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RESEARCH ARTICLE

The tort of malicious prosecution of civil proceedings: a critique and a proposal

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Abstract

Litigation is a tactical business. The recognition of the tort of malicious prosecution of civil proceedings in *Willers v Joyce* in 2016, by the barest of majorities, adds to the tactical intrigue, for it is now feasible that failed civil proceedings could be swiftly followed by a counter-suit for malicious prosecution against the original unsuccessful claimant. The tort requires proof of 'malice'. As a concept, malice may have a 400-year history, but insofar as the new tort is concerned, it has proven to be opaque. In this paper, a critical evaluation of the tort since the Supreme Court gave it the 'green light' in *Willers* is undertaken. As a cause of action, it has been sparsely used, and beset with difficulties and unforeseen consequences. Whilst tort law, as the rubric of civil wrongs, must remain 'on the move', it is important that judicial reform achieves desirable and useful outcomes. It is argued in the paper that the tort recognised by *Willers* has not met that objective to date. However, a detailed law reform study of this and other related torts, leading to a statutory tort of 'abuse of litigious processes', would serve to bring order to the present disarray.

Keywords: tort law; malicious prosecution of civil proceedings; abuse of process of litigation; meaning of malice; law reform

Introduction

Litigation is a complex and tactical business. The UK Supreme Court's recognition of the tort of malicious prosecution of civil proceedings (TOMP) in *Willers v Joyce*[1] (*Willers*) in 2016, by the barest (and rarest[2]) 5:4 majority, adds to the tactical intrigue. It is now conceivable that a failed civil action could yield a counter-suit for malicious prosecution which the original claimant must then defend. Prior to this ground-breaking decision, English law had decreed that the tort was only available for maliciously-instituted *criminal* proceedings, and for a few limited instances of abuse of civil proceedings, but absolutely nothing wider than that. That all changed in 2016. The new tort has huge potential to be a minefield for parties and for their legal representatives. Moreover, it requires proof of 'malice'. As a concept, malice may have a 400-year history,[3] but it has proven to be something of a slippery eel where this particular judicial reform is concerned.

†The author is grateful for the helpful comments received from members of the audience when this topic was presented to the Society of Legal Scholars on 1 September 2021, and for the constructive comments about the resulting manuscript which were provided by two referees. The usual caveat applies.

[1][2016] UKSC 43, [2018] AC 779, on appeal from [2015] EWHC 1315 (Ch).

[2]It was the only 2016 case to feature a bench of nine Justices, and the first since *R (Nicklinson) v MOJ* [2014] UKSC 38 (assisted suicide), signifying its importance: B Dickson 'Inside court' (2017) 167 NLJ 7736. One criterion for determining whether more than five Justices should sit on a panel is where a conflict between decisions in the Privy Council and the House of Lords has to be reconciled, as in this case: https://www.supremecourt.uk/procedures/panel-numbers-criteria.html.

[3]As noted by Lord Toulson in *Willers* [2016] UKSC 43, [52] (the *Willers Strike-Out Action*).

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The analysis herein is not only pertinent to English law, but may be of interest to jurists, scholars and legal representatives elsewhere, for *Willers v Joyce* has been cited in other common law jurisdictions where courts have confronted the same issue. For example, both Victorian[4] and New South Wales[5] Supreme Courts have regarded the TOMP as 'unsettled' and 'controversial', respectively; in New Zealand, it has been said to be 'reasonably available';[6] in Ireland, it has been recognised;[7] whilst in Singapore, it has been soundly rejected as being contrary to historical provenance, principle and policy[8] – with all citing *Willers* in the process. Hence, there is real potential for cross-fertilisation of relevant jurisprudence in other jurisdictions.

This paper presents several cautionary tales about the TOMP which have emerged in the case law since the Supreme Court gave the tort the 'green light' in *Willers* in 2016. The key events since that decision, from which the analysis herein is principally derived, are as follows.

The key decisions of note in England in, and since, *Willers v Joyce* (Supreme Court, 2016)

20 July 2016	*Willers v Joyce Strike-Out Action*[9] – the Supreme Court refused to strike out the TOMP suit brought by Mr Willers against Mr Gubay; the cause of action was to be recognised in English law, and the case was allowed to proceed to trial
29 November 2016	*CFC 26 v Brown Shipley*[10] – the TOMP failed re civil proceedings
6 December 2017	*Szekely v Park View Health Partnership*[11] – the TOMP failed re civil proceedings
20 February 2017	*Juman v AG of Trinidad and Tobago*[12] – the TOMP failed (this concerned criminal proceedings, but comments were made about the tort's application to civil proceedings too)
13 December 2018	the *Willers Trial Action*[13] – Mr Willers failed to prove the TOMP at trial
8 August 2019	the *Willers Costs Action*[14] – Mr Willers' legal team was sued by Mr Gubay's estate for its unrecovered legal costs which Mr Willers could not pay
22 December 2020	*Mosley v Associated Newspapers*[15] – the TOMP failed (this concerned criminal proceedings, but comments were made about the tort's application to civil proceedings too)
30 September 2021	*Total Extraction Ltd v Aircentric Ltd*[16] – a claim for abuse of process, alternatively one of the special categories of TOMP, succeeded (the general TOMP claim was not pleaded)

One obvious point from the timeline is that *very* few cases have sought to invoke the TOMP in the five years since the Supreme Court permitted the cause of action. However, what case law has occurred has thrown up considerable legal difficulties, procedural conundrums, and practical issues associated with the tort. Some of these were predicted by the dissenters, both in the Supreme Court in *Willers* and in

[4]*Giles v Jeffrey* [2019] VSC 562, [155], [111] (quote).

[5]*Perera v Genworth Financial Mortgage Ins Ltd* [2019] NSWCA 10, [15].

[6]*Burgess v Beaven* [2020] NZHC 497, [20].

[7]*Smyth v SAS Sogimalp Tarentaise* [2019] IEHC 568, [58] (any uncertainty 'resolved in this jurisdiction' in favour of the tort); and *Dublin Waterworld Ltd v National Sports Campus Devp Authy* [2019] IECA 214, [134].

[8]*Lee Tat Development Pte Ltd v Management Corp Strata Title Plan No 301* [2018] SGCA 50, [70].

[9]See n 3 above.

[10][2016] EWHC 3048 (Ch).

[11][2017] 12 WLUK 144 (Brighton CC).

[12][2017] UKPC 3 (*Juman*).

[13][2018] EWHC 3424 (Ch).

[14][2019] EWHC 2183 (Ch).

[15][2020] EWHC 3545 (QB).

[16][2021] EW Misc 21 (Barnsley CC).

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the Privy Council decision two years earlier in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd*[17] (*Sagicor*) where, also by bare majority, it was held that the TOMP should be recognised. However, some problems which have manifested were not predicted at all, but have since come to afflict the tort with real uncertainty and lack of coherence.

Section 1 of this paper sets the context, by examining how and why the *Willers Strike-Out Action* came before the Supreme Court. It also explains why Mr Willers is not in the same category as Mrs Donoghue, for whom we will never know whether there was a snail in the bottle, as that fact never required determination in the strike-out action, and there was never a trial.[18] Unfortunately, that 'air of mystery' does not apply to Mr Willers, for in a lengthy and carefully reasoned judgment, Rose J (as she then was) rejected his attempt to prove the TOMP at trial.[19] Section 2 then examines several key cautionary conundrums of the new tort as it has unfolded. Finally, Section 3 analyses how the TOMP fares against the backdrop of 'the bigger picture of tort law', and a short conclusion follows.

As the rubric of civil wrongs, it is vital that tort law remains 'on the move'.[20] However, it is equally important that judicial reform – especially reform as significant as this, which has created English law's newest tort – achieves desirable and useful outcomes. It is argued in this paper that the TOMP has **not** met that objective. Instead, the misgivings that were powerfully expressed by the dissenters in *Willers* (including the risk of 'unintended consequences') have been borne out in ways that even they probably never contemplated.

1. *Willers*, and its sequel

Throughout this paper, the following terminology will be applied for clarity's sake (and with the relevant parties of *Willers* inserted in italics):

Original Action: The Allegedly-Malicious Claimant (TAMC) sues The Aggrieved Defendant (TAD) – and that suit does not succeed for TAMC:

TAMC v TAD

Langstone Leisure Ltd v Mr Willers

↓

Malicious Prosecution Action: TAD then sues TAMC, on the basis that the Original Action was brought maliciously by TAMC against TAD:

TAD v TAMC

Mr Willers v Mr Gubay

(a) The recognition of a new tort …

The rather labyrinthine facts of *Willers* are a convenient place to start.[21] Peter Willers was Albert Gubay's 'right hand man' for 23 years during the course of Mr Gubay's extensive and successful

[17][2013] UKPC 13, [2014] AC 366, on appeal from the Cayman Islands Court of Appeal.

[18]*Donoghue v Stevenson* [1932] AC 562 (HL). The settlement sequel to the famous claim brought by Mrs Donoghue has been described thus by The Honourable Justice James Edelman in 'Fundamental errors in *Donoghue v Stevenson*?' (a Speech to the Friends of University of Western Australia, London, July 2014) ('[a]fter the decision of the House of Lords, the case was set down for a Proof (of the facts). The Proof was to be held on 10 January 1933. But Mr Stevenson died before the Proof. A motion was brought to discharge the Proof by reason of Mr Stevenson's death. The Proof was discharged. The matter did not come back before the Court of Session until 6 December 1934. On that date, it was only to approve a settlement. His estate had allegedly settled the claim for £100' (footnotes omitted)).

[19][2018] EWHC 3424 (Ch) (Rose J) (the *Willers Trial Action*).

[20]Per *Catholic Child Welfare Society v Institute of the Bros of Christian Schools* [2012] UKSC 56, [19].

