THEORIZING THE INSTITUTIONAL TORTFEASOR

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Institutions are entities (rather than collections of individuals), with distinct characters and identities that are most aptly explained in terms of institutional culture. The perceptions and actions of individuals embedded in a particular institutional culture are, to a significant extent, caused by that culture. This understanding of the relationship between institutional culture and institutional actors has been incisively theorized in other disciplines, but is virtually absent from tort law. As institutions have become increasingly important players in social life, in comparison with individuals acting qua *individuals, the absence of a robust theory of the institutional tortfeasor has marginalized tort law and will continue to do so. Coherent theorization of an institutional tortfeasor requires the translation of ideas about organizational culture and identity into the language of tort doctrine.*

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I. INTRODUCTION

> Tort law is about compensating those who are wrongfully injured. But even more fundamentally, it is about recognising and righting wrongful conduct by one person or a group of persons that harms others. If tort law becomes incapable of recognising important wrongs, and hence incapable of righting them, victims will be left with a sense of grievance and the public will be left with a feeling that justice is not what it should be.[1]

The premise underlying this article is that the institutional actor is inadequately theorized in tort law and that this under-theorization creates the kind of difficulty referred to by Justice McLachlin (as she was then) in the passage cited above. Institutions of different kinds, including schools, prisons, care facilities, religious bodies, and public organizations such as police forces, are not merely collections of individuals acting as individuals (either in compliance with or in spite of policy and/or directions); institutions are entities, with distinct characters or identities that are most aptly explained in terms of institutional culture (as described below). The perceptions and actions of individuals embedded in a particular institutional culture are, to a significant extent, caused by that culture. The police officer "in character" perceives and behaves differently than the same individual off duty, for example,

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[1] The Honourable Justice Beverley McLachlin (writing extra-judicially), "Negligence Law: Proving the Connection" in Nicholas J Mullaly & The Honourable Justice Allen M Linden, eds. *Torts Tomorrow: A Tribute to John Fleming* (Sydney, Austl: LBC Information Services, 1998) 16 at 16.

and differences between particular forces (each with its own culture) can be striking. This understanding of the relationship between institutional culture and institutional actors is obvious, even mundane, in terms of everyday observation and experience but virtually absent from tort law. As institutions have become increasingly important players in social life, in comparison with individuals acting *qua* individuals, I suggest that the absence of a robust theory of the institutional tortfeasor has marginalized tort law and will continue to do so.

Coherent theorization of an institutional tortfeasor requires the translation of ideas developed in other disciplines about organizational culture and identity into the language of tort doctrine. This project necessarily involves working at the flexible margins of the doctrines of tort law, and suggesting points where doctrinal evolution is justified; not a description of what *is* but an exploration of what could (and I argue should) be. This exercise is consistent with the famous plasticity of tort law and its responsiveness to social changes of many kinds. Doctrinal interpretation and development is, of course, the work of judges and this process comprises the special genius of the common law. I contend that it is also the work, indeed, the responsibility, of legal academics. This is particularly so in cases of public significance involving institutional defendants, given the likelihood that such cases will settle thereby precluding doctrinal development in the courts.[2] The development of tort doctrine in academic spaces may, in turn, inform future developments in the courts,[3] in public inquiries and other public or policy reports, and within the public discourse that informs and supports institutional cultures.

II. INSTITUTIONS AND ORGANIZATIONAL CULTURES

The Oxford English Dictionary defines an institution as "an organization founded for a religious, educational, professional, or social purpose."[4] In her seminal article "Concepts of Culture and Organisational Analysis" Linda Smircich identified four distinct ways in which the idea of "culture" has developed in connection with the study of organizations.[5] First, culture may be conceptualized as a "backdrop" providing the social context in which organizations operate (and by which they are informed). Second, organizations have cultures of their own: the "shared key values and beliefs"[6] and socio-cultural qualities "that produce distinctive cultural artifacts such as rituals, legends, and ceremonies."[7] These internal cultures convey "a sense of identity for organization members,"[8] facilitate the "generation

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2 See Heather Williams & Nicholas Bowen, "Chipping away at *Hill*: Negligence and the Police (Seminar delivered at the Doughty Street Chambers, 25 April 2012) [unpublished].

3 Bruce Feldthusen's work on economic loss provides an example of this process.

4 *The Oxford Dictionary of English*, 3rd ed, *sub verbo* "institution."

5 Linda Smircich, "Concepts of Culture and Organizational Analysis" (1983) 28:3 Administrative Science Q 339.

6 *Ibid* at 345.

7 *Ibid* at 344.

8 *Ibid* at 345–46, citing Terrence E Deal & Allan A Kennedy, *Corporate Cultures: The Rites and Rituals of Corporate Life* (Reading, Mass: Addison-Wesley, 1982); Thomas J Peters & Robert H Waterman Jr, *In Search of Excellence: Lessons from America's Best-Run Companies* (New York: Harper & Row, 1982).

of commitment to something larger than the self,"[9] enhance "social system stability,"[10] and serve as a "sense-making device"[11] that can guide and shape behaviour. Third, "culture" provides a "root metaphor"[12] or way of thinking about organizations. And fourth, organizational culture (like other kinds of cultures) may be understood in terms of the need to structure unconscious processes (the "unconscious infrastructure"[13]) in accordance with organizational objectives. In this way, the cultural norms and beliefs of organizations provide the conceptual "frames"[14] through which institutionally embedded actors read the behaviour of themselves and others — "a way of seeing that [is] simultaneously a way of not seeing."[15]

All four ideas described by Smircich — culture as the external context in which organizations of different kinds (including institutions) are situated and by which they are informed; culture as internal to organizations (the idea of an "institutional culture"); culture as a metaphor or way of thinking about organizations; and culture as the perceptual frame through which the institutionally embedded actor makes sense of what she sees — are interrelated aspects of culture in relation to institutions. The idea of culture as internal and specific to a particular institution, and as constructing the "role-frames" of institutional actors (as discussed below), is especially pertinent to the objective of this article: to explain how institutions act wrongfully and thereby cause harm in a way that is explicable by the doctrines of tort law. The idea of culture as backdrop (informing and, in turn, informed by institutional cultures) is also relevant, as the "cultural resonance" of an institutional culture (such as resonance with popular beliefs and narratives in the wider culture) contributes to its power and resilience.[16] Changes in the wider cultural context also have the potential to disrupt internal cultures, with the extent of disruption depending on a culture's resilience and insolation.

