Neutral Citation No: [2002] EWCA Civ 1470 Case No: B1/1999/1213

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Central London County Court
His Honour Judge Hornby

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd October 2002

Before:

LORD JUSTICE SIMON BROWN
Vice President of the Court of Appeal, Civil Division
LORD JUSTICE SEDLEY
and
LORD JUSTICE SCOTT BAKER

- -

Between:

(1) OSAYANIMO MERCY AKENZUA **(2) CAROLINE LIZA COY** **(Administrators of the Estate of Marcia Zena Laws (Deceased))**	**Appellants**
- and -	
(1) SECRETARY of STATE for the HOME DEPARTMENT **(2) THE COMISSIONER OF POLICE for the METROPOLIS**	**Respondents**

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Nicholas Blake Esq, QC & Matthew Ryder Esq
(instructed by **Christian Fisher Khan**) for the Appellants
Jonathan Crow Esq
(instructed by **Treasury Solicitor**) for the First Respondent
Simon Freeland Esq QC & Jeremy Johnson Esq
(instructed by **the Director of Legal Services**) for the Second Respondent

Hearing dates: 9th October 2002

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JUDGMENT : APPROVED BY THE COURT FOR HANDING DOWN
(SUBJECT TO EDITORIAL CORRECTIONS)

Lord Justice Sedley:

The history

1. Delroy Samuel Denton is serving a sentence of life imprisonment for the murder of Marcia Zena Laws, whose personal representatives are the claimants and appellants in these proceedings. The question we have to decide is whether it is arguable in law that Zena Laws' death at Denton's hands was the actionable consequence of acts of misfeasance in public office by one or more officials of the Home Office or officers of the Metropolitan Police. No point is taken for the present on the fact that it is the Home Secretary and the Commissioner of Police rather than the individual officers who are sued. (Practitioners tend to overlook the fact that the list published pursuant to s.17 of the Crown Proceedings Act names the Home Office, not the Home Secretary, as the name in which the Crown may be sued.)

2. The reason why it is said that the killing of Marcia Laws is their legal responsibility is this. Denton entered this country in April 1993 from Jamaica, the country of his nationality. Using his brother's passport he obtained permission to remain for 6 months. He was arrested the following month but not charged. An immigration officer, Brian Fotheringham, interviewed him but was unable to confirm his suspicion that Denton was here on somebody else's passport. On 12 May 1994, however, Denton was again arrested in the course of a raid and charged with possession of drugs with intent to supply and possessing an offensive weapon. At interview his true identity was established. He was, it turned out, a man with a record of violent crime in Jamaica who had served a long sentence there for armed robbery; and it later emerged that this might not be all. It followed also that he had no right to be in the United Kingdom.

3. Brian Fotheringham, who, albeit he was an immigration officer, was attached to a special operations unit at Scotland Yard, arranged for Denton to become a police informer. Within three days or so of his arrest Denton was bailed by or with the agreement of the police and released from detention by Fotheringham by way of temporary admission to the United Kingdom. The drug charges were dropped and in due course a plea of guilty to possessing an offensive weapon (not insignificantly, it was a knife) was visited with a fine of £100.

4. From June 1994, in return for payment, Denton provided Fotheringham, DC Barker and DS Bayes, his handlers, with important information on Yardie activity. Then, in December 1994, Denton was arrested on a rape charge. The charge was dropped just over a month later: subsequently Denton claimed that this was the work of his handlers; the handlers denied it.

5. Three days after the arrest which led to his becoming an informer, Denton had made a claim for asylum, admitting (or asserting) that he had committed a number of murders as a gangster in Kingston during the 1980s and claiming that his activities had been politically motivated. It is a logical inference that the application was made at

Fotheringham's instigation. In December 1994 a letter of refusal was drawn up by the Home Office's immigration and nationality department. It was not, however, served until the end of the following year, 1995. As Mantell LJ commented in giving the judgment of the Court of Appeal (Criminal Division) (see paragraph 6 below), the inference that the letter of refusal was held back deliberately in order to prolong Denton's usefulness as an informer is difficult to resist. Mantell LJ noted in particular that it was not until November 1995 that Fotheringham "lifted the embargo" on the letter.