[21]See *Willers Trial Action* [2018] EWHC 3424 (Ch), [1]–[13]; *Willers v Joyce* [2017] EWHC 1225 (Ch), [10]–[21].

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business dealings in supermarket and health club chains, but they fell out, and Mr Willers was dismissed in 2009. Prior to that, one of Mr Gubay's companies of which Mr Willers was a director, Langstone Leisure Ltd (Langstone), successfully sued Aqua Design and Play Ltd (Aqua) who had manufactured defective swimming pool covers for some of Mr Gubay's gyms. Before the judgment debt could be paid by Aqua, that company went into voluntary liquidation. Langstone then funded the liquidator in his suit against Aqua's two former directors for wrongfully trading whilst insolvent, and agreed to indemnify the liquidator for both his own-side costs and any adverse costs. The liquidator's suit against Aqua was long-running, expensive, and shortly before trial in 2009, abandoned by consent. Langstone's liability for legal costs under the indemnity amounted to the 'very substantial' sum of £1.95 million.[22] The directors of Langstone were very unhappy about the situation. They blamed Mr Willers for exposing Langstone to that huge costs bill, by offering the disastrous indemnity to the liquidator, and for failing to ensure that Langstone could terminate the indemnity if the litigation was not worth pursuing.

In 2010, Langstone sued Mr Willers for breach of fiduciary duty, breach of contract, and negligence, in his capacity as an ex-director of Langstone (the Original Action). Mr Willers defended that action, claiming that it had been Mr Gubay, and not himself, who had taken all the relevant decisions in relation to Langstone's suit against Aqua, and that Mr Gubay was 'agent, controller and/or shadow director of Langstone'. After many twists and turns,[23] Langstone discontinued that Original Action against Mr Willers in 2013, two weeks before trial. Langstone was ordered to pay Mr Willers' costs of defending the Original Action on a standard basis,[24] which were duly paid. Thereafter, Mr Willers sued Mr Gubay for the TOMP, alleging that the Original Action was brought against him 'as part of a campaign by Mr Gubay to do him harm',[25] and was 'one of many vindictive and wholly unjustified measures'[26] taken by Mr Gubay after the two men fell out. That Malicious Prosecution Action was continued against Mr Gubay's executors,[27] as Mr Gubay died in 2016.

At that time, the legal landscape re any claim for TOMP, ie, re *civil* process, was uncertain. Back in 2000, the House of Lords had disallowed the claim in *Gregory v Portsmouth City Council*,[28] but in 2014, the Privy Council reached a contrary decision in *Sagicor*. Faced with this situation, the first instance judge in *Willers* held that there was no such cause of action known to English law where the Original Action involved a civil (rather than a criminal) action, and struck out Mr Willers' claim,[29] but granted a 'leapfrog' appeal[30] to the Supreme Court.[31] As mentioned, a majority of the Supreme Court refused to strike out Mr Willers' claim for the TOMP,[32] but the four dissenters strongly disagreed and were not prepared to recognise any such tort.[33] A new tort was created.

[22]Ibid, [4], [118], [172].

[23]Described at ibid, [8]; and in *Willers v Joyce* [2017] EWHC 1225 (Ch).

[24]Per Newey J, 16 April 2013.

[25]Described in *Willers Strike-Out Action* [2016] UKSC 43, [5].

[26][2018] EWHC 3424 (Ch), [10].

[27]The claim is brought against 'Elena Joyce, John Nugent (in substitution for and in their capacity as executors of Albert Gubay, deceased)', hence the stylisation of the case as '*Willers v Joyce*'.

[28][2000] 1 AC 419 (HL) (*Gregory*) (Councillor Gregory's action against the Council for TOMP, after the Council's disciplinary action against him was quashed by judicial order, struck out).

[29]*Willers v Gubay* [2015] EWHC 1315 (Ch), [96] (Miss Amanda Tipples QC, whose judgment was called 'meticulous' by the Supreme Court: [2016] UKSC 43, [92]).

[30]Permitted under the Administration of Justice Act 1969, s 12.

[31]A related judgment, at [2016] UKSC 44, deals with the precedential order when the Privy Council reaches a different conclusion from the House of Lords/Supreme Court, which topic falls outside the scope of this paper.

[32]Lord Toulson wrote the leading judgment, with whom Lady Hale and Lords Kerr and Wilson agreed (at [1]); and Lord Clarke wrote a separate concurring judgment (at [60]).

[33]Lord Mance wrote the leading dissenting judgment (at [92]), whilst Lord Neuberger P (at [147]), Lord Sumption (at [174]), and Lord (now President) Reed (at [182]) wrote short concurring judgments.

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Its five elements (for which TAD bears the burden of proof[34]) were set out by Lord Toulson:[35]

(1) TAMC was responsible for having caused the Original Action to be brought against TAD;
(2) the Original Action was determined in TAD's favour – this does not require a 'determination' in TAD's favour on the merits (although sometimes that has occurred[36]); it is enough if the Original Action was discontinued prior to trial at the behest of TAMC, leading to judgment in favour of TAD;
(3) the Original Action was brought by TAMC against TAD without reasonable or probable cause;
(4) TAMC was actuated by malice in causing the Original Action to be brought against TAD; and
(5) TAD suffered damage – the tort is an action on the case, hence proof of damage is necessary. In *Willers*, this was alleged under four heads: damage to Mr Willers' reputation; damage to his health; loss of earnings; and the non-recoverable legal costs incurred by Mr Willers in the Original Action. Special damages incurred by TAD because of the consequences and fall-out of the Original Action are also claimable.[37]

These elements were carved from centuries-old cases in which malicious prosecution of civil process had been permitted in limited circumstances, viz: the malicious presentation of a winding-up order[38] or petition in bankruptcy;[39] the malicious procurement, ex parte, of a search warrant,[40] or of a bench warrant leading to a party's arrest;[41] and the malicious seizure or wrongful arrest of property (including ships).[42] For the dissenters, these old judgments had a narrow field of application (viz, where the civil suit in the Original Action could have an immediate and dire effect upon TAD's liberty, property or business), but they 'are sometimes hard to interpret, … are not entirely reliable, …and do not, on any view, speak with one voice'.[43] The *Willers* majority thought otherwise, remarking that early historical case law did not necessarily define 'where the boundaries of the tort lay', and that what really mattered was 'the malice that is the foundation of all actions of this nature, which incites men to make use of law for other purposes than those for which it was ordained'.[44] This vehement disagreement on the significance of precedent was typical of the chasms in reasoning between the majority and the dissenters in *Willers*.

(b) … and the underwhelming sequel

For the purposes of the leapfrog appeal in the *Willers Strike-Out Action*, the five elements of the tort were accepted as being met on a set of assumed facts, if the cause of action itself was capable of recognition in English law (which it was). Of course, it is no surprise when landmark cases in tort law are decided on the basis of an agreed statement of facts in a strike-out application. This procedural device has fuelled some of the most important tort cases in English legal history, and its role in reducing costs and achieving efficiency is well-embedded.[45]

However, in a significant setback, Mr Willers was unable to prove the TOMP when the case (the *Willers Trial Action*) was remitted for trial in 2018.[46] Once the set of assumed facts was set aside – and

[34] *Gregory* [2001] 1 AC 419 (HL), at 426; *S v Kensington and Chelsea RB* (QB, 28 November 2018), [16].
[35] [2016] UKSC 43, [5].
[36] *Szekely v Park View Health Partnership* [2017] 12 WLUK 144 (Brighton CC) (*Szekely*).
[37] Noted ibid (special professional indemnity insurance was required by TAD; but the tort ultimately failed).
[38] *Quartz Hill Consolidated Mining Co v Eyre* (1883) 11 QBD 674 (CA); *Savile v Roberts* (1698) 1 Ld Ravm 374; *Grainger v Hill* (1838) 4 Bing NC 212.
[39] *Johnson v Emerson* (1871) LR 6 Exch 329.
[40] *Gibbs v Rea* [1998] AC 786 (HL).
[41] *Roy v Prior* [1971] AC 470 (HL).
[42] *Clissold v Cratchley* [1910] 2 KB 244.
[43] [2016] UKSC 43, [150].
[44] Ibid, [16] (Lord Toulson) and [98] (Lord Mance, citing *Sagicor* [2013] UKPC 17, [49]).
[45] Several other examples exist, as noted in R Mulheron *Principles of Tort Law* (Cambridge: Cambridge University Press, 2nd edn, 2020) p 24.
[46] [2018] EWHC 3424 (Ch).

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the reality of a judge listening to the witnesses give evidence, and the (cross)examination of their statements by skilled counsel, were substituted – Rose J decided that some elements of the newly-minted cause of action were not provable by Mr Willers.[47] Undoubtedly, this has not helped the development of the tort. Lord Mance (dissenting) wrote presciently, in the *Willers Strike-Out Action*, that:

> [v]iewed in isolation, the assumed facts of this case make it attractive to think that [Mr Willers] should have a legal remedy. But the wider implications require close consideration. We must beware of the risk that hard cases make bad law, and we are entitled to ask why … there has been an apparent dearth of authority in this jurisdiction for a claim such as [Mr Willers] wishes to pursue.[48]

It turned out to be a very 'hard case' indeed. Unsurprisingly, the tort's second element – that the Original Action brought by TAMC (Langstone) must have been determined in TAD's (Mr Willer's) favour – was conceded by Mr Gubay in the *Willers Trial Action*,[49] but absolutely nothing else was.

Mr Willers joins a very select band of litigants (Patrick Bolitho was another[50]) whose litigation laid down new principles of tort law which other litigants may seek to take advantage of in the future; but who ultimately failed in their own claims. Such litigants are noble examples of using their individual circumstances to move the boundary rope of the law, at the risk of considerable own-side and adverse costs, whilst doomed to personal failure in their own cases. Perhaps even more troubling, however, is that no other case since *Willers* has established the tort either.