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9 Smircich, *ibid* at 346, citing Maryan S Schall, "An Exploration into a Successful Corporation's Saga-Vision and its Rhetorical Community" (Paper delivered at the SCA/ICA Conference on Interpretive Approaches to the Study of Organizational Communication, Alta, Utah, July 1981) [unpublished]; Caren Siehl & Joanne Martin, "Learning Organizational Culture" (1981) Graduate School of Business, Stanford University; Peters & Waterman, *ibid*.

10 Smircich, *ibid*, citing Meryl R Louis, "A Cultural Perspective on Organizations: The Need for and Consequences of Viewing Organizations as Culture-Bearing Milieux" (Paper delivered at the National Academy of Management Meetings, Detroit, Mich, August 1980) [unpublished]; Gary Kreps, "Organizational Folklore: The Packaging of Company History at RCA" (Paper delivered at the SCA/ICA Conference on Interpretive Approaches to Organizational Communication, Alta, Utah, July 1981) [unpublished].

11 Smircich, *ibid*, citing Louis, *ibid*; Alan D Meyer, "How Ideologies Supplant Formal Structures and Shape Responses to Environments" (1982) 19:1 J Management Studies 45; Jeffrey Pfeffer, "Management as Symbolic Action: The Creation and Maintenance of Organizational Paradigms" (1981) 3 Research in Organizational Behavior 1 at 1; Siehl & Martin, *supra* at note 9.

12 Smircich, *ibid* at 347.

13 *Ibid* at 351–52, citing Stephen P Turner, "Complex Organizations as Savage Tribes" (1977) 7:1 J for Theory Social Behaviour 99.

14 See PM Strong, *The Ceremonial Order of the Clinic: Parents, Doctors and Medical Bureaucracies* (London, UK: Routledge & Kegan Paul, 1979).

15 Diane Vaughn, *The Challenger Launch Decision: Risky Technology, Culture, and Deviance at NASA* (Chicago: University of Chicago Press, 1996) at 394.

16 Robert M Entman, *Projections of Power: Framing News, Public Opinion, and U.S. Foreign Policy* (Chicago: University of Chicago Press, 2004) at 6. See also, Erving Goffman, *Frame Analysis: An Essay on the Organization of Experience* (Boston, Mass: Northeastern University Press, 1986).

Legal narratives, by reason of the social authority accorded to law and legal discourse, are uniquely able to influence and even structure social and cultural narratives of many kinds.[17] These narratives include the doctrines of tort law which are, in effect, legal narratives of a particular kind. In this way, as well as through direct legal action engaging the traditional tort functions of compensation, deterrence, fairness, and appeasement, the doctrines of tort can exert a uniquely disruptive influence vis-à-vis institutional cultures through the explanations they provide: by first identifying the wrongful, and by explaining why it is wrong.[18]

A. ROLE-BASED FRAMES AND CULTURAL RULES: THEORIZING THE "ORGANIZATIONALLY EMBEDDED" ACTOR

> [T]he power of the organization to shape decision making is not only a function of the interplay between individual and organization. Rather, it results from the organization's power to *redefine the actor's frame of reference altogether*, i.e., to "mold the perceptions and information processing of its participants." … The key insight here is that individuals who are embedded in organizations do not make choices solely as individuals. To the extent that they accept the organizational or role-based frame, they will "no longer [be] acting as isolated rational individuals; [but as] part of a team, agents of authority, absorbed in a larger cause."[19]

Writing about police misconduct as an organizational problem, Barbara E. Armacost concludes that "the impulse to isolate misbehaving officers as 'rogue cops' is, essentially, a search for scapegoats."[20] Armacost sets out two reasons why "it is essential that the police organization be taken seriously, both in fixing blame and in formulating solutions."[21]

She writes:

> First, it is *factually inaccurate* to focus on individual deeds … Law enforcement organizations have cultures – commonly held norms, social practices, expectations, and assumptions – that encourage or discourage certain values, goals, and behaviors. Police agencies are culpable if they tolerate cultures that promote conduct that is morally or legally objectionable. Second, it is *unfair* to lay the moral responsibility for police misconduct solely at the feet of individual officers. … They are embedded in an organization that makes them more likely to frame their judgments in terms of role-based obligations and expectations.[22]

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17 Timothy D Lytton, "Clergy Sexual Abuse Litigation: The Policymaking Role of Tort Law" (2007) 39:3 Conn L Rev 809 ("[t]ort litigation framed the problem of clergy sexual abuse as one of institutional failure, and it placed that problem on the policy agendas of the Catholic Church, law enforcement, and state governments" *ibid* at 811–12).

18 Margaret Isabel Hall, "Institutional tortfeasors: Systemic Negligence and the Class Action" (2006) 2 Torts LJ 135 at 157 [Hall, "Systemic Negligence"]:

> Law is … the prism though which society explains and understands wrongdoing. Compensation for great wrongs of widespread social impact *without* law's explanation deprives society of the opportunity to explain, in its own terms of responsibility and justice, social disasters of the greatest significance. Long after the reports of committees have been read and forgotten, the law will continue to explain what is wrong, and why it is wrong, as new cases come before the courts [emphasis in original].

19 Barbara E Armacost ,"Organizational Culture and Police Misconduct" (2004) 72:3 Geo Wash L Rev 453 at 508–509 [emphasis in original], citing to Robert Jackall, *Moral Mazes: The World of Corporate Managers* (New York: Oxford University Press, 1988) at 17; Herbert C Kelman & V Lee Hamilton, *Crimes of Obedience: Toward A Social Psychology of Authority and Responsibility* (New Haven: Yale University Press, 1989) at 66.

20 Armacost, *ibid* at 493.

21 *Ibid*.

22 *Ibid* [footnotes omitted] [emphasis in original].

Institutionally embedded actors do not make decisions in the same way as rational actors, explaining "why legal sanctions that assume an individual rational actor model are less than successful in curbing police misbehavior."[23]

Inquiry reports provide rich de facto narrative accounts of institutional culture as entitative, the medium through which individual actors are brought into relationship with one another to create an institutional entity with a distinct identity.[24] Institutional cultures of this kind are not mere attitudes to be easily assumed or shed as and when directed by outsiders (as in report recommendations).[25] Institutional insiders who resist or critique institutional culture are marginalized or even excluded by the institutional entity. Such cultural outliers (the "hard-working individual police officers" described by Commissioner Oppal in the Missing Women Inquiry Report who, in the middle of "gross systemic inadequacies" "acknowledged the crisis and strived valiantly to solve the disappearances of the missing women")[26] are able to see what is there to be seen because they are outliers, working outside the culture (and such individuals are therefore ineffectual within the institution without culture change).[27]

The reports also illustrate the resilience of institutional cultures, and their apparent resistance to change. Discussing a review of inquiry reports dealing with child deaths and social services,[28] the British legal academic Robert Dingwall noted that "[o]ne of the striking features of these inquiries is the repetitive character of their findings and recommendations … this very recurrence suggests that these inquiries are actually failing to make any lasting impact on the everyday practice of the occupations and organisations under scrutiny."[29] The reports describe a

> general picture of practice … not of gross errors or failures by individuals on single occasions but of a confluence or succession or errors, minor inefficiencies and misjudgements by a number of agencies, together with the adverse effects of circumstantial factors beyond the control of those involved. … [A] witness in the Karen Spencer Inquiry described the entire case as "a whole chain of events … strewn with 'if only.'"[30]

In an earlier piece, Dingwall (writing with John Eekelaar and Topsy Murray) described as a "rule of optimism" the role-frame through which child protection workers perceived and

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23 *Ibid*.

