

MISFEASANCE IN PUBLIC OFFICE - AN EMERGING MEDICAL LAW TORT?

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I. INTRODUCTION

The case of *Akenzua v. Secretary of State for the Home Department*¹ concerned the death of a woman, Ms Zena Laws, at the hands of a man who had been imprisoned for armed robbery and who asserted that he was also a multiple murderer. Ms Laws' administrators were successful in their appeal against the decision that their action for compensation should be struck out as having no chance of success. The report of the case in *The Times* followed the eye-catching headline: 'Likely victim need not be known until harm done'. This was sufficient to prompt a mental comparison with *Palmer v Tees Health Authority*² - a case involving the murder of a child by a known paedophile in which a similar claim was rejected under the comparable headline: 'Health authority too remote from victim'.

Despite their apparent similarity, the two cases are, of course, fundamentally different, the former having been argued on the juristic basis of misfeasance in public office and the latter in negligence. The purposes of this paper are, first, to compare the two causes of action from the viewpoint of medical law; second, to consider whether misfeasance in public office can or could be applied to an NHS Trust today;³ finally, to speculate as to whether Mrs Palmer might have been successful had she

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¹ [2003] 1 All E.R. 35.

² (1998) 44 B.M.L.R. 88, (Q.B.D.); [1999] Lloyd's Rep. Med. 151, (C.A.).

³ The chances of a new Strategic Health Authority being involved are, at best, theoretical in that there is no direct contact between an SHA and the public. *Palmer*, of course, pre-dated the National Health Service Reform and Health Care Professions Act 2002.

taken the misfeasance pathway and, as a corollary, to consider whether we are likely to be confronted with an alternative to the medical negligence suit in the future.

II. THE CASES

A. Akenzua and Coy v. Secretary of State for the Home Department and the Commissioner of Police for the Metropolis

Ms Akenzua and Ms Coy were the administrators of the estate of Marcia Laws who was murdered by Delroy Denton. Denton entered the country on a false passport and was allowed to remain for 6 months. His true identity was disclosed at an interview following his arrest on a charge of possession of drugs with intent to supply, when it was established that he had been imprisoned in his home country of Jamaica following a life of violent crime. It followed that he had no right to be in the United Kingdom.

The immigration officer concerned, however, arranged for Denton to become a police informer and he was released from detention by way of temporary admission to the United Kingdom. He provided valuable information but was arrested on a charge of rape some 7 months after his original interview; the charge was dropped. Meantime, Denton was applying for asylum – presumably at the instigation of the immigration officer. This was refused but the notice was not served for another year, the inference being that this was deliberate. During that time, he murdered Ms Laws. The later history of the case makes fascinating reading but has no real relevance to the present discussion.

Ms Laws' representatives sued the relevant authorities on the grounds that her death was an actionable consequence of misfeasance in public office by one or more of their officials or officers. The judge struck out the claim on the grounds that there was insufficient proximity between the victim and the alleged wrongdoers, since the risk they were alleged to have created was a risk to the public at large and not specifically to his eventual victim. However, the *Three Rivers* action was progressing at the time and reached the House of Lords before Ms Akenzua's appeal against the

striking out was heard.⁴ In the event, therefore, the Court of Appeal was in a position to apply the law of misfeasance as it was interpreted by the Lords of Appeal in *Three Rivers*. We discuss this in detail below. Of particular note are Lord Steyn's observations as to the risk to a class of persons of which the plaintiff was a member;⁵ this, he thought, should be regarded as an expansive rather than a restrictive element of the tort: '...allowing the action to be maintained even where the identities of the eventual victims are not known at the time when the tort is committed, so long as it is clear that there will be such victims'.⁶

*B. Palmer v. Tees Health Authority*⁷

Armstrong was a man with a disturbed childhood. He was in the care of the defendants' medical and nursing staff between 1992 and 1994 and was diagnosed as suffering from personality disorder or psychopathic personality. He had stated during an admission to hospital in 1993 that he had sexual feelings towards children and that a child would be murdered after his discharge. He was discharged as an outpatient in 1993 and was last seen at the hospital in February 1994. On 30th June 1994, he sexually assaulted and murdered Rosie Palmer, aged 4.

