Filling the Gap: Public Authority Liability in Negligence and Misfeasance in Public Office

M I Hall

Throughout the common law world, public authority liability in negligence has been given a relatively restrictive interpretation. In Canada, the decision of the Supreme Court of Canada in *R. v Imperial Tobacco of Canada Ltd* [2011] SCC 42 appears to have confirmed and solidified a restrictive approach, after the suggestion in *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41 that a broader path for plaintiffs may be opening in Canada. This paper suggests that, from this vantage point, future less restrictive development of public authority negligence seems unlikely, and that this “dead end” has created a space for the principled development of the tort of misfeasance in public office to provide plaintiffs with remedy *vis a vis* public authorities where the requirements of this “new” (evolved) tort are met. This paper suggests that, within the more general framework of tort law, a “new” misfeasance would provide a more appropriate theory of redress for public authority plaintiffs than the tort of negligence (which has, indeed, proven such a poor fit). This paper will include a survey of common law developments in the tort of misfeasance and its relationship to public authority negligence, and propose a “Canadian model” for a “new” tort that would fill the gaps left by the development of negligence in this area. The paper will conclude by applying that model to the Missing Women Disaster in Vancouver, British Columbia (subject of the *Report of the Missing Women Commission of Inquiry* released in 2013), providing a localised and concrete example of the theoretical model proposed and its grounding in fundamental tort principles of justice.