24 Julie Spencer-Rodgers et al, "Culture and Group Perception: Dispositional and Stereotypic Inferences About Novel and National Groups" (2007) 93:4 J Personality & Social Psychology ("[e]ntitativity refers to the quality of 'groupness' or the extent to which social aggregates come to be bona fide groups, rather than mere collections of individuals" at 526).

25 United Kingdom, Department of Health, *Child Abuse: A Study of Inquiry Reports 1980–1989* (London: Her Majesty's Stationery Office, 1991) [DH *Child Abuse*]: "The stories of the individual children are moving and the tragedy of death, usually described near the middle of the Report, is always [impactful]. Afterwards, reading the policy and practice discussion seems rather superfluous. What really can be done?" (*ibid* at 109).

26 The Honourable Wally T Oppal, *Forsaken: The Report of the Missing Women Commission of Inquiry Executive Summary* (Victoria: Queen's Printer, 2012) at 26.

27 The "hard-working individual police officers" described by Oppal were unable to exert any effect on the general "gross systemic inadequacies" of the investigation and all left the force (*ibid*).

28 United Kingdom, Department of Health and Social Security, *Child Abuse: A Study of Inquiry Reports 1973–1981* (London: Her Majesty's Stationery Office, 1982) [DHSS *Child Abuse*]. The Study reviewed reports between 1973 and 1981; a second collection was published in 1991: DH *Child Abuse*, *supra* note 24.

29 Robert Dingwall, "Reports of Committees: The Jasmine Beckford Affair" (1986) 49:4 Mod L Rev 489 at 489 [Dingwall, "Jasmine Beckford"].

30 DHSS *Child Abuse*, *supra* note 28 at 28 [footnotes omitted].

constructed events in a way that would "favour the interpretation of signs and symptoms that least stigmatises parents" so long as parents could be made to fit within the frame.[31] The distorting effect of the "rule" can be seen throughout the inquiry report collections as a source of the "disasters" which, in hindsight (from the perspective of the outsider reading the report) seem obvious and inevitable.[32] The rule is also functional, however, effecting what Dingwall, Eekelaar, and Murray refer to as the "liberal compromise": "that the family will be laid open for inspection provided that the state undertakes to make the best of what its agents find."[33] The rule of optimism makes uninvited state surveillance of private behaviour possible in a liberal state[34] while allowing workers "to bridge the gap between their own ideals and the realities of their practice, that their impact can be no more than marginal in a liberal society" (taking into account both the nature of the surveillance task and the inability of workers to address material inequality in the context of capitalist society, with the "consequent endorsement of the legitimacy of inequality").[35] Dingwall was sharply critical of Lord Blom-Cooper's co-option of the "rule of optimism" in the *Report of the Inquiry into the Death of Jasmine Beckford*[36] to refer to the naïve and culpable refusal of individual social workers involved in the case to see what was there to be seen; in doing so Blom-Cooper's team "merely fed the appetites of the sensational press while wrecking … [the] careers of some unlucky social workers."[37] Blom-Cooper, in describing the workers as unreasonable[38] is (for Dingwall) missing the point: the rule determines what can and cannot be seen and understood in a way that is distinct from the vantage point of tort's "reasonable person."

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31 Robert Dingwall, John Eekelaar & Topsy Murray, *The Protection of Children: State Intervention and Family Life* (Oxford: Basil Blackwell, 1983) at 207. The authors describe several explanatory narratives/interpretative techniques through which this framing is enacted. See also Robert Dingwall, "Labelling Children as Abused or Neglected" in Wendy Stainton Rogers et al, eds, *Child Abuse and Neglect: Facing the Challenge* (London, UK: BT Batsford, 1989) 158; Margaret Isabel Hall, *The Child at the Centre: Rethinking Child Protection* (LLM Thesis, University of British Columbia Faculty of Law, 1998) [unpublished] [Hall, *Child at the Centre*]. The wider culture resonates with professional frames in different ways, in child protection as elsewhere. I have argued elsewhere that child welfare practices in the 1960s and 1970s in Canada vis-à-vis First Nations children were informed by an operational "rule of pessimism" that would have been unacceptable outside of that context. Professional frames adjust in connection with the macro-cultures in which they are embedded.

32 See especially United Kingdom, Department of Health and Social Security, *Report of the Committee of Inquiry into the Care and Supervision Provided in Relation to Maria Colwell* (London: Her Majesty's Stationery Office, 1974) (the report of the inquiry into the death of Maria Colwell consists of two reports: a minority report written by the social worker Olive Stevenson and the majority report written by social work outsiders).

33 Dingwall, Eekelaar & Murray, *supra* note 31 at 91 ("[s]tate agents will not find proven deviance, as opposed to questionable diversity, unless presented with quite overwhelming evidence" *ibid*).

34 Hall, *Child at the Centre*, *supra* note 31 (the authoritarian potential of state intervention requires its weakness). See also Dingwall, Eekelar & Murray, *ibid*.

35 Dingwall, "Jasmine Beckford," *supra* note 29 at 501, citing Dingwall, Eekelaar & Murray, *ibid* at 90.

36 United Kingdom, *A Child in Trust: The Report of the Panel of Inquiry into the Circumstances Surrounding the Death of.Jasmine Beckford* (Wembley: London Borough of Brent, 1985) [*A Child in Trust*].

37 Dingwall, "Jasmine Beckford," *supra* note 29 at 507.

38 *A Child in Trust*, *supra* note 36 at 32:

> We are entitled to judge a person's actions by reference to what was and should, reasonably, have been in his or her mind at the relevant time. We are not entitled to blame him or her for not knowing, or not foreseeing what a reasonable person would neither have known nor foreseen. In assessing whether a reasonable person would have known or foreseen an event, we are entitled to have regard to what actually happened, though, of course, the fact that an event occurred does not mean that a reasonable person would necessarily have known that it would occur or would have foreseen its occurrence. But the fact that it *did* occur (and was not an Act of God but the result of human action or inaction) gives rise to a presumption — either that there was knowledge that it would occur, or that foresight would have indicated its likely occurrence [emphasis in original].