Mrs Palmer, as her daughter's administratrix, brought an action in negligence against the Health Authority alleging that it failed to diagnose that there was 'a real, substantial and foreseeable risk' of his committing serious sexual offences against children and that they failed to provide any adequate treatment to reduce the risk of him committing such offences and/or to prevent his being released from hospital whilst he was at risk of committing such offences.

At first instance, the judge (Gage J.) struck out the action and Mrs Palmer progressed to the Court of Appeal where it was agreed that the injuries to her daughter were foreseeable; the issue was, essentially, one of proximity. Stuart-Smith L.J. dismissed the suggestion that foreseeability, proximity and fairness were all 'facets of

⁴ *Three Rivers District Council v. Bank of England (No 3)* [2000] 3 All E.R. 1, [2000] 2 W.L.R. 1220, (H.L.).

⁵ N. 3 above at [2000] 2 W.L.R 1235.

⁶ *Per* Sedley L.J. at para. [19].

⁷ [1989] Lloyd's Rep. Med. 351.

the same thing' and that, if the court was required to establish the facts on one ground, the implication was that the facts must be established on all three. The apparently supportive opinions in *Osman*⁸ and *Barrett*⁹ did not apply in that proximity was not at issue in either of these cases; rather, the definitive decision was that of *Hill v. Chief Constable of West Yorkshire*¹⁰ in which the crucial point was that there was no relationship between the defendant - i.e. the police - and the victim. Stuart-Smith L.J. went on to say:

It seems to me to be a relevant consideration to ask what the defendant could have done to avoid the danger, if the suggested precautions or treatment are likely to be of doubtful effectiveness, and the most effective precaution [to give warning to the victim] cannot be taken because the defendant does not know who to warn. This consideration suggests to me that the Court would be unwise to hold that there is sufficient proximity.¹¹

The Lord Justice did, however, reserve his position as to what would be the appropriate test if the victim in such a case was identified or identifiable.¹² It is also to be noted that Pill L.J. had grave doubts as to the logic behind defining a duty of care in terms of the identity of the victim of physical injury by a third party. Nevertheless, the appeal failed and the action was struck out.

The door is not, however, quite closed. We have already noted Stuart-Smith L.J.'s uncertainty and we have, for example, Gage J. at first instance in *Palmer*¹³ pointing out that, although no success could be expected when the victim was unidentified, a Health Authority at the time might have been held liable in negligence if, in fact, there were some special factors associated with the particular victim; in other words, the Health Service would not be totally immune from an action in the circumstances envisaged.

⁸ *Osman v. Ferguson* [1993] 4 All E.R. 344, (C.A); *Osman v. United Kingdom* [1999] 1 F.L.R. 193.

⁹ *Barrett v. London Borough of Enfield* [2001] 2 A.C. 550.

¹⁰ [1989] 1 A.C. 53.

¹¹ At para [32].

¹² At para [31].

¹³ *Palmer v. Tees Health Authority* (1999) 45 B.M.L.R. 88 at 102.

II. TWO CAUSES OF ACTION

A. Misfeasance in public office

The legal practitioner might well be forgiven were he or she to believe that the tort of misfeasance in public office lay buried in the vaults of the Vale of Aylesbury District Council's offices¹⁴ - indeed, it may not exist in Scots law.¹⁵ There is, however, little doubt that it is undergoing something of a resurrection and, even now, has been described by Brooke L.J. as a 'newly evolving tort'.¹⁶

It is interesting, and of some practical value, to consider the reasons for this movement. There are, one suspects, two main driving forces – the one following from the other. Fundamentally, we have the sudden and almost exponential growth in the acceptance of the principle of respect for personal autonomy which, although perhaps expressed most vividly in the context of medical law and ethics, is a phenomenon that extends across the whole societal spectrum. Autonomy is seen, at its simplest, as the power, and the desire, to control one's own being, to be able to make decisions free from coercion and, so far as is possible, to seek self-fulfilment unhindered by unnecessary authority. Consequentially, the ability to question authority goes hand in hand with this and the growing sense of freedom to do so is shown by the increasing resort to judicial review – encouraged, in part, by the coming into force of the Human Rights Act 1998. The practical significance of this analysis is that actions in misfeasance in public office are increasingly likely to be brought as authority is increasingly challenged and these are even more likely to proliferate should they be found to provide an easier route to compensation than do actions in negligence. Indeed, this option may prove particularly attractive for future litigants given the clear policy message that has been sent out by the courts in recent years in

