Who Regulates the Regulators?

Liability of Regulators in Tort Claims

Elizabeth-Anne Gumbel QC

And

Duncan Fairgrieve

<table>
<thead>
<tr>
<th>Paragraph</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction 1</td>
</tr>
<tr>
<td>Negligence: The Principles 2</td>
</tr>
<tr>
<td>Authorities Involving Claims against Regulatory Authorities 3</td>
</tr>
<tr>
<td>(a) Regulation of Care Homes by a Local authority</td>
</tr>
<tr>
<td>(b) Claims against Environmental Health Inspectors</td>
</tr>
<tr>
<td>(c) Claims against Building Inspectors</td>
</tr>
<tr>
<td>(d) Claims against Aircraft Inspectors</td>
</tr>
<tr>
<td>(e) Claims Against the Health and Safety Executive</td>
</tr>
<tr>
<td>(f) Claims against sports regulators</td>
</tr>
<tr>
<td>(g) Claims against Financial regulators</td>
</tr>
<tr>
<td>Misfeasance in public office 4</td>
</tr>
</tbody>
</table>

1. **Introduction**

1.1 There has always been a tension in English law between the principle that public policy requires that public authorities, including regulatory authorities, act independently and without threat of (excessive) litigation and the principle that where there is a wrong there should be a remedy. Particularly in the area of personal injury claims, the courts have examined very carefully the extent to which it is reasonable to exclude claims against public authorities for failure to prevent personal injury. Where injury is caused by an
individual or other uninsured body the only potential claim for compensation may be against a regulatory body. The responsibility of sports and aircraft regulators and the responsibility of local authority and health and safety inspectors have been the subject of recent consideration by the Courts.

2. **Negligence: the Principles**

2.1 A distinction has to be made between those areas of responsibility that are justiciable and those that are not. Where the acts of a regulator are justiciable the test in a personal injury claim for damages will be the *Bolam*\(^1\) test applied to the inspectors or regulators and not the *Wednesbury*\(^2\) test which would be applied to the regulation authority in judicial review proceedings.

2.2 As Lord Hutton pointed out in *Barrett v London Borough of Enfield*\(^3\):

“...I consider that where a plaintiff claims damages for personal injuries which he alleges have been caused by decisions negligently taken in the exercise of a statutory discretion, and provided that the decisions do not involve issues of policy which the courts are ill-equipped to adjudicate upon, it is preferable for the courts to decide the validity of the plaintiff's claim by applying directly the common law concept of negligence than by applying as a preliminary test the public law concept of *Wednesbury* unreasonableness to determine if the decision fell outside the ambit of the statutory discretion. I further consider that in each case the court's resolution of the question whether the decision or decisions taken by the defendant in exercise of the statutory discretion are unsuitable for judicial determination will require, as Lord Keith stated in the *Takaro* case at p.501, a careful analysis and weighing of the relevant circumstances.”

---

\(^{1}\) *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582
\(^{2}\) *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223
\(^{3}\) *Barrett v London Borough of Enfield* [1999] 3 WLR 79 at 111B
2.3 Weighed against the policy considerations in not imposing a duty of care are the advantages of raising standards by imposing a duty. In the Barrett case, Lord Slynn described the benefits of imposing a duty upon local authorities to protect vulnerable individuals (in that case children):

“As to the likelihood of an authority being over-cautious, I am of the same opinion as Evans L.J. in the Court of Appeal in this case at p.380A to B: I would agree that what is said to be a "policy" consideration, namely that imposing a duty of care might lead to defensive conduct on the part of the person concerned and might require him to spend time or resources on keeping full records or otherwise providing for self-justification, if called upon to do so, should normally be a factor of little, if any, weight. If the conduct in question is of a kind which can be measured against the standards of the reasonable man, placed as the defendant was, then I do not see why the law in the public interest should not require those standards to be observed.

Nor do I think that the remedies accepted to be available in "X" are likely to be as efficacious as the recognition by the court that a duty of care is or may be owed at common law. I agree with Sir Thomas Bingham M.R. in his dissenting judgment in the Court of Appeal in "X", at p. 662G:

"I cannot accept, as a general proposition, that the imposition of a duty of care makes no contribution to the maintenance of high standards."

And Lord Slynn stated:

“It is obvious from previous cases and indeed is self-evident that there is a real conflict between on the one hand the need to allow social welfare services exercising statutory powers to do their work in what they as experts consider is the best way in the interests first of the child, but also of the parents and of society, without an unduly inhibiting fear of litigation if something goes wrong, and on the other hand the desirability of providing
a remedy in appropriate cases for harm done to a child through the acts or failure to act of such services.

It is no doubt right for the courts to restrain within reasonable bounds claims against public authorities exercising statutory powers in this social welfare context. It is equally important to set reasonable bounds to the immunity such public authorities can assert. In "Sufficiently Serious?" (by Andenas and Fairgrieve in "English Public Law and the Common Law of Europe" ed. Andenas, (1998)) the authors show the difficult problems which have arisen in cases involving claims for negligence in a statutory context and not least in analysing "the method adopted by the judiciary to ensure restraint in negligence actions against public bodies."

2.4 The same issue was highlighted by Mr Justice Buckley in A and B v Essex County Council4.

"I cannot see how such a duty would detract from the importance of a child’s interests or in any way interfere with the statutory regime. On the contrary, as has been pointed out in some of the cases, it might encourage those involved to perform their tasks better. It is clearly in the public interest that those with special skills who are paid to offer their services to the public, should act to the appropriate standard, and at least in the context of this case, I can see no danger of such a duty encouraging unacceptably defensive behaviour, indeed such if displayed here might well have avoided the problems. It was a somewhat cavalier approach to the agency’s own written forms, in one instance at least that permitted the lack of proper information for A and B to arise and continue undetected."

2.5 In considering whether a claim can be brought against a regulatory authority the first task is to establish the basis on which a duty of care exists.