It is now appropriate to examine several significant problems with the TOMP since the Supreme Court granted recognition of the TOMP in 2016. It is not an uplifting picture.

2. Several cautionary tales

(a) The bulwark presented by the doctrine of legal professional privilege

Inevitably, any Malicious Prosecution Action will focus close attention upon TAMC's motives and purposes for launching the Original Action against TAD. Two elements of the tort – that the Original Action was instituted without reasonable and probable cause, and that it was instituted with malice – necessarily require attention to be cast upon precisely **why** TAMC sued TAD in the first place.

This immediately calls into question the legal professional privilege (LPP) that normally attaches to communications between TAMC and his lawyers, and any file-notes made by those lawyers which evidence those communications. It is trite law that LPP is a 'fundamental right'[51] that applies to communications between a party and his lawyer, seeking or giving legal advice. It 'arises out of a relationship of confidence between lawyer and client'.[52] As recently stated, '[t]he policy in favour of non-disclosure is a strong one, because legal professional privilege enables parties to communicate frankly with their legal advisers …, e.g. about the strengths and weaknesses, and the risks, of their case, knowing that the communications will remain private'.[53] Moreover, the nature of the privilege accorded by LPP is absolute. It must be, in order to retain faith in the confidence of non-disclosure. Hence, for any privileged communication or document between TAMC and his lawyer, it means that: (1) LPP cannot generally be overridden by some supposedly higher public interest that requires disclosure;[54] (2) LPP can be

[47]The TOMP action was tried without the benefit of any oral evidence from Mr Gubay, given his death in 2016.

[48][2016] UKSC 43, [93].

[49][2018] EWHC 3424 (Ch), [187].

[50]*Bolitho v City and Hackney Health Authority* [1997] 3 WLR 1151 (HL) (establishing an exception to but-for causation), and applied since in, eg, *Gouldsmith v Mid-Staffordshire NHS Trust* [2007] EWCA Civ 397; *Wright v Cambridge Medical Group* [2011] EWCA Civ 669.

[51]*Morgan Grenfell & Co Ltd v Special Commissioner* [2001] EWCA Civ 329, [18].

[52]*Three Rivers DC v Bank of England (No 6)* [2004] UKHL 48, [24] (Lord Scott).

[53]*The Abbeyfield (Maidenhead) Socy v Hart* [2021] UKEAT 162, [46].

[54]Reiterated recently in *Victorygame Ltd v Ahuja Investments Ltd* [2021] EWCA Civ 993, [52]–[62]. Exceptionally, a court may order disclosure of communications with non-parties that are privileged, in childcare or wardship proceedings

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overridden or abrogated by statute, but only in the clearest of terms; (3) it is not possible for the court to create exceptions to LPP; and (4) LPP can be waived solely by the client who is entitled to it, but otherwise is absolute.[55] The importance of LPP cannot be stated more highly than this: '[i]t is a fundamental condition on which the administration of justice as a whole rests'.[56]

So how, in the later Malicious Prosecution Action, is the court to ascertain TAMC's motives and purposes in bringing the Original Action, if TAMC does not waive his LPP? Rose J explicitly acknowledged this conundrum in the *Willers Trial Action*: '[o]ne of the difficulties in a malicious prosecution suit is that it necessarily involves a consideration of the views of the claimant in the earlier prosecuted claim about the merits of that claim, and the reasons why he prosecuted that claim. That material is generally covered by legal professional privilege'.[57] Earlier, in the *Willers Strike-out Action*, Lord Neuberger (dissenting) foreshadowed that, in a Malicious Prosecution Action brought by TAD against TAMC, TAD 'would presumably be waiving the privilege in order to bring his claim in the first place'.[58] But that, of course, is not likely to be the case for TAMC, who ends up being the defendant in the Malicious Prosecution Action. There will likely be no waiver of LPP there.

As it turned out – and in a real stumbling block for the new tort – Lord Neuberger's prediction proved to be incorrect in the *Willers Trial Action*. Mr Willers, TAD in the Original Action and who was now suing Mr Gubay for the tort of malicious prosecution, did **not** waive the LPP attaching to the communications arising in his defence of the Original Action. Nor (unsurprisingly) did Langstone or Mr Gubay's executors (as TAMC) waive theirs.[59] Hence, Rose J had no access to any of the privileged communications arising in the Original Action, where Langstone had sued Mr Willers for breach of fiduciary duty, etc. This obviously placed the court in a difficult position, not to be able to see the advice and documentation between Langstone, Mr Gubay, and their legal representatives, as to why the Original Action was brought against Mr Willers in the first place. Indeed, Rose J said that it 'hampered' her ability to assess whether the facts necessary to establish the TOMP were made out.[60] Sometimes, the witnesses even reminded themselves, when answering questions put to them in the *Willers Trial Action*, that the privilege associated with the Original Action had not been waived.[61] Not only was there no contemporaneous privileged documentation to explain why the Original Action was brought, but there was very little evidence about Langstone's reasons for discontinuing the Original Action against Mr Willers either.[62] It was all rather opaque.

Ultimately, Rose J reminded herself of the absolute nature of the protection accorded by LPP – and did not draw any adverse conclusions against Mr Willers for failing to disclose the material from the Original Action and not waiving his LPP: '[g]iven that the malicious prosecution jurisdiction exists, it would be unfair, in effect, to *require the waiver of privilege in the earlier claim* as the price of bringing the subsequent malicious prosecution proceedings'.[63] Nevertheless, the *Willers Trial Action* failed. The available evidence did not substantiate the elements of the tort sued upon by Mr Willers.

It is extremely unlikely that this scenario will give rise to any judicially-authorised exception requiring the privilege attaching to communications in an Original Action to be waived, in the event that TAD launches a later Malicious Prosecution Action. After all, the Supreme Court could have authorised such a step, but did not. A necessary waiver could be achieved by a clearly-worded statute,

concerning the welfare of children: A Zuckerman *Zuckerman on Civil Procedure* (Thomson Sweet & Maxwell, 2nd edn, 2006) [15.110].

[55]Eg *Magnesium Elektron Ltd v Neo Chemicals & Oxides (Europe) Ltd* [2017] EWHC 2957 (Pat), [38]–[42]; and *General Mediterranean Holdings SA v Patel* [2000] WLR 272 (Comm) 280–91.

[56]*Bowman v Fels* [2005] EWCA Civ 226, [78], citing *Derby Magistrates' Court, ex p B* [1996] 1 AC 487 (HL), 503.

[57][2018] EWHC 3424 (Ch), [44].

[58][2016] UKSC 43, [165]. The privilege belongs solely to the client, so is his to waive: *Victorygame*, above n 54, at [54].

[59][2018] EWHC 3424 (Ch), [44], [147]. Strictly speaking, Langstone was not a party to the later Malicious Prosecution Action either, and hence there was no automatic right to disclosure from that company.

[60]Ibid, [201].

[61]As evident from the exchange between counsel and witness at ibid, [207].

[62]Ibid, [301].

[63]Ibid, [47]–[49], quote at [49] (emphasis added).

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but the prospect of such statutory reform seems distant. Lord Neuberger (dissenting) noted in the *Willers Strike-Out Action* that history 'demonstrate[s] the problems thrown up by the law of privilege in relation to claims founded on the conduct of litigation'[64] – another prescient remark, as it turned out. The bottom line is that to create a new tort judicially, and to leave the evidentiary aspect of it statutorily unattended and solely in the parties' discretion, is very unhelpful to its utility.[65]

(b) Unforeseen – and unpleasant – consequences for TAD's legal representatives

New torts (just as with new legislation) may have unforeseen consequences. Indeed, some of the dissenters in *Willers* and *Sagicor* did not favour any recognition of the TOMP precisely for this reason. Lord Neuberger spoke of 'unforeseen problems which follow when a court seeks to change the law of tort to do what it sees as justice in particular cases';[66] Lord Reed disfavoured judicial reform that was taken 'without careful consideration of the implications';[67] and Lord Sumption put it most poetically of all: law reform 'must be done in a manner which … does not simply resolve one problem at the cost of creating many more. Even if judges were Herculean, it would be pointless for them to cut off the head of Lernaean Hydra merely to see it grow two more in its place'.[68]

However, even these doubting Law Lords may not have foreseen what unfolded in the *Willers* litigation, *after* the Supreme Court gave the 'green light' to the cause of action, and *after* Mr Willers failed to establish the cause of action at trial. The litigious sequel for *the legal representatives* for Mr Willers was quite remarkable, but it was entirely a product of the majority's decision in the *Willers Strike-Out Action*. Both the solicitors and barristers who represented Mr Willers, as TAD, in the Original Action – and who then also represented Mr Willers as the claimant in the Malicious Prosecution Action – were subjected to litigation themselves, in that non-party costs orders were sought against them by Mr Gubay's executors. Of course, legal representatives are not usually the subject of non-party costs orders, merely for the commonplace circumstance of representing their clients in hard-fought commercial litigation. There were two particular reasons, however, as to why this litigation unfolded – and it is a salutary lesson in how unpredictable the consequences of judicially-made law reform can be.

Essentially, one-half of the problem arose from the compensable head of damage which was upheld by the Supreme Court majority[69] (but vehemently opposed by the dissenters[70]) as flowing from the 'injury' of a maliciously-instituted action, viz, the irrecoverable costs which Mr Willers, as TAD, had not been able to recover in the Original Action. In that action instituted by Langstone against Mr Willers but discontinued, Newey J awarded Mr Willers his costs on a standard, rather than on an indemnity, basis ('readily understandable',[71] said the majority, given that the judge knew nothing of the merits of the discontinued claim). This left Mr Willers almost £2 million out of pocket, re his legal expenses in defending that Original Action. According to the majority, to allow the irrecoverable

[64][2016] UKSC 43, [172].