¹⁴ The seminal case appears to lie in *Ashby v. White* (1703) 2 Ld. Raym. 938, 3 Ld. Raym. 320

¹⁵ C. Ashton and V. Finch *Constitutional Law in Scotland* (2000), para. 18.20 cite Lord Ross in *Micosta v. Shetland Islands Council* 1986 S.L.T. 193 at 198 as indicative that it does – and we agree.

¹⁶ *R. Cruickshank Ltd. v. Chief Constable of Kent County Constabulary* [2002] All E.R. (D) 215 at paras. [14], [32]. This was an action relating to the disastrous business consequences for the plaintiff after a police raid to remove allegedly stolen cars from his premises and from clients who had already bought vehicles from him. For present purposes, however, the decision does little more than confirm the relevance of the misfeasance action to a wide range of public officers acting in the public interest.

respect of limiting negligence actions against key public authorities - most notably the police. Add to this the deferential attitude that the judiciary has shown historically towards the medical profession when faced with negligence claims, and an action in misfeasance in public office becomes an attractive and promising alternative.

Although the scope of the action had always been unclear and there were no prior definitive cases directly in point, it was agreed in *Akenzua* that no principle of law excluded an action based on the tort of misfeasance in public office simply because the consequence of the misfeasance was personal injury or death - a comparison of misfeasance and negligence within that parameter is, therefore, valid. The nature of the former tort was spelled out by the House of Lords in *Three Rivers District Council v Governor and Company of the Bank of England (No. 3)*¹⁷ and the Court of Appeal in *Akenzua* was content to rely for definition on the headnote which read:

[T]he tort of misfeasance in public office involved an element of bad faith and arose when a public officer exercised his power specifically to injure the plaintiff, or when he acted 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.

Thus, the tort is distinguished at two levels. First, there is the targeted intentional act towards an individual or, at least, a recognisable class of persons and, second, there is a general indifference to the fate of a broad sweep of unidentified persons who may be affected by an act of misfeasance – and it is with this latter limb, or untargeted malice, that we are mainly concerned here.

In this respect, Lord Hope defined the necessary mental element as being satisfied:

¹⁷ [2000] 3 All E.R. 1, [2000] 2 W.L.R. 1220, (H.L.).

... where the act or omission was done or made intentionally by the public officer: a) in the knowledge that it was beyond his powers and that it would probably cause the claimant to suffer injury or b) recklessly because, although he was aware that the claimant would suffer loss due to an act or omission which he knew to be unlawful, he willingly chose to disregard that risk. [T]he fact that the act or omission is done or made without an honest belief that it is lawful is sufficient to satisfy the requirement of bad faith.¹⁸

Thus, at first glance, it seems that the relatively onerous test of positive bad faith must apply if misfeasance in public duty is to be demonstrated. However, Lord Hope had this to say later:

[I]t is sufficient for the purposes of this limb of the tort to demonstrate a state of mind which amounts to subjective recklessness. That state of mind is demonstrated where it is shown that the public officer was aware of a serious risk of loss due to an act or omission on his part which he knew to be unlawful but chose deliberately to disregard that risk. Various phrases maybe used to describe this concept, such as ‘probable loss’, ‘a serious risk of loss’ and ‘harm which is likely to ensue’ The absence of an honest belief in the lawfulness of the conduct that gives rise to that risk satisfies the element of bad faith or dishonesty.¹⁹

Lord Hope thus seems to dilute the test both as to the likelihood of harm arising and, more importantly, from being one of positive choice to a negative belief. Indeed, this follows from the original explanation given by Lord Steyn²⁰ to the effect that it was not necessary in every case to prove that the public officer knew that he was acting in excess of the powers granted him and that his act was likely to cause damage to an individual or individuals. Moreover, it has been suggested that, where trained persons are involved, turning a blind eye to the complexities of a case might

¹⁸ *Three Rivers District Council v. Bank of England (No. 3)* [2001] 2 All E.R. 513 at para. [44].