Dingwall, "Jasmine Beckford," *supra* note 29 ("[i]n plain English, this appears to mean that if something went wrong, someone must be to blame" at 506).

Dingwall concludes that, while "[t]he empire of law should not necessarily yield to that of social science … any inquiry which neglects the findings of relevant, well-established research is likely to produce flawed conclusions."[39] Yet the mere description of institutional cultures and role frames in the sociological and organization theory literature seems no more effective than the legal scapegoating Dingwall decries; hence the strikingly repetitive patterns in the inquiry reports, describing the same errors over and over again. The irreplaceable function of the "empire of law" generally,[40] and *tort* law in particular, is to recognize and explain "important wrongs" in the way described at the beginning of this paper.[41] Identifying and describing the dynamics of institutional culture and the framing devices associated with it does not in itself justify "culpability" (in Armacost's language) or liability (in the language of tort), even where a causal relationship can be established between a harm suffered and the culture of a particular institution. A coherent theory of the institutional tortfeasor requires a coherent explanation of how institutional cultures act in ways that are wrongful. That explanation is, in turn, essential to the disruption of harmful institutional cultures; institutional cultures cannot be changed unless the nature of any wrongfulness is understood.

The legal approach of Lord Blom-Cooper in the *Jasmine Beckford Inquiry Report* is flawed, as Dingwall notes, because it applies a doctrinal narrative constructed with the individual "in mind" — the reasonable person — to an institutionally embedded actor who is different from the reasonable person in important ways. Moreover, fixing individual liability does nothing to identify and explain the source of harm, and so cannot effect the prevention of future harms through deterrence. Tort's role need not and *should* not be limited to this singular doctrinal narrative.

III. THEORIZING THE INSTITUTIONAL TORTFEASOR

> I should be sorry to think that, if a wrong has been done, the plaintiff is to go without a remedy simply because no one can find a peg to hang it on.[42]

Within and for the purposes of each doctrine, tort liability must be justified on the basis of an element of wrongfulness that separates the tortious from the accidental; mere cause and effect is not enough. The breach of a duty of care — fault — is the element of wrongfulness in negligence and the basis on which compensation (shifting the loss from plaintiff to defendant) is fair and thereby justified. For the purpose of the trespass torts, and the tort of nuisance, the element of wrongfulness is provided by the interference with rights. Liability is justified in the so called "strict-liability" doctrines of tort law by the defendant's creation of risk and the materialization of that risk as described in and for the purposes of each

[39] Dingwall, "Jasmine Beckford," *ibid* at 507.

[40] What law *can* do (although, as per Dingwall's critique, it does not currently do so).

[41] Armacost, *supra* note 19. Armacost's paper suggests legislation or court ordered injunctions as suitable "remedies"; it is the thesis of this paper that tort law is uniquely apposite and capable of evolving to provide a coherent response to institutional wrongs (indeed, that the very purpose of the flexibility inherent in tort law is to respond to "new" wrongs — newness here referring to both occurrence and understanding).

[42] *Abbot v Sullivan* (1951), [1952] 1 KB 189, Denning LJ, dissenting at 200.

doctrine.[43] Misfeasance in public office, discussed in more detail below, requires the deliberate misuse of public authority, through omission or commission, displaying "a conscious disregard for the interests of those who will be affected by the misconduct in question."[44]

The doctrines of tort law (including the elements of wrongfulness on which liability turns) have developed around the individual actor; this includes traditional theories of institutional liability (vicarious liability or the negligent failure to control a "rogue" institutional actor), in which wrongfulness is located in the institution's relationship to an individual tortfeasor whose wrong has "caused," in the proximate sense, the plaintiff's damage. Traditional theories of this kind do not require an explanation of how institutions *act* directly and wrongfully in a way that is analogous to, but distinct from, the actions of individuals. Theorising a truly institutional tortfeasor means explaining both action and wrongfulness in a way which develops but is consistent with the conceptual frameworks of existing tort doctrine.

Institutions, like individuals, act in different ways and therefore (as with individuals) no single doctrine suffices to explain all kinds and qualities of institutional wrongdoing. This paper will consider two distinct theories of tortious wrongdoing as they apply to the institutional tortfeasor: the doctrine of negligence and the doctrine of misfeasance in public office.

A. BREACHING THE DUTY OF CARE: UNREASONABLE INSTITUTIONS AND THE CREATION OF RISK

Liability in negligence requires fault; the breach of a duty of care owed by the defendant to the plaintiff. A duty is breached where the defendant reasonably foresees that its conduct or omission poses a "real risk" of harm to the plaintiff, and where the defendant proceeds in the face of that risk. "Conduct or omission" for this purpose includes the *creation* of risk, the decision to proceed in the face of unreasonable risk, and the failure to act in a way that reduces risk where required to do so by reason of a special relationship of proximity. The question of what is reasonably foreseeable is judged by the standard of the reasonable person; the question of what poses a "real risk" is determined on the basis of what a "reasonable [person] … would not brush aside as far-fetched."[45]

As discussed in the section above, it is both inaccurate and unfair to hold institutionally embedded actors to the rational actor standard of the reasonable person. Yet, for the purposes of tort law, where an injury has occurred involving a wholly innocent plaintiff, letting the damage fall where it lies creates a justice "gap" and a problem for the integrity of tort law in terms of its underlying functions of compensation, deterrence, fairness, and appeasement. Vicarious liability partially responds to this problem, in situations where two threshold

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43 Gregory S Pun, Margaret I Hall & Ian M Knapp, *The Law of Nuisance in Canada*, 2nd ed (Canada: LexisNexis Canada, 2015) ("the 'course and scope of employment' requirement for vicarious liability, the *ferae naturae* and *scienter* requirements for strict liability in relation to animals, and the *Rylands* requirements relating to use of land (the requirements of 'bringing onto land' and escape)" at 139).

44 *Odhavji Estate v Woodhouse*, 2003 SCC 69, [2003] 3 SCR 263 at para 29 [*Odhavji*].

45 *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27, [2008] 2 SCR 114 at para 13 [*Mustapha*], citing *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* (1966), [1967] AC 617 at 643.

conditions are met: first, that the institutionally embedded actor is found to have committed a tort, and second, that the actor is in an employee-like relationship with the institution. The first of these requirements raises the problems of fairness and accuracy, precluding effective deterrence (because the wrong cannot be avoided if it has not been accurately understood and described). In addition, it may be difficult to establish the negligence of individual tortfeasors precisely because of the institutional context in which they operate. Regarding the second requirement, institutionally embedded actors may not be in an employee-like position vis-à-vis the institution; *EB v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*[46] (discussed below) provides one example, as do the school cases involving the abuse of students by other students (also referred to below). In the case of intentionally caused harms, moreover, mere employment is not enough (requiring a close connection between the terms of employment and the creation of a specific risk that the very thing that did happen, would happen).

