovens, 'Analysing and Assessing Accountability' (n 3) 459–60; Robert D Behn, *Rethinking Democratic Accountability* (Brookings Institution Press, 2001) 6–10.

[18] See, eg, Mulgan (n 6) 24–8; Bovens, 'Analysing and Assessing Accountability' (n 3) 455–7.

[19] See, eg, Mashaw (n 6) 118. Mashaw addresses the *how* question by asking '*through what processes* accountability is to be assured; *by what standards* the putatively accountable behaviour is to be judged; and, what the potential *effects* are of finding that those standards have been breached' (emphasis in original).

[20] Mulgan (n 6) 30.

[21] See, eg, Philp (n 6) 42.

[22] Frederick M Barnard, *Democratic Legitimacy: Plural Values and Political Power* (McGill-Queen's University Press, 2001) xi; Bovens, Schillemans and 't Hart (n 5) 239; Mark Bovens, Deirdre Curtin and Paul 't Hart, 'Studying the Real World of EU Accountability: Framework and Design' in Mark Bovens, Deirdre Curtin and Paul 't Hart (eds), *The Real World of EU Accountability: What Deficit?* (Oxford University Press, 2010) 31, 53.

[23] See, eg, Bovens, Schillemans and 't Hart (n 5) 239.

terms. For that answer, we need to look at the more tangible rationales of transparency, control, restoration, desert, and deterrence.[24] According to the transparency rationale, the core focus of accountability is to provide the public with a means of scrutinising government decision-making and operations. The control rationale is concerned with providing those who have delegated power with a means to dictate the terms on which it is exercised, and to bring that exercise back within legal boundaries. Restoration is concerned with righting wrongs by providing a means of redress where an excess of power has caused loss or harm. The desert rationale is concerned with condemning the abuse of power. Finally, the deterrence rationale is concerned with discouraging the wrongful exercise of power and encouraging improved performance going forward. Of course, as with definitions of accountability more broadly, there are disputes amongst theorists as to whether all of these rationales are critical to achieving government accountability.[25] For present purposes, it is not necessary to come to a landing on which rationale is most important and whether others ought to be disregarded. Instead, this article proceeds on the basis that accountability is broadly concerned with furthering each of these five goals, and focuses on the role played by the misfeasance tort in that context.

At the outset, it is important to bear in mind that if we expect accountability to perform the various tasks of supporting transparency, control, restoration, desert, and deterrence, there will be circumstances in which these goals will come into conflict with one another. For instance, the transparency rationale might appear to demand a very open accountability regime, pursuant to which there would be a general right of access to government information. However, this might place the transparency rationale in potential conflict with the deterrence rationale, which is concerned with fostering improved performance; as O'Neill puts it, '[p]lants don't flourish when we pull them up too often to check how their roots are growing'.[26] A further

[24] For further detail, see Rock, 'A Core Public Law Value?' (n 2) 189, 194–6; Ellen Rock, 'Fault and Accountability in Public Law' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 171, 173–4. I have previously referred to the desert and deterrence rationales jointly as the 'punitive' objective of accountability. For present purposes, it is important to draw out these two ideas as separate rationales.

[25] For instance, some would view accountability as focused only on the obligation to provide an account, and dispute the relevance of punishment for the content of that account: see, eg, Philp (n 6) 37–8.

[26] Onora O'Neill, *A Question of Trust* (Cambridge University Press, 2002) 19, quoted in Jane Mansbridge, 'A Contingency Theory of Accountability' in Mark Bovens, Robert E Goodin

example of potential tension might be between the desert and deterrence rationales. We might think that the desert rationale is best served through the imposition of highly punitive sanctions in order to carry the requisite degree of condemnation that is appropriate in responding to abuses of public power. However, there is a risk that such an approach might undermine the deterrence rationale, as highly punitive sanctions carry a risk of producing a defiant reaction which may lead to a reduction, rather than improvement, in performance.[27]

All of this tells us that we need either to narrow our expectations of accountability, or to be conscious of these potential tensions in designing and analysing accountability mechanisms. We can choose either to tailor our mechanisms to suit a single rationale of accountability, or to attempt to find a 'middle ground' that goes some way towards accommodating both rationales. This article demonstrates that the tort of misfeasance in public office is a good reflection of this 'middle ground' approach.

III The Misfeasance Tort within the Accountability Framework

As our 'only truly public law tort',[28] it is clear why we might be particularly interested in the tort of misfeasance in public office for the purpose of facilitating government accountability.[29] This section utilises the accountability framework set out in Part I to map out the scope of the tort in that context.

A *Who Is Subject to Liability?*

Misfeasance in public office is limited in its application to 'public officers'.[30] Courts have indicated that '[i]t is not sufficient merely to be employed by a

and Thomas Schillemans (eds), *The Oxford Handbook of Public Accountability* (Oxford University Press, 2014) 55, 57.

27 See John Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers' (1997) 47(3) *University of Toronto Law Journal* 305, 322–4. Braithwaite explores the concept of 'reactance', which is 'greatest when the freedom subjected to control is something the regulated actor deeply cares about': at 322.

28 Aronson, 'Unfinished Business' (n 1) 428.

29 Carol Harlow, *Understanding Tort Law* (Sweet & Maxwell, 3rd ed, 2005) 142–4.

30 *Northern Territory v Mengel* (1995) 185 CLR 307, 370 (Deane J) ('*Mengel*'); *Dunlop v Woollahra Municipal Council* [1982] AC 158, 172 (Lord Diplock for the Court) (Privy Council) ('*Dunlop*').

public authority for public purposes'.[31] Instead, the position held by a government official must entail a 'relevant power' and 'one to which [public] duties attach in the discharge of which the public has an interest'.[32] In *Obeid v Lockley* ('*Obeid*'),[33] a recent Australian misfeasance case, Bathurst CJ noted that 'the degree of "attachment"' required between the office and the power was 'not entirely clear',[34] though his Honour accepted that it was not necessary to point to an express link.[35] For his Honour, the definition of public officer would 'at least include persons who, by virtue of the particular positions they hold, are entitled to exercise executive powers in the public interest'.[36] On this basis, Bathurst CJ was willing to accept that 'senior investigators' of the New South Wales Independent Commission Against Corruption were 'public officers'.[37] Although the investigators did not hold formal offices, his Honour had no doubt that they were 'exercising the functions of a public officer, namely, the performance of their role as "senior investigators" which … they were obliged to carry out in the public interest'.[38] As it stands, the tort has also been pleaded against officials ranging from government Ministers,[39] to police officers,[40] and to planning officers within a local council.[41] However, the tort may not extend to offices in respect of which there is no duty owed to the public, such as that of a prosecutor,[42] a solicitor representing a Minister in

[31] *Leerdam v Noori* (2009) 255 ALR 553, 556 [16] (Spigelman CJ) (New South Wales Court of Appeal) ('*Leerdam*').

[32] *Cannon v Tahche* (2002) 5 VR 317, 337 [49]–[50] (Winneke P, Charles and Chernov JJA) ('*Cannon*').

[33] (2018) 355 ALR 615 (Supreme Court of New South Wales) ('*Obeid*').

[34] Ibid 638 [97].

[35] Ibid 640 [103].

[36] Ibid 642 [114]. See also at 658 [206] (Beazley P), 659 [212] (Leeming JA).

[37] Ibid 642 [118].

[38] Ibid.

[39] *Cornwall v Rowan* (2004) 90 SASR 269, 334 [257] (Bleby, Besanko and Sulan JJ) ('*Cornwall*'), cited in Jim Davis, 'Misfeasance in Public Office, Exemplary Damages and Vicarious Liability' (2010) 64 *AIAL Forum* 59, 60.

[40] *Farrington v Thomson* [1959] VR 286, cited in Davis (n 39) 60–1.