[65]The interplay between (1) the absolute privilege which all participants in the Original Action enjoy from any suit in defamation, for words written or spoken in the ordinary course of those proceedings, and (2) the TOMP where TAD is seeking to sue TAMC by relying upon precisely those same statements for the purposes of the Malicious Prosecution Action, is also an unresolved issue, mentioned in *Willers*: [2016] UKSC 43, [184] (Lord Reed, dissenting), but has not yet been the subject of later judicial consideration.

[66]*Willers Strike-out Action* [2016] UKSC 43, [164].

[67]Ibid, [184].

[68]*Sagicor* [2013] UKPC 17, [144]. For an illuminating essay on the hallmarks of Lord Sumption's judgments, with particular reference to his dissenting judgments in *Sagicor* and the *Willers Strike-Out Action*, see J Lee 'The judicial individuality of Lord Sumption' (2017) 40 University of New South Wales Law Journal 862 (his 'judicial style and philosophy [encompassed]: an insistence on historical accuracy, a reaffirmation of previous views, and concern over the appropriateness of judicial innovation') (accessed via Austlii, no pp available).

[69]*Willers Strike-Out Action* [2016] UKSC 43, [46], [58].

[70]Ibid, [145] (Lord Mance) (opining, eg, that to allow this head of damage was contrary to a long line of authority in which costs could not constitute damages).

[71]Ibid, [58] (Lord Toulson).

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costs (the 'top-up costs') as damages in the later Malicious Prosecution Action was not a collateral attack on Newey J's judgment in the Original Action, as Newey J had not determined whether the Original Action had been brought maliciously.[72] The other half of the problem was that Mr Willers (as TAD) lost his Malicious Prosecution Action, and became liable for the costs incurred by Mr Gubay's executors in having successfully defended the Malicious Prosecution Action. By this point, Mr Willers was impecunious and could not pay that costs bill arising from what had turned into a disastrous piece of litigation.[73] Mr Gubay's executors could not obtain their costs award from Mr Willers, so they looked elsewhere – to Mr Willers' legal team.

Their argument for seeking non-party costs orders against these legal representatives (as permitted by case law[74] and by court rule[75]) was as follow: that the lawyers' combined motivation in assisting Mr Willers' to bring the Malicious Prosecution Action was their desire and vested interest to recover, as damages, their still-unpaid fees arising from the Original Action. Those non-recoverable costs were really their reward for having helped Mr Willers 'see off' the Original Action. Hence, the Malicious Prosecution Action was primarily brought and conducted for *the lawyers'* benefit, which (it was argued) rendered them properly liable to non-party costs orders. Essentially, this piece of litigation was a direct consequence of the majority's decision in the *Willers Strike-Out Action*, that top-up costs from the Original Action was an appropriate head of damages in the Malicious Prosecution Action.

In this *Willers Costs Action* in 2019, Rose LJ (as she now was) stated that she found this law suit against Mr Willers' legal representatives 'very difficult' to determine.[76] Ultimately, though, she declined to make a non-party costs order against those lawyers. After all, if the Supreme Court majority had explicitly permitted the costs shortfall from the Original Action as a head of damage, it was inconsistent and illogical to hold that the subsequent Malicious Prosecution Action should expose the out-of-pocket lawyers to a non-party costs order, merely for seeking to recover that shortfall in the later law suit. Also, it was understandable as to why TAD, in these suits, would want to keep the same legal team for the Malicious Prosecution Action – it would be very expensive and time-consuming to brief new lawyers. Access to justice, and equality of arms with TAMC, meant that the same legal team would understandably act for TAD in both the Original Action and, as claimant, in the Malicious Prosecution Action. Hence, it was not right to expose that legal team to a non-party costs order.[77]

For now, the danger to TAD's legal representatives of non-party costs orders being sought against them appears to have been seen off under the TOMP. Rose LJ indicated that her conclusion would be best seen as a 'general approach to these cases, rather than for liability to turn on nuances of fact in particular cases'.[78] That observation will no doubt be a relief to TADs' legal teams in future cases.

However, the fall-out does not necessarily end there. Rose LJ flagged a policy point which the Solicitors' Regulation Authority (SRA) and Bar Standards Board (BSB) may have to consider, sooner rather than later, ie should it be *mandatory* that TAD's legal team change if TAD then decides to bring a Malicious Prosecution Action against TAMC?

> There is a policy question as to whether …the [legal] team which advised a successful defendant in this kind of bitterly fought litigation is also then the team advising him on the benefits and

[72]Ibid, [46], [58]. Cf where the judge in the earlier action had considered, and rejected, the award of costs on an indemnity basis: *Magdeev v Tsvetkov* [2019] EWHC 1557 (Comm) [113], [117] (Picken J), citing *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2)* [2010] 1 All ER (Comm) [65]. Top-up costs would not be allowed then.

[73]The interim costs award against Mr Willers was £1M: *Willers v Joyce* [2019] EWHC 2183 (Ch), [4].

[74]*Aiden Shipping v Interbulk* [1986] AC 965 (HL); and *Dymocks Franchise Systems (NSW) Pt Ltd v Todd* [2004] UKPC 39, cited ibid, [33].

[75]Senior Courts Act 1981, s 51(1) and (3).

[76][2019] EWHC 2183 (Ch), [56].

[77]Ibid, [57]–[58].

[78]Ibid, [59].

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> disadvantages of pursuing a further round of litigation against the same foe. Would it be better for a fresh team to advise on the merits of that further round of litigation; a team that does not have quite as much of their own money at stake as the Cost Respondents [ie the solicitors and barristers for Mr Willers] had? … It is a matter for a professional regulator to address if that is thought necessary, and is not appropriately dealt with by creating the potential threat of a non-party costs order.[79]

The SRA and BSB (and perhaps the dissenters too) may be somewhat surprised that the new TOMP in *Willers* in 2016 could end up casting such an important and sensitive policy decision onto the regulators' shoulders. To date, so far as the author's searches can ascertain, there has been no policy decision taken by either body of the type flagged above. That step would seem to be very controversial. But the whole episode aptly illustrates the unforeseen consequences arising from a new tort. In this case, they were felt acutely by the legal team who represented Mr Willers, and raise real policy conundrums.

(c) Standing to sue, and to be sued, under the TOMP

Two significant issues have arisen under the TOMP since the Supreme Court permitted the cause of action in 2016: can a party 'knowingly assist' TAMC to sue, and can companies sue 'maliciously'? It will be recalled[80] that the first element of the tort requires that TAMC 'caused a claim to be brought' against TAD.[81] Logically, one would expect TAMC in the Original Action, who sued as claimant there, to be the same party being sued as defendant in the Malicious Prosecution Action – but that did not occur in either the *Willers Trial Action* or in the post-*Willers* case of *Szekely v Park View*.[82] It really is important to 'get the parties right', as these cases show. Failure to do so can be fatal to the claim.

In *Willers*, Langstone was TAMC in the Original Action – but in the later Malicious Prosecution Action, Mr Willers sued its director Mr Gubay individually, alleging that 'Mr Gubay prosecuted the Langstone claim, in the sense that he caused Langstone to bring that claim'.[83] On what basis could this substitution of parties validly occur? In the *Willers Strike-Out Action*, Lord Mance remarked that this could feasibly be a case of 'knowing assistance', whereby it would be possible to 'assimilate' the original TAMC (Langstone) and 'the liability of a third party [Mr Gubay] knowingly procuring or assisting a party to sue maliciously'.[84] This analysis appeared, potentially, to open up the tort rather dangerously, by drawing into the fold of potential defendants one who was not a party to the Original Action at all. Ultimately, however, this is the first basis upon which the *Willers Trial Action* stuttered when heard in 2018. Mr Gubay had **not** 'knowingly assisted' Langstone to bring the Original Action.[85] Mr Gubay was not a listed director of Langstone at the time of the Original Action; he did not own Langstone; it was a 'stringent test' to show that the decision to sue Mr Willers was Mr Gubay's alone; and Langstone had clearly brought the Original Action against Mr Willers independently of any direction of Mr Gubay. Hence, the substitution of Mr Gubay for Langstone was fatal to the success of Mr Willers' TOMP claim.

The issue manifested again in *Szekely*, where TAMC was the Nursing and Midwifery Council who prosecuted TAD, Nurse Szekely, for allegedly improper conduct. Nurse Szekely was formerly employed by Park View, a GP practice, and it was that practice which (reluctantly) reported the nurse to the Council for various incidents. The adjudicating arm of the Council held that, except for one incident, Nurse Szekely had no claim to answer. Nurse Szekely then instituted a Malicious Prosecution Action

[79]Ibid, [61].
[80]See text accompanying n 35 above.
[81][2016] UKSC 43, [5].
[82][2017] 12 WLUK 144.
[83]Noted in *Willers v Joyce* [2017] EWHC 1225 (Ch), [21].
[84][2016] UKSC 43, [100].
[85][2018] EWHC 3424, [189], [198], [200], [327], and citing *Martin v Watson* [1996] 2 AC 74 (HL), 86.

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against Park View, the GP practice which had referred her to the Council in the first place (whereas TAMC had been the Council in the Original Action). Again, as with Mr Gubay, Park View was an inappropriate defendant, for there was no 'knowing assistance' in *Szekely* either. The Council was 'an arms length regulatory body', and it 'was not in the gift of [Park View] to stop the prosecution once the referral had been made'.[86] As such, it could never be said that Park View knowingly assisted the Council to bring the Original Action against Nurse Szekely.

Hence, drawing into the later action a party who 'knowingly assisted' TAMC in the Original Action is theoretically possible, but the case law since *Willers* demonstrates just how unlikely it is.