The "unreasonable" institution for the purposes of negligence (the institutional breach of the duty of care) is one which creates risk or fails to reduce risk where required to do so by reason of the special relationship between the institution and the plaintiff or class to which the plaintiff belongs.[47] Cases involving a "failure to control" rogue actors, the "failure to have in place management and operations procedures that would reasonably have prevented the abuse," as described in the case of *Rumley v. British Columbia*,[48] fall into the second category, the failure to reduce risk. The plaintiffs in *Rumley* were former students of the Jericho Hill School for the Deaf in Vancouver. The plaintiffs sought certification of a class action against the province on the basis of systemic negligence, alleging that sexual abuse had been endemic at the school, perpetrated by certain staff members and pervasively by fellow students (regarding whom no "terms of employment" based relationship existed). The certification action was successful; the province subsequently settled. Despite the "systemic" nature of the negligence pled in *Rumley*, the breach alleged (the failure to detect and prevent the actions of individual tortfeasors) was not substantially different from the "ordinary" negligence described in the case of *Blackwater v. Plint*.[49] That case, which concerned sexual abuse perpetrated by an employee in a residential school, characterized the alleged breach of the duty owed to the students in the following terms: whether the defendant knew or should have known about the (employee) perpetrator's abusive nature; whether reasonable steps were taken to detect and stop the abuse; and whether reasonable supervision was exercised over employees. The Supreme Court concluded that the risk of sexual abuse was not reasonably foreseeable, citing the trial judge: "the unspeakable acts which were perpetrated on these young children were just that: at the time they were for the most part not spoken of."[50]

The handful of cases that locate the breach in the "nature of the institution" itself, what I have described as the culture of the institution, are concerned with negligence as the actual *creation* of risk (as opposed to the failure to control it). That approach is implicit in the Court's reasoning in the case of *White v. Canada (Attorney General)*,[51] another certification

46 2005 SCC 60, [2005] 3 SCR 45 [*Oblates*].
47 The decision to proceed in the face of risk is not conceptually apposite in this context.
48 2001 SCC 69, [2001] 3 SCR 184 at para 30 [*Rumley*].
49 2005 SCC 58, [2005] 3 SCR 3 [*Blackwater*].
50 *Ibid* at para 15, citing 2001 BCSC 997, 93 BCLR (3d) 228 at para 135.
51 2004 BCSC 99, 24 BCLR (4th) 347 [*White*].

case involving systemic negligence. The applicants in that case argued that (together with the kind of failure of oversight and control described in *Rumley*) "the creation of an environment which encouraged or fostered silence and obedience when such sexual abuse or misconduct arose" and "the creation of an environment of obedience and respect to its servants, agents, representatives or employees who were in a position of power regarding the minors and allowing that power to be abused, and the environment of obedience and respect to be exploited" gave rise to a duty of care.[52] The Court held that "[t]he duty of care in such a case is … essentially organizational, not in the sense of being direct, but in the sense of flowing from the *raison d'être* of the organization and the relationships and activities that it reasonably encompasses."[53] The British Columbia Court of Appeal affirmed the trial judge's characterization of the systemic negligence alleged as referring to a "general rather than a specific set of circumstances … [which creates or maintains] a system which [was] inadequate to protect the plaintiff class from the harm alleged."[54]

Institutional creation of risk was also suggested in the 2014 Australian case of *Giles v. Commonwealth of Australia*,[55] concerning historical child abuse (sexual and physical) at a residential home for child migrants who had been brought to Australia from England in the early part of the 20th century (Fairbridge Farm). The *Giles* case was, like *Rumley* and *White*, an application for certification of a class action. The plaintiffs alleged that the duty owed by the school to the child residents in their care was breached by the institution's exposure of "the plaintiffs to the abusive environment, which it is pleaded, existed at the Fairbridge Farm, … [exposure of] the plaintiffs … to the risk of physical and sexual abuse which was known or ought to have been known as occurring at the Fairbridge Farm, and [failure] to remove the plaintiffs … from the Fairbridge Farm as soon as practicable upon becoming aware of the risk that they might be exposed to physical and/or sexual abuse."[56] The defendant objected, as the province had in *Rumley*, that it had not been shown (nor could it be shown) who, over a period of decades, had committed what tort in connection with which particular student, with both staff and students coming and going over the (lengthy) period in question. The defendants also claimed that, "given that each individual claimant in a tortiously based claim needs to establish that the duty is owed to them individually" and that such a duty had been breached, there could be no "common issue";[57] the alleged "*abusive environment*"[58] at the school was totally irrelevant to the legal questions to be decided. The Court disagreed, and refused to strike out the certification:

> I am not persuaded that the proof of such an environment as is pleaded would be wholly irrelevant to the determination of the issues joined between the parties. If permitted into evidence at any hearing, the "environment" would seem to be common to a number of the plaintiffs and group members. Whether this will ultimately be so, can only be determined by the trial Judge.[59]

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52 *Ibid* at para 5, citing 2002 BCSC 1164, 4 BCLR (4th) 161 at para 20 [*White* BCSC].
53 *White*, *ibid* at para 66.
54 *Ibid* at para 50, citing *White* BCSC, *supra* note 52 at paras 47–48.
55 [2014] NSWSC 83, [2014] NSWSC 83 (AustLii) [*Giles*].
56 *Ibid* at para 24.
57 *Ibid* at para 118.
58 *Ibid* at para 117.
59 *Ibid* at para 118.