¹⁹ At para. [46].

²⁰ N. 3 above at [2000] 2 W.L.R. 1233.

be taken by a judge to connote recklessness.²¹ Given such dilution, and given that the tort is still ‘evolving’, it is apparent that the mental conditions justifying a claim of misfeasance in public office can be far removed from targeted malice and are coming closer to those normally associated with an action in negligence.

That having been said, it is clear that *intention* calls for a higher level of wrongdoing than does *recklessness* which, in turn, is more demanding than mere *carelessness*, the last being the remit of the negligence action. The criterion of recklessness is crucial to the misfeasance action from a policy perspective and it will doubtless play a central role in any future development of the cause. While negligence is characterised by inadvertent careless conduct, reckless behaviour normally requires advertence on the part of the actor. The particular feature of a given act of recklessness lies in the scope and form of disregard with which the actor none the less proceeds. The precise scope of this criterion remains in doubt because we currently have too few cases by which to form a judgment. Nevertheless, it will provide a powerful policy tool if the courts choose to restrict the flow of cases at any time in the future. They will, quite simply, raise the hurdle as to what amounts to recklessness. We return below to the question of where that hurdle is currently set.

B. The action in negligence

The problem posed in the current discussion is summed up in the well-known words of Lord Keith:

It has been said too frequently to require repetition that foreseeability of likely harm is not in itself a sufficient test of liability in negligence. Some further ingredient is invariably needed to establish the requisite proximity of relationship between the plaintiff and the defendant ... The nature of the ingredient will be found to vary in a number of different categories of decided cases.²²

²¹ *Cruickshank*, N. 15 above, *per* Brooke L.J. at para.

[43].

²² In *Hill v. Chief Constable of West Yorkshire Police* [1989] A.C. 53 at 60.

And, for the purposes of the present discussion, we can identify the ‘ingredient’ in the words of Lord Atkin as:

such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act²³.

We will see that this requirement presents a formidable obstacle in cases concerning public authorities – but, as will become apparent in the discussion of *Osman v Ferguson*²⁴, it is still not the only barrier to success. Both foreseeability and proximity were satisfied in *Osman* but there was a further hurdle which is, in practice, inseparable from actions involving public authorities – that of public policy. The importance of this element was established in *Hill*²⁵ where it was held that: ‘The threat of litigation against a police force would not make a policeman more efficient. [An action such as this] is misconceived and will do more harm than good’.²⁶ In short, when the issue relates to administrative negligence, public policy is little more than a substitute term for the ‘fair, just and reasonable’ criterion for apportioning a duty of care which was established in *Caparo*.²⁷

C. The actions compared

Hill has been generally regarded as precluding an action in negligence when the action against a public authority derives from the deeds or omissions of a third agency:

The authorities dealing with the police as defendants to negligence actions, from *Hill* onwards demonstrate with particular clarity the

²³ In *Donoghue v. Stevenson* [1932] A.C. 562 at 581.

²⁴ [1993] 4 All E.R. 344, (C.A.).

²⁵ N. 21 above.

²⁶ N. 21 above *per* Lord Templeman at 65.

²⁷ *Caparo Industries plc v. Dickman* [1990] 2 A.C. 605. See also *Cowan v. Chief Constable for Avon and Somerset Constabulary* [2001] E.W.C.A. Civ. 1699 *per* Keene L.J. at para. [44] in particular.

force of the public interest factors which tend to inhibit the imposition of liability in third agency cases.²⁸

Thus, while it is, of course, true that exceptional circumstances may arise and that ‘the public policy considerations which prevailed in *Hill*’s case may not always be the only relevant public policy considerations’,²⁹ an action in negligence of the type under discussion is very unlikely to succeed – at least where the police are the defendants.

Conversely, the tort of misfeasance in public office requires proof of the wrongful use of power by a public official which involves some sort of malice or unlawfulness. Causation when damage results from misfeasance might, then, be more difficult to prove than when the accusation is one of negligence simpliciter. Yet we have seen that the concept of misuse of power is not restricted to intentional wrongdoing in that it covers the occasioning of untargeted damage and, further, that unlawfulness may be demonstrated by no more than recklessness. Success in an action for misfeasance may, therefore, be easier than appears at first glance - subject however, as we have already pointed out, to policy considerations. The problem is how far can, and will, the boundaries of unlawfulness be extended? In particular, one wonders if they can include a failure to take what is an otherwise lawful action.