[41] *MM Constructions (Aust) Pty Ltd v Port Stephens Council [No 6]* (2011) 185 LGERA 276, 337–8 [270]–[273] (Johnson J) (Supreme Court of New South Wales).

[42] *Cannon* (n 32) 342–7 [61]–[76] (Winneke P, Charles and Chernov JJA). This can be compared with the approach taken in other jurisdictions: see, eg, *Elguzouli-Daf v Commissioner of Police for the Metropolis* [1995] QB 335, 347 (Steyn LJ, Rose and Morritt LJJ agreeing) (England and Wales Court of Appeal); *Milgaard v Kujawa* (1994) 118 DLR (4th) 653, 660–1 (Sherstobitoff JA for the Court) (Saskatchewan Court of Appeal). For discussion, see Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 108–11.

tribunal proceedings,[43] or public servants more generally.[44] Aronson has argued for a wider application of the tort than that envisaged by these cases, suggesting that there is no reason to limit the tort to those who, in a strict sense, are 'holders' of a 'public office', and that it should extend to public servants more broadly.[45] He responds to concerns about the extension of liability to low-level officials by noting that the tort would remain confined by reference to the burdensome fault elements that require intentional or consciously reckless wrongdoing.[46] Low-level officials, Aronson suggests, are unlikely to consciously consider the legality of their conduct, let alone proceed in the face of suspected illegality.[47]

A further interesting question arises as to the extended application of the tort in the context of outsourced powers. As the law presently stands, a private contractor exercising outsourced powers is unlikely to fall within the meaning of 'public officer' for the purpose of the tort. In *New South Wales v Roberson*,[48] Basten JA was not required to determine whether a doctor exercising statutory powers would be captured by the tort, noting in obiter that 'in an age when many statutory functions (including basic custodial services) are "contracted out", the scope of the tort (as with the scope of judicial review) remains uncertain'.[49] Aronson has forcefully argued that the tort should indeed extend to private contractors.[50] In his view:

> The essence of misfeasance is surely that it is a deliberate abuse of public power, and it should be no excuse that a particular defendant is not subject to the internal disciplinary processes of the public service. If anything, that should be seen as an argument for liability, because there are fewer alternative remedies against the contractor.[51]

[43] *Leerdam* (n 31) 558 [25]–[26] (Spigelman CJ), 564 [58] (Allsop P).

[44] See *Obeid* (n 33) 641–2 [113] (Bathurst CJ).

[45] Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35(1) *Melbourne University Law Review* 1, 49–50 ('A Very Peculiar Tort').

[46] Ibid 50.

[47] Ibid.

[48] (2016) 338 ALR 166 (New South Wales Court of Appeal).

[49] Ibid 183 [75].

[50] Aronson, 'A Very Peculiar Tort' (n 45) 49.

[51] Ibid (emphasis omitted).

While the extension of judicial review to private contractors is an issue that has received some attention,[52] the scope of the 'public officer' element of the tort of misfeasance in public office appears, to date, to have been defined more in institutional, rather than functional, terms.[53] There has been no real shift in approach that would see private contractors held liable for the tort simply on the basis that they are performing public functions.[54]

There are also serious doubts as to whether the misfeasance tort is capable of accommodating notions of corporate liability.[55] There are cases in which an entity (such as a local council) has been considered capable of committing the tort. For instance, in *Dunlop v Woollahra Municipal Council*,[56] Lord Diplock approved of the approach taken by the Supreme Court of New South Wales in accepting that the Council was a public officer for the purpose of the tort.[57] Similarly, in *Nyoni v Shire of Kellerberrin* ('*Nyoni*'),[58] North and Rares JJ found that the malicious conduct of the CEO of the Shire of Kellerberrin 'should be imputed' to his employer.[59] For their Honours, the CEO 'was the mind of the Shire … and, because he was "the hands and brains" of the Shire, the Shire became directly (and not vicariously) liable for any misfeasance in public office'.[60] On a broader scale, Gray J in *Trevorrow v South Australia [No 5]*[61] found that the State and the Aborigines Protection Board were directly liable for misfeasance in public office for harm suffered by an Aboriginal child as a result of his illegal removal from his family.[62] Critical to that finding were the facts that the removal was effected pursuant to government policy, that

[52] The case of *R v Panel on Take-Overs and Mergers; Ex parte Datafin plc* [1987] 1 QB 815 is relevant in that context and is discussed in Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 149–56 [3.180]–[3.200].

[53] This may be viewed in contrast to the position adopted in the United Kingdom: see, eg, Aronson, 'Unfinished Business' (n 1) 436–7.

[54] In *Obeid* (n 33), Bathurst CJ noted that the Australian approach 'is not as broad' as the English approach in this respect: at 641 [113].

[55] But see *Hart-Roach v Public Trustee* (Supreme Court of Western Australia, Murray J, 11 February 1998) 17.

[56] *Dunlop* (n 30).

[57] Ibid 172.

[58] (2017) 248 FCR 311 ('*Nyoni*').

[59] Ibid 329 [85]. Special leave was refused: Transcript of Proceedings, *Shire of Kellerberrin v Nyoni* [2018] HCATrans 27.

[60] *Nyoni* (n 58) 329 [85].

[61] (2007) 98 SASR 136 ('*Trevorrow [No 5]*').

[62] Ibid 338 [978]–[981].

various Crown Ministers and employees held positions on the Board, that the Board acted 'as an emanation and agent of the State', and that the State in effect 'authorised the conduct'.[63] On appeal, the Full Court of the Supreme Court of South Australia altered the character of the State's liability to vicarious, as opposed to direct (see below).[64] However, the Court was prepared to accept that the Board met the description of a public officer, notwithstanding its corporate nature.[65]

In contrast with these cases, there are statements to the effect that corporate entities cannot engage in misfeasance in public office. In *Emanuele v Hedley*,[66] one of the claims made was that the Commonwealth was directly liable for misfeasance.[67] The Court indicated that

> it is a legal nonsense to suggest there can be conduct of the Commonwealth itself that constitutes a misfeasance in public office. The Commonwealth of Australia is a legal entity created by the *Commonwealth of Australia Constitution Act 1900* (Imp). It is a juristic person but, of course, is incapable of acting except through agents. It is incapable itself of committing misfeasance in public office; it does not hold public office.[68]

Similarly, in *Bailey v Director General, Department of Natural Resources*,[69] Fullerton J was critical of the nomination of the Water Administration Ministerial Corporation as a defendant in a misfeasance in public office claim, stating that '[a] ministerial corporation cannot be a public officer on any view'.[70] This approach is at odds with that adopted in the United Kingdom, pursuant to which various corporate-style entities have been held liable for the tort.[71] While institutions cannot themselves maintain a mental state that would satisfy the intentional requirements of the tort, the cases cited in the

[63] Ibid 338 [980].

[64] *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331, 390 [275] (Doyle CJ, Duggan and White JJ) ('*Lampard-Trevorrow*'). See below 349.

[65] Ibid 388 [265]–[266] (Doyle CJ, Duggan and White JJ).

[66] (1998) 179 FCR 290.

[67] The Court wondered why the claims had been framed as misfeasance; the nature of the allegations fell more squarely within the torts of abuse of process or malicious prosecution: ibid 300 [36] (Wilcox, Miles and RD Nicholson JJ).

[68] Ibid.

[69] [2014] NSWSC 1012.

[70] Ibid [531], cited in Aronson, 'Unfinished Business' (n 1) 437.

[71] See, eg, Aronson, 'A Very Peculiar Tort' (n 45) 43–4; Aronson, 'Unfinished Business' (n 1) 437–8.

preceding paragraph certainly demonstrate the possibility of imputing to an institution the mental states of its agents.[72] If followed, this approach might lead to the result that the bad faith actions of an individual member of a corporation are taken to be the bad faith actions of the corporation itself.

