DATE:**20001215**
DOCKET:**C31438, C32935, C32938 and C32939**

COURT OF APPEAL FOR ONTARIO

CATZMAN, BORINS AND FELDMAN JJ.A.

BETWEEN:	
THE ESTATE OF MANISH ODHAVJI, DECEASED, PRAMOD ODHAVJI, BHARTI ODHAVJI AND RAHUL ODHAVJI	Julian N. Falconer and Richard Macklin for the Estate of Manish Odhavji et al
Plaintiffs (Appellants) Respondents by cross-appeal	
and	
MARTIN WOODHOUSE, PHILIP GERRITS, OFFICER JOHN DOE, OFFICER JANE DOE, METROPOLITAN TORONTO CHIEF OF POLICE DAVID BOOTHBY, METROPOLITAN TORONTO POLICE SERVICES BOARD AND HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO	K. McGivney and Cheryl Woodin for Martin Woodhouse and Philip Gerrits R. Mackay for David Boothy and The Metropolitan Toronto Police Services Board John Zarudny and T. Harrison for Her Majesty the Queen in Right of Ontario
Defendants (Respondents) Appellants by cross-appeal	
	Heard: April 5 and 6, 2000

On appeal from the judgment of Day J. dated December 30, 1998.

BORINS J.A.:

Background

[1] This action arises out of the fatal shooting of Manish Odhavji following the pursuit of suspected bank robbers by officers of the Metropolitan Toronto Police, including the defendants Woodhouse and Gerrits. The Special Investigations Unit of the Ministry of the Solicitor General (the "S.I.U.") subsequently completed an investigation into the circumstances of the death and the involvement of Woodhouse and Gerrits, who were exonerated of any wrongdoing. The claims asserted in this action focus on the shooting of Manish Odhavji and the subsequent S.I.U. investigation.

[2] The plaintiffs are the estate of Manish Odhavji, his parents and his brother. Their claim is divided into two parts. The first part of the claim, asserted by all the plaintiffs, is a negligence claim against Woodhouse and Gerrits based on the alleged wrongful death of Mr. Odhavji. It is alleged, on the basis of various theories, that the defendants Chief of Police Boothby, the Metropolitan Toronto Police Services Board (the "Board") and Her Majesty the Queen in Right of Ontario ("Ontario") are "responsible at law" for Mr. Odhavji's death. This part of the claim is not the subject of this appeal.

[3] The second part of the claim, which is asserted by Mr. Odhavji's parents and brother, arises out of the circumstances of the S.I.U. investigation. The basis of this claim is that Woodhouse and Gerrits failed to co-operate with the S.I.U. investigation. It is alleged that if they had co-operated, the S.I.U. would not have exonerated them of any wrongdoing arising from Mr. Odhavji's death. In general, it is further alleged that the other defendants had a duty to ensure that Woodhouse and Gerrits co-operated in the S.I.U. investigation. In addition, the plaintiffs assert that the Board is liable for the torts of Woodhouse, Gerrits and Chief Boothby pursuant to s. 50(1) of the *Police Services Act,* R.S.O. 1990, c.P. 15, which imposes liability on the Board for torts committed by members of a municipal police force in the course of their employment.

[4] More specifically, in paragraphs 33 to 48 of the statement of claim these plaintiffs assert a claim, which is headed "Breach of Public Duty/Misfeasance in Public Office", against Woodhouse and Gerrits, the essence of which is contained in paragraphs 33 to 35 of the statement of claim which state:

> 33. The plaintiffs state that the acts and/or omissions of the defendant police officers in undermining the investigation into the death of Manish Odhavji (particularized below) represented intentional breaches of their legal duties as police officers which they knew or ought to have known would cause injuries and/or losses to the plaintiffs. Having caused injuries and/or losses to the plaintiffs the defendant police officers are liable to the plaintiffs for breach of public duty and/or misfeasance in public office.

> 34. Pursuant to the provisions of the *Police Services Act*, R.S.O. 1990, c. P. 15, s. 113 (hereinafter the "Act"), the Special Investigations Unit (hereinafter "S.I.U.") is charged with investigating circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers. Upon the conclusion of an investigation, the director of S.I.U., if there are reasonable grounds to do so, shall cause informations to be laid against police officers and shall refer them to the Crown Attorney for prosecution.
>
> 35. Section 113(9) of the Act states that "Members of the police forces shall co-operate fully with the members of the unit in the conduct of investigations."

Particulars of this claim are pleaded in paragraphs 36 to 43 of the statement of claim.

[5] In paragraphs 44 and 45 it is alleged that Chief Boothby is also liable for "abuse/misfeasance in public office" as a result of "his failure to issue orders that would have ensured that the conduct of the defendant police officers did not undermine the S.I.U. investigation".

[6] Paragraphs 46 and 47 appear to be relevant to the general damages of $1,000,000 and the punitive, exemplary and aggravated damages of $1,000,000 claimed by Mr. Odhavji's parents and brother because "they have been deprived of a thorough, competent and credible criminal investigation" resulting in the loss "of any prospect of closure in respect of " the death of Manish Odhavji. They also say that their "grieving for their deceased family member has been aggravated and prolonged", that they "continue to suffer physically, psychologically and emotionally" and in addition "to suffering from mental distress, anger, depression and anxiety", they " have lost their confidence in police authorities". They claim, as well, to "have lost their enjoyment of life and will continue to suffer in the future".

[7] In paragraphs 49 to 54, these plaintiffs assert a claim under the heading "Negligent Supervision" against the defendants Chief Boothby, the Board and Ontario, it being alleged that Ontario is liable for the conduct of the Solicitor General and Minister of Correctional Services ("Solicitor General"),who is said to be "the statutory legal entity who administers" the *Police Services Act*.

[8] The essence of this claim is contained in paragraphs 51 and 53 in which it is alleged that Chief Boothby, the Board and Ontario breached their duty of care to the plaintiffs to ensure that Woodhouse and Gerrits received appropriate training which would have ensured that they "complied with their legal obligations to co-operate" with the S.I.U. In short, it is the plaintiffs' position that these defendants negligently

supervised Woodhouse and Gerrits who, if properly supervised, would have co-operated with the S.I.U. in its investigation of the death of Mr. Odhavji. It is the plaintiffs' position that the Solicitor General's duty to them, for which Ontario is responsible, arose from his duty to monitor police forces and police service boards and to develop programs to enhance police practices found in s. 3 of the *Police Services Act*, and that the Board's duty arose under ss. 27 to 40 of the Act that require police boards to oversee the police on behalf of the community. In respect to this claim, the plaintiffs say they suffered the same damages outlined in paragraphs 46 and 47 of the statement of claim.

Procedural History

[9] Woodhouse and Gerrits brought a motion under rule 21.01(1)(b) of the Rules of Civil Procedure to strike out the plaintiffs' claim against them for misfeasance in public office on the ground that it discloses no reasonable cause of action. Chief Boothby and the Board brought a similar motion, and, in addition, sought an order striking out the claim against them based on negligent supervision, on the ground that it discloses no reasonable cause of action. In addition, Ontario moved under rule 21.01(1)(b) to strike out the claims against it for negligence in the death of Mr. Odhavji, for misfeasance in public office and for negligent supervision. All of the motions were heard by Day J. During the course of the hearing, the plaintiffs abandoned their claims against Ontario for negligence in respect of the shooting of Mr. Odhavji and for misfeasance in public office.

[10] Day J. delivered extensive reasons for the order which he made. Insofar as this appeal is concerned, the motions judge ordered:

- Woodhouse and Gerrits - Paragraphs 2(a) and 3 and paragraphs 33 to 43 alleging "breach of public duty/misfeasance in public office" were struck out, with leave granted to the plaintiffs to amend the statement of claim to plead misfeasance in public office framed in malice.

- Chief Boothby - The claim for misfeasance in public office was struck out, but not the claim for negligent supervision.

- The Board - The claim for negligent supervision was struck out, but not the claim pursuant to s. 50(1) of the Act in respect to the claim against Chief Boothby based on negligent supervision.

- Ontario – The claim for negligent supervision was not struck out.

[11] The plaintiffs have appealed from the dismissal of their claims for misfeasance in public office and negligent supervision against Chief Boothby and the Board, respectively. Woodhouse, Gerrits, Chief Boothby, the Board and Ontario sought, and obtained, leave to appeal to the Divisional Court in respect to the claims against them that

were not struck out. Laskin J.A. ordered that the Divisional Court appeals be transferred to this court to be heard with the plaintiffs' appeal.

Issues

[12] Considered together, the appeals give rise to two issues:

> (1) Does the statement of claim, assuming that it is amended pursuant to the leave granted by Day J., disclose a reasonable cause of action for misfeasance in public office against Woodhouse and Gerrits?
>
> (2) Does the statement of claim disclose a reasonable cause of action for negligent supervision against Chief Boothby, the Board and Ontario?

Analysis

(i) Misfeasance in public office

[13] At the outset of my analysis it is helpful to repeat what this court said in *Dawson v. Rexcraft Storage Inc.* (1998), 164 D.L.R. (4th) 257 at 264 in identifying the two categories of motions that are commonly brought under rule 21.01(1)(b):

> Because the purpose of a rule 21.01(1)(b) motion is to test whether the plaintiff's allegations (assuming they can be proved) state a claim for which a court may grant relief, the *only* question posed by the motion is whether the statement of claim states a legally sufficient claim, i.e., whether it is substantively adequate. Consequently, the motions judge, as mandated by rule 21.01(1)(b), does not consider any evidence in deciding the motion. The motions judge addresses a purely legal question: whether, assuming the plaintiff can prove the allegations pleaded in the statement of claim, he or she will have established a cause of action entitling him or her to some form of relief from the defendant. Because dismissal of an action for failure to state a reasonable cause of action is a drastic measure, the court is required to give a generous reading to the statement of claim, construe it in the light most favourable to the plaintiff, and be satisfied that it is plain and

> obvious that the plaintiff cannot succeed: See *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321.
>
> In some cases, a statement of claim will be vulnerable to dismissal under rule 21.01(1)(b) because the plaintiff has sought relief for acts that are not proscribed under the law. The typical textbook example is a statement of claim that alleges that the defendant made a face at the plaintiff, or that the defendant drove a car of an offensive colour. In other cases, however, the statement of claim may be defective because it has failed to allege the necessary elements of a claim that, if properly pleaded, would constitute a reasonable cause of action.