---

4 A and B v Essex County Council [2002] EWHC 2707
2.6 The judgment of Lord Justice Brooke in *McLoughlin v Grovers* provides an overview of the various alternative tests. He describes at paragraph 28 how:

“...one must go once more to the battery of tests that the House of Lords has taught us to use (see my judgment in *Parkinson v St James NHS Trust* [2001] 3 WLR 376) I will refer briefly to four of them: the “purpose” test (*Banque Bruxelles Lambert SA v Eagle Star Insurance Company Limited* [1997] AC 191, 211G, the “assumption of responsibility “ test (*Henderson v Merrett Syndicates Limited* [1995] 2AC 145, 180G-181F) “the principles of distributive justice” test (*Frost v Chief Constable of South Yorkshire Police* [1999] 2AC) and the three pronged test (*Caparo Industries plc v Dickinson* [1990] 2AC 605). The fact that these tests are usually deployed in cases involving pure financial loss does not mean they are inappropriate for use when the only damage in question is psychiatric illness.”

2.7 The first consideration is whether the case is one of foreseeable personal injury from a negligent act of the Defendant. See *Perrett v Collins*.

2.8 The second consideration is whether the case can be analysed as one of assumption of responsibility and reliance pursuant to the principles in *Hedley Byrne & Co v Heller & Partners Ltd.*

2.9 The third consideration is whether when analysed according to the principles in *Caparo Industries PLC v Dickman* there is foreseeability and proximity and it is just, fair and reasonable to impose liability.

2.10 The “purpose” test and “distributive justice” test may also be helpful in analysing whether a duty of care can be imposed.

---

5 *McLoughlin v Grovers* (A Firm) [2002] PIQR P223
6 *Perrett v Collins* [1998] 2 Lloyds Rep 265
7 *Hedley Byrne & Co v Heller & Partners Ltd* [1964] AC 465
8 *Caparo Industries PLC v Dickman* [1990] 2AC 605
2.11 In general a duty of care will be more readily imposed to protect a Claimant from personal injury than from economic loss. Indeed, it is fair to say the courts have generally been reluctant to recognise that regulators owe a duty of care to members of the public in respect of economic loss suffered due to the actions of the regulated body. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, Lord Pearce stated:

“How wide the sphere of duty of care in negligence is to be laid depends ultimately upon the courts’ assessment of the demands of society for protection from the carelessness of others. Economic protection has lagged behind protection in physical matters where there is injury to person and property.”

3. **Authorities Involving Claims against Regulatory Authorities**

(a) **Regulation of Care Homes by a Local Authority**

3.1 In *Douce v Staffordshire County Council* [2002] EWCA CIV 506 Lord Justice Henry described how:

“The homes are regulated pursuant to the 1984 Act, and the regulations made thereunder, in particular the Residential Care Homes Regulations (SI 1984/1385 - “the Regulations”). The homes provide “residential accommodation with both board and personal care for persons in need of personal care by reason of old age, disablement, past or present dependence on alcohol or drugs, or past or present mental disorder” (see section 1 of the 1984 Act). What the occupants have in common is a degree of vulnerability which requires protection by the regulatory system set up by the Act.”

---

10 *Douce v Staffordshire County Council* [2002] EWCA CIV 506
It would appear from this passage that the local authority would owe a duty of care to residents in respect of the regulation of the home. This claim however was bought by the owners of the home. Under the Registered Homes Act 1984, the council was the statutory regulator for a residential care home owned and operated by the claimant. Part of the council's statutory duty was to set the level of staffing that the claimant was required to provide. The claimant contended that it had been negligent for the council to construe the 1984 Act as requiring staffing to capacity. The consequence of this was that the claimant had suffered economic loss, from substantially overpaid wages, in excess of £300,000, which it sought to recover from the council. The council contended that their actions were matters of discretion founded on policy for which they were liable only if acting unreasonably and therefore outside that discretion, and thus non-justiciable. The Court of Appeal found this was not an issue that could be decided on a summary judgment application and that this was a developing area of the law so it would be wrong to strike out the claim.

(b) **Claims against Environmental Health Inspectors**

3.2 In Welton & Anor V North Cornwall District Council 11 a local authority held liable in damages for the conduct of its environmental officer for giving unnecessary, unwanted and useless advice. The Claimants ran a guest house and an environmental health inspector required them to carry out substantial building works and alterations to their property in order to comply with environmental health regulations and he coupled his requirements with a threat to close down the business if they were not met. In consequence unnecessary and excessive expenditure was incurred for which the judge awarded £34,000 in damages. He also awarded general damages for disruption of family life, inconvenience and future loss of capital on sale. On the Defendant’s appeal the Court of Appeal found that applying the principles in Hedley v Byrne there was an assumption of responsibility by the

---

11 Welton & Anor V North Cornwall District Council [1997] 1 WLR 570
inspector and hence a duty of care owed by him. The defendants were offering an advisory service and the existence of their statutory powers did not prevent the defendants being liable at common law for conduct by the inspector on the Hedley v Byrne principle.

(c) Claims against Building Inspectors

3.3 In Murphy v Brentwood District Council\(^{12}\), the House of Lords considered whether a local authority, exercising supervisory duties under the Public Health Act 1936 and the relevant building bye-law regulations, could be liable in a private law claim for damages for economic loss suffered by a house purchaser. The House of Lords’ decision that no liability arose was confined to pure economic loss. The question whether there could be liability in similar circumstances for persons who suffered injury to person or health or damage to property was left open specifically. See the speeches of: Lord Mackay at page 457H; and Lord Keith at page 463G-H. The only basis of departure in Murphy from the case of Anns v Merton London Borough Council\(^{13}\) was that the damage in Anns, whilst characterised as physical damage by Lord Wilberforce, was pure economic loss. It followed from the reasoning of Deane J. in Council of the Shire of Sutherland v Heyman\(^{14}\) that no actual damage to the property occurred after the Appellant purchased it:

“…the loss or injury involved in the actual inadequacy of the foundations cannot, in the case of a person who purchased or leased the property after the inadequacy existed but before it was known or manifest, properly be seen as ordinary physical or material damage. The only property that could be said to be damaged is the building. The building itself could not be said to have been subjected to “material physical damage” by reason merely of the inadequacy of the foundations since the building never existed otherwise than with its foundations in that state ... any loss involved in the actual inadequacy of the foundations by a person who acquires an interest in the premises after the building has been completed is merely economic in its nature.”