However, it is important to bear in mind that, even on this extended model of corporate accountability, the corporation's intention cannot become more than the sum of its parts: 'The good faith mistakes and incompetence of a range of individuals within an organisation cannot be amalgamated to create the basis for inferring or imputing a "composite" bad faith to a fictional and "composite" officer.'[73] An example of a case adopting this approach is *Chapel Road Pty Ltd v Australian Securities and Investments Commission [No 10]*,[74] in which Schmidt J indicated that bad faith on the part of the Australian Securities and Investments Commission 'cannot be established simply by aggregating the acts of various public officers, or establishing a course of conduct, which it is claimed was improper or tainted in some way'.[75] All of this tells us that there remains some doubt as to whether government entities (whether statutory bodies or the state itself) will, in all cases, be capable of characterisation as a 'public officer', and how the intention of individuals might be imputed to an entity for the purpose of the tort.

There is also some dispute as to the extent to which the misfeasance tort accommodates the hierarchical accountability model, which in this context would be reflected in the notion of vicarious liability. In *Northern Territory v Mengel* ('*Mengel*'),[76] the High Court indicated that the usual position is 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'.[77] This passage points to the availability of vicarious liability where there is de facto authority.[78] While there are Australian authorities that have cautioned against reading the passage in *Mengel* as an unqualified denial of

[72] This is a point taken up by Aronson: see Aronson, 'A Very Peculiar Tort' (n 45) 44; Aronson, 'Unfinished Business' (n 1) 437.

[73] Aronson, 'Unfinished Business' (n 1) 438.

[74] (2014) 307 ALR 428 (Supreme Court of New South Wales).

[75] Ibid 444 [77].

[76] *Mengel* (n 30).

[77] Ibid 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

[78] In *Lampard-Trevorrow* (n 64), the Court found that the State was vicariously liable on the basis that the Secretary acted with the de facto authority of an agent of the Crown, and that the Aborigines Protection Board had acted with the de facto authority of the relevant Minister: at 390 [273] (Doyle CJ, Duggan and White JJ).

the possibility of vicarious liability outside cases of de facto authority,[79] doubt remains as to how far this might extend. The difficulty stems from the intentional nature of the tort, as vicarious liability is framed by reference to wrongful acts of employees committed 'in the course or scope of employment'.[80] As Vines puts it, '[t]he wrong in misfeasance in public office has been described as something which is an "abuse of office", and surely an abuse of an office could not be regarded as within the course of employment for that office'.[81]

One of the cases cited in *Mengel* was the English case of *Racz v Home Office*.[82] In refusing to strike out a pleading of vicarious liability for misfeasance in public office, Lord Jauncey accepted the plaintiff's submission that the relevant question was whether 'the prison officers were engaged in a misguided and unauthorised method of performing their authorised duties or were engaged in what was tantamount to an unlawful frolic of their own'.[83] In *South Australia v Lampard-Trevorrow*,[84] the Court applied this reasoning, finding the State vicariously liable for the misfeasance of its officers on the basis that the officers 'acted in apparent performance of their [statutory] duties' and in the belief that their actions were 'for the benefit of the public and of the State' rather than for personal gain.[85]

It is also useful to bear in mind that misfeasance in public office is not the only cause of action where vicarious liability and intentional wrongdoing might collide. In *Prince Alfred College Inc v ADC*,[86] the High Court considered the College's vicarious liability in circumstances where its employee had sexually abused a student. The High Court identified a number of factors that

[79] See, eg, *Okwume v Commonwealth* [2016] FCA 1252, [207]–[211] (Charlesworth J); *Neilson v City of Swan* (2006) 147 LGERA 136, 170 [152]–[154] (Buss JA) (Western Australian Court of Appeal).

[80] *Prince Alfred College Inc v ADC* (2016) 258 CLR 134, 148 [40] (French CJ, Kiefel, Bell, Keane and Nettle JJ) ('*Prince Alfred College*').

[81] Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, Justice James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221, 228 (citations omitted).

[82] [1994] 2 AC 45 (House of Lords) ('*Racz*'), cited in *Mengel* (n 30) 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

[83] *Racz* (n 82) 53.

[84] *Lampard-Trevorrow* (n 64).

[85] Ibid 390 [275] (Doyle CJ, Duggan and White JJ). For a more recent discussion of the extent to which the misfeasance of an officer might be imputed to a department head or employer, see *Frangieh v Deputy Commissioner of Taxation* [2018] NSWCA 337, [133]–[151] (White JA, Beazley P and Meagher JA agreeing).

[86] *Prince Alfred College* (n 80).

might assist in deciding whether such conduct fell within the scope of employment, including: (a) 'any special role that the employer has assigned to the employee and the position in which the employee is thereby placed vis-à-vis the victim';[87] (b) 'whether the apparent performance of such a role may be said to give the "occasion" for the wrongful act … [including taking] into account … authority, power, trust, control and the ability to achieve intimacy with the victim';[88] and (c) whether 'the employee used or took advantage of the position in which the employment placed the employee vis-à-vis the victim'.[89] These factors are particularly relevant in the context of the misfeasance tort, which can only be made out in respect of abuse of *public* powers, reflected in the requirement that the officer's act be done 'in the purported discharge of his or her public duties'.[90] As Aronson puts it, the types of wrongdoing captured by the misfeasance tort are of a kind that in most cases can 'only be committed "on the job"'.[91]

To summarise, in looking at *who* can be held accountable pursuant to the tort of misfeasance in public office, only a subset of government officials will fall within the scope of the 'public office' requirement. There remain doubts as to the reach of the tort into the realms of corporate accountability (ie direct liability of government entities) and hierarchical accountability (ie vicarious liability for the acts of a government employee).

B *To Whom Is the Government Accountable?*

The second aspect of the accountability framework looks at the party *to whom* an agent is accountable. There are really two levels of accountability holders in this context.[92] At one level, we might view the court as the body *to whom* an agent is required to account for the purpose of the misfeasance tort.[93] It is unnecessary to engage in any detailed analysis of the role of the courts as an accountability forum in this context, as this work has been done elsewhere.[94]

87 Ibid 159–60 [81] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

88 Ibid 160 [81].

89 Ibid 159 [80].

90 *Mengel* (n 30) 370 (Deane J).

91 Aronson, 'A Very Peculiar Tort' (n 45) 45.

92 Mulgan (n 6) describes the requirement of accountability jointly to the courts and to the applicant as a form of accountability with a 'dual direction': at 76.

93 Ibid.

94 See, eg, Dawn Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press, 1991) 26–7; John Goldring, 'Public Law

For present purposes, it is the second level of accountability holder that is relevant to consider, namely the party who is entitled to bring an agent before the accountability forum. In tort law, issues of standing are wrapped up in the nature of the cause of action, rather than being determined through standalone tests of eligibility to make a claim: 'In private law there is, in general, no separation of standing from the elements in a cause of action.'[95] In order to determine *to whom* a government defendant is accountable in tort, we must look at the content of the relevant cause of action. For the purpose of the misfeasance tort, two elements of the cause of action in particular operate as delimiting devices to mark out the range of individuals entitled to commence proceedings.

The first delimiting device is the mental element(s) of the misfeasance tort.[96] Each of the two types of misfeasance claim (ie targeted malice and reckless exercise of powers) place the defendant in the driving seat in marking out the category of individuals to whom they might be liable. In cases of targeted malice, a direct line is created between the plaintiff and defendant. The defendant in such a case has consciously considered the interests of the plaintiff and has acted either with the intention of causing harm, or not caring that this would be the result of their actions. As noted in *Sanders v Snell [No 2]*,[97] for the purpose of this limb of the tort, public power is employed 'as a means of inflicting harm'.[98] The second limb of the tort — reckless exercise of powers — also places the plaintiff in the contemplation of the defendant. This is because the tort cannot be made out merely in cases of 'foreseeable' harm, but instead requires the defendant to have 'foreseen' the harm likely to be occasioned.[99] While there had been some doubt expressed as to whether the High Court in *Mengel* might have extended the tort to cases where loss

and Accountability of Government' (1985) 15(1) *Federal Law Review* 1; Bovens, 'Analysing and Assessing Accountability' (n 3) 456; Mashaw (n 6) 120; Jeff King, 'The Instrumental Value of Legal Accountability' in Nicholas Bamforth and Peter Leyland (eds), *Accountability in the Contemporary Constitution* (Oxford University Press, 2013) 124; Mulgan (n 6) 76–7.