[14] In this appeal, both before Day J. and this court, the issue was whether the tort of misfeasance in public office, as pleaded, contained a radical defect in respect to the claims against Woodhouse, Gerrits and Chief Boothby. It was common ground that misfeasance in public office is a recognized tort in Canada, and, therefore, in the language of rule 21.01(1)(b), discloses a reasonable cause of action. As such, this appeal can be contrasted with the recent decision of this court in *Spasic v. Imperial Tobacco Limited*, (2000), 188 D. L. R. (4th) 577, in which the issue was whether the court has recognized, or should, recognize the tort of intentional spoliation of evidence. The issue before Day J. focused on the elements of the tort and whether the pleading contained a radical defect. He concluded that it did. That is why he struck out the relevant paragraphs and granted the plaintiffs leave to amend to plead misfeasance in public office framed in malice. However, it is the position of Woodhouse and Gerrits, with which I agree, that regardless of how the tort is pleaded, the plaintiffs cannot succeed in the claim against them because, assuming as the court must that the plaintiffs are able to prove all the elements of the tort, they will be unable to succeed as a matter of law because, as I will discuss, neither Woodhouse nor Gerrits was engaged in the exercise of a statutory power.

[15] It is clear that the tort of misfeasance in public office has been recognized in Canada since *Roncarelli v. Duplessis* [1959] S.C.R. 121, in which the Supreme Court was not required to consider the elements of the tort. Day J. considered a number of cases in which the elements of the tort are discussed, including *Francoeur v. Canada* (1994), 78 F.T.R. 109 (T.D.), aff'd (1996), 195 N.R. 313 (Fed. C.A.), *Garrett v. Attorney General*, [1997] 2 N.Z.L.R. 332 (C.A.) and *Three Rivers District Council and others v. Bank of England (No. 3)*, [1996] 3 All E.R. 558 (Q.B.), aff'd [2000] 2 W.L.R. 15 (C.A.) and concluded at paragraph 39 of his reasons:

> In Canada, misfeasance in a public office, also known as abuse of public office, can be established in one of two ways:

> either through proof of malice with intent to injure, or through proof that the public officer intentionally engaged in acts that were *ultra vires* the scope of his or office; and that from such actions he or she could foresee with a degree of certainty that harm would be caused to the plaintiff. It also goes without saying that in either instance, harm must result.

[16] Given Day J.'s view of the elements of the tort of misfeasance in public office, it appears that he was of the opinion that the potential liability of Woodhouse and Gerrits emanated from ss. 113 and 42 of the *Police Services Act*. In paragraph 23 he observed that "the duty allegedly breached" is found in s. 113(1) and (9) of the Act which state:

> 113. (1) There shall be a special investigations unit of the Ministry of the Solicitor General.
>
> (9) Members of the police forces shall co-operate fully with the members of the unit in the conduct of investigations.

He also found that s. 42(1) of the Act, which defines the duties of a police officer, is broad enough to incorporate s. 113(9), although specifically not included in s. 42(1). He concluded, as follows, in paragraph 35:

> I therefore find that if it is proved that the defendant officers purposefully and deliberately failed to cooperate with the SIU in their investigation of a potential culpable homicide, they would have breached their statutory duties to assist in the investigation and prosecution of possible criminal conduct, (Section 113(9) of the Act). I further find that the duties imposed upon the defendant police officers under s. 42 of the Act can be owed to the plaintiffs: See *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (Gen. Div.).

[17] Day J.'s analysis produced the conclusion that the statement of claim supported a claim against Woodhouse and Gerrits for misfeasance in public office framed in malice. As the statement of claim did not allege that they acted with malice in failing to co-operate with the S.I.U. investigation, it was struck out for not disclosing a reasonable cause of action, with leave granted to the plaintiffs to plead misfeasance in public office framed in malice.

[18] It is necessary to add that in addition to permitting the plaintiffs' claims against Woodhouse and Gerrits framed in misfeasance in public office to continue on the basis of an amended pleading, Day J. appeared to be of the opinion that their alleged breach of s. 113(9) of the *Police Services Act* created an independent cause of action against them, which was available to the plaintiffs.

[19] It is the position of counsel for Woodhouse and Gerrits that Day J. erred:

> (1) In failing to find that the statement of claim does not allege basic elements of the tort of misfeasance in public office in that:
>
> (a) the tort requires an abusive exercise of a power, authority or discretion by the defendant, and
>
> (b) no recognizable damages are claimed by the plaintiffs from the alleged misfeasance in public office.
>
> (2) In finding that the requirement of s. 113(9) of the *Police Services Act* to co-operate with the S.I.U. in its investigation creates a civil cause of action.

[20] Following the argument of this appeal, the decision of the House of Lords in *Three Rivers* defining the elements of the tort of misfeasance in public office became available: [2000] 2 W.L.R. 1220. It is unnecessary to review the complex facts of that case. It is sufficient to state that the action concerned two claims brought by over 6,000 creditors of the failed Bank of Credit and Commerce International S.A. ("BCCI") against the Bank of England, one of which was founded on the tort of misfeasance in public office. It was alleged that the Bank of England, which had obligations to supervise banking in England, had wrongly permitted the BCCI to retain a banking licence when it at least suspected that the BBCI would probably collapse. The proceedings before Clarke J. ([1996] 3 All E.R. 558), the Court of Appeal and the House of Lords concerned the substantive adequacy of both claims. The determination of this issue required each level of court to define the elements of the tort of misfeasance in public office. Lord Steyn, who delivered the leading opinion, defined the essential elements of the tort, with Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett delivering concurring opinions. Lord Hope of Craighead, who considered the substantive adequacy of the second claim, was in full agreement with what Lord Steyn and Lord Hutton said as to the essential elements of the tort and the requirements which must be satisfied.

[21] In considering the elements of the tort, Lord Steyn found it helpful to do so by stating the requirements in a logical sequence. I find it convenient to reproduce the summary of Lord Steyn's description of the ingredients of the tort found in (2000), 150 New L.J. 769:

The ingredients of the tort of misfeasance in public office could be considered in a logical sequence. First, the defendant had to be a public officer. The second was the exercise of power as a public officer. The third concerned the state of mind of the defendant. The case law revealed two different forms of liability for misfeasance in public office. First there was the case of targeted malice by a public officer which involved bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form was where a public officer acted knowing that he had no power to do the act complained of and that the act would probably injure the plaintiff.

The present case in tort was maintainable in the second form of the tort and it could now be regarded as settled law that an act performed in reckless indifference as to the outcome was sufficient to ground the tort in its second form. Only reckless indifference in a subjective sense would be sufficient. The plaintiff had to prove that the public officer acted with a state of mind of reckless indifference to the illegality of his act.

The fourth requirement was the duty to the plaintiff. The question was who could sue in respect of an abuse of power by a public officer. What could be said was that any plaintiff had to have a sufficient interest to found a legal standing to sue. Subject to that qualification, principle did not require the introduction of proximity as a controlling mechanism in this corner of the law. The state of mind required to establish the tort, as already explained, as well as the special rule of remoteness hereafter discussed, kept the tort within reasonable bounds. There was no reason why such an action could not be brought by a particular class of persons, such as depositors at a bank, even if their precise identities were not known to the bank.

The fifth requirement was causation which was a question of fact. That it was unsuitable for summary determination was plainly correct.

The sixth requirement was damage and remoteness. The claims by the plaintiffs were in respect of financial losses they suffered. These were, of course, claims for recovery of consequential economic losses. The question was when such losses were recoverable.

> The choice was between the test of knowledge that the decision would probably damage the plaintiff (as enunciated by the judge) and the test of reasonable foreseeability (as contended for by counsel for the depositors).
>
> As a starting point, in both forms of the tort the intent required had to be directed to the harm complained of, or at least to harm of the type suffered by the plaintiffs. That resulted in the rule that a plaintiff had to establish not only that the defendant acted in the knowledge that the act was beyond his powers but also in the knowledge that his act would probably injure the plaintiff or person of a class of which the plaintiff was a member. Subjective recklessness on the part of a public officer in acting in excess of his powers was sufficient. Recklessness about the consequences of his act, in the sense of not caring whether the consequences happened or not, was therefore sufficient in law.

[22] I would adopt the elements of the tort of misfeasance in public office as described by Lord Steyn. As I will explain, for the purposes of this appeal the significant elements are that the defendant must be a public officer who exercised a power as a public officer. In considering these elements as they apply to the plaintiffs' claim it is also helpful to consider the rationale of the tort, which Lord Steyn described at p. 1230:

> The rationale of the tort is that in a legal system based on the rule of law executive or administrative power "may be exercised only for the public good" and not for ulterior and improper purposes.

Thus, as the purpose of the tort is to combat executive and administrative abuse of power, its core is the abuse of power. This was also the view of Lord Hutton who, at p. 1266, endorsed the opinion of the New Zealand Court of Appeal in *Garrett* which regarded "the abuse of power as consisting in the unlawful exercise of a power by a public officer with knowledge that it is likely to harm another citizen, when the power is given to be exercised for the benefit of other citizens". Lord Hutton then adopted the following statement of the court in *Garrett* at p. 349: "The tort has as its base conscious disregard for the interests of those who will be affected by official decision making." At p. 1267 Lord Hobhouse of Woodborough similarly characterized the tort as "concerning ... the acts of those vested with governmental authority and the exercise of executive powers". He added at p. 1268:

> My Lords, features of this tort have to be found both in the origin and in the consequence. The official must have

> dishonestly exceeded his powers and he must thereby have caused loss to the plaintiff which has the requisite connection with his dishonest state of mind.