This issue also raises the question: can *a company maliciously prosecute* under the TOMP? If so, then it is at least feasible that Langstone could have been sued as defendant in the Malicious Prosecution Action, without having to substitute Mr Gubay at all. In the *Willers Trial Action* in 2018, Rose J answered this with a cautious 'yes': '[i]t is *possible* for a company to be the defendant in a malicious prosecution case'.[87] However, her Ladyship suggested that it will be inherently difficult to attribute the necessary state of mind (viz, of malice, and of suing without reasonable cause) to one individual, to the 'controlling mind' of a company, for the purposes of this tort: '[w]here a company decides to embark on a major piece of litigation, there are many different individuals inside and outside the corporate structure who will have contributed their information and opinions'.[88] Rose J remarked that '[i]f Mr Willers had sued Langstone for malicious prosecution, he would no doubt have sought to attribute to Langstone the malice of Mr Gubay on the grounds that Mr Gubay was the controlling mind of the company'; but Mr Gubay was, emphatically, not that 'controlling mind'. And even if Mr Gubay *had* been, something extra would be required, viz, that Mr Gubay *bullied* the Langstone directors to sue Mr Willers; or *misled* them with false information about Mr Willers; or *withheld information* that led them to sue Mr Willers when, otherwise, they would not have done so.[89] None of that was provable there.

Hence, whilst it is theoretically possible for a company to be sued under the TOMP where that company was TAMC in the Original Action, it will require that the Original Action was brought at the behest of the 'controlling mind' of that company, who behaved wrongly towards the company directors by bullying, misleading, or withholding crucial information. This is a very high threshold of wrongdoing for TAD to prove. Realistically, it will put the tort out of reach for many TADs who might otherwise seek to sue corporate TAMCs for actions which were brought against them.

(d) Can complaints about neighbours, professionals, etc, amount to malicious prosecution?

Complaints are regularly made to regulators about professionals, to ombudsmen about banks and other service providers, and to disciplinary bodies about employees. Are these caught by the TOMP? Post-*Willers* case law answers this with an emphatic 'no'. The Original Action requires a formalistic step by TAMC, which inevitably narrows the scope of where the tort may be used.

It will be recalled that Lord Toulson said, in the *Willers Strike-Out Action*, that TAMC 'caused a claim to be brought' against TAD.[90] In *Willers* itself, it was all very straightforward: a claim form was issued by Langstone in the Chancery Division. However, since then, several judges have had to grapple with attempts to widen the interpretation of 'causing a claim to be brought'. This uncertainty post-*Willers* was almost invited, given that both Lord Toulson and Lord Clarke endorsed an earlier statement of TAMC's 'put[ting] into force the process of the law maliciously'.[91] Clearly, this and 'setting the law in motion' against TAD are imprecise phrases that could mean something wider than

[86][2017] 12 WLUK 144, points 2 and 3 of the court's conclusions, respectively.
[87][2018] EWHC 3424, [192] (emphasis added).
[88]Ibid, [192].
[89]Ibid, quotes at [194] and [200], respectively.
[90][2016] UKSC 43, [5].
[91]Ibid, [28] and [64] respectively, citing: *Churchill v Siggers* (1854) 3 E&B 929.

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'causing a claim to be brought' (as Nicklin J noted in *Mosley*[92]). As a result, various TADs since the *Willers Strike-Out Action* have argued that a 'process' *was* commenced against them by TAMC, permitting them to turn around and sue TAMC for the TOMP. However, that tactic has not been successful – meaning that, even where TAD suffered from harm that the TOMP typically compensates for (ie reputation damage, injury to health, and lost earnings), no cause of action will arise.

Hence, in *CFC 26 Ltd v Brown Shipley and Co Ltd*,[93] a local authority's service of an enforcement notice upon a company for failing to remove hoardings outside a residential development in breach of planning controls could not comprise an Original Action necessary to found the TOMP. All that the notice did was to identify what the local authority wanted rectified, but its service might never lead to a civil claim. In *Mosley*[94] itself, in a suit for malicious prosecution instituted against a newspaper publisher, the conduct of the newspaper in handing to the Crown Prosecution Service a dossier which suggested that Mr Mosley might have committed perjury during his evidence given in an earlier case, and which the police received and investigated but which never led to any criminal or civil claim against Mr Mosley, was not an Original Action that could found the TOMP either. More recently, it was said, in *CXZ v ZXC*, that '*Willers v Joyce* does not provide any assistance for the Claimant's argument that the tort extends, or should be extended, to circumstances where no form of process has been instituted'.[95] The new TOMP has clearly aligned with the 'sister tort' of the malicious prosecution of criminal proceedings, in that 'causing a claim to be brought' is narrowly construed in both.[96]

A further restriction upon the ambit of the TOMP is that the Original Action must be destined to be heard by a person 'clothed with judicial authority'.[97] Nothing less will do. The principle underlying this ring-fencing is that compensation for TAD should only be available 'for injury caused by a malicious abuse of the *judicial power of the state*'.[98] This point ruled out the TOMP in *Szekely*.[99] Whilst Nurse Szekely was subject to a prosecution before the Nursing and Midwifery Council which was decided largely in her favour, this was not the kind of civil process that could give rise to the TOMP as it was disciplinary in nature.[100] It necessarily follows that some potentially very damaging complaints processes instituted against professionals, which are ultimately determined in the professional's favour, will not give rise to the TOMP, even where serious reputational or economic harm is sustained (eg a client's referral of a solicitor to the Solicitors' Regulation Authority; a patient's referral of a doctor to the General Medical Council; and a student's complaint against an academic which is referred to the Office of the Independent Adjudicator for Higher Education). The TOMP is about 'the malicious abuse of the process *of the court*'.[101] Had the wider terminology of TAMC's 'putting into place the process of the law' been upheld in *Willers*, the tort would have had wider application; but it was not. As a result, some might say that the tort is not available where it is most needed.

(e) The 'slippery eel' of malice

The key element of the TOMP is that TAMC was actuated by malice when instituting the Original Action against TAD. In common usage, malice may invoke descriptions of spite or ill-will, or that

[92][2020] EWHC 3545 (QB), [65].

[93][2016] EWHC 3048 (Ch), [66]–[67].

[94][2020] EWHC 3545 (QB), [56]. See further E Weinert et al 'Does sending evidence to the CPS amount to malicious prosecution?' (2021) 32 Entertainment Law Review 138.

[95][2020] EWHC 1684 (QB), [41].

[96]In the criminal context, a prosecution is not commenced when a person is charged and arrested, as that is not 'putting in force the process of the law' or a 'prosecution': *Barkhuysen v Hamilton* [2016] EWHC 2858 (QB).

[97]*CFC 26 Ltd v Brown Shipley & Co* [2016] EWHC 3048 (Ch), [68]; *CXZ* [2020] EWHC 1684 (QB), [37].

[98]*Barkhuysen v Hamilton* [2016] EWHC 2858 (QB), [146] (emphasis added); *CFC 26*, ibid, [66], citing: Clerk & Lindsell *Tort Law* (21st edn) [16-11].

[99][2017] 12 WLUK 144.

[100]Ibid, point 3 of the court's findings, citing *Gregory*, above n 28, in support.

[101]*Mosley v Associated Newspapers* [2020] EWHC 3545, [53] (emphasis added).

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one party deliberately intends to do a mischief to another.[102] Even across tort law, malice does not necessarily have a uniform meaning, which some scholarly commentary has rightly noted to be 'clearly unsatisfactory'.[103] For the purposes of the TOMP, however, it has a *particular* meaning, that TAMC 'deliberately misused the process of the court'.[104] This means that TAD will have 'a heavy burden to discharge',[105] and a 'high threshold' to surmount.[106] An even harder burden, the dissenters in *Willers* might say, is in applying the majority's definition of 'malice' to a piece of civil litigation.

On a practical note, it has been reiterated, post-*Willers*, that what constitutes malice must be fully particularised and supported by evidence,[107] cannot 'smack of conspiracy theory [rather than] fact',[108] and will be subject to 'anxious scrutiny' before the tort can proceed.[109] Some commentators have suggested that the existing professional obligations cast upon solicitors and barristers when making allegations of fraud (eg that there are clear instructions from the client to plead fraud) should be extended to where TAD's claim is alleging malice, given the equally serious nature of such an allegation.[110] Furthermore, malice on the part of TAMC must be established at the point at which the Original Action is instituted – TAMC's conduct **following** the institution of the civil process is not, strictly speaking, relevant to whether this element is proved.[111]

It has become clear, post-*Willers*, that the 'malice' element is a 'slippery eel' to pin down. It is easier to state what malice is not, rather than what it is (but the latter is a convenient starting point).

(i) The meaning of 'malice'

Proving that TAMC 'deliberately misused the process of the court', and hence acted maliciously, can seemingly be undertaken in one of two ways, both of which are problematical.

First, it covers the scenario where TAMC instituted the Original Action knowing that it was without any factual foundation – where there is no reasonable and probable cause for bringing the Original Action, because there *was no evidentiary basis* for it; and TAMC *knows* that. Lord Toulson called this 'the most obvious case' of malice.[112] That is why it has since been judicially accepted (including in the *Willers Trial Action*[113]) that malice can be inferred from the absence of reasonable and probable cause.[114] This interpretation of malice immediately causes difficulty, as it means that the earlier element of the TOMP (that the Original Action by TAMC against TAD was instituted without reasonable or probable cause[115]) and the element of malice are conflated, even though Lord Toulson stated them to be separate elements of the TOMP.[116] The confusion of the potential conflation became even more evident in the *Willers Trial Action*, in which Rose J determinedly analysed the elements separately, no doubt mindful of Lord Toulson's instruction, and concluded that whilst there **was** reasonable and

[102]*Secretary of State for Health v Servier Laboratories Ltd* [2019] EWCA Civ 1160, [58].

[103]J Murphy 'Malice as an ingredient of tort liability' (2019) 78 CLJ 355 at 363.

[104][2016] UKSC 43, [55] (Lord Toulson).

[105]Ibid, [56].

[106]*S v Kensington and Chelsea RB* (QB, 28 November 2018) [23].

[107]*Hersi & Co Solicitors v Lord Chancellor* [2018] EWHC 946 (QB) [134].