\(^{12}\) Murphy v Brentwood District Council [1991] 1 AC 398
\(^{13}\) Anns v Merton London Borough Council [1978] AC 728
\(^{14}\) Council of the Shire of Sutherland v Heyman 157 CLR 424
(d) **Claims against Aircraft Inspectors**

3.4 In *Perrett v Collins*\(^{15}\) the Claimant had been injured when an aircraft crashed. The crash occurred after an inspection by Mr Usherwood, the Second Defendant, who was employed by the Popular Flying Association, the Third Defendants. The crash occurred as a result of a defect which should have been identified during the inspection.  

Lord Justice Hobhouse stated

“No point has been taken in this case on the question of reasonable foresight. It is accepted on behalf of the Defendants that, if reasonable care was not exercised in relation to the airworthiness of this aircraft, it was reasonably foreseeable by persons in the position of the Second and Third Defendants that injuries might be caused to persons being carried in the aircraft such as the Plaintiff. Similarly, although there were delegated statutory functions no argument has been raised that there is any over-riding principle of public policy which protects the Second or Third Defendants from liability. The arguments that are advanced on their behalf are that the criteria of ‘proximity’, in particular a criterion of ‘directness’, and what is ‘fair, just and reasonable’ are not satisfied. In this connection they refer to the role being performed by Mr Usherwood and the statutory scheme within which he and the Company were operating. They also rely upon the decision (by a majority) of the House of Lords in *Marc Rich v Bishop Rock* [1996] 1 AC 211 and two unreported Court of Appeal decisions, *Philcox v Civil Aviation Authority* 25th May 1995 and *Reeman v Department of Transport and ors* 26th March 1997.

What the Second and Third Defendants seek to achieve in this case is to extend decisions upon “economic” loss to cases of personal injuries. It represents a fundamental attack upon the principle of tortious liability for negligent conduct which had caused foreseeable personal injury to others. That such a point should be considered to be even arguable

\(^{15}\) *Perrett v Collins* [1998] 2 Lloyds Rep 265.
shows how far some of the fundamental principles of the law of negligence have come to be eroded. The arguments advanced in the present case illustrate the danger anticipated by Lord Lloyd in the final paragraph of his dissenting speech in the Marc Rich case. They also illustrate the dangers of substituting for clear criteria, criteria which are incapable of precise definition and involve what can only be described as an element of subjective assessment by the court: such ultimately subjective assessments tend inevitably to lead to uncertainty and anomaly which can be avoided by a more principled approach.”

3.5 Further Lord Justice Hobhouse explained:

“In the common law there has always been a distinct category of liability for causing physical injury to the human body and to goods. The torts of trespass to the person and trespass to goods typify this. These torts originally derived from strict criteria regarding intentional unlawful acts which caused such loss or injury. The law developed from that into a scheme where such intention was not required but unreasonable conduct on the part of the defendant sufficed. However the fundamental point remained the same that the defendant had by some activity caused either injury to the plaintiff’s person or damage to his goods. It is the unreasonable conduct of the defendant causing foreseeable injury or damage which provides the legal nexus between the defendant and the plaintiff and founds the liability of the one to the other. Thus the formulations of the existence of a duty of care by the Court of Appeal in Le Lievre v Gould [1893] 1 QB 491 (adopted by the House of Lords in Donoghue v Stevenson [1932] AC 562) are by reference to injury to a person or his property. These are physical concepts arising from physical consequences of the defendant’s conduct: They do not relate to economic loss though economic loss may come into account at the time that it is necessary to quantify the plaintiff’s loss as a result of the physical consequence of which he is entitled to complain.”

3.6 In the Perrett case, Lord Justice Swinton Thomas described how:
“The regulatory framework recognises the dangers that are inherent in flying. That is the very purpose lying behind the prohibition on taking aeroplanes into the air without a Certificate of Airworthiness and a Permit to Fly, and the appointment of the C.A.A. or those authorised by them to issue such certificates. The whole purpose is one of air safety. In my judgment, any reasonably well informed member of the public, although not in possession of the detailed framework, would expect there to be such a regulatory system in force to ensure his safety when flying and would rely upon it. Furthermore, a member of the public would expect that a person who is appointed to carry out these functions of inspecting aircraft and issuing permits would exercise reasonable care in doing so. The Third Defendants, and those appointed to act on their behalf, are experts in their field the First Defendant is an amateur and inevitably will rely on the Second Defendant as an expert”.

3.7 In Clerk and Lindsell on Torts at para.7-58, page 316 it is stated that:

“This provided the regulatory agency has sufficient control and the purpose of the scheme is to protect the Claimant against the loss suffered, it seems that the agency may be held responsible for negligently failing to control the conduct of the third parties which was directly responsible for the loss. Even where the control and purpose requirements are met, the authority may still escape liability if the alleged negligence related to a policy decision.”

3.8 In Perrett Lord Justice Buxon concluded:

“I agree entirely with my Lords that the balance of justice comes down firmly on the side of imposing a duty, and that members of the public would expect to be protected from injury by careful operation of the regulatory system, and to be compensated if injured by its negligent operation. That was the judge’s view too. I also would dismiss this appeal”.

1 CROWN OFFICE ROW  020 7797 7500  www.1cor.com
© Elizabeth-Anne Gumbel Q.C.  lizanne.gumbel@1cor.com
© Duncan Fairgrieve  duncan.fairgrieve@1cor.com
3.9 In Philcox v Civil Aviation Authority\(^\text{16}\) the Court of Appeal held that the Civil Aviation Authority’s statutory duty to issue certificates of airworthiness involved no duty to the owner of the aircraft to exercise reasonable care to prevent him or his aircraft suffering injury as a result of taking off in an un-airworthy condition.”