[23] Lord Millett, at p. 1273, joined with Lord Steyn, Lord Hutton and Lord Hobhouse of Woodborough in the characterization of the tort:

> The tort is an intentional tort which can be committed only by a public official. From this two things follow. First, the tort cannot be committed negligently or inadvertently. Secondly, the core concept is abuse of power. This in turn involves other concepts, such as dishonesty, bad faith, and improper purpose. These expressions are often used interchangeably; in some contexts one will be more appropriate, in other contexts another. They are all subjective states of mind.

In addition, at p. 1274 Lord Millett elaborated on the element of abuse of power in comments that I find helpful.

> It is important to bear in mind that *excess* of power is not the same as *abuse* of power. Nor is breach of duty the same as abuse of power. The two must be kept distinct if the tort is to be kept separate from breach of statutory duty, which does not necessarily found a cause of action. Even a deliberate excess of power is not necessarily an abuse of power. Just as a deliberate breach of trust is not dishonest if it is committed by the trustee in good faith and in the honest belief that it is for the benefit of those in whose interests he is bound to act, so a conscious excess of official power is not necessarily dishonest. The analogy is closer than may appear because many of the old cases emphasise that the tort is concerned with the abuse of a power granted for the benefit of and therefore held in trust for the general public.
>
> The tort is generally regarded as having two limbs. The first limb, traditionally described as "targeted malice," covers the case where the official acts with intent to harm the plaintiff or a class of which the plaintiff is a member. The second is said to cover the case where the official acts without such intention but in the knowledge that his conduct will harm the plaintiff or such a class. I do not agree with this formulation. In my view the two limbs are merely different ways in which

> the necessary element of intention is established. In the first limb it is established by evidence; in the second by inference.
>
> The rationale underlying the first limb is straightforward. Every power granted to a public official is granted for a public purpose. For him to exercise it for his own private purposes, whether out of spite, malice, revenge, or merely self-advancement, is an abuse of the power. It is immaterial in such a case whether the official exceeds his powers or acts according to the letter of the power: see *Jones v. Swansea City Council*, [1990] 1 W.L.R. 1453. His deliberate use of the power of his office to injure the plaintiff takes his conduct outside the power, constitutes an abuse of the power, and satisfies any possible requirements of proximity and causation.

[24] Although it is common ground that the defendants Woodhouse and Gerrits are public officers, they were not engaged in the exercise of a power during the time the S.I.U. was conducting its investigation of the shooting of Manish Odhavji. At most, they were under a statutory obligation to "co-operate fully" with the S.I.U. in the conduct of the investigation as required by s. 113(9) of the *Police Services Act*. Assuming that it can be said that s. 113(9) imposed a duty on them, as Lord Millett stated, the breach of a duty is not the same as an abuse of power. In the language of the law Lords in *Three Rivers*, they were not the recipients of an executive or administrative power by which they were required to make decisions affecting members of the public. They were not in the position of a public official to whom a power is granted for a public purpose who exercised the power for his or her own private purposes. The most that can be said of Woodhouse and Gerrits is that they failed to comply with the duties imposed on them by s. 113(9) of the Act.

[25] It is well to pause for a moment and reflect upon the origin of the tort of misfeasance in public office. In my view, the authorities disclose that it is far from an evolving tort, but it is a tort that has been recognized for centuries albeit not by its present name. As *Three Rivers* illustrates, the recent judicial debate has not been about the existence of the tort but, rather, about the necessary state of mind of the tortfeasor. *Three Rivers*, as I have indicated, resolved the debate by describing two alternative states of mind sufficient to satisfy that element of the tort.

[26] A helpful discussion of the origin and the history of the tort is found in Sadler, *Liability for Misfeasance in a Public Office* (1992), 14 Syd. L. R. 137. By reference to the case law and the legal literature, Sadler has illustrated that misfeasance in public office is a special tort directed against public bodies which has a very long history.

Although the tort did not acquire its present denomination until the last century, it has been traced to as early as the beginning of the 18th century in *Ashley v. White* (1703), 2 Ld. Raym. 398 (K. B.); 3 Ld. Raym. 320 (H. L.) which represented perhaps the first application of private tort law to public bodies: Vol. 1 (1) Halsb., 4th ed., 1989, 311. In *Dunlop v. Woolahra Municipal Council*, [1982] A. C. 158 at 172 (P. C.) the tort was described as "well-established". The defining element of the tort apparent from the case law as it developed was misfeasance in the exercise of the *powers* held by a public officer. The tort is constituted by a public officer doing, or failing to do, an act which is an abuse of the powers adherent to his or her office, and which results in damage to another. Thus, the central focus of the tort is a public officer who is invested with a power to act for the benefit of the public and who abuses the power by exceeding it, failing to exercise it, or, in some cases, purporting to exercise a power which he or she does not hold.

[27] As Sadler points out at paragraph 141:

> The defendant must hold a "public office". The accepted view appears to be that a public officer is a decision-maker empowered to perform a statutory power or duty in which the public have an interest.
>
> Two questions must be answered to determine whether the defendant is a "public officer". First, does the defendant hold an "office" and, if so, secondly, is that office "public".

In *Jones v. Swansea City Council,* [1989] 3 All E. R. 162 at 175 (C. A.), Slade L. J. said that the essence of the tort is:

> ... that someone holding public office has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or for a section of the public either with the intent to injure another or in the knowledge that he was acting ultra vires.

Although an appeal to the House of Lords was successful: [1990] 3 All E. R. 737, this principle was not questioned by the court.

[28] Reference can be made as well to *Gershman v. Manitoba (Vegetable Producers' Marketing Board)* (1976), 69 D. L. R. (3d) 114 (Man. C. A.) in which O'Sullivan J. A., on behalf of a five judge panel, stated at 123:

> The principle that public bodies must not use their powers for purposes incompatible with the purposes envisaged by the statutes under which they derive such powers cannot be in

> doubt in Canada since the landmark case of *Roncarelli v. Duplessis* (1959), 16 D. L. R. (2d) 689, [1959] S. C. R. 121. Since that case, it is clear that a citizen who suffers damages as a result of flagrant abuse of public power aimed at him has the right to an award of damages in a civil action in tort.

This statement was referred to by Marceau J. in his discussion of the tort in *Alberta (Minister of Public Works, Supply and Services) v. Nilsson*, [1999] 9 W. W. R. 203 at 234 (Alta. Q. B.), in which an appeal is pending before the Alberta Court of Appeal.

[29] As I have stated, until it was settled by the House of Lords in *Three Rivers*, there was uncertainty concerning the state of mind required of the public officer to constitute the commission of the tort. The controversy centred on whether malice was the essence of the tort, or whether the doing of an act by a public officer which to his or her knowledge was an abuse of the powers attached to the office was sufficient to constitute the commission of the tort. As *Three Rivers* decided, these represent alternative states of mind, proof of either establishing the necessary mental element of the tort. Inherent in the mental element is the duty owed by the public officer to the person who has sustained damage as a result of the public officer's abuse of his or her powers. However, it is important to recognize that the necessity that there be such a duty should not be confused with a completely different tort that has as its focus the negligent performance of a statutory duty imposed on a public authority or a public officer, as illustrated by *Kamloops (City) v. Neilson*, [1984] 2 S. C. R. 2.

[30] In the passage from the reasons of Day J. which I have quoted in paragraph [16], he found that Woodhouse and Gerrits breached *duties* imposed by s. 113(9) and s. 42 of the Act. It follows that he erred in equating the obligation of police officers to co-operate with an investigation conducted by the S.I.U. found in s. 113(9) of the Act with the exercise of an executive or administrative power. In doing so, he failed to recognize that the tort of misfeasance in public office responds only to the abusive exercise of legislative or administrative power. *Roncarelli* and *Francoeur* are but two of the many authorities which underscore that the defining feature of the tort of misfeasance in public office is the exercise of legislative or administrative powers by their recipients for purposes incompatible with those envisaged by the legislation under which they derive such powers. In short, in allegedly failing to co-operate with the S.I.U. investigation Woodhouse and Gerrits did not misuse a public office through the abuse of a statutory or prerogative power.

[31] Although Day J. correctly identified the absence of a pleaded malicious intention to harm in the statement of claim, this constituted only one of the missing elements of the claim. While granting leave to amend the statement of claim may have cured this defect in the pleading, it could not cure the failure to plead that Woodhouse and Gerrits were engaged in the abusive exercise of a power. Where there is no power to be exercised, an

essential ingredient of the tort of misfeasance in public office is missing. Thus, even if the plaintiffs amend their statement of claim so that it is framed in malice, they cannot overcome the fundamental fact that an alleged breach of s. 113(9) of the *Police Services Act* is not an abuse of a power held by a public official. It follows that the statement of claim is radically flawed and cannot be cured.

[32] I would, therefore, give effect to this ground of appeal. Rather than striking out the portion of the statement of claim in which misfeasance in public office is alleged with leave to amend to plead malice, Day J. should have struck out this portion of the statement of claim and dismissed the plaintiffs' claim against Woodhouse and Gerrits based on the tort of misfeasance in public office on the ground that it is plain and obvious that it could not succeed.

[33] As I have found that this claim should have been struck out on the ground that it is radically flawed, there is no need to consider the additional ground for doing so raised by Woodhouse and Gerrits – the failure by the plaintiffs to claim recognizable damages. Nevertheless, I would observe that I consider problematic the plaintiffs' claim for damages based on the harm they allegedly sustained which I have reviewed in paragraph [6].

[34] Counsel for Woodhouse and Gerrits also submitted that the motions judge erred in finding that s. 113(9) of the *Police Services Act* creates a civil cause of action. I agree with this submission. It is well established that breach of a statutory obligation cannot by itself give rise to a civil cause of action unless so provided in the statute which establishes the obligation: *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205.