6. It was in this period of arranged liberty that Zena Laws was murdered by Denton. A young woman with 2 children, she was drug and alcohol dependent. She was known to Denton as a friend of Samantha Thompson, the woman with whom he had lived throughout his time in the United Kingdom. Zena Laws was found sexually assaulted and savagely stabbed to death in April 1995. Denton was arrested on 9 May 1995, interviewed and charged; but for a reason about which the Court of Appeal (Criminal Division) was able only to speculate, the proceedings were discontinued and Denton released from custody on 1 November 1995. He resumed contact with his handlers. But the murder investigation was resumed and on 23 December he was rearrested and again charged with the murder of Zena Laws. It was at the end of that month that the year-old letter refusing asylum was finally served on him. At trial he was convicted of murder and on 19 July 1996 sentenced to life imprisonment. On 15 February 2002, following an extension of time, the Court of Appeal (Criminal Division) dismissed his appeal against conviction.

The proceedings

7. Effectively all the facts set out above are taken not from the particulars of claim but from the judgment of the criminal division of this court. From this point, however, it will be appropriate to refer to the case pleaded on the claimants' behalf, since the issue for us is whether it discloses a viable claim in law.

8. In the Central London County Court on 26 August 1999 His Honour Judge Hornby acceded to an application made jointly by the first and second defendants to strike out the claim on the ground that, accepting as established the facts asserted in it, it could nevertheless not succeed. I would like, if I may, to pay tribute to the quality of his extempore judgment. It was delivered, however, at a time when the *Three Rivers* case, to which I will be coming, was on its way from this court to the House of Lords. His conclusion, in the then state of the law, was that there was insufficient proximity between the victim and the alleged wrongdoers, since the risk they were alleged to have created by arranging for the liberation of a known killer was a risk to the public at large and not specifically to his eventual victim. It is now common ground, in the light of the decision of the House of Lords, that this is not the test and that it is to their Lordships' speeches that it is necessary to look for the law. But the respondents submit that much of the appropriate reasoning and the correct outcome remain the same.

The law

9. The tort of misfeasance in public office originates, at least so far as the law reports take us, in electoral corruption cases beginning in the late seventeenth century. The right to vote was then a property right, and subsequent cases have likewise typically concerned deprivation of property. There is no reported case where the consequence of the misfeasance has been personal injury or death. But while this may, as counsel for the Commissioner suggests, be indicative of the historical nature of the tort it cannot be definitive of it. Moreover, no reported decision deals frontally with the question of law which we have to decide. The nature of the tort, however, is now authoritatively described in the decision of the House of Lords in the *Three Rivers* case, and it is from this source that the answer to the present appeal has to be derived.

10. *Three Rivers District Council v Governor and Company of the Bank of England* [2000] 2 WLR 1220 concerned the alleged liability of the Bank of England for derelictions of duty resulting in the loss by many depositors, the claimant district council among them, of money placed with the fraudulent Bank of Credit and Commerce International. The conclusion of the House, which was unanimous though not expressed in unitary form, is encapsulated in the headnote:

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

11. The leading speech, with which the other four members of the House expressly concurred, was delivered by Lord Steyn. For present purposes the following passages from the speech of Lord Steyn are material:

> "The rationale of the tort is that in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes..." (1230).