The more radical approach suggested in *White* and *Giles*, describing a true institutional actor or tortfeasor (as opposed to the institution's responsibility to detect and control individual tortfeasors operating within the institutional setting), was adopted more explicitly by the Ontario Court of Appeal in *Cloud v. Canada (Attorney General)*,[60] certifying a class action brought by former residents of a residential school on the common issue of systemic negligence:

> Broadly put, their claim is that the School was run in a way that was designed to create an atmosphere of fear, intimidation and brutality. Physical discipline was frequent and excessive. Food, housing and clothing were inadequate. Staff members were unskilled and improperly supervised. Students were cut off from their families. They were forbidden to speak their native languages and were forced to attend and participate in Christian religious activities. It is alleged that the aim of the School was to promote the assimilation of native children. It is said that all students suffered as a result.[61]

Implicit in this analysis is a theory of institutional culture (the nature of the institution itself) as giving rise to and perpetuating the behaviour of institutional actors in context. Systemically negligent institutional cultures of the kind described in *Cloud*, *White*, and *Giles* (and also in the English case of *KR v Bryn Alyn Community (Holdings) Ltd*, although the action against the institution on the basis of systemic negligence was dismissed in that case)[62] normalize and therefore induce behaviours which, outside of that context, would be understood as wrongful (even "unthinkable"):[63] the secret other world, a "way of seeing that is simultaneously a way of not seeing" (and that, taken at face value, provided the basis for the finding of no breach in *Plint*).[64] The nature of the institution refers not to its formal rules, policies, and self-definition but to its culture, which frames the everyday perceptions and interactions of the persons embedded within it. Secrecy and apartness, "the closed world," is a distinctive characteristic of negligent institutional cultures, as places in which "things can happen without 'really' happening."[65] Transparency and openness is essential to the

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60 (2004), 73 OR (3d) 401 (CA), leave to appeal to SCC refused, 30759 (12 May 2005) [*Cloud*].

61 *Ibid* at para 12. See also *Dolmage v Ontario*, 2010 ONSC 1726, 6 CPC (7th) 168; *Cavanaugh v Grenville Christian College*, 2012 ONSC 2995, 27 CPC (7th) 271. *Rumley*, *supra* note 48; *Cloud*, *ibid* are cited in both cases as authority for systemic negligence as a common issue in both; no distinction in the approach taken by these cases is noted, and description of the content of systemic negligence is scanty.

62 *KR v Bryn Alyn Community (Holdings) Ltd*, [2003] EWCA Civ 85, [2003] QB 1441 [*Bryn Alyn*] (concerning sexual abuse by staff and students in a children's home. The Court found that "it is asking too much of the defendants to expect other staff members to monitor every visit by a resident to the principal in his office in an attempt to ensure that no secret act such as sexual abuse might take place … [a]ccordingly, the claim based on negligence must fail" at para 202, citing [2001] All ER (d) 322 (Jun) at para 83. The rejection of the systemic negligence claim may have been connected to a perception that the pleading was being used as "workaround" to the limitation periods then applying to ordinary negligence. Nevertheless the alleged negligence as described by the plaintiffs resembles the cultural creation of risk breach as described — if not explicitly identified — in the other cases discussed here).

63 See Margaret Hall, "After Waterhouse: Vicarious Liability and the Tort of Institutional Abuse" (2000) 22:2 J Soc Welfare & Fam L 159 [Hall, "After Waterhouse"]. Hall discusses the idea of the abusive institution as a "crucible" of behaviour for the individuals embedded within it rather than a "honeypot" attracting deviants (which the organization must screen out and/or scrutinize).

64 See also *M (FS) v Clarke*, [1999] 11 WWR 301 (BCSC), as discussed in Hall, "Systemic Negligence," *supra* note 18 at 8.

65 Hall, "After Waterhouse," *supra* note 63 at 162–63:

> It seems certain that some … abusers are able to convince themselves that they haven't actually done anything so long as no-one knows about it. Abuse victims may also be able to convince themselves that the abuse did not somehow 'really' happen to them so long as it is not made real by acknowledgment.

This may account for the risk of suicide for both in the wake of disclosure, "like gremlins wooshing out of their subconscious" (Beatrix Campbell, "Twenty years of cover-up and denial," *The Guardian* (12 June 1996)).

reasonable and careful institution, actively working against the development of the "secret world."

Oblates[66] was a case decided on the basis of vicarious liability (which was not established on the basis of an insufficiently close employment connection between the tortfeasor)[67] but which *describes*, more aptly than any other case, the creation of risk through institutional culture. *Oblates* concerned sexual abuse perpetrated over many years by a baker at a residential school for Aboriginal children located on a remote island off the coast of British Columbia. The trial judge found that the school was vicariously liable for the baker's acts, on the basis that "the sexual abuse suffered by the appellant was part and parcel of the disciplined residential school model operated by the respondent Oblates. Having created a risky situation, the respondent should bear the cost when the risk ripened into harm to one of the innocent children entrusted to its care."[68] Having found vicarious liability, there was no finding made regarding negligence. The Court of Appeal reversed the decision on the basis that the trial judge had not considered whether a connection existed between the baker's intentional torts and any power and authority flowing from his terms of employment. The Supreme Court of Canada characterized these "differing approaches [as reflecting] a different philosophy about how far the law should go."[69]

Writing for the majority in the case, Justice Binnie remarked that "if … the school as organized and operated created a significant risk to every student by every employee regardless of the particulars of his or her job, this would argue for *direct* liability rather than *vicarious* liability for [the baker's] misconduct."[70] However, the majority held that the vulnerability of the students resulted from the nature of the institution (which is the subject of the appellant's claim of direct liability), not from power conferred by the employer on S (which is the subject of the appellant's claim of vicarious liability).[71]

In her dissent, Justice Abella agreed with the approach taken by the trial judge, finding that "[t]he breadth and amorphous nature of the employment duties given to [the baker], and the way in which those duties were allocated by the school's administration, gave him both actual and perceived power over the students."[72] The power structure inherent in the "enterprise" of the school, together with its isolation, created a risk that this power would be abused, on the one hand, while exacerbating the vulnerability of the child residents to this kind of abuse:

> The vulnerability created by this geographic and personal isolation was compounded by the harsh disciplinary regime consisting of routine corporal punishment, threats of such punishment and repeated orders to obey all staff members. The result, as found by the trial judge, was children who were young, afraid, isolated,

66 *Supra* note 46.
67 That analysis is implicit in the decision of the trial judge, the dissent of Justice Abella, and in the remarks of Justice Binnie discussed *ibid* at para 21.
68 *Ibid.*
69 *Ibid.*
70 *Ibid* at para 4 [emphasis in original].
71 *Ibid* at 46. Finding vicarious liability, the trial judge did not make a finding regarding direct liability in negligence.
72 *Ibid* at para 88.

> intimidated and conditioned to obey adults, especially school staff members. It is difficult to imagine a more vulnerable group of potential victims.[73]

Referring to the failure of vicarious liability in this case, Bruce Feldthusen concluded that "tort law has failed the residential school plaintiffs, often for the same reasons it has failed other vulnerable plaintiffs, including other survivors of sexual abuse."[74] I suggest that the failure of vicarious liability described in *Oblates* need not connote a failure of tort law per se but, rather, the limits of the doctrine of vicarious liability, and that Justice Abella's dissent de facto provides a description of the institution as negligent tortfeasor, and should be read and understood on those terms.