[35] Legislation creating the S.I.U is contained in s.113 of the *Police Services Act* pursuant to which the S.I.U is a unit of the Ministry of the Solicitor General and consists of a director and investigators: s.113(1)(2). The purpose of the S.I.U is stated in s.113(5):

> (5) The director may, on his or her own initiative, and shall, at the request of the Solicitor General or Attorney General cause investigations to be conducted into the circumstances of serious injuries and deaths that may have resulted from criminal offences committed by police officers.

The duties of the director are described in s.113(7)(8):

> (7) If there are reasonable grounds to do so in his or her opinion, the director shall cause informations to be laid against police officers in connection with matters investigated and shall refer them to the Crown Attorney for prosecution.

> (8) The director shall report the results of investigations to the Attorney General.

The duties of police officers in connection with an S.I.U investigation are stated in s.113(9):

> (9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations.

[36] In my view, it is clear from the statutory scheme which established the S.I.U that the legislature did not intend to create a private law duty of care owed by the S.I.U and it director to families of persons injured or killed in the circumstances described in s.113(5). Nor, in my view was it intended to create a similar duty of care by the provisions of s. 113(9). Indeed, nothing is said in s.113 about the failure of a police officer to co-operate in an S.I.U investigation. If there is a sanction, presumably it is to be imposed in the context of internal police disciplinary proceedings. The damages claimed by the plaintiffs arising from the police officers' alleged failure to co-operate in the S.I.U investigation are not the "type of loss the statute is intended to guard against", to use the language of Wilson J. in *Kamloops* at p. 35. Moreover, as I have indicated previously, it is pure speculation that had the officers co-operated in the investigation that a different result would have followed. Indeed, this is the unarticulated premise of the plaintiffs' statement of claim.

[37] The powers of investigation given to the S.I.U by s.113(5) are in furtherance of the public interest by ensuring that there be an independent investigation of police conduct to determine whether reasonable grounds exist in the opinion of the director that police officers may have committed a criminal offence. The statutory scheme seeks to maintain public confidence in the performance of the statutory duties of police officers. I do not understand the statutory scheme to include an accompanying private law duty of care to the members of the public, including the family of a person whose injury or death resulted from the conduct of police officers. If it were otherwise, the S.I.U and police officers required to co-operate with its investigations, would effectively become guarantors that every investigation must result in criminal charges. It would not only be contrary to good sense, but, given the nature of the statutory scheme, unfair to the S.I.U to impose upon it such a burden. Its decision must be taken to be based on the director's assessment of the facts. I do not read s.113 as requiring that the result of the exercise of the S.I.U.'s investigatory power must find favour with every member of the public, including the family of the injured or deceased person. In my view, the duty owed by the police officers under s.113 (9), which is a duty to co-operate in an S.I.U investigation, cannot be higher than that owed by the S.I.U.

[38] In reaching the conclusion that the statement of claim in pleading misfeasance in public office contains a radical defect and that the motions judge erred in finding that s.113(9) of the *Police Services Act* creates a civil cause of action, I have considered the argument that a court should be reluctant to strike out a statement of claim and "drive a plaintiff from the judgment seat" at the pleadings state. However, as Newbury J.A. observed in *Cooper v. British Columbia (Registrar of Mortgage Brokers)* (2000), 184 D.L.R.(4th)287 at 317 (B.C.C.A.), "one does not always do justice to plaintiffs by allowing a hopeless action to proceed to months of trial."

(ii) Negligent supervision

[39] Chief Boothby and Ontario appeal from the order of Day J. dismissing their motions to strike out the claims against them based on the claim that they negligently failed to supervise Woodhouse and Gerrits. The Board also appeals from this order as it affects Chief Boothby. The basis of these claims is that if the police officers had co-operated in the investigation the S.I.U. would have found one, or both, at fault in causing the death of Manish Odhavji, and that had Chief Boothy and the Solicitor General properly supervised Woodhouse and Gerrits they would have co-operated.

[40] Before Day J., Chief Boothby did not seriously challenge the substantive adequacy of the claim based on the tort of negligent supervision. However, he was successful in having the claim based on the tort of misfeasance in public office struck out. Before this court, his counsel took the position that if Woodhouse and Gerrits were successful in having the claim against them based on misfeasance in public office struck out, the claim against him should also be struck out. Counsel submitted that any duty on the part of Chief Boothby to supervise the obligation of Woodhouse and Gerrits to co-operate in the S.I.U. investigation depended on there being a duty to co-operate. Thus, if there was found to be no duty to co-operate, Chief Boothby could not be found negligent in failing to supervise a non-existent duty.

[41] I am unable to agree with this submission. The reason why I have struck out the claim against Woodhouse and Gerrits based on the tort of misfeasance in public office is not because s. 113(9) of the *Police Services Act* failed to impose an obligation on them to co-operate in the S.I.U. investigation. It was struck out because a breach of s. 113(9) did not result in an abuse of a power held by a public official. The plaintiffs' claim against Chief Boothby is based on s. 41(1)(b) of the *Police Services Act* which imposes on a police chief the duty of "ensuring that members of the police force carry out their duties in accordance with the Act and the regulations". The plaintiffs' claim based on the alleged negligent supervision of the two police officers is not dependent on their liability for misfeasance in public office. It is not plain and obvious that this claim cannot succeed. Accordingly, Chief Boothby's appeal should be dismissed and the plaintiffs' claim for damages for negligent supervision may proceed to trial, notwithstanding the

reservation I have expressed concerning the plaintiffs' claim for damages. It follows that the Board's appeal must also be dismissed.

[42] However, I am satisfied that the claim for negligent supervision against Ontario should have been struck out on the ground that it does not disclose a reasonable cause of action. This claim is made against the Solicitor General based on his alleged negligent supervision of Woodhouse and Gerrits in respect of the S.I.U. investigation. It is based on an alleged breach of a statutory duty by the Solicitor General, for which he is personally liable, and which Day J. found provided the foundation for a private law duty of care by the Solicitor General to the plaintiffs.

[43] The *Police Services Act* does not impose a duty on the Solicitor General to control the operational conduct of municipal police officers, such as Woodhouse and Gerrits. As I have indicated, that duty is imposed by s. 41(1) of the Act on the Chief of Police, who has the sole authority to deal with the day-to-day operational conduct of police officers. The duties of the Solicitor General with respect to policing matters are contained in s. 3(2) of the Act and do not impose any duty concerning the day-to-day supervision of municipal police officers. Specifically, there is nothing in the Act that imposes a duty, or power, on the Solicitor General to ensure that municipal police officers comply with s. 113(9) of the Act. As there is no such statutory duty, there is no foundation for imposing a common law duty on the Solicitor General to supervise the police officers: *Canada v. Saskatchewan Wheat Pool, supra. Cf. R. v. Metropolitan Police Commissioner, Ex parte Blackburn*, [1968] 1 All E.R. 763 at 769 *per* Lord Denning (C.A.).

[44] I would, therefore, give effect to Ontario's appeal. Day J. should have struck out the claim for negligent supervision against the Solicitor General as not disclosing a reasonable cause of action.

(iii) <u>The plaintiffs' appeal</u>

[45] The plaintiffs appeal from the order of Day J. striking out their claims against Chief Boothby for misfeasance in public office and against the Board for negligent supervision.

[46] As I understand his reasons, Day J. struck out the claim against Chief Boothby on the ground that the plaintiffs failed to plead that Chief Boothby's alleged indiscretions were intended to cause harm to the plaintiffs. Although Day J. was correct as misfeasance in public office is an intentional tort which may be committed in one of the two ways discussed in *Three Rivers,* there is a more fundamental reason why the claim must be struck out. The claim against Chief Boothby contains the same radical defect as the claim against Woodhouse and Gerrits. It is framed as a failure on the part of Chief Boothby to ensure that Woodhouse and Gerrits co-operated in the S.I.U. investigation and does not allege that he misused a public office through the abuse of a statutory or

prerogative power, such as ordering the police officers not to co-operate in the investigation. There is no allegation that Chief Boothby exercised a statutory power in a manner for which it was not intended. Thus, in the result, Day J.'s order striking out the claim against Chief Boothby was correct. Accordingly, I would not give effect to this ground of appeal.

[47] I also agree with the result of Day J.'s order dismissing the claim against the Board based on negligent supervision. The motions judge characterized this claim as whether there was a private law duty of care owed by the Board to the plaintiffs "to ensure that police officers met their statutory obligations to investigate possible criminal offences committed by fellow police officers".

[48] In deciding whether the facts as pleaded stated a reasonable cause of action based on the tort of negligent supervision, Day J. considered the principles articulated in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.), *Kamloops (City) v. Nielsen, supra,* and *Just v. British Columbia,* [1989] 2 S.C.R. 1228. Performing the two-step analysis developed in *Anns* and approved in *Kamloops*, he concluded that s. 42(1) and s. 113(9) of the *Police Services Act* create a private law duty which the Board owed to a discrete group of potential plaintiffs - the families and estates of those persons killed by police officers. However, in his view the duty of care was negatived by s. 31(4) of the Act which limits the decisions of the Board to "purely policy decisions".

[49] It was the position of the plaintiffs' counsel that Day J. erred in failing to apply *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 and *Doe v. Metro Toronto Commissioners of Police* (1990), 72 D.L.R. (4th) 580 (Ont. Div. Ct.); leave to appeal to the Ontario Court of Appeal dismissed (1991), 1 O.R. (3d) 416 which, in his submission, compelled the court to permit the plaintiffs' claim against the Board to proceed to trial.

[50] Although I believe that Day J.'s conclusion in respect to the first step of the analysis is problematic, in the view that I hold of this branch of the plaintiffs' appeal it is unnecessary to deal with this point. I am satisfied that Day J. reached the correct result in the second step of the analysis.