[108]*Szekely* [2017] 12 WLUK 144, point 8, 'conclusions'.

[109]*CFC 26 Ltd v Brown Shipley & Co Ltd* [2016] EWHC 3048 (Ch), [70], citing: *Chancery Guide*, para 10.1.

[110]K Garbett and M Karagoz 'Shaping the tort of malicious prosecution of civil claims' (2018) 168 NLJ 11.

[111]*Szekely* [2017] 12 WLUK 144, point 9, 'conclusions' (TAD had alleged that TAMC had ignored requests for documentation during the Original Action; this was irrelevant to proof of malice; and, in any event, was justified because of the need for confidentiality during those proceedings).

[112][2016] UKSC 43, [55].

[113][2018] EWHC 3424 (Ch) [279] (Rose J).

[114]*Juman* [2017] UKPC 3, [10]. See also *S v Kensington and Chelsea RB* (QB, 28 November 2018) [17].

[115]This element is comprised of **both** an objective and a subjective enquiry – that, objectively, there were reasonable grounds for TAMC's bringing the Original Action against TAD; and that, subjectively, TAMC had an honest belief that there was a case against TAD fit to be tried in the Original Action. If **either** of these fails, then there is no reasonable or probable cause for TAMC's having instituted the original action.

[116][2016] UKSC 43, [54]; and see too *Willers Trial Action* [2018] EWHC 3424 (Ch), [278] (Rose J).

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probable cause for Langstone's Original Action against Mr Willers, it was unnecessary to decide whether that action was brought with malice.[117] Rose J nevertheless noted that the two elements were very 'entwined', especially where the Original Action was a civil claim.

Alternatively, malice covers the scenario where TAMC did not care, nor take any steps to ascertain, whether the Original Action had any factual basis at all (the 'indifferent' TAMC who is uncaring of, and disinterested in, the merits) – because that party instituted the civil action 'not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right'.[118] Hence, TAMC may well subjectively have had an honest belief that the action against TAD was reasonable and meritorious, but even so, malice will be proven if there is proof of some ulterior, illegitimate, wrongful, and improper motive for bringing the Original Action.[119] This is problematical 'at the coalface' of litigation, however. This author agrees with the view of Lord Mance (dissenting) that the TOMP would have been be clearer and more logical if it required TAMC to believe that the Original Claim was unfounded – and that to allow the tort to be brought under **any** other state of mind unjustifiably expands the potential ambit of the tort.[120] Any experienced litigator would surely concur with this wholeheartedly.[121] The motives that drive litigants may change during the course of a case; may indeed **never** be quite fathomable to their legal representatives; and may 'hark back' to an animosity that is rooted in bygone grievances. Some litigants can be fairly disinterested in the proceedings which they are instituting, to the chagrin of their legal representatives who struggle to obtain instructions or investigate their client's case – but where, nevertheless, there is some factual and/or expert evidence to support the litigant's wish to sue *in the here and now*, and where the litigant honestly believes in the action's merits. Any seeming indifference should not constitute a state of mind that amounts to 'malice'. Malice should require that TAMC had no genuine or honest belief in the merits of the Original Action.

Recently, in a perceptive judgment concerning the tort of abuse of process, DJ Branchflower considered that the phrases commonly associated with malice were, in essence, quite differential:

> When discussing 'bad faith', 'malice' etc, it is important … to differentiate between the meanings of 'motive', 'intention' and 'purpose' – a distinction that some of the authorities have perhaps not always focused upon. If 'motive' is taken to be the state of mind which provides the reason for doing something, then one can readily see that a motive – for instance, ill will, bad faith or spite – in the pursuit ('purpose') of a legal right will not, of itself, render that action unlawful. 'Purpose', on the other hand, may be taken to be the intended outcome of the action taken. A collateral or improper purpose, whether or not accompanied by a bad motive, may form the basis of an action for abuse of process. 'Intention' is the relationship between the state of mind of the actor (including foreseeability) and the outcome actually achieved. Having said that, there may of course be a considerable degree of overlap between these concepts in any given set of facts. A person's motive may drive his or her purpose; that purpose may be intended. Nevertheless, for the purposes of the law, the concepts should be properly treated as distinct.[122]

This paragraph perhaps encapsulates, better than any previous exposition, the variety of meanings that can accompany the concept of 'malice'. As the District Judge notes, the objective-versus-subjective

[117] [2018] EWHC 3424 (Ch), [276] and [287], respectively.

[118] *Willers Strike-Out Action*, ibid, [55] (Lord Toulson); and cited in: *Juman* [2017] UKPC 3, [18]; and *Rees v Commr of Police* [2018] EWCA Civ 1587, [85]. Whether that improper motive has to be *a* motive, or the *dominant* motive, for TAMC's bringing the Original Action, was not addressed by the majority, but was queried in dissent: [140] (Lord Mance). See too *Sagicor* [2013] UKPC 17, [101] (Lord Kerr).

[119] *Williamson v AG of Trinidad and Tobago* [2014] UKPC 29, [12].

[120] [2016] UKSC 43, [139].

[121] That was the author's experiences as a litigator; and see too K Garbett and M Karagoz 'Catch them if you can' (2020) 170 NLJ 17 ('parties to litigation rarely, if ever, communicate their true motive for bringing a claim').

[122] *Total Extraction Ltd v Aircentric Ltd* [2021] EW Misc 21 (Barnsley CC), [39].

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enquiries at the heart of these differential meanings can easily sway the result one way or the other. That is why a precise meaning of malice matters.

Apart from these legal aspects, there are *practical* problems with proving malice under the TOMP too. To dissect the multi-layered and complex landscape of the Original Action in subsequent proceedings in order to ascertain the motives for which it was brought, many years down the track – and then to prove that the motives were 'improper' in the sense required – is likely to be immensely difficult (and especially if TAMC and TAD are unwilling to waive their legal professional privilege attaching to the Original Action). There was no malice proven on the part of Langstone in the *Willers Trial Action*, and Rose J explains precisely why its proof in civil actions is arguably unrealistic:

> Criminal prosecutions are brought in the public interest by an impartial Government agency … In contrast, a claimant in a civil action does not need to show any reason why he is bringing the claim, other than the desire to recover money to which he is entitled as a matter of law. The court does not generally inquire into whether the motive of a claimant bringing an action is proper or improper. Every judge of the Business & Property Courts has experience of presiding over cases arising out of the unreasoning hatred that is generated when former close friends and business partners fall out. Indeed, part of the function of the judicial process is to provide a non-violent course through which such bitter enmity can be channelled and, one hopes, resolved to some extent by the cathartic process of the trial and judgment.[123]

In the author's view, the very poor prospects of proving malice (and motive) in civil proceedings means that the TOMP itself should not have been recognised. Moreover, the discussion of malice in the *Willers Trial Action* reflects the concerns of the dissenters two years earlier, that the TOMP will simply 'invit[e] fresh litigation about prior litigation'.[124]

(ii) What does not constitute 'malice'

It is easier to state what 'malice' is not. According to post-*Willers* case law, malice must not be confused with any *error or negligence* on TAMC's part in bringing the Original Action.[125] It cannot be equated to *recklessness* in bringing that claim either: '"[r]eckless" is a word which can bear a variety of meanings in different contexts. It is not a suitable yardstick for the element of malice in malicious prosecution'.[126] Malice also does not cover the scenario where TAMC *failed to carry out any sufficient investigation* before instituting the Original Claim. That failure may be either inadvertent (because TAMC innocently did not realise the avenues of investigation open to him) or sloppy – but 'sloppiness, of itself, is very different from malice'.[127] The mere fact that *the outcome of the Original Action was in TAD's favour*, and that no adverse findings were ever made against TAD, 'is not to the point in considering [a] claim for malicious prosecution'.[128] Instituting and then discontinuing the Original Action against TAD '[does] not imply that it had been improper to raise the proceedings' in the first place.[129] That discontinuance might be explained by the fact that TAMC did not want to pursue TAD to bankruptcy.[130] Where TAMC *was spiteful and vengeful towards TAD in other respects* (apart from the litigation), then the highest that can be presently said is that it does not automatically constitute malice either. In the *Willers Trial Action*, there was evidence of real animosity by Mr Gubay towards Mr Willers,[131] but ultimately, Rose J said that whether this 'unjustified

[123] [2018] EWHC 3424 (Ch), [280].
[124] [2016] UKSC 43, [124] (Lord Mance).
[125] *CFC 26 Ltd v Brown Shipley & Co Ltd* [2016] EWHC 3048 (Ch), [73]–[74].
[126] *Juman* [2017] UKPC 3, [17].
[127] Ibid, [19].
[128] *Szekely* [2017] 12 WLUK 144, point 6, 'conclusions'.
[129] *Ecclesiastical Insurance Office plc v Whitehouse-Grant-Christ* [2018] CSIH 19, [25].
[130] *Willers Trial Action* [2018] EWHC 3424 (Ch), [303] (Rose J).
[131] Mr Gubay arranged for caveats to be placed on the Willers' residential home; attempted to prevent the payment of Mr Willers' pension; took steps to obtain bank statements relating to Mr Willers' private bank accounts; and engaged a private detective who probably used unlawful methods to obtain Mr Willers' phone records: ibid, at [281].

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enmity amounts to malice for the purposes of the tort of malicious prosecution, when there is no evidence of collateral purpose, does not need to be resolved'.[132]

In the *Willers Strike-Out Action*, the dissenters considered that the precise meaning of 'malice' is key to the tort, but problematical and uncertain, especially in circumstances where malice is generally irrelevant to tortious actions.[133] The majority disagreed; that there was over 400 years of judicial case law attesting to the meaning of malice; that torts such as misfeasance in public office, malicious prosecution of criminal process, and the wrongful arrest of a ship, all require proof of malice, 'or something akin to it'; and that, as a concept, malice had an ascertainable meaning.[134] However, post-*Willers* case law has not borne out that optimism. It is far easier to state what is **not** malice than what is. The two interpretations accorded to malice under the TOMP thus far are both problematical. It should not be possible to prove malice merely by proving lack of reasonable and probable cause; and malice surely requires something far more than indifference to a litigious outcome.