B. INSTITUTIONAL MISFEASANCE: THEORIZING THE DELIBERATE INSTITUTION

The element of fault in negligence, the breach, is, essentially, carelessness. The core of misfeasance in public office has been described as "the absence of an honest attempt to perform the functions of the office,"[75] the deliberate misuse of authority conferred by statute, or the deliberate failure to exercise one's statutory obligations. The element of wrongfulness in misfeasance is qualitatively distinct from the breach of the reasonable care duty, describing a qualitatively distinct kind of behaviour. I suggest that the tort of misfeasance may, at least in certain situations, provide a more coherent and therefore satisfactory explanation for institutional behaviour and the harm flowing through it.

The Supreme Court in *Odhavji* described "the underlying purpose of the tort [of misfeasance in public office as the protection of] each citizen's reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful conduct in the exercise of public functions."[76] Two elements must be established: first, that the defendant's conduct was deliberately unlawful, and second, that the defendant "knew" that the conduct was unlawful and that is was likely to cause harm to the plaintiff.[77] For the purposes of the first element, an act or omission will be unlawful if it falls outside the scope of statutory authority *or*, if within the scope, it is "carried out with an improper purpose"[78] but the requirement of "deliberate" unlawfulness excludes the "public officer who inadvertently or negligently fails [to adequately] discharge the obligations of his or her office."[79] Misfeasance is not limited to unlawful exercises of statutory or prerogative powers but includes the failure to exercise power where obliged to do so (although "mere failure to

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[73] *Ibid* at para 91.

[74] Bruce Feldthusen, "Civil Liability for Sexual Assault in Aboriginal Residential Schools: The Baker Did It" (2007) 22:1 CJLS 61 at 61.

[75] *Northern Territory of Australia and Others v Mengel and Others*, [1995] HCA 65, 185 CLR 307 at 357 [*Mengel*].

[76] *Supra* note 44 at para 30.

[77] *Ibid* at para 32.

[78] *E (D) (Guardian ad litem of) v British Columbia*, 2005 BCCA 289, 45 BCLR (4th) 101 at paras 7–8; *Rosenhek v Windsor Regional Hospital*, 2010 ONCA 13, 257 OAC 283 at paras 7, 29, 32; *Roncarelli* v *Duplessis,* [1959] SCR 121 at 140 [*Roncarelli*]; *JP v British Columbia (Children & Family Development)*, 2015 BCSC 1216, 2015 BCSC 1216 (CanLII) [*JP*] at para 565.

[79] *Odhavji*, *supra* note 44 at para 26.

discharge obligations of an office"[80] will not comprise misfeasance in a public office unless the plaintiff can prove that the failure was deliberate).[81]

The second element goes to the defendant's state of mind. The traditional requirement of actual malicious intent[82] has been "relaxed" in the modern law (beginning with the decision of the Australian High Court in *Mengel*)[83] and the second element may now be satisfied by other states of mind. This relaxation is consistent with the "core" purpose of the tort as described in *Mengel*: "the absence of an honest attempt to perform the functions of the office"[84] and the "reasonable expectations" of the citizen.[85] *Mengel* identified two distinct states of mind (described as "limbs"), each of which would comprise a state of mind sufficient for the tort: a targeted and malicious intent to injure, and a "reckless indifference"[86] regarding both the lawfulness of the conduct in question and the likelihood that it would produce the injury in question. The House of Lords in *Three Rivers District Council and others v. Bank of England (No 3)*,[87] articulated the two limbs of the second element as "acting with subjective knowledge that [the defendant] has no power to do the act complained of and subjective knowledge that the act will probably injure the plaintiff; *or* acting with subjective reckless indifference with respect to the illegality of the act and subjective reckless indifference to the outcome."[88]

The modern requirements of the tort in Canadian law were set out by the Supreme Court of Canada in *Odhavji*.[89] That case involved a claim brought against members of the Metropolitan Toronto Police Service by the estate and family of Mr. Odhavji, who had been fatally shot by police officers. The plaintiffs alleged that by intentionally failing to cooperate fully with the investigation into the shooting, the defendants were liable in misfeasance. The defendants sought to have the claims struck. The Supreme Court allowed the misfeasance claims to proceed, and in the process of so doing, explored the defining elements of the tort.

Discarding the "limbs" language, and setting out a rather (but not altogether) different conceptual framework, the Court in *Odhavji* described two distinct "categories" of misfeasance in public office. "Category A" misfeasance described conduct by a public officer that was specifically intended to injure a person or class of persons.[90] In such a case, establishing the fact that the public officer acted for the express purpose of harming the plaintiff would serve to establish the unlawful nature of the act (as a public officer does not have the legal authority to exercise his or her powers for the purpose of deliberately harming a member of the public). "Category B" misfeasance described a situation where a public officer "acts with *knowledge* both that she or he has no power to do the act complained of

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80 *Ibid* at para 37.
81 See also *JP*, *supra* note 78 ("the tort is directed at "a public officer who *could* have discharged his or her public obligations, yet wilfully chose to do otherwise" at 570, citing *ibid* at para 26 [emphasis in original]).
82 See e.g. *Roncarelli*, *supra* note 78.
83 *Supra* note 75.
84 *Ibid* at 357.
85 *Ibid*.
86 *Ibid*.
87 [2001] UKHL 16, [2003] 2 AC 1 [*Three Rivers*].
88 Lisa A Peters, "Claims for Misfeasance in Public Office: A Brief Summary" (25 May 2007) online: Lawson Lundell <www.lawsonlundell.com>.
89 *Odhavji*, *supra* note 44.
90 This is the type of scenario in *Roncarelli*, *supra* note 78.

[the requirement of unlawfulness] and that the act is likely to injure the plaintiff."[91] A plaintiff would be required to establish both elements, that the public officer knew that the conduct was unlawful and knew that it was likely to injure the plaintiff in a Category B misfeasance case.[92]

The Supreme Court of Canada in *Odhavji* found that the defendants in that case had actual knowledge of likely harm to the plaintiff, but cited with approval the House of Lords decision in *Three Rivers* together with two Canadian cases applying a wider approach to knowledge that would include subjective recklessness and wilful blindness:

> misfeasance in a public office is an intentional tort that requires subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct. At the very least, according to a number of cases, the defendant must have been subjectively reckless or willfully blind as to the possibility that harm was a likely consequence of the alleged misconduct: see for example *Three Rivers*, *Powder Mountain Resorts*, and *Alberta (Minister of Public Works, Supply and Services)* (CA).[93]