Millett LJ (as he then was) stated:

"It is clear, to my mind, that the risk which the scheme of the legislation is designed to prevent is the risk that the owner or operator of an aircraft will fly the aircraft even when it is unfit to fly; and that the persons for whose protection the scheme has been established are the passengers, cargo-owners, and other members of the public likely to be harmed if an unfit aircraft is allowed to fly. The owners and operators of the aircraft are not within the class of persons for whose protection the scheme has been established; they are the persons against whose imprudent activities the scheme is designed to protect the public. They are not entitled to rely on the issue of the certificate to exonerate them from their own responsibility to ensure that their aircraft are fit to fly”.

(e) Claims Against the Health and Safety Executive

3.10 In the case of Thames Trains Limited v Health and Safety Executive\(^\text{17}\), Mr Justice Morland considered the duties owed by the Health and Safety Executive to travellers on Thames trains in the context of a strike out application by the Health and Safety Executive. Morland J. considered the authorities and cited passages from the cases of Perrett and Philcox. He concluded in paragraph 94 by approving the quotation of Lord Justice Buxton in Perrett that:

“By emphasising that the scheme is intended for the protection of persons in the position of the present plaintiff Philcox, as both Lords Justices Hobhouse and Swinton Thomas have pointed out, is strongly supportive of liability in our case.”

---

\(^{16}\) In Philcox v Civil Aviation Authority (The Times June 8, 1995)

3.11 At paragraph 63 Mr Justice Morland pointed out that:

“... the Executive has a specific purpose, albeit long-arm or perhaps more appropriately as long-stop, safety from personal injury where the loss may be of life or limb. It thus differs from a regulatory body designed to protect against economic loss such as the Commissioner of Deposit – taking Companies as in Yuen Kun Yeu v AG of Hong Kong [1988] 1 AC 175.”

3.12 Further Mr Justice Morland adopted the analysis of the Federal Court of Appeal in Canada in the case of Swanson v The Queen in Right of Canada\(^{18}\). Although this case was not followed by the majority of the House of Lords in Stovin v Wise and Norfolk County Council\(^{19}\) [1996] AC 923, Mr Justice Morland pointed out that the facts once determined might well distinguish Stovin’s case.

3.13 The Court of Appeal (Waller LJ, Mantell LJ and May LJ) in Thames Trains Limited v Health and Safety Executive dismissed the appeal by the Health and Safety Executive and confirmed the decision of Morland J.

Lord Justice Waller explained how the case could be distinguished from Stovin v Wise and stated:

“First, I am not clear at present that the case against the HSE is confined to “omissions” alone. The pleading includes allegations of conduct whereby it is alleged that the HSE assumed responsibility by their actual involvement in the design or positioning of SN109, or the safety of the track outside Paddington generally; the allegation is also that the HSE permitted an unsafe signalling system, not simply that they did nothing. It is arguable that the Stovin v Wise double condition requirement does not apply outside the discretionary non-exercise of a power case. As to the first

---

\(^{18}\) Swanson v The Queen in Right of Canada [1991] 80 DLR 741

\(^{19}\) Stovin v Wise and Norfolk County Council [1996] AC 923
condition “irrationality” in Kane v New Forest DC [2002] 1 WLR 312 the Court of Appeal distinguished Stovin v Wise holding that where a planning authority had “permitted” or “required” the construction of a foreseeably dangerous footpath, or if they assumed responsibility for the removal of the danger, they were arguably liable for the personal injury of the person who was injured. Irrationality was not the test. Furthermore in Kane there was no suggestion that the second limb of Lord Hoffmann’s dictum was applicable.

Second, if this was a discretionary non-exercise of power case, it can be argued as it could not be argued in Stovin v Wise, that the public and in particular passengers would rely on the HSE performing their duty. In the context of a track run by Railtrack with individual rail companies profiting from its use, the outside and independent regulator ensuring safety is arguably an important safeguard on which rail users rely. In Lord Hoffmann’s speech it seems to me that he recognises the possibility that where there is general reliance on what a “public authority was supposed to do. Powers of inspection for defects clearly fall within this category” [954E], that might give rise to a duty of care. Reliance is certainly recognised as a possible basis in the minority opinion [937F-938C].

Third, Lord Brennan’s retort to Mr Carlisle Q.C.’s reliance on the non-existence of the factors that persuade Lord Nicholls to treat Stovin v Wise as exceptional, was to seek to demonstrate that in fact the factors did exist. In my view the reasons why liability might be imposed on the HSE may be different to the reasons why liability might be imposed on the Local Authority in Stovin v Wise and since it is certainly not clear to me that Lord Nicholls would have been less likely to put the HSE in the exceptional category than he was the Local Authority in that case, in the light of his treatment of Swanson Estate v Canada (1991) 80 DLR (4th) 741 at page 938 F to which I am about to turn, this is a further area where it would be unhelpful to express views on precisely what may make this a case where a duty of care should be imposed or factors which may make it inappropriate to impose such a duty. It is better to allow those arguments to be developed in the context of the fuller facts which will be available at trial.
Fourth, Lord Nicholls in his speech recognised that a “power to control air safety” referring with apparent approval to Swanson Estate v Canada (1991) 80 DLR (4th) 741 was at the edge of the spectrum “where comparatively little extra may be needed to found a common law duty of care owed to a particular person or class of persons”. Swanson was a decision of the Canadian Federal Court of Appeal by which that court upheld a decision that Transport Canada was negligent in allowing an airline to continue its unsafe practices. Air safety is very arguably analogous to the safety of the railways. Furthermore in Perrett v Collins [1998] 2 Lloyd’s Rep 255 the Court of Appeal here held that an Inspector who provided a certificate of fitness to fly under the regulatory regime provided by the Civil Aviation Act 1992 owed a common law duty of care.”