95 *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247, 264 [43] (Gaudron, Gummow and Kirby JJ).

96 See generally *Mengel* (n 30) 356–7 (Brennan J); *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 376 [124] (Gummow J) ('*Pyrenees*'); *Three Rivers District Council v Governor and Company of the Bank of England [No 3]* [2003] 2 AC 1, 24 (Hirst LJ) ('*Three Rivers*').

97 (2003) 130 FCR 149.

98 Ibid 178 [108] (Black CJ, French and von Doussa JJ) (emphasis omitted).

99 For discussion of the difference between these forms of mental state, see Mads Andenas and Duncan Fairgrieve, 'Misfeasance in Public Office, Governmental Liability, and European Influences' (2002) 51(4) *International and Comparative Law Quarterly* 757, 762–4.

was reasonably foreseeable,[100] the New South Wales Court of Appeal recently indicated in *Obeid* that this was a misreading of *Mengel*.[101] Bathurst CJ was firmly of the view that it was necessary for the plaintiff to establish that the defendant was aware that their conduct would cause harm, or was recklessly indifferent to such a risk.[102] The defendant, therefore, must have adverted to the plaintiff's interests at some level, and decided to proceed irrespective of the harm that was likely to result.[103] We can say, therefore, that for both limbs of the tort, the individuals *to whom* a government defendant may be accountable are marked out by some degree of subjective contemplation by the defendant (whether conscious or recklessly indifferent), and, in this sense, the defendant plays a large role in determining *to whom* they are liable.

A second delimiting device employed by the misfeasance tort is the requirement of loss or damage.[104] Unlike those torts which are actionable per se,[105] the misfeasance tort is derived from the historical action on the case,[106] meaning that proof of damage is an essential element for liability. This is demonstrated by the plaintiff's failure in the English case of *Watkins v Secretary of State for the Home Department* ('*Watkins*').[107] In that case, prison officers were found to have acted ultra vires and in bad faith by opening the plaintiff's legal correspondence. The plaintiff sought to establish misfeasance in public office either on the basis that the tort was actionable per se, or alternatively, that some lesser degree of anxiety ('distress, injured feelings, indignation or annoyance') was sufficient to satisfy the requirement of loss or damage.[108] The House of Lords rejected the claim, confirming that, as an

[100] See, eg, *Lampard-Trevorrow* (n 64) 387–8 [260]–[264] (Doyle CJ, Duggan and White JJ); Aronson, Groves and Weeks (n 52) 1151–2 [19.650]; Alison Doecke, 'Misfeasance in Public Office: Foreseen or Foreseeable Harm' (2014) 22(1) *Torts Law Journal* 20, 27–8.

[101] *Obeid* (n 33) 648–53 [153]–[172] (Bathurst CJ), 665–7 [242] (Leeming JA).

[102] Ibid 648–53 [153]–[172].

[103] This requirement of subjectively *foreseen* as opposed to *foreseeable* loss might go some way towards ameliorating Chamberlain's concerns about the erosion of the historically strict 'standing' rules for the purpose of the misfeasance tort: Erika Chamberlain, 'The Need for a "Standing" Rule in Misfeasance in a Public Office' (2007) 7(2) *Oxford University Commonwealth Law Journal* 215, 225. Her other concern relates to the changing role of 'duty' in the context of the misfeasance tort, which might otherwise have acted as a further delimiting device: at 225–6.

[104] Ibid 227–8.

[105] Such torts include assault, battery, and false imprisonment: Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 35.

[106] *Three Rivers* (n 96) 189–90 (Lord Steyn).

[107] [2006] 2 AC 395 (House of Lords) ('*Watkins*').

[108] Ibid 402–3 [6]–[7] (Lord Bingham).

action on the case, proof of material damage was an essential element of the tort.[109] Therefore, the category of individuals *to whom* a government official will be liable pursuant to this tort is confined to those who suffer material loss or damage by reason of the defendant's conduct.

Having said this, the recognised forms of material loss and damage are relatively broad, extending beyond personal injury and property damage to pure economic loss, psychological harm, and loss of reputation.[110] Recently, the Full Federal Court in *Nyoni* was willing to infer material damage where one government agent represented to another that Mr Nyoni was unfit to continue to conduct his pharmacy business: 'The making of such an allegation … should be presumed (as it would in cases of slander) to cause sufficient material or actual damage to support the action of misfeasance in public office'.[111] While it remains necessary, therefore, for a plaintiff to point to a recognised form of harm, the court may be more willing to infer harm in cases involving malicious conduct aimed at affecting the plaintiff's reputation (or, at least, business reputation).

C *For What Does the Misfeasance Tort Hold an Agent Accountable?*

The tort of misfeasance in public office provides a remedy in damages for: '(i) an invalid or unauthorised act; (ii) done maliciously; (iii) by a public officer; (iv) in the purported discharge of his or her public duties; (v) which causes loss or harm to the plaintiff'.[112] The third, fourth, and fifth of these elements (namely, the definition of 'public officer', the requirement that the agent's conduct be sufficiently linked with official functions, and the requirement of proof of damage) have been discussed above. It is the remaining elements of the tort that are most relevant for considering *for what* an official is held accountable.

1 *An Invalid or Unauthorised Act*

To understand the meaning of 'invalid or unauthorised', it is useful to contrast the scope of the tort with the now-defunct *Beaudesert* tort,[113] which purported to make a remedy in damages available for the 'unlawful, intentional and

[109] Ibid 410 [27].

[110] See generally RP Balkin and JLR Davis, *Law of Torts* (LexisNexis Butterworths, 5th ed, 2013) 726 nn 226–9 and accompanying text.

[111] *Nyoni* (n 58) 332–3 [101] (North and Rares JJ).

[112] *Mengel* (n 30) 370 (Deane J).

[113] Ibid 344–5 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

positive acts of another'.[114] In that context, 'unlawful' was used not in the public law sense of 'an act that is ultra vires and void', but was instead interpreted to mean 'an act forbidden by law'.[115] The misfeasance tort, in contrast, encompasses both illegal conduct in the traditional sense (eg fabrication of evidence, forgery, and cover-ups by police officers),[116] as well as more technical instances of illegality as understood in judicial review proceedings. As noted by Brennan J in *Mengel*:

> [T]he purported exercise of power must be invalid, either because there is no power to be exercised or because a purported exercise of the power has miscarried by reason of some matter which warrants judicial review and a setting aside of the administrative action.[117]

Accordingly, the meaning of 'invalid or unauthorised' is in part informed by our understandings of the grounds on which a decision might be set aside in judicial review proceedings. It is also important to bear in mind that 'unlawfulness' in this context is limited to the abuse of *public* power, touched on in the discussion of 'public office' above.[118] For this reason, an official who happens to be in uniform while committing a crime entirely unrelated to their public functions will not commit the tort of misfeasance.[119]

2 *Causation*

In addition to the requirement that the loss be of a type recognised by the tort of misfeasance in public office,[120] it is further necessary to demonstrate that there exists a requisite link between the conduct complained of and the harm occasioned. Tort law employs concepts of causation to mark out the boundaries of outcomes attributable to impugned conduct, most commonly by asking whether the harm would have occurred 'but for' that conduct (factual causation),[121] and whether the outcome ought to be treated as a cause in law (attributive causation).[122] In many cases, determining whether an official's

114 *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, 156 (Taylor, Menzies and Owen JJ).