IV. MISFEASANCE v. NEGLIGENCE

Our purpose here, however, is to consider the merits of the alternative route via misfeasance and to contrast its current and possible future scope with the vagaries of the medical negligence action. Each route has its own, individual snakes and ladders.

On the face of things, misfeasance might well be regarded as the more difficult route insofar as, at least in its original form, it requires some form of malice or

²⁸ *K. v. Secretary of State for the Home Department* [2002] E.W.C.A. Civ. 983 per Laws L.J. at para. [22].

²⁹ *Costello v. Chief Constable of Northumbria Police* [1999] 1 All E.R. 550 per May L.J. at 563.

unlawfulness on the part of the tortfeasor. In this respect, Ms Akenzua's case appears relatively simple. At the very least, the officials involved in the liberty of Denton seem to have manipulated, if not clearly abused, their powers; the case, thus, stands at the clearer end of the spectrum and provides no more than the starting point for argument.

No actions in misfeasance resulting in personal injury had been taken before the judgment in *Three Rivers* where, as we have seen, the minimum threshold for the tort was reduced to subjective recklessness. Since then, we have the Court of Appeal in *Cruickshank*³⁰ holding that misfeasance, which is a 'newly evolving tort', will 'in all but extreme cases afford any remedy which may be due for the abuse of public power'.³¹ The size of the obstacle to be surmounted is, then, determined by the limits to which the definition of abuse can be stretched and the willingness of the courts to do so. At the end of the day, these matters turn solely on policy considerations and it goes without saying that the particular policy of choice will unquestionably have a major effect on the development - or restriction - of any particular tort.

One significant advantage to the misfeasance action lies in the clear judicial pronouncement that the concept of proximity, as expressed by the identifiability of a victim of personal injury, is irrelevant within the tort – 'what matters is not the predictability of [Denton] killing the deceased but the predictability of his killing someone'.³² The apparently insurmountable hurdle that has dogged so many similar cases brought in negligence is demolished in one sentence.

The difficulties surrounding an action for negligence inflicted by a third party have already been outlined but are, perhaps, most vividly demonstrated in the present context by the case of *K. v. Secretary of State for the Home Office*,³³ the decision in which Arden L.J. considered could not be distinguished from that reached in *Palmer*. Here, Musa, a man who had been recommended for deportation following imprisonment for buggery and burglary was inexplicably released from detention and, within a few months, raped a woman, Ms K. Ms K brought an action in negligence

³⁰ N. 15 above. *Cruickshank* was not, of course, associated with personal injury.

³¹ *Per* Sedley L.J. at para. [53].

³² *Akenzua per* Sedley L.J. at para. [21].

³³ [2002] E.W.C.A. Civ. 983.

against the Secretary of State alleging that he should have known that Musa was a very dangerous man who ought to have been kept in detention until he was deported. Almost inevitably, the claim was struck out on the grounds of a lack of proximity; equally inevitably, this was confirmed on appeal where Laws L.J. indicated:

[L]iability for damage carelessly occasioned to another's person or property is, as a matter not of legal principle but of pragmatic reality, the rule not the exception where there is no third agency which constitutes the immediate cause of the damage; but where there is such a third agency, liability is the exception not the rule.³⁴

And, although Arden L.J. was quick to remark on Laws L.J.'s qualification of the rule,³⁵ the substance of the dictum is fast assuming the status of a mantra which governs the law in this area.

A. Mrs Palmer's predicament

These policy-driven interpretations of the threshold criterion of duty of care conspired to deprive Mrs Palmer of a remedy in negligence. Stuart-Smith L.J. said in *Palmer*: '[I]t is impossible not to have the deepest sympathy for Mrs Palmer for this truly appalling catastrophe'. Most people would feel the same – and, come to that, would apply it to Ms K. Indeed, the sentiment lies at the origin of this paper, the main purpose of which is to question whether Mrs Palmer could have succeeded had she taken the misfeasance road.