3.14 Lord Justice May, in agreeing that the appeal should be dismissed, stated:

“In Kane v New Forest District Council [2002] 1 WLR 312, a local planning authority which permitted or required the construction of a foreseeably dangerous footpath were held to have assumed responsibility to those, including the claimant, who might wish to use the footpath to see that it was not open until the danger was removed. The court considered and distinguished Stovin v Wise. On the facts of that case, the defendants were not immune from a claim in negligence because they were exercising a statutory function under planning legislation. In Perrett v Collins [1998] 2 Lloyd’s Rep 255, this court held that a Flying Association and their inspector, who were approved and required to inspect and approve an aircraft before its owner could obtain a certificate of airworthiness, had undertaken to discharge a statutory duty for the protection of the public and were under a duty of care to the plaintiff passenger who was injured when the aircraft crashed. The regulatory framework provided by the Civil Aviation Act 1982 was designed at least in substantial part for the protection of those who might be injured if an aircraft was certified as being fit to fly when it was not. Stovin v Wise was not
apparently cited, but the decision is difficult to reconcile with the restrictive interpretation of Stovin v Wise for which Mr Carlisle contends. Larner, Kane and Perrett are but three of a number of authorities which in my view indicate that blanket immunity, whatever the facts, in favour of a statutory body is a difficult position to sustain. I do not consider that Stovin v Wise concludes the matter in the present case at the present stage without factual findings and the application to those facts of a wide body of authority.”

(g) Claims against Sport Regulators

3.15 In the case of Watson v British Boxing Board of Control Ltd the governing body was found to owe a duty to boxers.

3.16 In the case of Wattleworth v (1) Goodwood Road Racing Company, (2) Royal Automobile Club Motor Sports Association Ltd and (3) Federation Internationale de L’Automobile the Judge found that both the track owners and the governing body who inspected the track owed a duty of care to an amateur driver using the track. In summary, the Judge held in that case as follows:

“(1) Goodwood owed the Claimant a duty of care but was not in breach of it. It regarded all aspects of track safety as paramount, but knew it was not expert in such matters and had reasonably relied upon the advice of MSA and to some extent FIA. It had followed their recommendations to the letter and had every reason to think that the recommended safety measures were appropriate. (2) MSA owed a duty of care to Goodwood and to the Claimant even though the event at which the Claimant died was not one for which an MSA track licence and permit were required. The Claimant, in common with other lawful users, was entitled to assume, and would have assumed, that all due care had been taken by those persons responsible for safety matters.

20 Watson v British Boxing Board of Control Ltd (2001) PIQR, P213
21 Wattleworth v (1) Goodwood Road Racing Company, (2) Royal Automobile Club Motor Sports Association Ltd and (3) Federation Internationale de L’Automobile [2004] EWHC 140
Goodwood had understandably relied on MSA's advice as applicable to non-MSA events. On the evidence, MSA had discharged its duty of care: the design and/or construction of the barriers at the crash site met a reasonable standard of safety (see Perrett v Collins & ors (1998) 2 Lloyd's Rep 255, followed; Watson v British Boxing Board of Control Ltd & anr (2001) PIQR P213, followed). (3) FIA did not owe the Claimant a duty of care, but if it had, it was not in breach of it. Its involvement was far less than that of MSA, and was restricted to international events.

3.17 On the facts of the Wattleworth case, breaches of duty were not found. However the case establishes that a duty of care exists between the track owners who invite amateurs to race and the governing body who determine the track design. If it can be shown in this case that the track did not conform to safety standards or inspection recommendations, and that the design of the track contributed either to the accident or to the seriousness of the injury sustained, then the claim will succeed.

3.18 In the case of Glen Craven v John Riches and others (sued on their own behalf and on behalf of all other members of Italian Motor Cycle Owners Club (GB) and Knockhill Racing Circuit Ltd) the Court of Appeal found that the Defendants’ duty of care in respect of the race track extended to a duty to prevent obstruction to faster riders by slower riders, and that it was foreseeable that injury would be caused if the faster riders used the track at the same time as the slower riders.

---

22 Glen Craven v John Riches and others (sued on their own behalf and on behalf of all other members of Italian Motor Cycle Owners Club (GB) and Knockhill Racing Circuit Ltd [2001] EWCA Civ 375
(h) Claims against Financial Regulators

3.19 On the other hand, the English courts have generally been very wary of imposing liability in respect of claims for economic loss concerning public authorities, including safety inspection and certification,\(^{23}\) social welfare payments,\(^{24}\) planning regulation,\(^{25}\) and decisions of licensing authorities.\(^{26}\)

3.20 Claims against regulators for failure to undertake adequately their supervisory obligations have thus foundered in the sphere of financial supervision.\(^{27}\) Unsurprisingly, actions for regulatory failure have also been rejected where the supervisee has sued the supervisor.\(^{28}\)

3.21 Amongst reason for rejecting such claims, reference has been made to the classic list of policy factors traditionally invoked in the context of public authorities exercising statutory discretion,\(^{29}\) including the fear that potential liability would prompt authorities to engage in liability-avoiding defensive practices, as well as diverting time and resources to repelling speculative claims.\(^{30}\)

3.22 Over and above the restrictive position of the common law concerning financial regulators, statutory immunities have also been granted. For instance the Financial Services Authority

---

\(^{23}\) Murphy [1991] 1 AC 398; Philcox v Civil Aviation Authority The Times, 8 June 1995; Gaisford v Ministry of Agriculture Fisheries and Food The Times, 19 July 1996.

\(^{24}\) Jones v Department of Employment [1989] QB 1; Flynn v Department of Social Security (CA, 16 November 1994).


\(^{26}\) Partridge v General Medical Council [1890] 25 QB 90; Rowling [1988] AC 473. See also David v Abdul Cader [1963] 3 All ER 579 (based on delict under Roman-Dutch law); Ballantyne v City of Glasgow District Licensing Board (1987) SLT 745 (Scottish case).