It is now apposite to turn to the final part of the critique – by placing the TOMP within the bigger landscape of tort law in general.

3. Examining the new tort within the larger tort landscape

(a) Where is the 'gap'?

In any area where a party alleges that he was wronged, there are, inevitably, two policy claims that can be made. The claimant (TAD, in the Malicious Prosecution Action) will allege that 'the rule of public policy which has first claim on the loyalty of the law [is] that wrongs should be remedied';[135] the defendant (TAMC) will cite that 'the world is full of harm for which the law furnishes no remedy'.[136]

Whether a general TOMP should be recognised in English law entailed a steep descent into policy in the *Willers Strike-Out Action* and in *Sagicor*. Divisions occurred: the epitaphs of 'unjustified and unwise' (per Lord Mance),[137] and 'unwarranted, unjustified, and indefensible' (per Lord Sumption)[138] contrasted markedly with Lord Toulson's view that the common law is 'prized for its combination of principle and pragmatism … to do justice', and that the tort's recognition was 'both obvious and compelling'.[139] Of the myriad of policy arguments, one prevails over all others, in this author's view: where is the 'gap' which the TOMP was created to fill? Undeniably, tort law may be used for 'the filling of an unacceptable gap' in the common law;[140] and it 'fulfil[s] an essential gap-filling role' where lacunae exist.[141] But where was the unacceptable gap here? Three points are worth noting.

First, the essence of the wrong being pled against TAMC is that TAMC abused state-provided infrastructure for improper motive. There is a public interest in preserving that infrastructure for 'deserving' claims. Lord Kerr has described the wrong as 'the illegitimate use by an individual of coercive legal powers to cause harm to another';[142] and academically it has been said that the tort is best seen as 'an

[132]Ibid, [281]–[287], [287], quote at [328].

[133][2016] UKSC 43, [178] (Lord Sumption).

[134]Ibid, [79] (Lord Clarke), and [52] (Lord Toulson), respectively. Lord Toulson did not identify authority for the reference to 400 years of jurisprudence on the meaning of malice, but according to the author's searches, there is reference to 'an action for a malicious prosecution' in, eg, *Cutler v Dixon* (1585) 4 Co Rep 14b (KB), 76 ER 886, 888, at fn (A) of the report, as an editorial note to this Collateral Report. That case concerned witness immunity for anything said or done in court, even falsely and maliciously.

[135]*X v Bedfordshire CC* [1995] 2 AC 633 (CA), 663 (Lord Bingham MR), cited in *Sagicor* [2013] UKPC 17, [73].

[136]*JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23 [100] (Lord Rodger).

[137]*Willers Strike-Out Action* [2016] UKSC 43, [136].

[138]Ibid, [174].

[139]Ibid, [42] and [43], respectively. See too [66] (Lord Clarke).

[140]*White v Jones* [1995] 2 AC 207 (HL), 268 (Lord Goff).

[141]*Williams v Natural Life Health Foods Ltd* [1998] 1 WLR 830 (HL), 837 (Lord Steyn).

[142]*Sagicor* [2013] UKPC 17, [104].

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improper exercise of a power intended to be employed in the public interest'.[143] However, TAD has available to him various in-built and oft-exercised powers and sanctions which comprise part of the procedural framework of English civil procedure. These include strike-out and summary judgment applications, cross-undertakings as to damages, indemnity costs orders, and widely-couched case management powers.[144] The use of civil restraint orders[145] and non-party costs orders[146] also spring to mind. Additionally, TAD may be able to resort to substantive law. As well as the torts mentioned in *Willers* that may be available to TAMC (eg defamation, abuse of process, malicious falsehood, conspiracy, and misfeasance in public office),[147] the tort of harassment[148] may apply.

Moreover, even if none of these torts is available to TAD after the Original Action is concluded in his favour, and in the event that procedural steps do not assist TAD to 'see off' the Original Action before it gains traction, then absent this new tort in *Willers*, the category of the 'aggrieved litigant' is hardly the only 'uncompensated litigant in town'. Of the grievously disabled baby who is injured *in utero* because of the rampant drug-taking of his mother, Parliament has decreed that the mother should have a statutory immunity against tort liability.[149] Of the parent who is negligently accused of sexually abusing his child, the economic and psychiatric consequences of that wrongful accusation are the price to be paid for curbing the 'appalling prevalent' problem of child abuse in our society.[150] Of the business who is using (but without owning) an essential facility which is damaged by the defendant, and who suffers business interruption whilst the facility's owner gets it repaired, it can either take out appropriate insurance or work harder.[151] Of the uncompensated pre-identified victim of crime who dies at the hands of a criminal third party, any duty of care by the police to that victim was 'best left to Parliament'.[152] It is difficult to see how TAD, aggrieved and out-of-pocket as he is, should stand in a more protected, and elevated, position in comparison with these parties.

Finally, there is, undeniably, an interplay between the TOMP and the tort of abuse of process – but quite what that is remains opaque. Abuse of process requires that one party (equivalent to TAMC) brings legal process against another party principally for an improper, collateral or ulterior purpose; and that the improper use to which the process was applied causes the other party (equivalent to TAD) damage.[153] However, according to *Sagicor*, the tort of abuse of process does not require that the action should have been brought without reasonable cause, nor proof of malice, nor that it was terminated in TAD's favour.[154] The tort has rarely been successful in English law[155] (although there has been a very recent instance of the tort's success arising from a wrongfully-entered judgment issued under the

[143]D Nolan 'Tort and public law: overlapping categories?' (2019) 135 Law Quarterly Review 272 at 287.

[144]Noted in: *Willers Strike-Out Action* [2016] UKSC 43, [160], [168].

[145]Per CPR 3.11, and PD 3C. See, for further discussion S Gold 'Civil way' (2016) 166 NLJ 7715, 7715; and J Sorabji 'Malicious prosecution and abuse of process' (2017) 36 Civil Justice Quarterly 387, 387.

[146]Per nn 74 and 75 above.

[147][2016] UKSC 43, [8].

[148]Per the Protection from Harassment Act 1997, as discussed in L Shmilovits 'Harassment: an elephant in the corner' (2019) 135 Law Quarterly Review 27, 30; and Gold, above n 145. In *Iqbal v Dean Mason Solicitors* [2011] EWCA Civ 123, it was held that 'even litigation, whose natural contentiousness also requires its own freedom of speech, can exceptionally be abused' under the tort: R Mulheron *Principles of Tort Law* (Cambridge: Cambridge University Press, 2016), ch 'HA', principle HA.3, p 259.

[149]Per the Congenital Disabilities (Civil Liability) Act 1976, s 1(1).

[150]*JD v East Berkshire Community Health NHS Trust* [2005] 2 AC 373, [126].

[151]*Spartan Steel and Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27 (CA), 38.

[152]Eg in *Michael v South Wales Police* [2015] UKSC 2, delivered 18 months prior to *Willers*.

[153]Originating in: *Grainger v Hill* (1838) 4 Bing (NC) 212.

[154][2013] UKPC 17, [62], [149]. However, in *Total Extraction Ltd v Aircentric Ltd* [2021] EW Misc 21 (Barnsley CC, 30 September 2020) [54], termination in TAD's favour was said not to be required for the special instances of malicious prosecution of civil proceedings that pre-dated *Willers v Joyce* (per nn 38–42 above).

[155]In *Land Securities plc v Gladgate Fielder* [2009] EWCA Civ 1402, it was stated that 'the last reported successful action in this jurisdiction for the tort of abuse of process was either about 140 or 170 years ago'; also: *Sagicor* [2013] UKPC 17, [149] ('there are only two reported cases in England in which the action has succeeded, both involving the now obsolete procedures for the arrest of debtors').

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Money Claim Online portal in *Total Extraction Ltd v Aircentric Ltd*[156]). In *Mosley*, Nicklin J aptly observed that 'the coherence of this area of the law is, perhaps, impaired' by the separate torts of abuse of process and the TOMP that 'sprang from the same tree'.[157] In *Sagicor*, Lady Hale remarked that their respective boundaries were 'either unclear or make little sense in today's world', and that the whole area was 'a judge-made mess'.[158] Notably, in the *Willers Trial Action*, Mr Willers had no success with the tort of abuse of process either. Essentially, Langstone's bringing the Original Action against Mr Willers was a burden on Mr Willers, of course – but Mr Gubay and the Langstone directors did intend the Langstone Action to go to trial, and did not bring it solely to impose any financial burden on Mr Willers.[159] The recent and thoughtful judgment in *Total Extraction* describes the tort of abuse of process as 'a tort of some antiquity and considerable obscurity' – and queries the Privy Council's assertion in *Sagicor* that malice is not required for abuse of process, with DJ Branchflower suggesting that malice *is* required for that tort (just as it is for TOMP).[160] The opacity of the interplay is increasing with every judgment.

Undoubtedly, the clarity and coherence of the law demands that a better coalescence is identified between these two torts. The author endorses the comments of Lady Hale that, '[i]n an ideal world, the[se] separate torts … might be brought together in a single coherent tort of misusing legal proceedings. This looks like a task much better suited to the Law Commission than to this Board'.[161] *That* is 'the gap' which requires (probably legislative) attention, in the overall scheme of abusive litigation. To that end, the Appendix to this paper contains a list of questions which, in the author's view, could usefully govern the terms of reference for a law reform project entitled, 'The Tort of Abuse of Litigation'. It is envisaged that the TOMP, the existing tort of abuse of process, and the longstanding instances of malicious prosecution of civil proceedings re search warrants, seizure of ships, etc, should all be abolished in their current forms, and encompassed within a new statutory tort, 'the Tort of Abuse of Litigation', and under which it should be clarified as to whether, and if so what, 'malice' and 'abuse' actually mean in the context of that statutory tort (plus a whole host of other questions contained in the Appendix). The common law is in state of disarray, but legislative intervention can solve that, with prior detailed reform consideration of the 'abuse of litigation' torts which constitute civil wrongs in this jurisdiction.[162]

(b) Assessing the TOMP against the principal purposes of tort law

The principal purpose of the new tort is compensatory. But what of the other purposes of tort law[163] – how does the TOMP 'stack up' against those purposes? In the author's view, poorly.