Where the malice is untargeted –

> "[t]he basis for the action lies in the defendant taking a decision in the knowledge that it is in excess of the powers granted to him and that it is likely to cause damage to an individual or individuals....[R]eckless indifference to consequences is as blameworthy as deliberately seeking such consequences. It can therefore now be regarded as settled law that an act performed in reckless indifference as to the outcome is sufficient to ground the tort in its second [untargeted] form." (1231-2)

As to who can sue for an abuse of power by a public officer:

> "It would be unwise to make general statements on a subject which may involve many diverse situations. What can be said is that, of course, any plaintiff must have a sufficient interest to found a legal standing to sue. Subject to this qualification, principle does not require the introduction of proximity as a controlling mechanism in this corner of the law. The state of mind required to establish the tort, as already explained, as well as the special rule of remoteness hereafter discussed, keeps the tort within reasonable bounds. There is no reason why such an action cannot be brought by a particular class of persons, such as depositors at a bank, even if their precise identities were not known to the bank....
>
> ...[T]he question is raised whether the Bank is capable of being liable for the tort of misfeasance in public office to plaintiffs who were potentially depositors at the time of any relevant act or omission of misfeasance by the Bank. The majority in the Court of Appeal and Auld LJ held that this issue is unsuitable for summary determination. In my view this ruling was correct." (1233).

Lastly - and crucially for present purposes - in relation to damage and remoteness:

> "Enough has been said to demonstrate the special nature of the tort, and the strict requirements governing it. This is a legally sound justification for adopting as a starting point that in both forms of the tort *the intent required must be directed at the harm complained of, or at least to harm of the type suffered by the plaintiffs. This results in the rule* that the plaintiff must establish not only that the defendant acted in the knowledge that the act was beyond his powers but also in the knowledge that his act would probably injure the plaintiff or persons of a class of which the plaintiff was a member. In presenting a sustained argument for a rule allowing recovery of all foreseeable losses counsel for the plaintiffs argued that such a more liberal rule is necessary in a democracy as a constraint upon abuse of executive and administrative power. The force of this argument, however, is substantially reduced by the recognition that subjective recklessness on the part of a public officer in acting in excess of his powers is sufficient. Recklessness about the consequences of his act, in the sense of not caring whether the consequences happen or not, is therefore sufficient in law." (1235, italics added).

12. While other members of the House added their own reasons in sometimes slightly different terms, to which our attention has been drawn, I do not believe that we are assisted on a strike-out appeal by doing more than note that Lord Hutton, with whom the other members of the House also expressed their agreement, summarised his view in this way:

> "...if the public officer knows that his unlawful conduct will probably injure another person, or is reckless as to that consequence, the plaintiff does not need to show, before liability can arise, some other link or relationship between him and the officer. The requirement of foresight of probable harm to the plaintiff, or recklessness as to such harm, is sufficient to ensure that the tort is confined within reasonable bounds." (1267).

The issues

13. We do not know whether, if the action goes ahead, the defendants will seek to defend as reasonable – or at least not reckless – the decision to set Denton at large. For the present, the pleaded allegation is in essence that Fotheringham as an immigration officer knew that the only proper course was to detain Denton pending his removal from the United Kingdom, and that he instead colluded with police officers, who thereby also became implicated in the misfeasance, in setting Denton at liberty recklessly as to the risk at which this put the potential victims of his violent proclivities. I will come later in this judgment to the question, raised by amendment of the second respondent's notice, whether the facts pleaded against the police are sufficient to sustain the cause of action against them.

14. The defendants seek to sustain Judge Hornby's decision to strike out on a single clear ground: that untargeted malice of the sort which has to be relied on here cannot go wider than the members – *all* the members, in Mr Crow's submission for the Home Secretary - of a closely defined class.

15. Insofar as the claimants have sought by re-amendment of the claim to rely on a class consisting of "persons residing in the London area", of whom Zena Laws was one, I agree with the submission of both defendants that it is a spurious endeavour to give specificity to the unspecific. If a class is required, it cannot be a population of 7 million people or even (if one takes the potential victims to be women) half of that population. It is therefore necessary, in my judgment, to approach the case before us without regard to the re-amendment. If there is a relevant class, it is Denton's potential victims; but the more fundamental question is whether in a case such as this a pre-existing class needs to be identified at all.

Discussion

16. Before turning to the arguments, let me put two paradigm cases which were put by the court in argument, in varying forms, to counsel:

    A. A public official corruptly arranges the liberation of a man serving a sentence for attempting to murder his wife, knowing that he will make a further attempt to kill her if allowed to do so. On his release the man finds his wife and kills her.