\(^{27}\) See Yuen Kun Yeu v Attorney General of Hong Kong [1988] AC 175; Davis v Radcliffe [1990] 2 All ER 536.

\(^{28}\) Minories Finance Ltd v Arthur Young [1989] 2 All ER 105.


\(^{30}\) Cf Yuen Kun Yeu v Attorney General of Hong Kong [1988] AC 175, 198.
benefits from such an immunity under Schedule 1, Section 19(1) of the Financial Services and Markets Act 2000:

“19. - (1) Neither the Authority nor any person who is, or is acting as, a member, officer or member of staff of the Authority is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of the Authority's functions.

(2) Neither the investigator appointed under paragraph 7 nor a person appointed to conduct an investigation on his behalf under paragraph 8(8) is to be liable in damages for anything done or omitted in the discharge, or purported discharge, of his functions in relation to the investigation of a complaint.

(3) Neither sub-paragraph (1) nor sub-paragraph (2) applies -

(a) if the act or omission is shown to have been in bad faith; or

(b) so as to prevent an award of damages made in respect of an act or omission on the ground that the act or omission was unlawful as a result of section 6(1) of the Human Rights Act 1998.”

4. Misfeasance in Public Office

4.1 In order to circumvent the statutory immunities and the restrictions under the common law, attempts have been made to base claims on the tort of misfeasance in public office.
4.2 Misfeasance in public office is the only specifically ‘public law’ tort. It provides a remedy for citizens who have suffered loss due to the abuse of power by a public officer acting in bad faith.31

4.3 This tort is of impressive lineage, and may be traced back to election cases in the 18th century, in particular Ashby v White,32 in which the House of Lords allowed a claim against a returning officer who had prevented the claimant from voting in an election. Other cases followed,33 and by 1828, Best CJ was able to state that:

“Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous, that it would be a waste of time to refer to them.”34

4.4 In a change in fortune, the tort slipped into obscurity during the late 19th Century, and one authoritative study has concluded that its existence was almost completely forgotten.35

4.5 In more recent times, the pendulum has swung back in favour of this tort. In the last few years, misfeasance in public office has undergone sustained scrutiny at the highest level, culminating in the case of Three Rivers District Council v Bank of England.36 This litigation arose out of alleged wrongdoing by the Bank of England in supervising the Bank of Credit and Commerce International (BCCI). Following the liquidation of BCCI, depositors brought damages claims against the Bank of

---

32 Ashby v White (1703) 3 Ld Raym 320.
33 Malice was accepted as the basis for the action: Harman v Tappenden (1802) 1 East 555; Cullen v Morris (1819) 2 Stark 577; Tozer v Child (1857) 7 E & B 377.
34 Henly v Lyme Corporation (1858) 5 Bing 91 at 107. See Wade and Forsyth, 768.
36 Three Rivers DC [2000] 2 WLR 1220 (House of Lords’ first decision); Three Rivers DC [2001] UKHL 16 (House of Lords’ second decision).
England for alleged failures in its supervisory role. These claims were struck out in the High Court and Court of Appeal.\textsuperscript{37} Appeal was made to the House of Lords, and in order to simplify matters the procedure was divided into two hearings.\textsuperscript{38}

4.6 The first hearing focussed upon two questions of law.\textsuperscript{39} The first issue concerned the exact ingredients of the tort of misfeasance in public office. The second issue was whether the Bank of England was capable of being liable in damages to the claimants for violation of Community law as laid down in the First Banking Directive.\textsuperscript{40} As far as this point was concerned, the House of Lords held that the claimants did not have a damages remedy under Community law.\textsuperscript{41}

4.7 The second hearing before the House of Lords dealt with the question whether it was right to strike out the claimants’ action on the basis that there was no reasonable prospect of the claim succeeding at trial.\textsuperscript{42} The Bank of England’s application to strike out the claim was rejected by a majority of the House of Lords.\textsuperscript{43} A crucial factor in the decision of the majority of the House of Lords was the reliance of the lower courts on the findings of the Bingham Report concerning the supervision of BCCI.\textsuperscript{44} The crux of the argument was that Bingham LJ (as he then was) had not been in a position to conduct a fair trial of the issues pertaining to the tort of

\textsuperscript{37} At first instance, after initial proceedings concerning various preliminary issues of law, Clarke J acceded to the Bank of England’s application to strike out the action (Judgment of 30 July 1997 (unreported)). The Court of Appeal upheld Clarke J’s decision in a joint majority judgment of Hirst and Robert Walker LJJ; Auld LJ dissented: \textit{Three Rivers DC v Bank of England} [1999] EuLR 211.

\textsuperscript{38} The claim ultimately failed at trial.

\textsuperscript{39} \textit{Three Rivers DC} [2000] 2 WLR 1220.

\textsuperscript{40} First Council Banking Co-ordination Directive of 12 December 1977 (77/780/EEC).

\textsuperscript{41} Which itself is controversial, see further M. Andenas and D. Fairgrieve, ‘Misfeasance in Public Office, Governmental Liability and European Influences’ (2002) 51 ICLQ 757.

\textsuperscript{42} Under the transition arrangements guiding the introduction of the Civil Procedure Rules (CPR) in 1999, the question whether the misfeasance claim should be struck out was determined according to the CPR: \textit{Three Rivers District Council} [2001] UKHL 16, paras 12-13.

\textsuperscript{43} The Bank of England asked the House of Lords to give summary judgment against the claimants under Rule 24.2 CPR. Lords Steyn, Hope and Hutton allowed the appeal against the striking out of the claim. Lords Hohbhouse and Millett dissented.

\textsuperscript{44} \textit{Inquiry into the Supervision of the Bank of Credit and Commerce International} (HC Paper (1992-93) No 198).
misfeasance in public office, and thus it would not be right to treat the Bingham Report as effectively conclusive on the questions that arose in the litigation. The majority held that if the conclusions in the Bingham Report were thus disregarded, it could not be said that the claim had no real prospect of succeeding. The action was consequently allowed to go to trial.