[51] The essential allegations on which the plaintiffs rely in support of their claim that the Board committed the tort of negligent supervision are found in paragraph 53 of the amended statement of claim which reads as follows:

> 53. The plaintiffs state that the defendants Boothby, Police Services Board and Ontario, in failing to mandate a course of conduct for the defendant police officers that ensured the integrity of criminal investigations into police shootings, breached the duties of care owed to the plaintiffs. <u>These defendants failed to institute training, programs, policies and/or orders which would ensure that police officers</u>

> including the defendant police officers, complied with their legal obligations to co-operate with the S.I.U.. Further and/or in the alternative, if the training, programs policies and/or orders were adequately instituted, then these defendants failed to ensure that police officers including the defendant police officers complied with this training. The plaintiffs state these defendants are thus liable for negligent supervision of the defendant police officers.

[52] This pleading assumes that the Board is empowered by the *Police Services Act* to engage in operational decisions affecting a municipal police force and its members. However, as I will explain, the Act not only limits the Board to policy decisions, it precludes the Board from making operational decisions. Thus, on the authority of *Just* any potential duty of care which the Board may owe to the plaintiffs is negatived.

[53] The duties and responsibilities of Police Services Boards are contained in s. 31 of the Act. Section 31(1)(b) provides that the Board shall "generally determine ... objectives and priorities with respect to police services in the municipality". Section 31(1)(c) provides that a Board shall "establish policies for the effective management of the police force". However, ss. 31(3) and (4) prohibit any involvement by a Board in the day-to-day implementation of the policies it creates. Section 31(3) prevents the Board from giving orders and directions to any member of a police force other than the chief of police. Section 31(4) expressly states that the Board "shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force". Thus, there is a clear separation in the Act between the policy-making function of the Board and the day-to-day operational function, which is the preserve of the chief of police under s. 41. This statutory division between the roles of the Board and the police chief is reflected as well in s. 2 of O. Reg. 421/97 which states that Board members "shall not interfere with the police force's operational decisions and responsibilities or with the day-to-day operation of the police force...."

[54] It follows, in my view, that if the Board owes a duty of care to the plaintiffs, it cannot be liable for failing to give specific directions to police officers to comply with their training, or with s. 113(9) of the Act, where the statute prevents it from doing so. Moreover, there is no statutory duty imposed upon the Board to ensure co-operation by individual police officers with S.I.U. investigations. In brief, the Board being a statutory entity, is not empowered by the statute by which it was created to supervise police officers and is expressly precluded from doing so. It follows that the paragraphs of the statement of claim alleging the tort of negligent supervision on the part of the Board contain a radical defect and were properly struck out as not disclosing a reasonable cause of action.

[55] In my view, the plaintiffs are not assisted by *Johnson* or *Doe*. Each case is distinguishable on its facts. In *Johnson* the legislation which governed at the time, the *Police Act*, R.S.O. 1970, c. 351, does not contain the clear division of powers between the Board and the chief of police contained in the *Police Services Act*. Moreover, as the claim against the Board was characterized by Arnup J.A. at p. 241 as being "undoubtedly novel", it was allowed to proceed to trial. In this appeal, it was common ground that negligent supervision is a recognized tort, the real issue being whether, as pleaded, the statement of claim contained a radical defect.

[56] In *Doe*, the plaintiff sued two police officers, the chief of police and the Board of Commissioners of Police for the Municipality of Metropolitan Toronto for damages for negligence in failing to warn her of the presence of a serial rapist in her neighbourhood and for negligence in failing to apprehend the offender before he assaulted her. The Divisional Court refused to strike out the plaintiff's statement of claim, concluding that the plaintiff's allegations raised a "triable issue" of negligence, that the harm was foreseeable and that a special relationship of proximity existed. The plaintiff's action was successful: see (1998), 39 O.R. (3d) 487 (Gen. Div.). In my view, there are a number of reasons why this decision, which is not binding on this court, does not assist the plaintiffs. Not only is it distinguishable on its facts, it did not involve the tort of negligent supervision. Moreover, the reasons for judgment of the court do not contain any analysis of the statutory role of the Board which, as in *Johnson*, was contained in legislation which preceded the enactment of the *Police Services Act*.

Result

[57] In the result, the plaintiffs' appeal is dismissed with costs, and an order will issue striking out paragraph 50 of the amended statement of claim. The appeals of Chief Boothby and the Board are dismissed with costs, with the result that the plaintiffs' claim for damages for negligent supervision by Chief Boothby, for which the Board bears statutory liability, is not struck out.

[58] The appeals of Woodhouse and Gerrits are allowed with costs. Paragraph 1 of the order of Day J. is set aside and an order will issue striking out paragraph 2(a) with the exception of the claim for damages for negligence, and paragraphs 33 to 43 of the amended statement of claim. The appeal of Ontario is allowed with costs and an order will issue striking out paragraph 49 and "Police Services Board and Ontario" in paragraphs 51, 52 and 53 of the amended statement of claim.

(signed) "S. Borins J.A."

(signed) "I agree M.A. Catzman J.A."

FELDMAN J.A. (Dissenting):

[59] I have had the benefit of reading the reasons for judgment of Borins J.A. With respect, I do not agree that the claims for misfeasance in public office and negligent supervision cannot succeed and must therefore be struck out at the pleadings stage.

1. Facts Alleged in the Statement of Claim

[60] The proceedings in this case arise directly from the death of Manish Odhavji, a suspected member of a group of bank robbers, who was fatally shot by officers of the Metropolitan Police Service while fleeing from a vehicle after a bank robbery. Odhavji, who was unarmed at the time of the shooting, was hit twice, one shot hitting him in the back. Almost immediately following the shooting, the S.I.U. began an investigation into the death. Eventually, the S.I.U. completed its investigation and no charges were brought against any officers in respect of the shooting. The S.I.U. Director, Andre Marin commented in his report to the Attorney General that he could give no weight to statements from witness officers as independent recollection evidence and that the failure of trained surveillance officers to recount specifics of the incident hampered the investigation.

[60] In the amended statement of claim filed by the father, mother and brother of the deceased Odhavji, the plaintiffs allege that the acts and/or omissions of the defendant police officers in undermining the investigation represented intentional breaches of their legal duties as police officers which they knew or ought to have known would cause injuries and/or losses to the plaintiffs.

[61] Specifically, the plaintiffs allege that despite the fact that an S.I.U. investigation into the death of Odhavji began almost immediately after he was shot by the police, the defendant officers deliberately breached their *Police Services Act*, R.S.O 1990, c.P.15 duties by engaging in a course of conduct calculated to undermine the S.I.U. criminal investigation. Particulars of the defendant officers' alleged impugned conduct include: leaving the police station without notice on the day of the shooting despite express requests by S.I.U. investigators for immediate same-day interviews; not attending for interviews until four days following the shooting and then providing inaccurate or misleading statements to the interviewers; communicating with other involved officers and failing to comply with requests to remain segregated from other involved officers; failing to make timely, complete and accurate notes prior to the conclusion of their shifts; making misleading and inaccurate notes about their observances; failing to recount specifics of the shooting as it unfolded; and failing to provide or delaying in providing

requested evidence including on duty clothing, medical releases, blood samples and notebooks. These actions were alleged to have been deliberately motivated by a desire to frustrate the investigation and to prevent the authorities from uncovering the truth about the shooting.

[62] The plaintiffs further allege that the defendant Chief Boothby's actions make him liable for misfeasance in public office on the basis that the Chief, through his legal counsel, was directed by S.I.U. officers to segregate the defendant officers but deliberately failed to do so, that the Chief failed to ensure that the defendant officers produced timely and complete notes, that the Chief failed to ensure that the defendant officers attend for interviews in a timely manner, and that the Chief failed to ensure that the defendant officers gave accurate and complete accounts of the specifics of the shooting incident. According to the statement of claim, despite the fact that Chief Boothby had known for over nine years that police officers under his supervision had regularly failed to comply with their statutory duties to ensure the integrity of criminal investigations, the Chief failed to take steps to implement policies to ensure co-operation or prevent this systemic problem.

[63] The plaintiffs allege that as a result of the actions of the police officers, the family has been deprived of a thorough, competent and credible criminal investigation, and has been denied any prospect of closure with respect to what they assert was the wrongful death of Odhavji. The defendants' actions in undermining the investigation are alleged to have aggravated and prolonged the plaintiffs' grieving, as well as their physical, psychological and emotional distress. In addition to suffering from mental distress, anger, depression and anxiety, the plaintiffs have lost their confidence in police authorities and their enjoyment of life.

[64] In the order appealed from, Day J. struck out the claim for misfeasance in public office, but in the case of the officers, with leave to amend to plead malice against the plaintiffs on the part of the defendants, a necessary and missing ingredient of the tort of misfeasance in public office. Because of the appeal, the amended statement of claim as ordered by Day J. has not been filed.

2. Misfeasance in Public Office

[65] In my view, this is an important example of a case which should be allowed to proceed pursuant to the principles set out in *Hunt v. Carey*, [1990] 2 S.C.R. 959. The cause of action for misfeasance in public office is continuing to develop in the courts, most recently in the New Zealand Court of Appeal and in the English House of Lords. The cause of action addresses a serious public law issue. Misfeasance in public office, although fortunately not a frequent occurrence in this country, can take new and unforeseen forms. The delineation of the boundaries of those forms must be allowed to develop through the trial process and must not be closed off at the pleadings stage.

[66] Borins J.A. holds that the plaintiffs' complaint does not disclose a cause of action for misfeasance in public office because it involves a breach of duty and not an abuse of power. He states that the abusive exercise of an executive or administrative power, and not a duty, is an essential ingredient of the tort of misfeasance in public office. He further states that the police were not engaged in the exercise of such a power during the S.I.U. investigation: "The most that can be said of Woodhouse and Gerrits is that they failed to comply with the duties imposed on them by s. 113(9) of the Act." Borins J.A.'s position is that since there was no express power being exercised, the tort of misfeasance in public office cannot be made out.