115 *Mengel* (n 30) 336 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ).

116 See generally Aronson, Groves and Weeks (n 52) 1159 [19.760] nn 584–5, 587 and accompanying text.

117 *Mengel* (n 30) 356.

118 See above 343–6. See also Aronson, 'Unfinished Business' (n 1) 440–1.

119 Aronson, 'Unfinished Business' (n 1) 441.

120 See above 352–3.

121 Barker et al (n 105) 533.

122 Ibid 544.

excess of power has caused the plaintiff's loss may be straightforward. This may be the case, for instance, where the government official had no jurisdiction to act in the first place (ie simple ultra vires). However, the situation becomes more complicated where the nature of the error is such that the same act could potentially have been performed within power (eg where the same decision could be made having afforded a fair hearing or ignoring the irrelevant consideration).[123] After all, most species of public law 'unlawfulness' are concerned not with the substance of the ultimate decision, but with the means by which that decision is reached. This problem is particularly evident in respect of powers that are discretionary in nature. As noted in *Lock v Australian Securities and Investments Commission*:[124]

> The causation question requires consideration of what the relevant public officer would have done if there had been no such deliberate omission. In the case of an unlawful decision not to exercise a discretionary power, there may have been a range of alternative lawful decisions, one of which might include a lawful decision not to exercise the power.[125]

Although the matter did not need to be determined in that case, the implication is that causation may be difficult to establish in cases where there is more than one legal way in which power might be exercised. This particular causation issue is one that must be confronted by advocates of a public law remedy in damages (ie damages for illegality per se).[126] The crux of the difficulty is that, in determining whether harm would have occurred 'but for' the illegality complained of, the court is being asked implicitly to determine

[123] Relief may also potentially be unavailable in the public law context in such cases, either on the basis that a non-'material' error is not jurisdictional (ie it would not 'have resulted in the making of a different decision': *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1, 9 [31] (Kiefel CJ, Gageler and Keane JJ)), or through the exercise of remedial discretion to deny relief in cases where it would be futile: see, eg, *Australian and International Pilots Association v Fair Work Australia* (2012) 202 FCR 200, 242–3 [182]–[185] (Perram J).

[124] (2016) 248 FCR 547.

[125] Ibid 579 [138] (Gleeson J). See also Aronson, Groves and Weeks (n 52) 1158–9 [19.750].

[126] See, eg, PP Craig, 'Compensation in Public Law' (1980) 96 (July) *Law Quarterly Review* 413, 438–9; Rossana Panetta, 'Damages for Wrongful Administrative Decisions' (1999) 6(4) *Australian Journal of Administrative Law* 163, 171–2; CS Phegan, 'Damages for Improper Exercise of Statutory Powers' (1980) 9(1) *Sydney Law Review* 93, 115–17. For a brief discussion of the misfeasance tort in this context, see Ellen Rock and Greg Weeks, 'Monetary Awards for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41(4) *University of New South Wales Law Journal* 1159, 1175–6.

how the discretionary power *should* have been exercised, potentially moving the court into forbidden merits review territory.

The English courts confronted this difficulty in the context of the tort of false imprisonment in *R (Lumba) v Secretary of State for the Home Department*.[127] In that case, the substance of the plaintiffs' claim was that their detention was unlawful because the Home Department had operated in reliance on an unpublished and unlawful policy.[128] Relevantly, however, the plaintiffs would still have been detained if the decision-maker had instead relied on the applicable published and lawful policy.[129] Applying what was described as 'the causation test', the trial judge and the Court of Appeal rejected the claim on the basis that the detention was inevitable; the application of the unlawful policy was of no 'causative effect' because the lawful policy dictated the same result.[130] This approach was rejected by a majority of the Supreme Court, with Lord Dyson JSC indicating that there was 'no place for a causation test' in the context of the tort of false imprisonment.[131] In his Lordship's view:

> Where the power has not been lawfully exercised, it is nothing to the point that it could have been lawfully exercised. If the power could and would have been lawfully exercised, that is a powerful reason for concluding that the detainee has suffered no loss and is entitled to no more than nominal damages. But that is not a reason for holding that the tort has not been committed.[132]

To adopt the words of Lord Kerr JSC, '[t]he fact that a person *could have been* lawfully detained says nothing on the question whether he *was* lawfully detained'.[133] Nominal damages could therefore be awarded in recognition of the fact that the defendant's chosen justification for detention was an unlawful one, reserving higher quantum awards for cases in which there was no available legal justification, thereby giving rise to material loss.[134]

[127] [2012] 1 AC 245 (Supreme Court) ('*R (Lumba)*'). See also *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 610–11 [324] (Kiefel J) ('*CPCF*'); *Fernando v Commonwealth* (2014) 231 FCR 251, 265–7 [66]–[76] (Besanko and Robertson JJ).

[128] *R (Lumba)* (n 127) 261 [7] (Lord Dyson JSC).

[129] Ibid 273 [59].

[130] Ibid 273 [56]–[59].

[131] Ibid 274 [65].

[132] Ibid 276 [71].

[133] Ibid 321 [239] (emphasis in original).

[134] Ibid 301 [169] (Lord Dyson JSC).

It may at first glance be tempting to extrapolate this reasoning across to misfeasance cases,[135] treating the illegality of the defendant's chosen justification as determinative irrespective of whether or not an alternative legal path was open. However, there remains a critical point of difference between the two species of tort — while false imprisonment is actionable per se,[136] courts have maintained a strict hold on the damage requirement for the misfeasance tort, as outlined above.[137] The use of nominal damages to serve a non-compensatory purpose,[138] circumventing the question of causation, is therefore a much smaller step to take in that context. Put simply, the cases have not yet gone far enough to tell us how these difficult causation questions might be resolved for the purpose of the misfeasance tort.[139]

3 *Malice*

The final element of the misfeasance tort to consider, in looking at *for what* an agent is held accountable, is the requirement that the act be 'done maliciously'.[140] This mental element of the tort has been described as comprising 'two alternative "limbs"'.[141] The first is that of 'targeted malice',[142] which captures 'actual intention to cause such injury',[143] or conduct either 'specifically intended to injure a person'[144] or engaged in 'with the predominant intent of damaging a person'.[145] The second limb, which addresses a knowingly or recklessly unlawful act that causes damage, captures both deliberate wrongdoing and recklessness in the sense of 'deliberate blindness'.[146] In other words,

[135] For discussion on this point, see, eg, Erika Chamberlain, 'When Unlawfulness Becomes Tortious: Misfeasance in a Public Office and Administrative Law' (2015) 44(4) *Advocates' Quarterly* 489, 501–2.

[136] *CPCF* (n 127) 569 [155] (Hayne and Bell JJ).

[137] As to the requirement of proof of damage for the purpose of the misfeasance tort, see above 352–3.

[138] One such non-compensatory purpose is vindication: Jason NE Varuhas, *Damages and Human Rights* (Hart Publishing, 2016) 46–9.

[139] Aronson, 'Unfinished Business' (n 1) 444.

[140] *Mengel* (n 30) 370 (Deane J).

[141] *Three Rivers* (n 96) 137 (Auld LJ).

[142] Ibid; *Mengel* (n 30) 370 (Deane J).

[143] *Mengel* (n 30) 370 (Deane J).

[144] *Three Rivers* (n 96) 191 (Lord Steyn).

[145] Ibid 137 (Auld LJ).

[146] *Mengel* (n 30) 371 (Deane J).

the tort requires a degree of 'conscious maladministration',[147] either in the form of intention to cause harm (or recklessness as to harm arising), or intention to exceed powers (or recklessness as to legality).