Constituent Elements of Misfeasance in Public Office

4.8 As a result of the recent decisions, it is possible to identify a series of elements which a claimant must show to bring a successful claim based upon misfeasance in public office. It must be shown that the defendant is a public officer, and that the claim relates to the defendant’s exercise of power as a public officer.

4.9 The crux of the tort, however, is the mental state of the defendant. The manner in which the *mens rea* of misfeasance has been framed by the courts is an essential part of understanding the role of this tort in controlling public wrongdoing. The mental element is the tort’s main control-mechanism. Indeed, litigation has focussed exactly upon this element.

4.10 The mental elements of this tort boil down to two limbs. First, the most stringent arm of this tort is known as targeted malice and requires proof that a public officer has acted with the intention of injuring the claimant. The second limb is less strict

---

45 The findings and conclusions in the Bingham report were the result of an investigation that lacked the benefit of statutory powers and was conducted behind closed doors. The claimants were not present nor were they represented. Bingham LJ had no power to compel the attendance of witnesses or to require the production of documents, and there was no counsel to the inquiry.
46 *Three Rivers DC* [2001] UKHL 16, paras 33, 80 and 86 (Lord Hope), 132 (Lord Hutton).
47 *Three Rivers DC* [2000] 2 WLR 1220, 1230-1231.
48 Ibid.
and in essence is made out when a public officer acts in the knowledge that he thereby exceeds his powers and that this act would probably injure the claimant.\textsuperscript{51}

4.11 The second limb of this test has been examined \textit{in extenso} in the \textit{Three Rivers} litigation. It is perhaps helpful to distinguish two separate issues which the courts have focussed upon. The first is the public officer’s knowledge of the unlawfulness of his or her act. Must it be shown that the defendant knew or suspected that the act was unlawful? Or is it sufficient to show that he \textit{ought} to have known that such was the case? The second question concerns the awareness of the \textit{consequences} of that unlawful act. What must be the requisite state of mind of the public officer concerning the likelihood of the claimant being damaged by the unlawful act?

4.12 In the first judgment of the House of Lords, these questions were resolved in the following way. In respect of knowledge of illegality, it was held that the claimant must show either that the officer had \textit{actual knowledge} that the impugned act was unlawful or that the public officer acted with a state of mind of \textit{reckless indifference} to the illegality. As to awareness of consequences, counsel for the claimants had argued that that there was no need for it to be shown that the public officer had actually known that his actions would probably injure the claimants, arguing that recovery should be made for all reasonably foreseeable loss.\textsuperscript{52} This had been supported by Lord Justice Auld’s dissenting judgment in the Court of Appeal.\textsuperscript{53} In the first judgment of the House of Lords, the test of reasonable foreseeable loss was rejected. The relevant test was subjective. It was necessary to show that the public officer knew that his act would probably injure the claimant. As with the knowledge as to the unlawfulness of the act, it would seem that reckless indifference as to the consequences, in the sense that the officer acted without caring whether the consequences happened or not, was sufficient.

\textsuperscript{51} \textit{Three Rivers DC} [2000] 2 WLR 1230 and [2001] UKHL 16.
\textsuperscript{52} See argument in the Court of Appeal: \textit{Three Rivers DC} [1999] EuLR 211, 243.
\textsuperscript{53} \textit{Three Rivers DC} [1999] EuLR 211, 270-272, 370 (CA).
4.13 The second judgment of the House of Lords applied the test thus expounded in order to rule on the question whether the claim should be summarily dismissed.\textsuperscript{54} The second judgment however did more than illustrate the practical application of the requirements of the tort. The second judgment provided some clarification of two aspects of the action, the necessary knowledge as to consequences in terms of untargeted malice, and the exact meaning and role of bad faith.

4.14 As to the question of knowledge as to consequences, in the second judgment of the House of Lords in \textit{Three Rivers}, it was reiterated that what is required is recklessness in a subjective sense of awareness of risk by the defendant.\textsuperscript{55} Inadvertent recklessness, in the sense of reasonable foreseeability, was not enough. But it was again repeated at various stages that the test as to knowledge of the consequences covers reckless indifference to the risk of loss,\textsuperscript{56} which extends to ‘recklessness about the consequences, in the sense of not caring whether the consequences happen or not, will satisfy the test.’\textsuperscript{57}

4.15 A related issue is the degree of awareness of risk which will have to be averred by the claimants. The defendants had argued that there needed to be proof of awareness of probable loss. In response to this, Lord Hope underlined that in the end this question was a matter of fact and degree to be determined by the judge at trial.\textsuperscript{58} In giving guidance for that process his Lordship acknowledged that an important consideration was that supervision was conferred by statute in order to protect depositors. The First Banking Directive was premised upon this policy. Underpinning the supervisory system is the fact that in the absence of proper supervision, deposits are likely to be at risk. In that context, Lord Hope expressed

\textsuperscript{54} \textit{Three Rivers DC} [2001] UKHL 16, para 41.
\textsuperscript{55} \textit{Three Rivers DC} [2001] UKHL 16, paras 44, 46, 62, 76.
\textsuperscript{56} See eg ibid para 58.
\textsuperscript{57} Ibid, para 62. Another variant of this is referred to in Lord Hobhouse’s judgment as ‘blind eye knowledge’ - see para 164.
\textsuperscript{58} Ibid, para 60.
the test to be applied at trial as whether the risk of loss was *sufficiently serious* to warrant a finding of reckless on the part of the supervisor.\(^{59}\)