    B. A public official corruptly arranges the liberation of a man serving a sentence of imprisonment for terrorist bombings, knowing that he will resume his activities if allowed to do so. On his release the man places a bomb in a public place and kills several people.

17. All parties accept that no principle of law excludes the action for misfeasance in public office purely because the consequence is personal injury or death rather than loss of or damage to property. Any other doctrine would give life to the old reproach that the law of England and Wales was more concerned with property than with

people. The question is then whether the decision of their Lordships' House in *Three Rivers* excludes the action where the predictable victim is neither an identifiable individual nor an identifiable group of individuals.

18. Neither respondent's counsel has been able to explain either the logic or justice of making case A actionable and case B not: yet both counsel submit in the light of the *Three Rivers* decision that it is so. Counsel for the appellants submits that if – as is conceded – case A is actionable as misfeasance in public office at the suit of the victim, so must case B be; and in my judgment he is right. The purpose of the "class" category of liability is to enlarge case A, not to exclude case B. Case B was not before their Lordships' House; nor was it before any of the courts deciding the analogous cases to which our attention was drawn. The question for us is whether the logic of *Three Rivers* includes or excludes it.

19. The reference in Lord Steyn's speech (at 1235) to an individual or a class is not a freestanding requirement of the tort. As the words which I have italicised in it indicate, it is derived from the antecedent proposition that the intent or recklessness must relate ("be directed") to the kind of harm suffered. It is clear, too, that it is 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. So understood, the need for a class is not a special hurdle set by legal doctrine but a practical means, in the kind of case then before the House, of relating and restricting liability to effects in the direct contemplation of the wrongdoer.

20. In cases of electoral or financial malpractice such a class can generally be expected to be capable of exact definition. Even there, however, as the House recognised in *Three Rivers*, those who were only potential depositors at the time of the misfeasance were also capable of having valid claims. So here, it seems to me, the purpose of being required to specify an individual or a class is to be able to establish that the harm which was done lay within the ambit of the material intent or recklessness. So understood, it will be a sufficient pleading in a case where the consequence of misfeasance in public office is alleged to have been personal injury or death that the harm in contemplation was either to a known victim or victims (case A) or to one or more victims who would be unknown unless and until the expected harm eventuated (case B). In both cases the distinction between individual and class is purely numerical: each is relevant to the remoteness principle to which the core reasoning of Lord Steyn is directed. If in his period of arranged liberty Denton had killed someone by careless driving, no action of the present kind would lie because the harm would not have been of the kind indicated by his known proclivities. If, by parity of reasoning, he committed a murder in circumstances in which the defendants knew or should have known he was likely to do so (and, of course, if the other requirements are satisfied), the action lies.

21. It follows that the averment that the deceased was a member of a class – any class - is an immaterial averment. Denton killed a single person in the period of his arranged liberty. If he had predictably murdered or maimed more than one person they would form a class for present purposes. What matters is not the predictability of his killing

the deceased but the predictability of his killing someone. That is my understanding of the effect of the reasoning in *Three Rivers*. It is also case B of my examples. Put another way, but again using the *Three Rivers* taxonomy, Denton's single known victim stands in the same situation as each of those claimants who at the time of the alleged misfeasance in *Three Rivers* were only potential depositors (that is to say, she too was a potential victim). The alternative analysis, that the material class was all Denton's potential victims, among whom it is sufficient to be able now to identify the deceased, is feasible but seems to me artificial to the point of torture. On none of these views is the claimants' pleading demurrable.

22. I consider that these conclusions follow in point of law from the reasoning of their Lordships in *Three Rivers*; but even if they did not, I would hold that the question of law raised by this appeal is at lowest an open one and so inapt for determination by strike-out.