It is further worth making the point that it is likely not possible to argue against liability for 'malicious' conduct on the basis that the act was otherwise within power. While it has been suggested that 'spite or an intention to harm are not sufficient [to make out the tort] if the action is in fact lawful',[148] the better view is that spiteful or malicious conduct is unlikely to ever be considered 'otherwise lawful'; such conduct would likely contravene the judicial review grounds of improper purpose and bad faith.[149] This leads to the conclusion that a plaintiff does not need to identify a separate ground of illegality (such as a failure to accord procedural fairness) in cases of targeted malice, but can rely on that conduct itself to establish an excess of power.

D *How Is an Agent Held Accountable?*

The question of *how* an agent is held accountable encompasses two levels of enquiry. The first considers the process by which accountability is delivered (ie procedural aspects of the court process), and the second considers the final result of that process (ie court orders). As noted above, others have already considered the more general contribution that the courts make to government accountability.[150] Returning to the various rationales for accountability set out above,[151] there is much to recommend judicial process for the purpose of meeting these ends. Transparency is fostered in a number of ways. Perhaps most critically, courts contribute to transparency through the open nature of the court forum and through the publication of judicial reasons.[152] Government transparency is further facilitated through the use of pre-trial and in-court procedures to compel the production of documents and evidence from

147 *Pyrenees* (n 96) 376 [124] (Gummow J). See also *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 153–4 [11]–[15] (Gummow, Hayne, Heydon and Crennan JJ).

148 Aronson, 'Unfinished Business' (n 1) 441. Aronson gives the example of a parking inspector gleefully issuing a parking fine to their enemy.

149 *Nyoni* (n 58) 329–30 [87]–[91] (North and Rares JJ). The only circumstance in which this would not be the case would be in relation to a power specifically conferred to enable an official to act maliciously, and it is inconceivable that the legislature would enact such a law.

150 See above n 94. Notable amongst these are the observations of King (n 94) about the instrumental benefits associated with accountability via the judicial process: at 129–51.

151 See above 341–2.

152 Justice Michael Kirby, 'Judicial Accountability in Australia' (2003) 6(1) *Legal Ethics* 41, 45–6.

government defendants, including discovery, subpoenas, interrogatories, pleadings, and cross-examination.[153] The tort of misfeasance in public office enjoys all of these transparency-oriented accountability benefits, providing citizens with a means to call a government official to explain and justify their conduct in a public forum.

The remaining results-oriented rationales for accountability are then supported through the provision of remedies and sanctions.[154] The archetypal remedy in tort proceedings is an award of damages.[155] While damages are, in essence, a reparative remedy aligned with the restorative rationale for accountability, they can also be viewed as contributing to a number of the other accountability rationales: 'Money is probably the most frequently used means of punishing, deterring, compensating and regulating throughout the legal system.'[156] When awarded in the context of the tort of misfeasance in public office, compensatory and punitive damages can each be understood to contribute to a number of accountability rationales. Compensatory damages provide an individual with a monetary payment to make up for pecuniary and non-pecuniary loss, damage, or injury that they have sustained.[157] In this context, the aim of the award is to place the plaintiff in the same position as they would have been in but for the defendant's wrong.[158] This rationale is well aligned with the restorative function of accountability, providing individuals who have suffered loss with a monetary payment designed to repair that loss; the tort is 'designed to provide redress for acts done by public officers in abuse or misuse of powers conferred on them for the purpose of their public duties'.[159]

Punitive (or exemplary) damages are also available for the purpose of the misfeasance tort.[160] Punitive damages align well with the desert rationale for

[153] Rock, 'A Core Public Law Value?' (n 2) 196.

[154] See ibid 196–7.

[155] Barker et al (n 105) 693.

[156] Pat O'Malley, *The Currency of Justice: Fines and Damages in Consumer Societies* (Routledge-Cavendish, 2009) 1.

[157] Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th ed, 2014) 13.

[158] *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39, cited in McGregor (n 157) 14.

[159] *Obeid* (n 33) 639 [100] (Bathurst CJ).

[160] There remains dispute as to whether aggravated damages fall into this same category: see, eg, Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) 114; Allan Beever, 'The Structure of Aggravated and Exemplary Damages' (2003) 23(1) *Oxford Journal of Legal Studies* 87. If we conceive of aggravated damages as plaintiff-focused (ie appeasing a perceived indignity) as opposed to defendant-focused (ie punishing and deterring), it is conven-

accountability, not only in terms of their purpose, but also in terms of the circumstances in which the award is thought to be appropriate. Punitive damages are thought to be appropriate in cases where a defendant's 'conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence or the like',[161] or in response to 'conscious wrongdoing in contumelious disregard of another's rights'.[162] Though it is not necessary to establish that the defendant's conduct was malicious in order to obtain a punitive damages award, it does appear necessary to establish a minimum level of conscious engagement on the part of the defendant, in the form of intentional or reckless behaviour.[163] Australian courts have not followed the restrictive approach of the English courts represented by the decision of *Rookes v Barnard* ('*Rookes*'),[164] in which the House of Lords fixed the availability of punitive damages to already-recognised categories of cases.[165] Even within that restrictive approach, however, punitive damages have been made available for egregious conduct by government officials. In *Rookes*, Lord Devlin was concerned to maintain the availability of punitive damages in response to 'arbitrary and outrageous use of executive power',[166] as in cases of 'oppressive, arbitrary or unconstitutional action by the servants of the government'.[167]

Punitive damages are particularly apt in the context of the tort of misfeasance in public office.[168] As outlined above,[169] this tort involves a serious

ient to hive off aggravated damages in the context of the present discussion. Otherwise, little turns on this dispute.

161 McGregor (n 157) 454.

162 *Gray v Motor Accident Commission* (1998) 196 CLR 1, 7 [14] (Gleeson CJ, McHugh, Gummow and Hayne JJ) ('*Gray*'), quoting *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71, 77 (Knox CJ).

163 *Lamb v Cotogno* (1987) 164 CLR 1, 8–9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ); *Gray* (n 162) 196 CLR 1, 9–10 [19]–[23] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Trevorrow [No 5]* (n 61) 389–90 [1213]–[1221] (Gray J). See also Carol Harlow, 'A Punitive Role for Tort Law?' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart Publishing, 2008) 247, 252.

164 [1964] AC 1129 (House of Lords) ('*Rookes*').

165 See *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 138–9 (Taylor J); *Rookes* (n 164) 1226–7 (Lord Devlin).

166 *Rookes* (n 164) 1223.

167 Ibid 1226.

168 Note that while there is a degree of alignment between rationales, in practice the award of punitive damages for the misfeasance tort has been rare. But see *Fernando v Commonwealth [No 4]* (2010) 276 ALR 586, 589–95 [13]–[53] (Siopis J) (Federal Court). The finding of

degree of subjective fault on the part of the official concerned, which may invite the conclusion that punitive damages will be available in every case where a claim is made out. However, courts appear to require something more than the elements of subjective fault comprised in the misfeasance tort before awarding punitive damages. In *Kuddus v Chief Constable of Leicestershire Constabulary* ('*Kuddus*'),[170] Lord Hutton accepted that punitive damages may be available in respect of oppressive, arbitrary, or unconstitutional acts by government officials, but expressed the view that 'not every abuse of power which constitutes the tort of misfeasance will come within [that] category'.[171] In order for punitive damages to be relevant, therefore, the plaintiff must show something more than the degree of subjective fault that constitutes the tort itself.

Like the desert rationale for accountability, punitive damages focus primarily on the individual wrongdoer rather than on the victim.[172] This is because the purpose of a punitive damages award is to punish and mark public disapproval of the wrongdoer's conduct.[173] As put by Chamberlain, making punitive damages available in misfeasance cases 'is necessary to express a sense of public outrage at the misuse of the powers that were granted to the official to exercise in the public interest'.[174] The availability of punitive damages further serves the important constitutional function of 'uphold[ing] and vindicat[ing] the rule of law',[175] or, in Harlow's words, represents 'a constitutional principle of symbolic importance'.[176] Not only is the purpose of a punitive damages award closely aligned to the accountability rationale of desert, it can also be viewed as contributing to the higher theoretical goal of supporting the legitimacy of government.