[67] I see no principled reason for drawing a distinction between a public official who improperly exercises a power and one who deliberately fails to carry out a duty, where they know or are recklessly indifferent to the fact that injury to those in the position of the appellants is the likely result. In fact, many of the relevant cases involved acts by an official which were beyond that person's powers and therefore could not be said to have involved the exercise of a statutory power or the exercise of a discretion. *Roncarelli v. Duplessis*, [1959] S.C.R. 121, the seminal case on misfeasance in public office in Canada, involved that very situation. Nor is there a case which states that the tort is only applicable when there has been an abuse of a power and not of a duty. The essence of the tort is the misfeasance in or misuse of the public office itself. The nature of that misfeasance is not a determinative element to the cause of action, nor in my view, is there any reason in principle why it should be.

[68] Rather than focusing on the nature of the abuse of authority, the debate in the cases has centered around the nature of the defendant's intention toward the plaintiff and, in particular, whether the tort requires a direct, malicious intent or merely knowledge that harm to the plaintiff would or would probably be caused as a result of the defendant's abuse of authority.

[69] By excluding at the pleadings stage certain methods or types of misfeasance by public officials, even when done with malice against the plaintiff, the court is in effect granting blanket immunity to public authorities guilty of those types of misfeasance, from liability to those who may have suffered harm as a result.

[70] I refer below to three key cases, *Roncarelli v. Duplessis*, the first case in Canada where the tort was recognized, *Garrett v. Attorney General*, [1997] 2 N.Z.L.R. 332 (C.A.), a recent New Zealand Court of Appeal case where the police misfeasance complained of was remarkably similar to that in this case, and the recent House of Lords decision *Three Rivers District Council and others v. Bank of England* (No. 3), [2000] 2 W.L.R. 1220 (H.L.) which approves *Garrett*. In my view, these cases are consistent with

the conclusion that misfeasance in public office can be based on a deliberate breach of duty by a public official.

[71] In *Roncarelli*, the plaintiff sued Mr. Duplessis, then Premier and Attorney General of Quebec, for damages suffered by the plaintiff's restaurant when the Quebec Liquor Commission cancelled the liquor license it had held for 34 years. As a result, the plaintiff was forced to close his restaurant and sell the premises. The plaintiff proved that the Commission had acted on a direct order from Mr. Duplessis, who wanted to punish the plaintiff for his Jehovah's Witness activities in Montreal. Mr. Duplessis had nonetheless argued that he was acting in good faith carrying out his official functions. The Supreme Court of Canada found that Mr. Duplessis had no authority to direct the cancellation of a permit under the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255 but only to see that the *Act* was properly administered by the Commission. Martland J. writing for the majority concluded:

> 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. (p.155)

Abbott J. concluded:

> It follows, therefore, that in purporting to authorize and instruct the manager of the Quebec Liquor Commission to cancel appellant's licence, the respondent was acting without any legal authority whatsoever. Moreover, as I have said, I think respondent was bound to know that he was acting without such authority. (p.185)

Rand J., in a concurring opinion for himself and Judson J., characterized the actions of the Premier as a breach of an implied duty:

> The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant

> and his act was an intrusion upon the functions of a statutory body. (pp.141-2)

[72] *Garrett v. Attorney General, supra*, was an action for the tort of misfeasance in public office brought by Mrs. Garrett against the Attorney General in respect of the actions of the New Zealand police force and the Commissioner of police. She alleged that she had suffered damage because the police had failed "to investigate and properly deal with" her complaint that she had been raped in the police station by a police constable. She maintained that there had been a cover-up which damaged her reputation.

[73] Before the trial, the New Zealand Attorney General had moved to strike the claim on various grounds ([1993] 3 N.Z.L.R. 600 (N.Z.High Court)). The claim was, however, allowed to proceed after certain amendments. One of the arguments made on the motion was that this was an improper action against the police for negligence, and that there had been no power exercised in respect of the plaintiff. The motions judge rejected that argument, and gave the following description of the tort of misfeasance in public office.

> ... the tort is not so much concerned with private remedies for the failure by the police to investigate or prosecute as private remedies for damage caused to a plaintiff for misfeasance in connection with the investigation of a complaint, coupled with malice. The absence of a specific duty to the complainant to investigate or prosecute does not relieve the police from the public duty to exercise their powers for the public good. Malicious breach of that public duty, thereby occasioning private damage, establishes the tort. (p.606)

[74] At trial, the jury found that the police had failed to properly investigate but that the failure was not actuated by malice against the plaintiff. Judgment was entered for the defendant in accordance with the jury's verdict. Mrs. Garrett appealed. The issue on her appeal was whether the jury had been misdirected as to the nature of the intention required of the police in failing to investigate in a claim of misfeasance in public office. There was no suggestion by the court that the breach of duty by the police in failing to investigate could not found the basis for the tort, if the police had had the requisite intent to harm the plaintiff.

[75] The Court of Appeal discussed the history of the tort at p. 344 as follows:

> It is accepted that police officers are holders of public offices for the purpose of the tort and that their employer is

> responsible for tortious acts done by police officers in the course of their duty.
>
> Proceedings for the tort of misfeasance in public office, also known as abuse of public office, have never been common. Early in its development an essential ingredient was malice on the part of the defendant: a deliberate and vindictive act by a public official involving a breach of duty and directed towards the plaintiff. This has come to be known as "targeted malice". But the tort is no longer so confined. It can also be committed by an official who acts or omits to act in breach of duty knowing about the breach and also knowing harm or loss is thereby likely to be occasioned to the plaintiff. As will appear from the following discussion, "knowing" in relation to both the breach and its effect on the plaintiff includes acting recklessly, in the sense of believing or suspecting the position and going ahead anyway without ascertaining the position as a reasonable and honest person would do.
>
> Some formulations of the ingredients of the tort are rather more relaxed than this about the element of damage: it is said that it is sufficient to establish the tort if the plaintiff has suffered harm or loss as a result of a knowing breach of duty by an official who foresaw *or ought reasonably to have foreseen* that consequence. Phrased in this way the tort would resemble a claim for negligent breach of duty although there would remain an additional requirement that the official must have known he or she was acting in breach of duty or must have been reckless as to that. (Emphasis in underlining added. Italics in original.)

[76] The New Zealand Court of Appeal discussed the case law, including the original decision of Clarke J. in *Three Rivers District Council v. Bank of England,* [1996] 3 All E.R. 558 (Q.B.), and agreed with his formulation of the nature of the intent required of the wrongdoer in order to make out the tort. In so stating, the Court articulated the components of the tort, including a breach of duty, as follows at pp. 349-50:

> We are in respectful agreement with Clarke J. that it is insufficient to show foreseeability of damage caused by a knowing breach of duty by a public officer. The plaintiff, in our view, must prove that the official had an actual

> appreciation of the consequences for the plaintiff, or people in the general position of the plaintiff, of the disregard of duty or that the official was recklessly indifferent to the consequences and can thus be taken to have been content for them to happen as they would. The tort has at its base conscious disregard for the interests of those who will be affected by official decision making. There must be an actual or, in the case of recklessness, presumed intent to transgress the limits of power even though it will follow that a person or persons will be likely to be harmed. The tort is not restricted to a case of deliberately wanting to cause harm to anyone; it also covers a situation in which the official's act or failure to act is not directed at the injured party but the official sees the consequences as naturally flowing for that person when exercising power. In effect this is no more than saying the tort is an intentional tort. In this context, a person intends to bring about the known consequences of his or her actions or omissions, even if other consequences form the primary motive. *Bourgoin* [*Bourgoin SA v. Ministry of Agriculture, Fisheries and Food*, [1986] Q.B. 716; [1985] 3 All E.R. 585 (C.A.)] is an example. The concept of attributing intention by necessary inference in this way is well established.
>
> The purpose behind the imposition of this form of tortious liability is to prevent the deliberate injuring of members of the public by deliberate disregard of official duty. (Underlining added.)

[77] The court's concern was to ensure that the tort not be broadened to include mere negligent breach of duty or acting beyond authority or power, and noted that there were other administrative consequences for police officers who "break the rules." Importantly, the court's concern about not broadening the scope of the tort was not at all focused on the nature of the misfeasance, but only on the intent of the wrongdoer:

> The common law has long set its face against any general principle that invalid administrative action by itself gives rise to a cause of action in damages by those who have suffered loss as a consequence of that action. There must be something more. And in the case of misfeasance of public office that something more, it seems to us, must be related to the individual who is bringing the action. While the cases have made it clear that the malice need not be targeted there must,

> as we have said, be a conscious disregard for the interests of those who will be affected by the making of the particular decision. (p.351)

[78] Finally, in dismissing the appeal, the court considered the evidence presented to the jury and concluded:

> There is then some evidence on which it was open to the jury to conclude that Sergeant Yates committed a deliberate breach of his duty and could reasonably have foreseen that Mrs Garrett would suffer harm to her reputation and financial loss as a direct result, though the case is not especially strong and there is an element of hindsight in the criticisms made of the sergeant. The jury found that he was in breach of duty. They can be taken to have found that he did so knowingly. But they also found that he had not acted with an improper motive, namely for the purpose of a cover-up and at Mrs Garrett's expense. That was an understandable verdict since there was nothing in the evidence suggesting that Sergeant Yates knew that by failing to report or carry out a proper investigation he was likely to cause harm of the kind alleged. It was foreseeable perhaps but neither foreseen nor bound to occur.
>
> For these reasons we are of the view that there was no misdirection of the jury giving rise to a miscarriage of justice. (pp.351-52) (Underlining added.)

[79] In my view, it is clear both from the analysis of the New Zealand Court of Appeal as well as from the procedural course of the case, that the tort of misfeasance in public office can be based on a failure of a public officer to carry out a duty and is not limited to abusive exercises of statutory power, or to purporting to exercise a power that the officer does not possess. In my view, the key is the malicious intent of the public official.