Tortious causes of action can achieve an ancillary ***deterrent*** effect, but that is unlikely in this instance, given that: (1) the TOMP has primarily arisen in the context in which vetting by legal representatives, third party funders, and BTE/ATE insurers is likely to have weeded out malicious and unmeritorious claims; and (2) there is a real paucity of successful applications of the tort since *Willers*; a tort which is likely to apply only to 'exceptional cases',[164] and possibly not be used much in the future,[165] and where '[d]oubtless the great majority of secondary actions [Malicious

[156]See n 154 above. The case was brought, in the alternative, as a special category of the TOMP, but not for the generic TOMP.

[157][2020] EWHC 3545 (QB) [66], citing *Sagicor* [2013] UKPC 17, [62].

[158]*Sagicor*, ibid, [84].

[159]*Willers Trial Action* [2018] EWHC 3424 (Ch), [303]–[304].

[160]*Total Extraction*, above n 154, [28], [33], [44], citing supportive comments in *Grainger*, above n 153.

[161]*Sagicor* [2013] UKPC 17, [83].

[162]The author is undertaking a detailed study of two doctrines which used to be torts that belonged in the stable of 'abuse of litigation', viz, champerty and maintenance, until their statutory abolition as torts (and as crimes) in 1967: *The Modern Doctrines of Champerty and Maintenance* (Oxford: Oxford University Press, forthcoming).

[163]Identified in Mulheron, above n 45, pp 9–15, by reference to judicial sources.

[164]Foreshadowed in J Goudkamp 'A tort is born' (2017) 167 NLJ 7753.

[165]Mooted in Sorabji, above n 145, at 399.

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Prosecution Actions] will fail',[166] is hardly an off-putting spectre to a well-funded and determined litigant in TAMC's position.

Tortious causes of action also ***balance parties' competing rights*** – in this case, the right to use the state-provided judicial system to sue for grievances, provided that such a suit meets the requirements of eligibility (a cause of action; brought within the limitation period, etc), versus the right to be protected against the prospect of having to rebut ill-founded law suits, at the cost of money, time and health. They are 'countervailing interests of high social importance', as Fleming put it.[167] Again, the requisite balance was *already provided for* within the existing civil procedural and substantive law frameworks (subject to the development of a statutory abuse of process tort), without the creation of another cause of action.

Upholding a vindicatory purpose is another legitimate purpose of tort law. This is laudatory in the context of maliciously-prosecuted *criminal* proceedings where the individual is acquitted; the subsequent tort action for malicious prosecution is 'pushing back' at the coercive power of the state, visibly and transparently. However, it lacks force where law suits are brought principally for the redress of *private* grievances.[168] Besides, and ironically, TAD's Malicious Prosecution Action may become a vehicle for *further* damage to TAD's reputation if he fails to establish the TOMP (as for Mr Willers himself, where there **was** reasonable and probable cause for Langstone's Original Action, said Rose J).

Finally, tortious causes of action ***apportion risk across society's individuals and entities***. In reality, substantial risk is *already* imposed upon TAMC in the Original Action – the risk of losing (and costs-shifting), and the risk of loss to his reputation, health, and financial position. Ironically, the TOMP actually imposes *additional* risk upon that party. In *Willers*, the risk increased exponentially for Langstone (as TAMC), in that it discontinued the Original Action and duly paid the adverse costs award, and then successfully defended the Malicious Prosecution Action and was unable to recover its costs award from the impecunious Mr Willers (or, it will be recalled, from his legal advisers). Without the tort (said the majority in the *Willers Strike-Out Action*), the outcome for Mr Willers would be 'instinctively unjust'.[169] As it turned out, the same might be said about the outcome for Langstone.

Conclusion

The tort of malicious prosecution of civil proceedings, recognised in 2016, is 'a significant development',[170] by which the Supreme Court was prepared (albeit by bare majority[171]) 'to recognise and acknowledge further types of tortious wrongdoing'.[172] Tort law was again on the move.

However, developments **since** that ground-breaking decision suggest that it was a wrong turn. Contrary to the majority's assertion in *Willers*, the tort was not dictated by 'simple justice'.[173] Rather, it has been plagued with difficulties and unforeseen consequences. There is no point in permitting a tort that depends upon proof of motive in previous proceedings, if legal professional privilege simply blocks those avenues of proof. The new tort has also led to troublesome consequences for legal representatives who are involved in such suits (and possibly for the legal profession's regulators). A downright opaque meaning attributed to 'malice' has not helped the tort's coherence either. Albeit that instituting civil proceedings is one of the cornerstones of a democratic society, there are already

[166][2016] UKSC 43, [179] (predicted by Lord Sumption); and 'rarely applied': *Szekely* [2017] 12 WLUK 144.

[167]*Fleming's The Law of Torts* (Sweet & Maxwell, 10th edn, 2011) [27.10], as cited in *Whitehouse v The Lord Advocate* [2020] SCLR 165, [104].

[168]*Willers Strike-Out Action* [2016] UKSC 43, [131], [174].

[169][2016] UKSC 43, [43].

[170]*CXZ v ZXC* [2020] EWHC 1684 (QB) [41].

[171]ie the tort nearly did not exist, as pointed out in, eg, D Regan 'Litigation: what next?' (2016) 166 NLJ 7713 at 7713; A Samuels 'Malicious prosecution: a useful weapon in the armory' (2016) 160 Solicitors' Journal 25 at 28.

[172]*Lakatamia Shipping Co Ltd v Nobu Su* [2021] EWHC 1907 (Comm), [123] (Bryan J).

[173][2016] UKSC 43, [57].

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sanctions for litigating without foundation or reasonable cause. The defendant is not without remedy, either prior to, during, or after the offending lawsuit. The paucity of successful cases since *Willers* – including the unsuccessful outcome in the *Willers Trial Action* itself – further calls into question why the tort was required at all. Apart from its compensatory purpose, the new tort does not measure up to the principal purposes of tort law either. It has not been 'worth the candle', and should be legislatively abolished.[174]

Undoubtedly, this is an area of tort law that is best left to Parliamentary intervention, rather than to common law creation and development. A quarter of a century ago, in *Gregory v Portsmouth CC*, the majority of the Court of Appeal[175] accepted that the historical boundaries of the TOMP were not easy to justify; that the existing law was in disarray; that numerous practical difficulties were likely to follow if the tort was to be extended beyond the-then limited scenarios; and that any further expansions of liability should be left to Parliament. The experience since the Supreme Court permitted the TOMP as a cause of action in *Willers* only confirms the wisdom of that view.

It has been proposed herein that the idea of enacting an overarching tort of abuse of litigious process should be pursued, to bring coherence, logic, and consolidation to this area of tort law. The TOMP's statutory abolition, followed by a comprehensive law reform examination of all forms of abusive litigation with a view to crafting an appropriate statutory tort, would be both welcomed and warranted.

Appendix

For any reform project re legislating for 'The Tort of Abuse of Litigation' ('the Statutory Tort'), the terms of reference should include, but not be limited to, the following questions – derived from the consideration of TOMP undertaken in this paper:

- What are the elements, and defences (if any), of the Statutory Tort;
- Whether there is any place for the doctrine of 'knowing assistance' under the Statutory Tort;
- Whether, and if so how, a state of mind (that it abused the litigious process) can be attributed to a corporate body;
- What is meant by 'litigious process', ie what type of adjudicator, and what type of legal process, are to be covered by the Statutory Tort;
- What state of mind the Statutory Tort will require (ie malice, recklessness, or neither); and whether that state of mind is to be judged subjectively, objectively, or contain elements of both;
- Whether the Statutory Tort requires that the party abusing the litigious process had no honest belief in the merits of the earlier action, or whether something less than that (eg indifference) should suffice;
- Whether the 'abuse' of litigious process requires the use of the litigious process for an ulterior and improper motive unconnected with the merits of the action, objectively-assessed, or whether 'abuse' is to be defined in some other way;
- Whether the doctrine of legal professional privilege attaching to the earlier action should be statutorily waived in the event that the Statutory Tort is subsequently pleaded;
- Whether the existing defence of absolute privilege against defamation that attaches to anything said or done in the course of the earlier action requires amendment in light of the Statutory Tort;
- What heads of compensatory damage should be available under the Statutory Tort (and whether aggravated or exemplary damages should be permitted, or barred, thereunder);

[174]It is unlikely that the Supreme Court will reverse its 2016 decision, as: '[t]he presumption is that the Supreme Court will follow its own previous decisions … it has a power to reverse its previous decisions, which will be exercised sparingly': Sir Philip Sales 'The common law: context and method' (2019) 135 Law Quarterly Review 47 at 59.

[175][1997] 11 WLUK 69 (CA, 5 November 1997), as described by the HL, above n 28, at 424–25.

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- Whether the non-recoverable legal costs incurred in the earlier action should be recoverable as damages under the Statutory Tort (and, if so, whether those lawyers with a vested interest in the recovery of those damages should be compulsorily replaced in the Statutory Tort action);
- Whether the existing tort of abuse of process should be statutorily abolished and accommodated within the Statutory Tort;
- Whether the historical and limited forms of malicious prosecution of civil process at common law (re search warrants, seizure of property, etc) should be statutorily abolished and accommodated within the Statutory Tort.

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