It is also worth noting that, even in the absence of an award of punitive damages, misfeasance proceedings may play a potentially punitive role in maintaining government accountability. The process of appearing in court to

liability was ultimately set aside: *Commonwealth v Fernando* (2012) 200 FCR 1, 28–9 [130]–[131] (Gray, Rares and Tracey JJ).

169 See above 351–2, 357–8.

170 [2002] 2 AC 122 (House of Lords) ('*Kuddus*').

171 Ibid 153 [91].

172 *Gray* (n 162) 7 [15] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

173 *Wilkes v Wood* (1763) Lofft 1; 98 ER 489, 498–9 (Pratt CJ).

174 Chamberlain, *Misfeasance in a Public Office* (n 42) 67.

175 See *Kuddus* (n 170) 149 [79] (Lord Hutton), cited in *New South Wales v Ibbett* (2006) 229 CLR 638, 649–50 [40] (Gleeson CJ, Gummow, Kirby, Heydon and Crennan JJ).

176 Harlow, 'A Punitive Role for Tort Law?' (n 163) 251.

answer to a claim of misfeasance, along with findings of malice or knowing recklessness, can be imagined to be an unpleasant and embarrassing experience even aside from the imposition of damages liability. As Bovens puts it, public acknowledgement of a failure to comply with prescribed norms may in some circumstances be 'particularly painful', in which case 'sanctions [are] therefore present in the very process of being held responsible'.[177] If we accept that a finding of liability for misfeasance in public office (and attendant compensatory damages) carries a potentially punitive effect, the award of punitive damages then serves a function of reinforcing that stigma in more egregious cases.

Beyond restoration and desert, we might wonder whether the remedies available in misfeasance claims have a potential deterrent function. For many, the idea of tort law as a tool of deterrence is 'innate',[178] although, as Harlow notes, '[d]eterrent theories of tort law are today hard to come by'.[179] More recent academic attention has focused instead on attempting to discern the impact of tort remedies as an empirical matter, with varying degrees of success.[180] Whatever we think of the potential utility of *compensatory* damages as a tool of deterrence, there are far stronger claims supporting the deterrent effect of *punitive* damages. Reflections of this rationale were evident even in the seminal misfeasance case of *Ashby v White*,[181] where Holt CJ stated that '[i]f publick officers will infringe mens rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences'.[182] To similar effect, Lord Hutton in *Kuddus* indicated that

> the power to award exemplary damages in such cases … serves to deter such actions in future as such awards will bring home to officers in command of in-

[177] Mark Bovens, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, 1998) 39–40. See also Behn (n 17) 3.

[178] Carol Harlow, 'Damages and Human Rights' [2004] (3) *New Zealand Law Review* 429, 432.

[179] Harlow, 'A Punitive Role for Tort Law?' (n 163) 249. For discussion of deterrent justifications for the misfeasance tort, see Chamberlain, *Misfeasance in a Public Office* (n 42) 66–9.

[180] Harlow, 'A Punitive Role for Tort Law?' (n 163) 249–50. See also Peter H Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (Yale University Press, 1983) 16–17; David S Cohen, 'Regulating Regulators: The Legal Environment of the State' (1990) 40(2) *University of Toronto Law Journal* 213, 257–9.

[181] (1703) 2 Ld Raym 938; 92 ER 126 ('*Ashby*'). See generally Aronson, 'A Very Peculiar Tort' (n 45) 6.

[182] *Ashby* (n 181) 137.

> dividual units that discipline must be maintained at all times. In my respectful opinion the view is not fanciful … that such awards have a deterrent effect …[183]

Lord Scott was less convinced, at least in cases where liability was to be borne not by the individual wrongdoer but by their employer.[184]

There are also doubts as to whether personal liability to pay punitive damages has a deterrent effect, or whether there is a risk that such punitive sanctions may be counterproductive (particularly in cases of abuse of power). Braithwaite's review of a range of empirical (primarily criminological) research led him to conclude that the threat of sanction may not be a useful deterrent in this context.[185] According to this research, there are a range of reasons why 'big sticks often rebound'.[186] For instance, in some cases an individual may respond to a threat of sanction with defiance: by 'getting mad rather than by ceasing to be bad'.[187] The level of reactance (ie the motivation to act to regain a freedom that has been lost or threatened)[188] may be affected by factors such as the actor's level of emotionality or the importance of the freedom under threat.[189] While the threat of sanction might produce gains in some contexts, the risk of backfire, Braithwaite concludes, leads to a potentially nil overall effect.[190] Courts have also acknowledged this risk in connection with the misfeasance tort, noting that the '[i]nappropriate imposition of liability on public officials may deter officials from exercising powers conferred on them when their exercise would be for the public good'.[191]

IV The Misfeasance Tort: Caught between Accountability Rationales

The foregoing analysis has demonstrated that the misfeasance tort is often said to be underpinned by three different objectives that can also more broadly be understood to be rationales of accountability: restoration, desert, and deter-

183 *Kuddus* (n 170) 149 [79].

184 Ibid 157 [108], 161 [129]. See also Bruce Feldthusen, 'Punitive Damages: Hard Choices and High Stakes' [1998] (4) *New Zealand Law Review* 741, 761.

185 Braithwaite (n 27) 314–22.

186 Ibid 360.

187 Ibid 318.

188 See generally Jack W Brehm, *A Theory of Psychological Reactance* (Academic Press, 1966).

189 Braithwaite (n 27) 316–19, 322–4.

190 Ibid 318.

191 *Sanders v Snell* (1998) 196 CLR 329, 344 [37] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) ('*Sanders*').

rence. Because these three accountability rationales are at times in tension, the misfeasance tort reflects something of a compromise between competing positions. This is evident in the following aspects of the tort.

First, the high-grade mental element of malice places a significant restriction on a plaintiff's ability to obtain restoration. If the primary purpose of tort is to compensate loss, we might be concerned if this mental requirement contributes to low rates of success in misfeasance cases.[192] But the high-grade nature of this mental element is perhaps explicable when taking into account the desert rationale for accountability. Desert-oriented mechanisms are attended by notions of condemnation, stigma, and public disapproval. For this reason, we have difficulty extending punishment beyond the reaches of subjectively faulty conduct.[193] This reluctance is well reflected in the misfeasance tort's mental elements of intention and subjective recklessness, which apply both in relation to the impugned act itself and in relation to the harm likely to be suffered by the plaintiff. One way of viewing these mental elements is as a compromise between the primary restoration rationale and the subsidiary rationales of desert and deterrence. In *Obeid*, Bathurst CJ was of the opinion that the fault element strikes such a balance, noting that

> an approach which requires a plaintiff to establish that they were likely to suffer harm and that the defendant was either aware of or recklessly indifferent to that risk strikes a correct balance between, on the one hand, the inappropriate imposition of liability on public officers which may deter them from exercising powers conferred on them to be exercised in the public interest, and on the other hand, the protection of persons affected by misuse or abuse of public power.[194]

We can also view the misfeasance tort's requirement of proof of damage as a compromise between competing rationales. If the sole concern of the tort was to condemn abuse of power (a reflection of the desert or deterrence rationales), we might say that this goal would be best served if the tort were actionable without proof of harm. Courts' insistence that damage is the gist of the action[195] might potentially be viewed as accommodating the restoration rationale for accountability, which is concerned with compensating harm. In

[192] Vines (n 81) notes that between 2002 and 2010, only five of 79 pleaded misfeasance cases appear to have succeeded: at 222–3.

[193] HLA Hart, *The Concept of Law* (Oxford University Press, 1961) 173, cited in Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 95.

[194] *Obeid* (n 34) 649 [157].