[80] In *Three Rivers District Council v. Bank of England (No. 3),* [2000] W.L.R. 1220 (H.L.) the House of Lords, affirming the decision of Clarke J., comprehensively set out the components and requirements of the tort of misfeasance of public office. The action was brought by former depositers of the Bank of Credit and Commerce International S.A. (B.C.C.I.) who suffered losses as a result of its collapse. Their claim was against the Bank of England, which was responsible for supervising banking activities in the U.K. The claim was for damages for misfeasance in public office by the Bank's failure to

revoke B.C.C.I.'s license when it knew or believed that B.C.C.I. would probably collapse.

[81] The scope of the tort of misfeasance in public office is set out in the headnote as follows at p. 1221:

> [T]he tort of misfeasance in public office involved an element of bad faith and arose when a public officer exercised his power specifically intending to injure the plaintiff, or when he acted in the knowledge of, or with reckless indifference to, the illegality of his act and in the knowledge of, or with reckless indifference to, the probability of causing injury to the plaintiff or persons of a class of which the plaintiff was a member; that subjective recklessness in the sense of not caring whether the act was illegal or whether the consequences happened was sufficient; that a deliberate omission involving an actual decision not to act might also give rise to liability; that only losses which had been foreseen by the public officer as a probable consequence of his act were recoverable; and that such a formulation of the tort struck the appropriate balance between providing adequate protection for the public and protecting public officers from unmeritorious claims.

[82] Lord Steyn gave the majority judgment. Again, the main issue before the court was not the nature of the misfeasance itself, but rather, the level of the required foreknowledge of loss to the plaintiff. In this case, the defendants were exercising their functions as officers of the Bank, but in an improper or illegal way. The issue was their intent toward the plaintiffs in so doing.

[83] Lord Hutton delivered a separate opinion dealing with the delineation of the tort of misfeasance in public office. He quoted extensively and with approval from the *Garrett* decision of the New Zealand Court of Appeal including references to the tort as involving a breach of duty by police officers. For example, at p. 1264 Lord Hutton described the Court of Appeal's conclusion as follows:

> ... The Court of Appeal held that to succeed in a claim for misfeasance in public office the plaintiff had to prove that the public officer knew that his disregard of his duty would injure the plaintiff or that the officer was recklessly indifferent to the consequences for the plaintiff.

And at p.1265:

> The opinion of the New Zealand Court of Appeal, in agreement with Clarke J., that it is insufficient for the plaintiff to show objective foreseeability that the breach of duty will probably cause damage and that it must be proved that the public officer himself foresaw the probability of damage, or was reckless as to the harm which is likely to ensure, is the same as the view taken by Deane J. in the *Mengel* [*Northern Territory of Australia v. Mengel* (1995) 69 A.L.J.R. 527 (H.C.A.)] case.

[84] In his opinion, Lord Hobhouse of Woodborough dealt with the issue of whether the tort could include omissions as well as acts. He said at p.1269:

> The argument before your Lordships has touched upon the question whether omissions as well as acts can give rise to the liability in this tort. I would answer this question by saying that the position is the same as in the law of judicial review. If there is an actual decision to act or not to act, the decision is amenable to judicial review and capable of providing the basis for the commission of the tort. If there is a legal duty to act and the decision not to act amounts to an unlawful breach of that legal duty, the omission can amount to misfeasance for the purpose of the tort: *Reg. v. Dytham*, [1979] Q.B. 722; the *Henly* case, 5 Bing. 91. 107. What is not covered is a mere failure, oversight or accident. Neglect, unless there is a relevant duty of care, does not suffice and the applicable tort would then be negligence not misfeasance and different criteria would apply: *X (Minors) v. Bedfordshire County Council* [1995] 2 A.C. 633, the *Mengel* case, 69 A.L.J.R. 527, 547.
>
> The relevant act (or omission, in the sense described) must be unlawful. This may arise from a straightforward breach of the relevant statutory provisions or from acting in excess of the powers granted or for an improper purpose. Here again the test is the same as or similar to that used in judicial review. (Underlining added.)

Again it is clear in the language used that the distinction between an act amounting to (1) the impugned exercise of a power, (2) the purported exercise of non-existent power, and (3) the failure to act in breach of a statutory or other legal duty to do so, is not one which

is relevant or determinative of the tort: all three types of abuse of authority by a public official can ground the tort if the other criteria are met.

[85] In separate concurring reasons, Lord Millett set out the elements of the tort of misfeasance in public office, emphasizing the need to limit the tort to intentional rather than merely negligent conduct:

> The tort is an intentional tort which can be committed only by a public official. From this two things follow. First, the tort cannot be committed negligently or inadvertently. Secondly, the core concept is abuse of power. This in turn involves other concepts, such as dishonesty, bad faith, and improper purpose. These expressions are often used interchangeably; in some contexts one will be more appropriate, in other contexts another. They are all subjective states of mind. (p.1273)

It was in that context, of differentiating the tort of misfeasance in public office from mere negligence demonstrated by a breach of a duty imposed by statute, that he made the statement at p. 1274 referred to by Borins J.A.:

> It is important to bear in mind that *excess* of power is not the same as *abuse* of power. Nor is breach of duty the same as abuse of power. The two must be kept distinct if the tort is to be kept separate from breach of statutory duty, which does not necessarily found a cause of action. Even a deliberate excess of power is not necessarily an abuse of power. Just as a deliberate breach of trust is not dishonest if it is committed by the trustee in good faith and in the honest belief that it is for the benefit of those in whose interests he is bound to act, so a conscious excess of official power is not necessarily dishonest. The analogy is closer than may appear because many of the old cases emphasise that the tort is concerned with the abuse of a power granted for the benefit of and therefore held in trust for the general public. (Italics in original.)

[86] Lord Millett clearly does not exclude from the tort a breach of duty done deliberately as opposed to negligently, as he concludes:

> In conformity with the character of the tort, the failure to act must be deliberate, not negligent or inadvertent or arising from a misunderstanding of the legal position. In my opinion, a failure to act can amount to misfeasance in public

> office only where (i) the circumstances are such that the discretion whether to act can only be exercised in one way so that there is effectively a duty to act; (ii) the official appreciates this but nevertheless make a conscious decision not to act; and (iii) he does so with intent to injure the plaintiff or in the knowledge that such injury will be the natural and probable consequence of his failure to act. (pp.1275-6)

[87] In my view, the above authorities do not support the conclusion reached by Borins J.A. that the alleged deliberate actions of the defendant officers in refusing to comply with their duty to cooperate with the S.I.U. investigation, if done with the required knowledge of the likelihood of harm to the plaintiffs or the direct intent to harm them, cannot, if proved, amount to the tort of misfeasance in public office. The tort does not require the exercise of an executive or administrative power. Rather, failure to carry out a statutory duty can amount to misfeasance for the purpose of the tort. The misuse of a power was the basis of the claim alleged in *Three Rivers*. It was not in *Roncarelli*, where the defendant abused his position because he had no power to do what he did. It was not in *Garrett*, where the police officers deliberately failed to carry out their duty to investigate. All three types of actions can amount to the type of misfeasance in public office or misuse of public authority required for the tort, if all of the other requisite elements are proved.

[88] Moreover, the distinction which Borins J.A. draws between a power and a duty ignores the very close correlation between a power and a duty. Imposing a duty on a public official to act in a certain way, in effect creates a limit on the power of that official. Where a public official acts in deliberate breach of a duty, the implication is that he or she has knowingly abused his or her powers. An attempt to depict a power and a duty as mutually exclusive concepts is ultimately a semantic exercise that ignores the close connection between them.

[89] Borins J.A. states at para 37 that if a private law duty were found to exist in this case, "the S.I.U. and police officers required to co-operate with its investigations, would effectively become guarantors that every investigation must result in criminal charges. It would not only be contrary to good sense, but, given the nature of the statutory scheme, unfair to the S.I.U. to impose upon it such a burden." I do not share my colleague's concern that any burden would be imposed on the S.I.U. by finding that the facts as alleged by the plaintiffs are capable of supporting the cause of action of misfeasance in public office. If officers comply with their duty to cooperate, whatever the outcome of the S.I.U. investigation, there could be no claim for misfeasance in public office.

2(i) ***Cause of Action for Breach of Statute***

[90] The defendants also suggest that the statement of claim is deficient because it purports to plead a cause of action based on breach of a statute, which is contrary to the law as stated in *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. However, the alleged breach of statute is not pleaded as a cause of action in itself, but rather as evidence of the misfeasance by the police officers and by the Chief of Police that forms the basis of the claim for the tort of misfeasance in public office. Day J. held that a breach of a statute by a public official could found the basis for the tort of misfeasance in public office, which is the claim in this action, as long as the required malicious intent was also pleaded.

2(ii) ***Damages***

[91] The appellants also argue that the type of damages sought, being non-pecuniary damages, are not the type of damages recoverable in an action for misfeasance in public office. Day J. rejected this submission on the basis that recovery for intangible damages is common where an action is based on an intentional tort.

[92] In concluding that he would not strike the claim for misfeasance in public office but rather give leave to amend, Day J. noted that in so doing he was not ruling on the merits of the case or its potential for success. In upholding his decision, I do so with the same caveat. This is a pleadings motion only. Day J. made the following observation on the potential merits of the action, in particular regarding the damages:

> In conclusion, I would add that I anticipate that the plaintiffs could face difficulties in making a case for misfeasance. I have doubts as to whether they will be successful in proving not only that the officers involved intended the injuries claimed, but also that the injuries were directly foreseen by the respective defendants as a consequence of their actions. I note that even in *Garrett, supra*, the authority upon which the instant plaintiffs relied so greatly, the court held against the plaintiff. It was insufficient that the damages pleaded were a 'foreseeable' or possible outcome; it must have been the case that the damages were the foreseen or natural consequence of the investigating officer's acts or omissions. However, notwithstanding my reservations as to their ultimate success, I will not drive the plaintiffs from the judgment seat at this stage of the proceedings.