Clearly, there are a number of obstacles to negotiate before she can do this, the main one being that she would have to attribute wrong-doing of some sort, not to powerful and relatively impersonal organisations such as the immigration authorities and the police, but to a far less commanding and closer-to-home, NHS Trust. We must, therefore, consider the likely position of the former before we can assess that of the latter – remembering that, in this respect, the policy considerations underlying the law of negligence and misfeasance overlap.

³⁴ At para. [16].

³⁵ At para. [41].

B. Osman v Ferguson

The well known case of *Osman v. Ferguson*³⁶ is probably the ‘police’ case which corresponds most closely to *Palmer*. In this case, a known paedophile became obsessed with a 15 year-old boy and, having, as a consequence, been dismissed from his post of schoolteacher, informed a police officer that he might do something which could be regarded as criminally insane. Amongst his other retaliatory actions, he deliberately rammed a car in which the boy was travelling - yet the police did not take the matter to the magistrates’ court. Ultimately, he stole a shot-gun and injured the boy and killed his father. The boy and his mother brought an action in negligence against the police in respect of their investigation into the paedophile’s activities but this was struck out as disclosing no reasonable cause of action. During the course of the appeal, McCowan L.J. had this to say:

In my judgment the plaintiffs have an arguable case that, as between the second plaintiff and his family on the one hand, and the investigating officer on the other, there existed a very close degree of proximity amounting to a special relationship.³⁷

In other words, there was no problem as to proximity. Nonetheless, the appeal failed on the policy grounds which were laid down in *Hill v Chief Constable of West Yorkshire Police*³⁸ where it was held, in essence, that an action in negligence is not an appropriate mechanism to investigate the efficiency of a police force.

Appeal to the public interest, however, inevitably leads us to wonder if it does not, at the same time, deny justice to the individual who has suffered a wrong - in short, is not the appeal to distributive justice, that is so regularly heard in duty of care disputes, to be applied to both the claimant and the defendant ?³⁹

³⁶ [1993] 4 All E.R. 344, (C.A.); *Osman v. United Kingdom* [1999] 1 F.L.R. 193.

³⁷ *Ibid.*, at All E.R. 350.

³⁸ [1989] A.C. 53.

³⁹ See, in particular, Lord Steyn in *McFarlane v. Tayside Health Board* [2000] 2 A.C. 59.

A straightforward analysis of the case from the perspective of misfeasance leaves little room for doubt that the police in *Osman* knew of the dangers, that they had been specifically appraised of them and that they failed to take adequate action. Reverting to principle, they had the relevant powers and, at the same time, had duties to perform; an action for misfeasance in public office might still have failed on grounds of causation depending on the precise circumstances - but it is arguable that one might well have succeeded given the subsequent *Three Rivers* judgment. What, then, of policy? There is no obvious reason why the tort of misfeasance should be exempt from the claim that a tort action - *any* tort action - is an inappropriate device by which to regulate and judge the operational effectiveness of public bodies. We have no present indication that the courts find this to be a relevant factor but, then again, the same was true of the negligence action until fairly recently.

V. MISFEASANCE v. NEGLIGENCE: THE CASE OF NHS TRUSTS

That being the case, the way is open to consideration of the second limb - can the principles derived from police cases be applied to other public bodies - in particular, to NHS Trusts? There are, in fact, powerful reasons for suggesting that they ought not to be.

In the first place, the medical control of dangerous persons is a matter of clinical judgment which is, itself, controlled to a large extent by statute. The criterion of recklessness in misfeasance may, therefore, be difficult or impossible to establish because the element of discretion in release decisions is greatly reduced. The very process of executing the required checks and balances on these decisions is likely to be evidence enough to rebuff a claim that there has been blatant disregard for the consequences of that decision.

The most that a potential claimant could hope to achieve would be to demonstrate actionable negligence on the part of the Trust - and this would be determined on *Bolam* principles⁴⁰ - which is, effectively, to say that, to be actionable,

⁴⁰ *Bolam v. Friern Hospital Management Committee* [1957] 2 All E.R. 118.

the decision taken would have to be one which was not supported by any responsible body of medical opinion.