[195] *Watkins* (n 107) 410 [27] (Lord Bingham).

Watkins, Lord Bingham confirmed that the scope of the tort ought not to be expanded beyond this reach, noting: '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.'[196] While making the tort actionable per se would potentially serve other plaintiff-oriented functions (eg vindication),[197] this is not an intrinsic function of the restoration rationale. In this respect, we might view the desert and deterrence potential of the tort as tempered by the restoration rationale.

We might make a similar observation in relation to the availability of punitive damages, which are treated not as a freestanding head of recovery but as an extension of compensatory damages.[198] This means that punitive damages will be available only if compensatory damages are insufficient to facilitate punishment, and will be unavailable if the claim for compensation fails: 'If there is no host, there can not be a parasite.'[199] If our core concern was to facilitate punishment of wrongdoing, we might wonder why punitive damages are not available independently of compensatory damages. Again, however, we can view the prioritisation of compensatory damages as tempering the desert rationale by reference to the restoration rationale.

The identification of the appropriate defendant in misfeasance claims also reveals a tension between rationales. It was noted above that the misfeasance tort is primarily conceived of as the personal tort of a public officer, and that the extension of the tort to encompass vicarious liability is the exception rather than the rule.[200] If our primary concern was to facilitate restoration of wronged parties, we might question that approach; there can be little doubt that the government is better placed than individual officials to support compensation claims.[201] The preference for individual liability might instead be viewed as a reflection of the desert and deterrence rationales. Shifting liability to a government employer removes focus from the individual who engaged in the conduct warranting punishment, and there may be very real

196 Ibid 409–10 [26].

197 See Jason NE Varuhas, 'The Concept of "Vindication" in the Law of Torts: Rights, Interests and Damages' (2014) 34(2) *Oxford Journal of Legal Studies* 253.

198 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 468–9 (Brennan J).

199 *Fatimi Pty Ltd v Bryant* (2004) 59 NSWLR 678, 691 [73] (Giles JA).

200 See above 348–50.

201 This is to say nothing about the broader question of the propriety of expanding government liability in such a fashion, which may raise issues of public resourcing and the appropriate allocation of public funds. The point here is simply a pragmatic one: the government will likely have 'deeper pockets' than an individual official.

doubts as to the deterrent effects of a damages award borne by an employer.[202] In this sense, we might view the reluctance to extend the misfeasance tort more widely into the realm of vicarious liability as a potential accommodation of these punitive rationales.[203]

A further area of compromise between rationales can be viewed in connection with the applicable burden of proof. Adopting the ordinary civil standard, a plaintiff in a misfeasance claim must make out their case 'on the balance of probabilities'.[204] However, the nature of the allegations forming the tort's mental elements move it into more difficult terrain. Unless an official has made an admission revealing their motives in a given situation, proof of state of mind is notoriously difficult,[205] often becoming a matter of inference.[206] Courts have reiterated that the requisite state of mind to establish the misfeasance tort 'is a very serious allegation … [that] cannot be made in a broad brush way'.[207] Although the standard of proof technically remains constant (being on the balance of probabilities), the *Briginshaw* principle[208] governs proof of malicious intent.[209] The result is that courts will not lightly find that a public officer has acted with malice, and will prefer to adopt an inference that is favourable to the public officer against whom such a serious accusation of wrongdoing has been made.[210] Further, costs implications may arise following a baseless allegation of bad faith or malice, particularly in the context of the

[202] *Kuddus* (n 170) 157 [108] (Lord Scott).

[203] Nolan makes the point that the imposition of vicarious liability might serve the public law purpose of demonstrating 'that deliberate abuse of public office is intolerable behaviour for which the relevant official will be held to account': Nolan, 'Tort and Public Law' (n 1) 291–2. As positioned in this article, such a purpose might be more directly served via a corporate approach to liability: see above 346–8.

[204] See, eg, *Deputy Commissioner of Taxation v Frangieh [No 3]* (2017) 321 FLR 1, 25–6 [124]–[126] (Harrison AsJ) (Supreme Court of New South Wales) ('*Frangieh [No 3]*'), citing *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449, 449–50 (Mason CJ, Brennan, Deane and Gaudron JJ) (High Court).

[205] Peter Cane, '*Mens Rea* in Tort Law' (2000) 20(4) *Oxford Journal of Legal Studies* 533, 542.

[206] *A v New South Wales* (2007) 230 CLR 500, 521 [61] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

[207] *Leinenga v Logan City Council* [2006] QSC 294, [64] (Mullins J). See also *Uniform Civil Procedure Rules 2005* (NSW) r 15.4.

[208] The case of *Briginshaw v Briginshaw* (1938) 60 CLR 336 is taken as having established the principle that a judge will not find that a serious allegation has been made out on the balance of probabilities unless they 'feel an actual persuasion': at 361 (Dixon J); or reach a 'comfortable satisfaction' as to that allegation: at 350 (Rich J).

[209] *Frangieh [No 3]* (n 204) 25–6 [124]–[126] (Harrison AsJ).

[210] Ibid 26 [125].

exercise of public powers.[211] We might say, therefore, that the restoration rationale gives way to the desert rationale in connection with the burden of proof for the mental elements of the misfeasance tort.

All of these points lead us to the conclusion that the misfeasance tort reflects a compromise between various rationales, which are framed in this article as rationales for accountability. Striking an appropriate balance in this compromise is no small task, as reflected by the comments of the High Court in *Sanders v Snell*:

> Misfeasance in public office is concerned with misuse of public power. Inappropriate imposition of liability on public officials may deter officials from exercising powers conferred on them when their exercise would be for the public good. But too narrow a definition of the ambit of liability may leave persons affected by an abuse of power uncompensated. The tort of misfeasance in public office must seek to balance these competing considerations. Not surprisingly, identifying the intention with which the public official acts has a prominent place in striking that balance.[212]

V Conclusion

This article has presented a picture of the tort of misfeasance in public office as an accountability mechanism, analysing its structure within the framework of *who* is accountable *to whom*, *for what*, and *how*? This analysis reveals that the misfeasance tort is underpinned by three rationales (restoration, desert, and deterrence), each of which can also be understood as rationales for government accountability. Using this accountability framework, we can view the misfeasance tort as reflecting tensions between these rationales. Some tensions pull in the direction of the restoration rationale (eg the requirement of proof of damage and the prioritisation of compensatory over punitive damages), whereas others pull in the direction of the desert or deterrence rationales (eg the high-grade fault element, limits on the scope of vicarious liability, and implications of the *Briginshaw* principle). These tensions within the tort can be thought of as reflecting a compromise between competing goals. Building a picture of the misfeasance tort as a reflection of accountability rationales can assist in explaining some of these anomalous aspects of the tort.

[211] See, eg, *Obeid v Ipp* [2017] NSWSC 271, [15]–[21] (Hammerschlag J).

[212] *Sanders* (n 191) 344 [37] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

This characterisation of the tort might also help to explain why it continues to remain a focal point in discussions of government liability, notwithstanding its low rates of success in practice. Government accountability need not always be measured by reference to outcomes, but may instead, in some cases, be reflected in the *potential* of those outcomes. As stated by Mulgan:

> Strictly speaking, the concept of accountability implies potentiality (account-*ability*), the *possibility* of being called and held to account. Someone can therefore be account*able* without actually being called to account. All that is necessary is that some account-holder has a right to call the agent to account, not that this right is actually exercised.[213]

On this view, the very existence of the misfeasance tort may be viewed as a critical contribution to government accountability, irrespective of how often a claim is successful in practice. What is important is the fact that wronged individuals have a mechanism to allege abuse of power by public officers, and in those rare cases where the claim is made out, there is potential to achieve restoration, condemnation, and deterrence. As explored in this article, the misfeasance tort reflects a balance struck between these competing accountability rationales.

[213] Mulgan (n 6) 10 (emphasis in original).