The case against the police

23. The material paragraphs of the particulars of claim, as reamended, read:

> "26. Further or in the alternative, in encouraging/inciting Brian Fotheringham to recommend the temporary release of a known dangerous criminal Delroy Denton in the circumstances set out above so that he could be used as a paid police informer, PC Steve Barker and other Metropolitan Police Officers involved, knowingly and dishonestly acted outside of their powers in that they was aware that in so doing Fotheringham would be acting beyond his powers as an immigration officer in the respects particularised in paragraph 19 above.
>
> 27. Further or in the alternative, in thereafter secretly maintaining Denton as a paid police informer, despite his known criminal record, propensity for violence, associations and the circumstances in which he gained entry into the United Kingdom and in which his temporary release had been secured PC Barker and other Metropolitan Police Officers involved knowingly and dishonestly acted beyond their powers as a police officer."

24. Apart from exemplifying the virtue of proof-reading one's pleadings, these paragraphs are open to attack on a number of grounds. The one advanced by Mr Simon Freeland QC for the Commissioner of Metropolitan Police is that the allegations they contain cannot sustain a case against the Commissioner because they aver no more than that police officers instigated a breach by Fotheringham of *his* public duties. He is in my judgment nearly right, but not quite. Mr Nicholas Blake QC for the claimants accepts, rightly, that instigating a breach of duty by someone else cannot by itself constitute the tort of misfeasance in public office. But, as Mr

Freeland for his part accepts, it would be a breach of the commission of the peace for a police officer improperly to procure the release by another official of a criminal known to him or her to be dangerous. Mr Blake submits that this, among much else, is what is alleged here.

25. This pleading needs a good spring-clean, but I am satisfied that for the present it passes muster on the ground put forward by Mr Blake. It appears possible, however, from his submissions that the case he wants to advance may go beyond the incitement of misfeasance by Fotheringham to the acts of police officers in (for example) granting or procuring bail, dropping the drugs charge and downplaying the offensive weapon charge, as well as then running Denton as an informer in collaboration with Fotheringham. Much will depend on discovery. Whether this can be secured without seeking judgment against the police is for the claimants and their legal advisers to consider in the light of the strengths of the respective claims made in this action.

Conclusion

26. As presently pleaded, in my judgment, this claim does not fall to be struck out. Mr Blake is ready to limit the meaning of the allegations, made by way of amendment, that the acts complained of were done dishonestly to their having been done in the knowledge that they were unlawful or improper (see the analysis of *Three Rivers* in Andenas and Fairgrieve, 'Misfeasance in public office, governmental liability and European influences' (2002) 51 ICLQ 757, 765). With that gloss, and treating the reamendments seeking to set up a class of victim as immaterial averments, the pleading is not in my judgment demurrable.

27. I would accordingly allow this appeal.

Lord Justice Scott Baker:

28. For the reasons given by Simon Brown and Sedley LJJ, I too would allow this appeal.

Lord Justice Simon Brown:

29. I wholly agree with Sedley LJ's judgment and gratefully take from it all the facts and most of the law. Only because of the obvious importance and interest of the appeal do I add a few brief comments of my own.

30. To commit the tort of misfeasance in a public office otherwise than by way of targeted malice, the tortfeasor must be proved to have acted with subjective reckless indifference both to the illegality of his act and as to the probability that harm will result from it. The critical question arising before us is whether the claimant must prove too that it was him or a particular class of which he was a member who would

probably be harmed, or whether it is sufficient to prove merely that someone would probably be harmed and in the event it was him?

31. At the heart of the respondents' argument that harm must be likely to result to some particular person or class of person is that misfeasance is a tort of intention and that even where the case is not one of targeted malice the tortfeasor must still have intended harm to his victim. Save, therefore, where the tortfeasor is intent on acts of mass destruction, runs the argument, he cannot intend to harm the population at large. It would, submit the respondents, make a nonsense of the tort to suggest that a public officer can intend harm to an indeterminate category. The logic of this argument, as certainly Mr Crow's skeleton argument recognises, is that the class of victims "must consist of a category that is readily identifiable at the moment when the tort is allegedly committed", and "the risk of harm must be a risk of harm to the entire class, not a risk that an unidentified member of the class might eventually suffer harm".