The subjective intent requirement does not work to confine the tort to single actor situations (the iconic *Roncarelli v Duplessis* scenario); Canadian courts have found that misfeasance in public office may also be committed by a group of individuals.[94] In the case of *Apotex*,[95] the defendant Health Canada was found liable on the basis of misfeasance in public office for its failure to consider submissions made by the Canadian pharmaceutical company Apotex on the basis of "equivalency," as agreed upon in a Settlement Agreement between the two parties, in favour of a different basis of "identicality." The Court found that Health Canada "ignored that requirement … [sticking] to an internal notion of identicality [and making] an effort … to conceal this notion from Apotex,"[96] conduct amounting to "bad faith" (the "deliberate exercise of conducting its examination of Apotex's submissions on the basis of identicality, notwithstanding its undertaking to do otherwise").[97] Referring to the "broad range" of misconduct described by Justice Iacobucci in *Odhavji*[98] capable of satisfying the "unlawfulness" required for the tort, Justice Hughes referred to the decision of the Federal Court in *McMaster v. Canada*, a case involving the failure by prison officers to provide special shoes required by a prisoner.[99] The officers' "procrastination" was found to be sufficient in that case to establish the unlawfulness of the act (the failure to carry out a statutory obligation) together with the required state of mind: "The evidence shows that the Defendant dragged its feet in ordering the correct shoes for the Plaintiff and improperly tried

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91 *Odhavji*, *supra* note 44 at para 22 [emphasis added].

92 *Alberta (Minister of Public Works, Supply and Services) v Nilsson*, 2002 ABCA 283, 220 DLR (4th) 474 at paras 95, 141. Subjective recklessness towards the likelihood of a *specific* injury to a plaintiff is not necessary and the second element will be made out where "there is proof the alleged tortfeasor foresaw the risk of harm of the type sustained" (*ibid* at para 41).

93 *Odhavji*, *supra* note 44 at para 38. See also *Alberta (Minister of Public Works, Supply & Services) v Nilsson*, 1999 ABQB 440, [1999] 9 WWR 203; *Polsom v Couston*, 2014 ABQB 43, 2014 ABQB 43 (CanLII); *Ontario Racing Commission v O'Dwyer*, 2008 ONCA 446, 293 DLR (4th) 559 [*O'Dwyer*]; *McMaster v Canada*, 2009 FC 937, 2009 FC 937 (CanLII) [*McMaster*]; *Apotex Inc v R*, 2014 FC 1087, 2014 15 CCLT (4th) 220 [*Apotex*]; *Georgian Glen Developments Limited v The Corporation of the City of Barrie*, 2005 CanLII 31997 (Ont Sup Ct J).

94 See *Odhavji*, *ibid*; *O'Dwyer*, *ibid*.

95 *Supra* note 93.

96 *Ibid* at para 117.

97 *Ibid* at para 118.

98 *Ibid* at para 112.

99 2008 FC 1158, 336 FTR 92, aff'd *McMaster*, *supra* note 93.

to convince the Plaintiff to accept the ill-fitting shoes when it obviously knew they did not and could not fit."[100]

In certain circumstances at least, "group" misfeasance of this kind may more properly be understood in terms of a subjective recklessness or wilful blindness of the part of the institution itself (as the kind of cultural entity described in the first part of this article rather than as a group or collection of individuals qua individuals). Reading cases through this lens may, depending on the facts of each case, reveal the individual actor focus as both inaccurate and unfair with the true source of wrongfulness lying in in the institutional culture in which actors are embedded. Consider the facts of *Odhavji* itself. The case is explained in terms of the misfeasance of the individual police actors (through their tortious failure to participate in the internal review), with the vicarious liability of the police organization flowing through the employment relationship. Bringing institutional culture into the frame of analysis, however, we can see (and therefore understand) the individual actors in the case as embedded institutional characters, rather than independent "rational actor" tortfeasors. From a compensation perspective, this analytical shift makes no real difference. From a deterrence perspective, however, assigning direct tort liability, on the basis of institutional culture, is an important means of effecting organizational change, disrupting harmful institutional cultures, through the explanation it provides: that institutional cultures cause the embedded actors within them to act in certain ways.

The recent British Columbia case of *JP*,[101] provides a striking illustration of this dynamic (albeit it is not acknowledged explicitly in the case, but rather remarked upon as a source of wonder). In that case, a social worker (S) was found liable in tort on the basis of misfeasance in public office, regarding his conduct towards the plaintiff in a child protection case involving her children. The plaintiff (J.P.), concerned that her former husband was sexually abusing their children, was dismissed by social workers and police as mentally unbalanced and dangerous; the children were removed from J.P.'s custody and returned to their father, where they experienced further abuse. The Court found no direct evidence that S "specifically intended to injure either J.P. or the children through his conduct" but found that the plaintiffs (J.P. and her children) had "established liability under Category B."[102] Despite S's "statutory obligation to act in a manner that put the safety and well-being of the children foremost in his consideration at all times … his closed mind and antipathy toward their mother led him to approach the file other than in their best interests as required."[103] The Court went on to find as follows:

> Insofar as the second element of the tort is concerned -- awareness on the part of [S] both that his conduct was unlawful and that it was likely to harm the plaintiffs -- I find that it has also been made out. As described earlier, the mental element of the tort may be based on actual knowledge, subjective recklessness, or wilful blindness. I am satisfied that [S] was, at a minimum, subjectively reckless to both the unlawfulness of his conduct and that it was likely to harm the children and J.P.[104]

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[100] *Ibid* at para 52.
[101] *JP*, *supra* note 78.
[102] *Ibid* at para 585–86.
[103] *Ibid* at para 587.
[104] *Ibid* at para 594.

The Court notes with apparent wonder that S's "closed mind and antipathy,"[105] while both egregious and wrongful, were not particular to him (although his position of authority vis-à-vis J.P. meant that his actions were an especially proximate *cause* of harm to her) but shared by virtually all other social workers in his office — the institution — and by the police officer involved in the case.[106] Justice Walker held:

> In all, I am satisfied that a negative view of J.P. and her mental capacity, to the point of being overtly visceral, as well as a disbelief in the finding that B.G. sexually abused his children, despite statements that the Director ultimately wished an independent third party to assess the evidence and determine the issues, inappropriately and unreasonably persists amongst social workers to this day.[107]

IV. CONCLUSION

Institutions have become increasingly important social players; in connection with this development, society's understanding of the nature of institutional identities and cultures has also changed. As illustrated by the developments in the modern doctrine of misfeasance in public office discussed above, the "rules" of tort doctrine are never static; they must evolve in connection with social and technological change, but also in response to *ontological* changes originating outside of the law. Legal academics have a special responsibility to explore those changes and to contribute in this way to the combination of consistency and flexibility that is the genius of the common law.

[105] *Ibid* at para 587.
[106] *Ibid* at paras 587–92.
[107] *Ibid* at para 867.

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