Secondly, the NHS Trust has no disciplinary power over its patients in the community and the power of recall is only as good as the monitoring systems that support it; in the event that the patient breaches his or her terms of release, the Trust's only recourse is to enlist the help of the local authority and the police. A crucial question in any misfeasance claim, then, would be to pinpoint where the relevant reckless conduct took place. Should the focus be on the recklessness, or otherwise, of the original decision to release? That decision can be seen as reckless whether or not there is any continuing control over the patient. However, the outcome may be very different if the focus falls post-release as there is, then, very much less that a Trust is able or can be expected to do. Alternatively, an argument in favour of collapsing these two elements might be made, namely, that it is precisely because a health service Trust has no direct power over someone once released that it is all the more important that release decisions are taken with due care. However, as we have already indicated, the degree of discretion in such decisions is severely restricted under the Mental Health Acts across the United Kingdom.

Thus, it is apparent that the passage to compensation for injury done by a third party by way of an action against a public authority in misfeasance is likely to be more difficult when that authority lies within the hierarchy of the National Health Service.

VI. AN ACTION IN MISFEASANCE

Remembering that Mrs Palmer's case preceded *Three Rivers*, would a future complainant in her position have any prospect of crossing the striking out barrier in an action based on misfeasance? Would it, in short, be worth raising?

The fundamental truth is that, as we have seen, an action in negligence involving an authority and a third party would be bound to fail on the simple grounds of lack of proximity. Looked at comparatively, then, the answer might well be 'yes' insofar as *some* chance of success, as represented by the avoidance of the proximity

test, is better than no chance at all – and a glimmer of possible success is to be found in *K*⁴¹, discussed above. Here, Laws L.J.⁴² had this to say in respect of the relationship between proximity and negligence:

If a public authority were to be held liable in negligence on facts like those pleaded here, with no true nexus between Claimant and Defendant, the negligence or fault in the case would have to be supplied by proof that the authority had acted unreasonably in the public law sense But if that were sufficient, without the added element of proximity, the result as it seems to me is that the court would have in effect created a category of administrative tort sounding in damages. Our law, however, knows no such tort outside the confines of misfeasance in public office, or

In short, Laws L.J. positively invites the attempt.

The chances of success would, however, be slim. Not only would the element of recklessness that is so important to misfeasance be difficult to show but the ‘public policy’ antipathy to burdening public authorities is so evident in all the relevant cases that one feels it would be extremely difficult to overcome – particularly as it raises the courts’ special bogey of defensive medicine.⁴³ It is unlikely that a new tort is about to be introduced to medical jurisprudence. But one feels intuitively that, while the medical profession can well do without further threats of litigation, an action *ought* to be available to those thrust into the tragic situations endured by Mrs Palmer and Ms K - and Ms Akenzua has shown that it is achievable, at least in respect of the police. It may well be that the courts would resist any further attempt to replace the now vastly restricted negligence action with a new plaintiff-friendly tort of misfeasance. Nevertheless, in the words of Brooke L.J.

⁴¹ N. 27 above. *K* was decided some 5 months prior to *Akenzua*.

⁴² At para. [30].

⁴³ It is undeniable that successful litigation in this field would be likely to result in fewer potentially dangerous persons being released – but the tone of recent Government thinking suggests that this would not be seen as being wholly undesirable: see the White Paper *Reforming the Mental Health Act* (2000) and the comparable publication by the Scottish Executive *Renewing Mental Health Law* (2001).

.... (I)n matters of this kind, where public officers do not merely possess relevant powers but also have duties to perform in the public interest, it is to the evolving tort of misfeasance in public office that one needs to turn when an abuse of those powers is alleged.⁴⁴

The problem, as has already been suggested, remains that of how far it is fair, just and reasonable to expand the meaning of ‘abuse’. Whatever the promise of the emerging tort of misfeasance may be, there are plenty of weapons in the judicial armoury to ensure that developments do not get out of hand. We suspect that the twin devices of a) a restrictive interpretation of the meaning of ‘recklessness’, and b) policy arguments drawn from the negligence arena, will ensure that, should misfeasance begin to be seen as an attractive alternative to negligence in the medico-legal arena, it will finish up as a victim of its own success.

⁴⁴ In *Cruickshank*, N. 15 above at para. [32].