32. To my mind the argument is an impossible one. If, as their Lordships' speeches in *Three Rivers* make plain, the element of bad faith and intent are demonstrated in these cases by the public officer's reckless disregard of the risk (the probability of harm) to which his unlawful act gives rise, I see no good reason why liability should arise only in those cases where the public officer, had he turned his mind to it, could actually have identified just which person or persons would be harmed. My Lord's paradigm examples A and B in paragraph 16 of his judgment admirably illustrate the absurd and unacceptable consequences of the respondents' argument.

33. Take too an example which I myself raised in argument, initially in *K -v- Secretary of State for the Home Department* [2002] EWCA Civ 983 (a case brought in negligence) and then again in our case, that of the release (negligently or corruptly) of someone like Hannibal Lecter (merely a more extreme case on the facts than here or in *K*). Why should liability depend not merely on the predictability of harm but on the predictability of who precisely would suffer it? The claim in *K* necessarily failed because in negligence there remains the need to show proximity (meaning closeness of a relevant kind between the parties) as a separate requirement of the duty of care. I see no good reason, however, to introduce proximity by the back door into the tort of misfeasance. Laws LJ, giving the leading judgment in *K* said this:

> "If a public authority were to be held liable in negligence on facts like those pleaded here, with no true nexus shown between claimant and defendant (its absence being supposedly filled by the perceived gravity of the risk involved), 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 would be 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 ..."

34. The claimant there was in no position to allege misfeasance. Here by contrast this graver tort is plainly pleadable. As Lord Steyn said in *Three Rivers* in a passage already cited by my Lord:

> "principle does not require the introduction of proximity as a controlling mechanism in this corner of the law."

I am quite unable to accept Mr Crow's submission that Lord Steyn's reference to the need for the plaintiff to have "a sufficient interest to found a legal standing to sue" was intended to limit claims to specified individuals predictably at risk.

35. As for the respondents' argument that it would be very strange if the claim could proceed on the basis of misfeasance in public office (which requires that the harm should be foreseen) in circumstances where it would fail in negligence (which only requires that the harm should be reasonably foreseeable), I see nothing strange in this at all: a claim in misfeasance postulates that the claimant can prove altogether more blameworthy conduct that in a negligence action; it is unsurprising that the law should decline to impose a further limiting requirement akin to proximity.

36. The respondents rely heavily on the many references throughout their Lordships' speeches in *Three Rivers* to a person or "class" of persons. To my mind, however, this reliance is misplaced. Rather, these references are explicable in the particular circumstances arising there given that recovery was envisaged by a large number of people. As Sedley LJ explains in paragraph 19 of his judgment, the concept of class is "expansive rather than restrictive".

37. Quite why Lord Steyn at p1233 (in the passage already cited by my Lord) regarded the question whether the Bank is capable of being liable in misfeasance to plaintiffs who were *potentially* depositors at the time of any relevant act or omission of misfeasance merely as "unsuitable for summary determination" I am not altogether clear. He had just previously approved Clarke J's observations at first instance with regard to bank depositors and Clarke J had clearly indicated that he regarded the Bank as no less liable to potential depositors than to existing depositors - [1996] 3 All ER 558, 601-2, 631. Certainly Lord Millett's speech concluded:

> "The statutory powers in question were conferred on the Bank of England for the protection of actual and potential depositors, and any member of either class can satisfy the requirement [the requirement of 'a legally protected interest']" (p1276)

38. Lord Millett's reference there to potential depositors being a "class" seems to me revealing. Denton's victim in the present case (the victim, therefore, of the respondents' assumed unlawful act in placing/leaving Denton at liberty) seems to me in just the same position as a potential depositor of the Bank who, after the Bank's assumed misfeasance in allowing BCCI to open or failing thereafter to close it, becomes an actual depositor. I respectfully agree, therefore, with Sedley LJ's

analysis in paragraph 21 of his judgment, an analysis, of course, wholly inconsistent with the respondents' core submissions set out in paragraph 31 above.

39. I too, therefore, would allow this appeal.