2(iii) ***Conclusion***

[93] For the above reasons, I would uphold the order of Day J. to allow the respondents to amend their claim for misfeasance in public office to include a plea of the required intent of the police officers Gerrits and Woodhouse to harm the plaintiffs. In my view,

with such an amendment, the pleading is sufficient to allow the action for misfeasance in public office to proceed.

3. The Claim Against Chief Boothby for Misfeasance in Public Office

[94] Day J. was of the view that the claim for misfeasance in public office should be struck against Chief Boothby without leave to amend, because, being one step removed from the two officers, he could not have been actuated by malice against the plaintiffs. However, the pleading against him alleges deliberate action by the Chief: that contrary to the direction of the S.I.U., he deliberately failed to segregate the officers, that he failed to ensure that they produced their notes, that they attended for their requested interviews by the S.I.U. and that they gave full accounts of the shooting. Consequently, the plaintiffs should also be entitled to amend their pleading, if so advised, to include a plea that the Chief's deliberate actions were done with the requisite intent against the plaintiffs. I would therefore allow their appeal in respect of the claim for misfeasance in public office against Chief Boothby, with the result that the claim would be struck out, but with leave to amend.

4. Claim for Negligent Supervision Against the Police Services Board and Ontario

[95] Borins J.A. has said that the plaintiffs' claim for negligent supervision of the two officers may proceed as against Chief Boothby. I agree with that disposition. Day J. held that that cause of action should be struck out as against the Police Services Board, but could proceed as against Ontario as represented by the Solicitor General, who is the Minister responsible for policing under the *Police Services Act*. Each of these decisions was appealed. I would dismiss the appeal of the Solicitor General of Ontario and uphold the ruling of Day J. that the action against Ontario for negligent supervision of the officers should not be struck out at this stage. I would also allow the appeal of the appellants against the Board and therefore the claim for negligent supervision to proceed against the Board.

4(i) *Ontario*

[96] The claim against Ontario is based on the obligations of the Solicitor General set out in s. 3(2) of the *Police Services Act*:

> s. 3(2) The Solicitor General shall,
>
> (a) monitor police forces to ensure that adequate and effective police services are provided at the municipal and provincial levels;

(b) monitor boards and police forces to ensure that they comply with prescribed standards of service;

(c) [repealed 1995, c.4 s.4(1)]

(d) develop and promote programs to enhance professional police practices, standards and training;

(e) conduct a system of inspection and review of police forces across Ontario;

(f) assist in the co-ordination of police services;

(g) consult with and advise boards, municipal chiefs of police, employers of special constables and associations on matters relating to police and police services; [since amended]

(h) develop, maintain and manage programs and statistical records and conduct research studies in respect of police services and related matters;

(i) provide to boards and municipal chiefs of police information and advice respecting the management and operation of police forces, techniques in handling special problems and other information calculated to assist; [since amended]

(j) issue directives and guidelines respecting policy matters;

(k) develop and promote programs for community-oriented police services;

(l) operate the Ontario Police College.

[97] The plaintiffs plead that Ontario owed them a duty of care to ensure that police officers complied with their legal obligations to co-operate with the S.I.U. as required by s.113(9) of the *Act*:

> s. 113(9) Members of police forces shall co-operate fully with the members of the unit in the conduct of investigations.

The plaintiffs plead that Ontario was obliged to do this through training, programs, policies or orders and that Ontario failed to do this, knowing that for nine years prior to the shooting, police officers regularly failed to co-operate with the S.I.U.

[98] Day J. analyzed the viability of this claim by applying the two-part test in *Anns v. Merton London Borough Council*, [1978] A.C. 728 and *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, and concluded first that Ontario did owe a duty of care to the plaintiffs. Day J. then went on to consider the second part of the test, whether there is anything which negatives or limits the scope of the duty. He found nothing in s. 3 which negatives a duty. He then went on in accordance with *Just v. British Columbia*, [1989] 2 S.C.R. 1228, to consider whether the decisions of the Solicitor General are purely policy decisions which would not be reviewable, as opposed to operational decisions. He concluded that Ontario made a policy decision when it set up the Special Investigations Unit to ensure that when the police are involved in a death, a *bona fide* investigation is conducted. However, the steps taken by the Minister to implement the policy are operational in character and can be reviewed by a court.

[99] Day J. accepted, based on the pleading which must be taken as true, that the objective of the government in setting up the S.I.U. had been systematically thwarted by police officers and that the Solicitor General had taken no steps to rectify the situation. Day J. concluded:

> To conclude, I have found that there is no statutory exemption in the *Police Services Act* which would exclude the Solicitor-General. I have further found that the failure by the Solicitor-General to address the non-cooperation by police officers with the SIU fell within the ambit of an operational decision. I therefore find that Ontario is properly named as a party to this cause of action, and the motion to strike in this regard is denied.

[100] I agree with Borins J. A. that the duties imposed on the Solicitor General by s. 3(2) of the *Police Services Act* do not include the day-to-day supervision of police officers, including ensuring their compliance with s. 113(9) of the *Act*. However, the nature of the allegation pleaded against the Solicitor General of Ontario is not that he failed to interfere directly with these officers, but that he failed to implement training, procedures and other policies in accordance with s. 3(2) which would ensure that officers would regularly comply with their duties instead of systematically refusing to comply. In my view, it is not clear that s. 3(2) does not impose a statutory duty on the Solicitor General in respect of these operational matters. It is therefore not appropriate to strike the claim at this stage of the action. In my view it cannot be said that the claim is bound to fail.

4(ii) ***Metropolitan Toronto Police Services Board***

[101] Day J. conducted a similar analysis with respect to the claim for negligent supervision of the officers by the Board. He concluded that there is a duty of care owed by the Board to the plaintiffs. However, he held that s. 31(4) of the *Act* exempts the Board from liability because it precludes the Board from providing any input into operational decisions. The section provides:

> s. 31(4) The board shall not direct the chief of police with respect to specific operational decisions or with respect to the day-to-day operation of the police force.

Likewise, Borins J.A. concluded that "there is a clear separation in the *Act* between the policy-making function of the Board and the day-to day operational function, which is the preserve of the chief of police under s. 41."

[102] The Board's powers are set out in s. 31(1) of the *Act*:

> s. 31(1) A board is responsible for the provision of police services and for law enforcement and crime prevention in the municipality and shall, [since amended]
>
> (a) appoint the members of the municipal police force;
>
> (b) generally determine, after consultation with the chief of police, objectives and priorities with respect to police services in the municipality;
>
> (c) establish policies for the effective management of the police force;
>
> (d) recruit and appoint the chief of police and any deputy chief of police, and annually determine their remuneration and working conditions, taking their submissions into account;
>
> (e) direct the chief of police and monitor his or her performance;
>
> (f) [repealed 1995 c.4, s. 4(7)]; [since replaced]

(g) receive regular reports from the chief of police on disclosures and decisions made under section 49 (secondary activities);

(h) establish guidelines with respect to the indemnification of members of the police force for legal costs under section 50;

(i) establish guidelines for the administration by the chief of police of the public complaints system under Part VI; [since repealed and replaced]

(j) review the administration by the chief of police of the public complaints system and receive regular reports from him or her on that subject; [since repealed and replaced]

[103] The appellant's claim against the Board is the same as the claim against the Solicitor General. The claim is that the Board knew of the systematic failure of police officers to comply with their duty to co-operate with the S.I.U. It is alleged that in the face of that knowledge, the Board breached its duty to the appellants by failing to institute training, programs, policies and orders to ensure that officers comply with their statutory duty to co-operate.

[104] It is not clear that under the *Act*, the Board has no operational powers. To the contrary, it appears that the Board is given the power in s. 31(1)(e) to ensure that its policies are implemented by the Police Chief and therefore by the police force.
In my view, ss. 31(1)(c) and (e), which require the Board to establish policies for the effective management of the police force and to direct the chief of police and monitor his or her performance, may be broad enough to include the obligation to establish policies and monitor their implementation, to train officers and to require their compliance with statutory obligations. In my view the pleading is sufficient to allow the action to proceed at this stage.

4(iii) ***Conclusion***

[105] This is not a final determination of the various duties and obligations of the Board, the Solicitor General or of the Chief of Police under the *Police Services Act*. In my view the structure of the *Act* and its operations including the division of powers among the Solicitor General, the Board and the Chief is an issue best determined on a full record after trial.

[106] In *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.) and in *Jane Doe v. Metropolitan Toronto Commissioners of Police*, (1990), 72 D.L.R. (4th) 580 (Div.Ct.) (leave to appeal to the Court of Appeal denied (1991), 1 O.R. (3d) 416 (C.A.)), this court and the Divisional Court recognized both a duty of care owed by the Police Chief and the Police Commission to the plaintiffs, as well as potential causes of action based on alleged breaches of such duties. Although those decisions were based on the *Police Act,* R.S.O. 1970, c. 351, and R.S.O. 1980, c. 381, which have since been replaced by the *Police Services Act,* S.O. 1990, c. 10 (now R.S.O. 1990, c. P.15), the policy of those cases should not be effectively overruled unless it is clear that the new *Act* is intended to preclude any such actions. In my view, the sections which impose obligations on the Solicitor General and on the Board do not make clear that they are to be immune in all circumstances from any claim by members of the public, and that it is only the Chief of Police who may be answerable for any misfeasance by police officers.

5. Result

a) I would dismiss the cross-appeals of Woodhouse and Gerrits, with costs.

b) I would allow the appeal of the appellants in respect of the claim for misfeasance in public office by Chief Boothby, striking that claim but with leave to amend, with costs.

c) I would dismiss the appeal of Ontario in respect of the negligent supervision claim against it, with costs.

d) I would allow the appeal of the appellants in respect of the negligent supervision claim against the Board, with costs.

(signed) "K. Feldman J.A."

RELEASED: December 15, 2000

40p