4.16 Another important aspect of Lord Hope’s judgment is the clarification of the *exact meaning and role of bad faith*. The first House of Lords’ judgment had left this question somewhat open. Counsel for the Bank of England argued that the action should be struck out because the pleadings did not make specific allegations of dishonesty in the sense of subjective bad faith on the part of officials of the bank.\(^{60}\) Lord Hope flatly rejected this argument.\(^{61}\) In effect he held that proof of the elements of the tort in terms of knowledge of unlawfulness of the act or omission and its consequences was enough.\(^{62}\) This is particularly important in terms of recklessness as to consequences. It would seem that proof that the defendant did not care whether the consequences happen or not is enough. Bad faith is demonstrated by recklessness on the part of the administrator in disregarding the risk.\(^ {63}\) Lord Hope emphasised that no additional element of dishonesty or bad faith was required.\(^ {64}\)

**The Place of Misfeasance in Regulator’s Liability**

4.17 The *Three Rivers* litigation has had an important effect on the tort of misfeasance in public office. There is no doubt that the tort has been brought to the attention of litigators by virtue of this high-profile litigation. It is clear also that the *Three Rivers* decisions have substantially broadened the test of misfeasance in public office. The cause of action has evolved from being a prohibitively restrictive tort of intentional

---

\(^{59}\) Ibid, paras 60 and 76. He also expressed this in terms of the following test: ‘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.’ (para 46).

\(^{60}\) Ibid, paras 57 and 62.

\(^{61}\) Ibid, para 62.

\(^{62}\) Ibid, paras 44 and 62.

\(^{63}\) Ibid, para 44.

\(^{64}\) Ibid, para 62.
wrongdoing to become essentially a tort of (subjective) recklessness in which bad faith may be constituted by the elements of recklessness.

4.18 There are other reasons why this tort may play a more prominent role in providing compensation for governmental wrongdoing. First, the notion of proximity, a prerequisite of liability in negligence, would now seem to have no role to play in respect of the tort of misfeasance in public office. The majority in the Court of Appeal in *Three Rivers*, had indicated that proximity might play a limiting role where the number of claimants was large and alleged ‘range of duty’ was wide. However, the House of Lords took a different view, and the Court of Appeal’s approach to proximity was rejected by Lord Steyn and Lord Hutton. The absence of the proximity requirement may indeed serve to make the tort of misfeasance in certain circumstances a more realistic option to claimants than the tort of negligence, particularly where the class of the potential claimants to which a duty of care in negligence would be owed is very broad. Secondly, the tort of misfeasance may be prove to be an attractive option where claims are brought to recover pure economic loss, in respect of which the courts have been reluctant to allow claims in negligence. This policy of caution has not - as yet - been extended to the tort of misfeasance in public office, and it is no coincidence therefore that many of the leading misfeasance cases concern economic loss, of which *Three Rivers* is an example *par excellence*. Misfeasance in public office might provide a remedy for those who traditionally would have difficulties in availing themselves of a negligence claim, such as claimant in cases of regulatory failure.

---

65 See discussion in section 2.1.2.1 above.
67 [2000] 2 WLR 1220, 1233 and 1267.
68 For general discussion, see chapter 7, section 2.1.1.
69 Bourgoin S.A. *v MAFF* [1986] QB 716; *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 (Canadian Supreme Court).
4.19 There has recently been a rash of recent attempts to use the tort of misfeasance in public office as an instrument for governmental accountability,\(^{70}\) including a second claim impugning the Bank of England in its regulatory role.\(^{71}\) Although few of the claims have had much success, not all have been rejected,\(^{72}\) and in a case the corporate officer of the House of Commons was successfully sued for misfeasance in public office arising from the unequal treatment of tenders for a construction contract concerning the new Parliament building.\(^{73}\)

4.20 One last point to make is the European law influence on the development of this tort. In the *Three Rivers* litigation, there are signs of the influence of both European Community and Human Rights law.

4.21 In the second House of Lords decision in *Three Rivers*, repeated reference is made to the claimant’s right to a fair trial.\(^{74}\) Similar concerns are present when Lord Hope expresses his hesitant to striking out claims concerning complex issues of fact and law without examination at trial. An explicit analogy was drawn with the right to a fair trial guaranteed by Article 6 of the European Convention when emphasising the overriding objective of the new procedural rules.\(^{75}\)

4.22 Also, Community law influences can be detected within Lord Hope’s judgment. In various key areas of his judgment, he acknowledged the influence of European law

---

\(^{70}\) *Greville v Sprake* [2001] EWCA Civ 234; *Thomas v Chief Constable of Cleveland* [2001] EWCA Civ 1552; *Chief Constable of Kent v Rixon*, The Times 11 April 2000; *Abdul Rauf Qazi v London Borough of Waltham Forest* (QBD, 3 August 1999); *Harris v Evans* [1998] 3 All ER 522; *Barnard v Restormel BC* [1998] 3 PLR 27.

\(^{71}\) *Hall v Bank of England* (CA, 19 April 2000) (Bank of England sued for misfeasance in public office, on basis of Bank’s alleged action in supervising a company, Bradford Investments PLC, of which the claimants were shareholders).

\(^{72}\) *Racz v Home Office* [1994] 2 AC 45 (refusal to strike out claim in respect of vicarious liability for misfeasance of prison officers); *Toumia v Evans* The Times, 1 April 1999 (refusal to strike out alleged misfeasance of prison warders in refusing to unlock prisoners’ cells); *Weston v Foreign and Commonwealth Office* [2005] EWHC 2953 (FCO arguably liable for the consequences arising from legalisation of documents).

\(^{73}\) *Harmon Facades Ltd v The Corporate Officer of The House Of Commons* (1999) 67 ConLR 1; *Harmon CFEM Facades (UK) Ltd v Corporate Officer of the House of Commons (No 2)* (2000) 72 Con LR 21.

\(^{74}\) [2001] UKHL 16, paras 6, 33 and 80.

\(^{75}\) [2001] UKHL 16, para 92.
in shaping the elements of the cause of action. In response to the fact-sensitive issue of the degree of risk of which the regulator must have been aware, Lord Hope instinctively latched upon the test of a *sufficiently serious* risk of loss.76

76 [2001] UKHL 16, paras 60 and 76.